Antitrust Risks for Trade Associations and Members
Best Practices to Avoid Anticompetitive Conduct Amid
Increasing Federal Scrutiny

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:
Robert A. Lipstein, Partner, Crowell & Moring, Washington, D.C.
Erica S. Mintzer, Counsel, Hogan & Hartson, Washington, D.C.
Carl W. Hittinger, Partner, DLA Piper, Philadelphia

Tuesday, June 16, 2009
The conference begins at:
  1 pm Eastern
  12 pm Central
  11 am Mountain
  10 am Pacific

The audio portion of this conference will be accessible by telephone only. Please refer to the dial in instructions emailed to registrants to access the audio portion of the conference.

CLICK ON EACH FILE IN THE LEFT HAND COLUMN TO SEE INDIVIDUAL PRESENTATIONS.

If no column is present: click Bookmarks or Pages on the left side of the window.
If no icons are present: Click View, select Navigational Panels, and chose either Bookmarks or Pages.

If you need assistance or to register for the audio portion, please call Strafford customer service at 800-926-7926 ext. 10
Antitrust Risks For Trade Association Members

Best Practices to Avoid Anticompetitive Conduct Amid Increasing Antitrust Scrutiny

Strafford Teleconference
June 16, 2009

Rob Lipstein
Crowell & Moring LLP
Washington, D.C.
rlipstein@crowell.com
(202) 624-2630
• What risks?
  ➢ DOJ full-frontal assault on associations for cartel activity
  ➢ Increasingly complex civil risks
• Prohibited Agreements
  ➢ Nuances
• Association Meetings
• Antitrust compliance strategies
What risks?
• There are thousands of associations operating in the U.S., comprising hundreds of thousand of members.
  ➢ The American Society of Association Executives states: “In 2004, there were an estimated 86,054 trade and professional associations.”
  ➢ The association path is well-trodden.
  ➢ Empirically, associations appear safe.
• From a practical point of view, are there really any risks from non-compliance with antitrust law?
• **Obvious risks**
  > stemming from criminal activity to use the association as cover for ‘intentional’ agreements on price, output, customer or territory, or boycotts

• **Nuanced risks**
  > usually civil, stemming from well-meaning association activities that unfairly disadvantage competitors, customers, or suppliers
• DOJ full-frontal assault on possible criminal activities in associations
  - DOJ running over 100 grand juries, with more than half focused on international price fixing cartels -- most involve associations
• Cartels “frequently use trade associations as a means of providing ‘cover’ for their cartel activities.”
  
  \textit{U.S. DOJ Director of Criminal Enforcement, Antitrust Division}

• “So much for the good part of trade associations, the bad part of trade associations is cartels.”
  
  \textit{Commissioner, Federal Trade Commission}
- Polychloroprene (PCP) Rubber
  - International Institute of Synthetic Rubber Producers (IISRP)
- DRAM Computer Chip
  - SyncLink Consortium
- Electrical and Mechanical Carbon Products
  - European Carbon & Graphite Association
- Copper ACR and Plumbing Tube
  - Cuproclima Quality Association (SSO)
- Lysine
  - European Feed Additive Association
Increasingly Complex Civil Risks

• Historically, associations as a class of business have been the single largest source of antitrust cases under U.S. antitrust law.

• Associations increasingly engage in activities that trigger antitrust risk without intending to do so.
  - Standard setting
  - Information exchanges
  - Membership restrictions
  - Marketing and trade shows
  - Codes of ethics and other industry self-regulation
  - Public statements and publications
  - Other restrictive practices
  - Process failures
Consequences of Antitrust Violations Are Severe

- Criminal prosecution for hard core violations
  - Prison for individuals (up to 10 years)
  - Huge fines for corporations (up to $100 million or more)
- DOJ/FTC/State AG investigations
- Private Litigation
  - Class actions
  - Triple damages
• **June 2009:** The FTC obtains a consent decree with Alta Bates Medical Group, Inc. a 600-physician independent practice association settling FTC charges that it violated federal antitrust law by fixing prices charged to health care insurers.

• **March 2009:** The FTC obtains a consent decree against the National Association of Music Merchants, Inc. (NAMM) for facilitating price discussions between retailers and manufacturers.

• **July 2008:** A group of New York consumers amended its proposed class action alleging that four of the largest title insurance companies in the US and a trade association (Title Insurance Rate Association) violated the antitrust laws by engaging in a conspiracy to fix prices.

• **March 2008:** “Two Connecticut chiropractic associations and one of their attorneys have agreed to settle charges that they orchestrated an illegal anti-competitive boycott of a Connecticut-based health insurer.”

• **February 2008:** “The National Athletic Trainers' Association Inc. has accused the American Physical Therapy Association of maintaining a monopoly in the market for physical therapists by keeping fitness trainers from completing the coursework necessary to compete.”
“First, a discussion of prices, output, or strategy may mutate into a conspiracy to restrict competition. Second, and even in the absence of an explicit agreement on future conduct, an information exchange may facilitate coordination among rivals that harms competition. In light of the long-recognized risk of antitrust liability, a well-counseled trade association will ensure that its activities are appropriately monitored and supervised.”

• Claimed Conduct
  ➢ Bringing together retailers and manufacturers to discuss MAP Policies and prices
  ➢ NAMM sponsored the meetings
  ➢ NAMM representatives “set the agenda and helped steer the discussions”

• Settlement
  ➢ More rigorous antitrust compliance by NAMM
    • Outside counsel as “antitrust compliance officer” for first 3 years
    • Advance review of written materials
    • Live training of Board of Directors annually
    • Effective reporting and disciplining of violations
    • Required recording of specific sessions for review by antitrust compliance officer
Prohibited Agreements
Section 1 of the Sherman Act:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.
• Principal legal concern: Agreements among competitors not to compete

• Obvious examples:
  ➢ Price fixing
  ➢ Bid rigging
  ➢ Market allocation

• Not so obvious examples
  ➢ Membership strategies/restrictions
  ➢ Marketing
  ➢ Trade Shows
Per Se Violations

- **Price fixing**
  - Competitors agree to raise, fix, or otherwise maintain the price at which their goods or services are sold. The competitors need not agree to charge exactly the same price, and not every competitor in an industry needs to join the conspiracy. Price fixing can take many forms, and any agreement that restricts price competition violates the law.

- **Bid rigging**
  - Competitors agree in advance who will submit the winning bid, or otherwise conspire to reduce competition for bidding.

- **Market/customer allocation**
  - Competitors agree to divide markets among themselves by allocating specific customers or types of customers, products or territories.
Nuances
Membership Strategies

- Who participates – and who does not?
  - Who is allowed in the association? And onto the committees? What is their economic interest?
  - Who is not allowed in? What is their economic interest?
  - Are some companies being excluded from the process? On what basis? Are these objective criteria? Are they reasonably related to furthering legitimate goals?

- What are the criteria for inclusion/exclusion?
  - Membership and expulsion factors
  - *Klickads v. Real Estate Bd. of NY* (S.D.N.Y. Aug. 6, 2007) (genuine issue of material fact existed re: whether members’ justification for denying access to potential competitors outweighed anticompetitive effects)
• Trade shows
• Industry-wide advertising
  ➢ ‘Got milk’
  ➢ FTC scrutiny
• Avoid price issues
• Advertising rules for members are disfavored
  ➢ Code of ethics can trigger
  ➢ Prohibiting false or deceptive information has been upheld
  ➢ Creating any barrier for new entrants, facilitating coordination among competitors, or lessening competition, is prohibited
  ➢ *Craftsmen Limo., Inc. v. Ford Motor Co.*, 491 F.3d 380 (8th Cir. 2007) ($6 million jury verdict resulting from trade show exclusion overturned, but court notes reasonable inference of conspiracy, further evidence required); Ford eventually wins summary judgment
Trade Shows

• Primary antitrust issue is exclusion of competitors of the members/participants/exhibitors

• Antitrust issues
  ➢ Association is entitled to set criteria for participation – it is permitted to define its own show and to reasonably exclude competitors of the association.
  ➢ Is access to the show economically important?
  ➢ Are there alternative marketing means available?
  ➢ Are the admission criteria objective and applied in an unbiased manner?
  ➢ Competitors never should be excluded solely because they are a price-discounter.
Association Meetings
• All members are at risk for antitrust violations arising from a meeting, even the back-benchers and those who are silent.


  ➢ “petitioner permitted itself to be used to further the scheme...At no time did petitioner disavow the challenged conduct...the jury found that petitioner had ‘ratified or adopted’ the conduct in question”
Preparing for the meeting

• Do some homework
  ➢ Bylaws
  ➢ Website
  ➢ Prior meeting minutes
  ➢ Industry dynamics
  ➢ Association dynamics
  ➢ What projects are underway?
• Antitrust compliance programs 101
  ➢ Antitrust policy
  ➢ Antitrust reminder at the meetings
  ➢ Monitored by or have access to antitrust counsel
  ➢ Advance review and distribution of meeting materials
At the meeting

• Meet the staff
  ➢ Will they take minutes?
  ➢ Check on the antitrust reminder
  ➢ Availability of legal counsel if needed

• Sign-in
  ➢ The minutes should accurately reflect who was there (and who was not). Remember, the antitrust risk is about who might have agreed with whom, so these records matter.

• Be on guard
At the meeting: Be on guard

- Substantive issues
  - Prices or price related information, whether historical or future.
  - Pricing policies or proposed or planned price changes.
  - Discounts, allowances, credits, or other terms of sale.
  - Costs, inventory levels, profit margins, capacity utilization or other similar information.
  - Allocation of or other limitations on sales to particular customers, territories, or products.
  - Past or future plans for bidding or not bidding on particular business.
  - Refusing to deal, or means of dealing, with any third parties (customers, competitors, or suppliers).
  - Ongoing or planned research, development, new product introductions, product improvements, or marketing approaches.
  - Any discussion that might make it appear that members did not exercise independent business judgment in pricing, dealing with customers and suppliers, and determining the markets in which to compete.
• Appearance issues
  ➢ By common definition, a trade association is a combination of competitors.
  ➢ Consequently, the risk exposure to an antitrust issue is much greater than a single company or a gathering of non-competitors; appearance matters.
  ➢ Many antitrust investigations are triggered by an ‘appearance’ issue.
  ➢ Associations should use belt-and-suspenders treatment.
• Counteract appearance issues by creating a more complete record that indicates that the association is fully complying with the antitrust laws.
At the meeting: Spill the water

- How to handle antitrust issues; what should be done?
  - If an issue arises (e.g., someone suggests that everyone should agree that ‘raw materials prices are so high the industry needs to move its own downstream prices higher in response’), remedial action should be taken.
  - The chairperson or attorney should counteract.
  - Worst case scenario: nothing is done.
  - Silence is not a good option; so ‘break a glass’.
- Make sure a record is created indicating the antitrust remediation or your departure (certainly everyone would remember if you spilled your water glass to record your departure).
- Those who did not spill the water glass at the realtor association meeting at Congressional County Club later dearly regretted it (*U.S. v. Foley et al.*, 598 F.2d 1323 (4th Cir. 1979) (upholding convictions of association members, even those that remained silent at meeting, for price fixing))
Antitrust Compliance Strategies
YOUR MOMMA’S RULES TO KEEP OTHER PEOPLE FROM GETTING YOU AND YOUR OUTFIT IN ANTITRUST TROUBLE*

1. Who’s Giving the Party? When you were 15, your Momma wouldn’t let you go to a party unless the right group sponsored it (like a church, or school, or somebody’s parents). You couldn’t just say “Momma a few couples are getting together in the woods”. Same deal here; your Momma was right. Don’t go to any meeting unless there is a clear and proper sponsor, and it is the right kind of officially-recognized body which is properly-constituted, broadly-based, and well-run. Otherwise, you may get in more trouble than you can handle.

2. “What’s Up?” Your Momma wanted to know “what kind of party is it?” She was right; there is a difference between drinking and skating and she wanted to know what was going on. Same deal here. What is going on? If they don’t send a written agenda in advance, you really shouldn’t go. (It is not an “agenda” if all it says is “(1) old business, (2) new business, (3) other”, or anything like that.)

*David A. Bagwell, Your Momma’s Rules to Keep Other People from Getting You in Antitrust Trouble, Fairhope, AL.
3. **Chaperones.** When you were 15, your Momma wouldn’t let you go unless a chaperone was going. A lawyer is kind of like a chaperone; they tend to spot any developing troublemakers and throw them out of the party. If no lawyer is going to be there to chaperone, it is a sign the party might get too wild, and maybe you shouldn’t go.

4. **Stay Out of the Bushes.** Your Momma knew that if you left the party, you were more likely to get in trouble. She was right. Don’t go to “rump sessions” before, during or after meetings; the natural human temptation is to talk business there and your business is best discussed openly in the proper forum. It is okay to have lunch with a friend or two, but don’t let it turn into a “rump session” (hard to define, but we all know it when we see it; so see it before it is too late).

5. **No Select Groups.** Remember how it hurt your feelings when some people got invited to the party but you didn’t? Same deal here. If they don’t invite the whole class, don’t go. Especially don’t go if they call it something stupid like “let’s get the ‘big three’ together”. That kind of talk will just get you in trouble; don’t go.
6. **Don’t Get Taken in By Sweet Words.** Your Momma told you they would talk sweet to you; don’t get taken in. She was right. It would be simple if you could spot antitrust trouble just by seeing an evil-looking guy in a cloak and silk hat and a waxed mustache who whispered “Pst! Let’s conspire!” They don’t do that. People sometimes unknowingly fall into conspiracies, pulled in by other nice-seeming people who say “let’s get on the same wavelength”, or “let’s sort it out before the meeting”, or “let’s get our story straight”. If they whisper to you like that, they are the Devil. Don’t be tempted. **Don’t go.** It can only get you in trouble. Your “story” is open and honorable and firmly-based on correct data, and your story is already “straight”. The only time you need to be on the “same wavelength” as anybody else is when you both tune into the religious channel on your separate radios.

7. **Don’t Let Them Spike the Punch.** Your Momma suspected that some boy might try to spike the punch, and she told the chaperone to keep a lookout. She was right; same deal here. Watch out that no narrow interest tries to rig the meeting or the system unfairly in favor of its company or its narrow interest; like a spiked punch at junior high party, it can only lead to trouble (and don’t let anybody do the minutes on company stationery; it makes it look like their company is “in charge”, which is probably unfair).
8. Appearances Count. Your Momma knew that if you slipped off to the woods from the party, people would assume the worst, even if you only held hands. She was right. Pay attention to how things might look to somebody else. Some people always assume the worst, and start a bunch of gossip. Don’t be grist for the gossip; make sure you behave and look like you are behaving. For instance, don’t sit over in the corner whispering with your competitors, even about football or movies. (At this point in your life, it won’t be a gossip who will spread the scandal; it will be some lawyer trying to make you look bad to a jury, so he can personally make a lot of money. Strike a blow for liberty; behave and look like you behave and keep all the lawyers poor.)

9. If the Party Turns Wild, Leave. Your Momma told you to leave if it got wild. She was right. If the other people at your meeting start talking about or doing bad stuff, get up and walk out. (It may be unpleasant then but it beats going to jail or getting sued.)

10. Call Your Momma if You’re Not Sure. Your Momma gave you a dime (or a quarter or a nickel, depending on how old you are) to call her if you needed advice or help. She was right; same deal here. If you can’t get your Momma, call your lawyer.
Antitrust Risks for Trade Association Members

Strafford Teleconference
June 16, 2009

Erica S. Mintzer
Hogan & Hartson LLP
Washington, D.C.
ESMintzer@hhlaw.com
(202) 637-5785
Presentation overview

- Antitrust Background
- Information Exchanges
- Recent Enforcement Actions
- Tort Liability
Antitrust Background
Overview – Antitrust Laws

U.S. antitrust laws apply to trade associations in several principal areas:

- **Agreements (Sherman Act § 1)**
  - Agreements among competitors (horizontal) receive closest scrutiny; potentially *per se* illegal or criminal (e.g., price fixing, market allocation)
  - Agreements among suppliers and customers (vertical) are usually subject to more detailed analysis of pro-competitive effects and are usually upheld

- **Conduct by monopolists/dominant firms (Sherman Act § 2)**
  - “Predatory” actions that exclude competition, create/enhance monopoly power

- **FTC Act Section 5**
  - “Unfair methods of competition” and “unfair or deceptive acts or practices”
Information Exchanges
Information Exchange Programs: Antitrust Risk

- Gathering and disseminating information – legitimate and important activity of a trade association
  
  - "The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a per se violation of the Sherman Act." United States Gypsum, 438 U.S. at 441 n.16 (1978)

  - "Any data exchange or statistical reporting that includes current prices, or information that identifies data from individual competitors, can raise antitrust concerns if it encourages more uniform prices than otherwise would exist." An FTC Guide to Dealings with Competitors

- Primary risk – inference of an anticompetitive agreement via the exchange of competitively sensitive information

  - Important factors: What information is being collected? Who is the information being provided to and in what form? How might the information be used by individual companies?
Information Exchanges: Sources of Guidance – Case Law

- Case law
  - Line of Supreme Court Cases from the 1920’s evaluating information exchanges in a trade association context. *American Column and Lumber Co. v. US; US v. American Linseed Oil Co.; Maple Flooring Mfrs. Ass’n v. US*
    - Most concerned with price and output exchanges, especially future pricing and production predictions
    - Considered purpose of exchange and whether results were “public” (i.e., available to customers)
    - *Maple Flooring*: upheld an exchange of historical and aggregated information; data was available to the association and members’ customers
      - Established that certain exchanges would be subject to the “rule of reason”
  - Subsequent Supreme Court cases involving information exchanges among competitors (outside of an association context)
    - Price exchanges will be closely scrutinized
    - Exchange of cost information less risky where the purpose is to improve operating efficiency
    - Structural characteristics of the industry important to assessing effects (U.S. v. Container Corp. of America – highly concentrated industry, fungible product, inelastic demand)
Information Exchanges: Sources of Guidance – Agency Guidelines

  - “Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables. Similarly, other things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information. Finally, other things being equal, the sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data.” (emphasis added)
Information Exchange Programs: Sources of Guidance – Agency Guidelines

  - Agencies created a “Safety Zone” for the exchange of fee information when
    1. Outside third-party collects the information (e.g., a trade association, consultant)
    2. Fee information is more than 3 months old
    3. Specific fee information is anonymous
      - At least 5 providers report data and no provider represents more than 25% of the weighted basis of the statistic and the information is aggregated
  - Applied by the agencies in industries other than health care
Information Exchanges: Sources of Guidance – Agency Enforcement

• Government Enforcement
  
  - Mostly settled by consent decrees
    
    • Prohibited activities include forecasting future production, identifying program participants, exchanging information not available to the public, auditing participants' records
  
  - Recent examples of enforcement
    
    • The FTC issued a complaint against the National Association of Music Merchants (NAMM) alleging that NAMM "organized various meetings and programs at which competing retailers of musical instruments were permitted and encouraged to discuss strategies for implementing minimum advertised price policies, the restriction of retail price competition, and the need for higher retail prices." (2009)
    
    • According to the complaint, NAMM not only sponsored these meetings, but set the agenda and helped steer discussions on competitively sensitive topics with "the purpose, tendency, and capacity to facilitate price coordination and collusion" without offering procompetitive benefits.
    
    • The case was settled by a consent order that bars NAMM from, among other things, coordinating the exchange of price information among musical instrument manufacturers and dealers or coordinating certain discussions concerning the conditions under which any manufacturer or dealer will buy or sell products. NAMM also must implement an antitrust compliance program.
Information Exchanges: Sources of Guidance – Agency Enforcement

- Government Enforcement
  - Recent examples of enforcement
    - DOJ action against Utah Hospital Associations and a number of Utah hospitals for conspiring “to restrain wage competition” by exchanging current and prospective, nonpublic registered-nurse entry wage information. *US v. Utah Society for Healthcare Human Resources Administration et al* (1994)
    - The Final Judgment allows the hospitals to participate in surveys of information concerning compensation if, among other things:
      - Request and dissemination of information is in writing
      - The survey does not request or disseminate prospective compensation information
      - The survey only disseminates aggregate data that would not allow participants to determine what another hospital is or will be paying its nurses
      - The hospitals do not have access to unaggregated data produced in response to the survey.
      - Each disseminated statistic is based on data from a sufficient number of separately owned facilities
    - There are a number of recent private suits challenging nursing wage rate exchanges
Recent Examples of Enforcement (continued)

- DOJ charged the American Bar Association with violating the antitrust laws by, among other things, using comparative data collected from members to restrain competition. *US v. American Bar Ass'n* (1995)

- The ABA collected extensive, detailed salary information, among other data collected, in annual questionnaires that ABA-approved law schools were required to complete. Using comparative salary, the association required law schools seeking accreditation to proffer salaries and benefits that were "comparable."

- Association agreed, among other things, to stop collecting compensation data and to stop requiring comparable salaries as a prerequisite of accreditation
Information Exchanges: Business Review Letters

**Business Review Letters (DOJ)**

DOJ asks organizations requesting a review of an information exchange to provide information sufficient to show:

1. Participants in the information exchange;
2. The purposes and objectives of the information exchange;
3. The nature, type, timeliness, and specificity of the information to be exchanged (include a sample);
4. The method by which the information will be exchanged;
5. The characteristics of the market(s) in which the information will be exchanged (e.g., the homogeneity of the product(s) or service(s), the pricing and marketing practices, and the availability of information concerning market conditions, individual transactions and individual competitors);
6. The identity and competitive significance (described in terms of market shares, capacities, etc.) of participants in the relevant product and geographic markets, who will not participate in the information exchange;
7. The ten largest customers in the relevant geographic market for any product(s) or service(s) involved in the information exchange and an estimate of their annual purchases;
8. Any safeguards that are planned to prevent disclosure of firm-specific information to competitors; and
9. Any business synergies, efficiencies or other benefits likely to flow from the venture.

All documents:

1. Reflecting or representing the agreement(s) among the parties to exchange information;
2. Discussing or relating to the legality or illegality under the antitrust laws of the information exchange or the impact of the information exchange on competition or the price of any product or service.
Information Exchanges: Sources of Guidance – Business Review Letters

- DOJ Business Review Letters

  - *External Compliance Officer, Inc. (2008)* – ECO, which provides anti-money laundering consulting services to financial institutions, proposal to collect and distribute information relating to the termination of money transmitter agents (companies that provide electronic money transfer services to individuals).

  - Proposed database would allow money transmitters to determine if a prospective agent has ever had a relationship terminated with another money transmitter and, if so, the reason why that relationship was terminated.

  - DOJ stated: "The proposed information collection and dissemination activities are not likely to reduce competition. In fact, information of this type may serve to facilitate more efficient compliance with prohibitions against money laundering and terrorist financing."
Information Exchanges: Sources of Guidance – Business Review Letters

- DOJ Business Review Letters
  - National Association of Small Trucking Companies and Bell & Company (2007)
    - Operational and financial survey of small-and medium-sized trucking companies; results to be made available to any interested party
  
  - DOJ noted that the survey procedures appear to fall within the safe harbor rules of the Health Care Statements
    - Third party administration of the survey
    - Confidentiality of individual information
    - Aggregate information and only published if there are five or more responses to a survey question
    - Aggregate information in the report at least 3 months old
    - Only nationally-aggregated information will be used at meetings

- Recognized that benchmarking surveys can benefit consumers when industry members utilize the result to operate more efficiently or price products more competitively (See also WoodWork Institute of California (2003) – Cost Survey of architectural millwork manufacturers with goal of identifying performance measures and best practices).
Information Exchanges: Sources of Guidance – Business Review Letters

- DOJ Business Review Letters
  - *Fair Factories Clearinghouse* (2006) – Operation of a database for member companies to use to voluntarily collect and share information about workplace conditions (e.g., wages, use of underage labor, workplace safety) in manufacturing facilities around the globe. Factories could also submit audits they have commissioned.

- Potential concerns that some audits in the database may include factories' wage and hour information and the initiative could facilitate concert action against factories were mitigated by FFC assurances – factories would not have access to competitor wage and hour data except in the aggregate; Members required to comply with Antitrust Policy Statement requiring that all decisions regarding whether to use a factory be unilateral.
Information Exchanges: Sources of Guidance – Business Review Letters

• DOJ Business Review Letters
  
    
    • Cautioned that internet listservs could serve as a for a for problematic discussions
  
  - *BroChem Marketing* (2003) – Chemical Information System that would compile information from chemical producers (product names, producer names, prices) for use by chemical distributors. Computer safeguards would ensure that each producer could only access its own information.
**Information Exchanges: What have we learned?**

- **For statistical gathering activities**
  - Ensure there is a legitimate reason for the collection
  - Limit the data collection to historical data or data that is less current (e.g., the prior 3-6 months)
  - Disseminate data in an aggregate form
  - Ensure enough participants to “mask” the identities of individual contributing organizations
  - Allow access to results to all members and their customers
  - Ensure that participation is voluntary
  - Use a third-party to collect and distribute the data; ensure confidentiality safeguards are in place
  - “In general, information reporting cost or data other than price, and historical data rather than current or future data, is less likely to raise antitrust concerns.” *(An FTC Guide to Dealings with Competitors)*

- **Areas of caution:**
  - Prices, rates, discounts, allowances, credit terms, warranty provisions, or other competitive conditions of your company or any other company involved in the meeting.
  - Individual data on costs, production, sales, or plans of or any other participant.
  - Industry pricing policies, levels, changes, allowances, etc.
  - Plans of individual companies concerning the development, production, design, distribution, sales, marketing or introduction dates of particular products or services.
  - Any other competitively sensitive information.
Trade Association Enforcement Activity – Alive and Well
Recent Enforcement Actions
Recent Enforcement Actions

  - In May of this year the Connecticut Attorney General entered a settlement with the IDSA after uncovering “serious flaws” in IDSA’s process from writing its Lyme disease guidelines
  - Guidelines were used by insurance companies to restrict coverage for long-term antibiotic treatment
  - AG noted undisclosed financial interests of IDSA panelists; alleged that the panel excluded divergent medical evidence and opinion and abused the process of establishing guidelines

  - NAR policy allowed selling real estate brokers to opt out of making their MLS listings available to “virtual office websites” or to make them available in a less useful form
  - Policy also prohibited advertising homes on VOW websites
  - DOJ challenged as an illegal agreement that excluded more efficient competitors from the market and prevented information from reaching consumers
Recent Enforcement Actions

  - FTC charged that a Board regulation that prohibited Board licensees from advertising discounts for “preneed” funeral planning
  - Consumers deprived of truthful pricing information and benefits of price competition
  - DOJ and the State of Arizona challenged the Association’s operation of its registry for hospitals’ purchases of temporary nursing services from staffing agencies.
  - Agency use of the registry was conditioned on accepting the same maximum bill rate from participating hospitals
  - Most Arizona hospitals participated in the Registry (collective market power)
  - Alleged anticompetitive effect: depressed bill rates for temporary nursing services below competitive levels
Recent Enforcement Actions: Standard-Setting and Unilateral Conduct

  - While participating in an SSO, Rambus amended and prosecuted patent applications covering memory interface technology
  - Rambus did not disclose the IP to the SSO and, after its patents issued, Rambus asserted patents against memory vendors
  - Reversing the Administrative Law Judge, the FTC Commissioners unanimously found that Rambus violated the antitrust laws (relied on Section 2 and Section 5)
    - Focus on “holdup” and cooperative environment of SSO; duty of good faith
  - DC Circuit Court of Appeals reversed
    - FTC did not prove Rambus’ technology would not have been chosen in the “but for world” and if the commission could not definitively find that Rambus’ monopoly was caused by deception, then Rambus is a lawful monopolist and its “use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals.”
  - FTC formally dismissed the complaint following denial of petition for certiorari
    - “The standard-setting issues that were at the heart of this case remain important, both as a matter of antitrust policy, and in order to protect consumers, and we will remain vigilant in this area.” (May 2009)

- Other FTC enforcement actions: *Dell Computer* (non-disclosure), *Unocal* (non-disclosure), *N-Data* (breach of licensing commitment, FTC Act Sec 5)
Recent Enforcement Actions: Standard-Setting

- Compare *Rambus* to *Broadcom Corp. v. Qualcomm Inc.*
  
  - Alleged refusal to honor FRAND commitment made to SSO
  
  - The district court concluded that there was no antitrust violation and the Third Circuit reversed

  - "[I]n a consensus-oriented private standard-setting environment, a patent holder’s intentionally false promise to license essential proprietary technology on FRAND terms, coupled with an SDO’s reliance on that promise when including the technology in a standard, and the patent holder’s subsequent breach of that promise, is actionable anticompetitive conduct."
What can organizations do? Mandatory

- Goal – preserve the value of competition and avoid *ex post* exploitation
  - Essential patent holders should not exploit the additional power gained as a result of being included in a standard

- Need to balance competing interests in developing IPR policies
  - Innovators
  - Implementers

- Spell out rules – learn patentee’s intentions *ex ante*
  - Disclosure Rules
  - Licensing Rules
  - Negotiation Rules
Response to *Rambus* – What can organizations do?

- US Agencies clarified policies toward *ex ante* licensing discussions through public statements and a business review letters, e.g.,
  - VITA Standards Organization (2006). The proposed VITA rules would require (1) disclosure of essential patents and applications and (2) that the member declare its most restrictive licensing terms (irrevocable)
    - DOJ indicated it would take no action and that the standard of review is the rule of reason
    - "Requiring patent holders to disclose their most restrictive licensing terms in advance could help avoid [holdup] by preserving the benefits of competition between alternative technologies that exist during the standard-setting process…. Disclosure of this information, enforced by the requirement that nondisclosed patents be licensed royalty-free, permits the working group members to make more informed decisions…"
    - IP owners’ unilateral announcement of licensing terms – by itself – does not violate the antitrust laws
    - Bilateral *ex ante* negotiations – unlikely to be a problem
    - No position on whether SSOs should engage in joint *ex ante* discussions
Tort Liability
Safety Standards and Product Certification: Tort Liability

• Evidence of industry standards is “often highly probative when defining a standard of care.” 57 A Am. Jur.2d Negligence Sec 185 (2002)
  - Not negligence per se (compare to violation of a statute)
  - Failure to comply with a standard may be offered as evidence against a company

• Negligence for association itself
  - Example: National Spa and Pool Institute - represents manufacturers and retailers of swimming pools and equipment
  - Published voluntary safety standards regarding the type of board to be used with pools of certain dimensions
  - Supreme Court of Washington (2000) found that NSPI owed a duty of care the ultimate consumer – it had assumed the responsibilities of the pool and board manufacturers and retailers for setting safety standards

• Industry-wide / Enterprise liability
  - Courts are generally restrictive in the application of these theories
    - *Hall v. E.I. du Pont de Nemours & Co.* (1972) - Existence of industry-wide standards or practices could support a finding of joint control of risk – "special applicability" to concentrated industries
    - “The allegations in this case suggest that the entire blasting cap industry and its trade association provide the logical locus at which precautions should be taken and liability imposed.”
For more information on Hogan & Hartson, please visit us at

www.hhlaw.com

Baltimore
Beijing
Berlin
Boulder
Brussels
Caracas
Colorado Springs
Denver
Geneva
Hong Kong
London
Los Angeles
Miami
Moscow
Munich
New York
Northern Virginia
Paris
Shanghai
Tokyo
Warsaw
Washington, DC
TRADE ASSOCIATIONS
Standard Setting
&
Immunities

By: Carl W. Hittinger, Partner

DLA Piper LLP
One Liberty Place
1650 Market Street, Suite 4900
Philadelphia, PA 19103
(215) 656-2449 (t)
(215) 606-2149 (f)
carl.hittinger@dlapiper.com
June 16, 2009
TRADE ASSOCIATIONS

STANDARD SETTING
Standard Setting

- Types of standards:
  - Technical standards
  - Quality standards
  - Safety standards
  - Seals of approval
  - Certifications
Standard Setting

Section 1 of the Sherman Antitrust Act:
- To prove a violation of Section 1 of the Sherman Antitrust Act, the following must be established:
  1. The existence of a contract, agreement, combination, or conspiracy among two or more separate entities that,
  2. Unreasonably restrains trade, and
  3. Affects interstate/foreign commerce
Standard Setting

- Section 5 of the FTC Act
  - Broader than Section 1 of the Sherman Act
  - Broad scope of coverage:
    - "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

- State law claims

- Unfair Competition
  - Tortious Interference With Prospective Economic Advantage and/or Contract
Standard Setting

Under the Obama administration there will be a significant increase in antitrust enforcement, including for trade associations and standard setting organizations.

- **Christine Varney** will lead the Antitrust Division of the Department of Justice (DOJ).
- **Jonathan Leibowitz** will serve as Chairman of the Federal Trade Commission (FTC).
Standard Setting

- Both Varney (DOJ) and Leibowitz (FTC) have promised reinvigorated antitrust enforcement, including anticompetitive standard setting conduct.

- Leibowitz recently remarked in October 2008 that Section 5 of the FTC Act would be particularly useful against unfair standard setting conduct.
Standard Setting


  - Supreme Court recognized that when trade associations promulgate safety standards based on objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling competition, the standards can have pro-competitive advantages.
Standard Setting

■ Other benefits:
  - Facilitating interoperability
  - Public safety
  - Creating open networks based on objective criteria
  - Making it easy for consumers to identify the appropriate product and be confident of its standard setting applicability

■ Per Se Analysis vs. Rule of Reason
  - Generally, courts will apply the rule of reason absent some showing that the standard was deliberately distorted by competitors and market foreclosure. *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 501 (1988) (noting that most lower courts apply the rule of reason analysis because private standards can have significant pro-competitive advantages).
Standard Setting

- Courts recognize that every trade association must have rules or criteria.
- Membership rules or criteria can restrict trade, at least incidentally.
- When a trade association promulgates industry standards, it runs the risk of being accused of *unlawful horizontal and vertical concerted refusal to deal.*
Trade associations promulgating standards should understand the risks, particularly when the trade association has a large share of the relevant market and the membership is closed:

- The standard setting could be viewed as a cover for agreements to fix prices, limit output, or allocate markets
- The standard setting could unreasonably limit competition on quality and innovation.
- The standard setting could be used by members to harm or exclude competitors from the relevant market.
Standard Setting

What should **NOT** be part of a standard setting discussion:

- Confidential business information, including research and development
- Members’ prices and pricing methods
- Members’ profit margins
- Members’ levels of output and geographic sales territories
- Price advertising
- Complaints about certain entities’ business practices
- Whether to do business with particular entities
Standard Setting

When a standard promulgated by a trade association is challenged as an unlawful concerted refusal to deal, courts will generally examine the real goal behind the standard and evaluate the standard to determine if it is reasonably related to that goal and if it is objective.

- In doing so, courts will perform a balancing test → pro-competitive benefits versus anticompetitive harm.
Standard Setting

- Key factors court will examine in determining whether a standard promulgated by a trade association unreasonably restrains trade:
  - The economic detriment imposed on non-qualifying (excluded) entities.
  - The scope of the restrictions in relation to their need
  - Market structure
  - The application of the standard
  - Whether members are forced to adopt the standard
    → standards should be voluntary
Standard Setting

Other important factors:

- Who is the party enforcing the standard?
  - The trade association itself? Courts will be suspicious if this is the case.
  - Consumers?
  - Government regulatory agencies?

- Procedural safeguards \(\rightarrow\) notice and the right to be heard before being excluded.
Standard Setting

- Special industries require self-regulation:
  - Sports Leagues and Associations
    - Standards required in order to maintain competition within the league or association.
    - Standards must still serve a legitimate purpose.
  - Healthcare
    - Exclusion of doctors allowed for lack of professional competence or conduct.
    - Ethical rules required
    - Standards must still serve a legitimate purpose.
Select Cases:

- *Wilk v. Am. Med. Ass’n*, 895 F.2d 352 (7th Cir. 1990): Seventh Circuit affirmed the lower court’s judgment. Defendant medical trade association with market power was liable for promulgating ethical standards to make chiropractors appear unscientific and to encourage others not to deal with chiropractors. Additionally, plaintiff chiropractors were entitled to injunctive relief.

- *Carleton v. Vermont Dairy Herd Improv. Ass’n*, 782 F. Supp. 926, 932 (D. Vt. 1991): “A member of a Dairy Herd Improvement Association may be expelled for valid or invalid reasons. The mere acts of expulsion and group boycott of a member do not entail either anticompetitive animus or predominantly anticompetitive effects, for the expulsion and boycott of a member who flouts the rules of the Association or prevents the impartial collection of data from his or her herd, while damaging the member’s ability to compete, might have largely beneficial effects on competition in the market for Holstein animals. Indeed, DHIAAs are established precisely in order to enhance the value of their members’ herds and to encourage fair competition. . . . [T]his is manifestly not a case where the surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”
Santana Prods. v. Bobrick Washroom Equip., Inc., 401 F.3d 123, 131-35 (3d Cir. 2005), cert. denied, 546 U.S. 1031 (2005): The Third Circuit affirmed the lower court’s decision to enter judgment in favor of defendants because there was no “restraint of trade.” Defendants merely criticized the safety of plaintiff’s product. Defendants did not engage in coercive measures that prevented plaintiff from selling its products to any willing buyer or prevented others from dealing with plaintiff. Furthermore, plaintiff’s allegations of fraud in the manner in which the hazards of its products were portrayed were irrelevant because “deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned.”
TRADE ASSOCIATIONS
Immunities

NOERR-PENNINGTON
ANTITRUST IMMUNITY
Noerr-Pennington
Antitrust Immunity

- What is Noerr-Pennington?
- What conduct is protected?
- Exceptions to Noerr-Pennington
- Specific Application to Trade Associations
- Related State Action Immunity
Noerr-Pennington Immunity

- Competitors often petition government entities to restrict the ability of rivals to compete in the marketplace.
- This petitioning often occurs through trade associations.
- Courts have conferred antitrust "petitioning immunity" on a wide range of conduct designed to induce the government to restrain competition.
Noerr-Pennington Immunity

The Noerr-Pennington doctrine provides antitrust immunity for individuals, businesses and trade associations petitioning for competition-restricting government action.

The doctrine was established by the courts, not Congress. Flows from the First Amendment.

- Eastern R. Conf. v. Noerr Motors, 365 U.S. 127 (1961) and
Noerr-Pennington Immunity

Protected Conduct

- Efforts to influence the legislative process (Lobbying)

A group of railroads lobbied the legislature to restrict competition from the trucking industry. The Supreme Court held that a violation of the Sherman Act cannot be based on attempts to influence the passage or enforcement of laws; the Sherman Act does not prohibit two or more persons from acting together to influence legislation even if it would result in a restraint on trade or a monopoly.
Noerr-Pennington Immunity

Protected Conduct

- Efforts to influence the administrative process

  Coal mine operators and their union tried to persuade the Secretary of Labor to establish a higher minimum wage for coal workers. The Supreme Court held "(j)oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."
Noerr-Pennington Immunity

Protected Conduct

- Efforts to influence the adjudicatory process

  The Supreme Court extended *Noerr-Pennington* to adjudicatory processes, including litigation. "The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to the courts."
Noerr-Pennington Immunity

Specific Application to Trade Associations

- Trade Associations take action, on behalf of their members, with the government in a variety of ways:
  - Association executive testifying to a subcommittee regarding proposed legislation
  - Political action arm of an association coordinating support of legislation
  - Association bringing legal action for or against a license application

This is all protected conduct under Noerr-Pennington.
Exceptions to Noerr-Pennington

- Sham Exception
  - Using the government process as an anticompetitive weapon, not genuinely seeking favorable government action, by engaging in objectively baseless conduct

- Supplying False Information
  - Misrepresentations and false information are usually not protected by Noerr-Pennington but some courts have gone further allowing even fraudulent or deceptive conduct in order to avoid government decision-making scrutiny. See Bobrick (3d Cir.), supra.

- Conspiracies with Public Officials
  - Government officials conspiring with private parties is not protected conduct
Exceptions to *Noerr-Pennington*


- Defense attorneys jointly refused to represent indigents until the city, Washington, D.C., raised its rates. The attorneys agreed that absent *Noerr-Pennington* immunity their actions would be per se illegal.

- The Supreme Court held that *Noerr-Pennington* did not apply. “(I)n the *Noerr* case the alleged restraint of trade was the intended consequence of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation.” Means versus outcome.

- Trade associations may lobby the government for action that will restrain trade, but you cannot use an illegal restraint of trade as the means to try to get government action.
TRADE ASSOCIATIONS
Immunities

THE STATE ACTION DOCTRINE
State Action Immunity

- *Noerr-Pennington* protects efforts by citizens and groups of citizens (i.e. trade associations) that encourage the adoption of government policies that suppress competition.

- State Action Immunity similarly protects the government policies themselves from antitrust liability.

- *Noerr-Pennington* also stems from State Action Immunity to not suppress legitimate petitioning of governmental officials.
State Action Immunity

  - Established the State Action Doctrine
  - State of California developed an agricultural marketing plan to stabilize the price of raisins by allowing raisin producers and distributors to determine what percentage of the raising crop would be withheld from the market. The Supreme Court held that Congress did not intend the Sherman Act to apply to such state action even though allowed restraint on competition.
Select cases:

*Health Care Equalization Committee of the Iowa Chiropractic Society v. Iowa Medical Society, 51 F.2d 1020 (8th Cir. 1988)*

- Health care service organization complied with legislative mandate to refuse to deal with certain chiropractors; assignee of 120 chiropractors sued health care service organization for violations of the Sherman Act; organization sought immunity under state action doctrine
- Court held conduct of private organization was protected under the state action doctrine because: 1. the challenged restraint was one "clearly articulated and affirmatively expressed as state policy" and 2. the policy was "actively supervised by the State itself."
Lawline v. American Bar Association, 956 F.2d 1378 (7th Cir. 1992)

- Unincorporated association of lawyers and laypersons challenged American Bar Association’s Model Rules of Professional Responsibility prohibiting lawyers from forming partnerships with non-lawyers

- The rules in question were immune from antitrust liability because the Illinois Supreme Court, a state actor, adopted the rules, NOT because the ABA drafted them