

NON-PROFITS AND ANTITRUST LAW

Will History Repeat Itself With a New Generation of Directors and Officers?

VIOLATIONS of antitrust laws can have serious consequences for an association, its officers, directors, and employees. Even an allegation of anti-competitive behavior can lead to significant defense costs and lasting harm to an association's reputation, not to mention the costs of consent decrees, damage suits, and criminal fines that can result from a finding of antitrust violations. Individuals are even subject to imprisonment. Furthermore, an association's exposure is not limited to government action. Private parties injured by violations of antitrust laws may also bring action seeking treble damages against the association and its representatives.

Sherman, Clayton, and the FTC

Since 1890 the Sherman Act has been the basic federal antitrust law. The law prohibits agreements that unreasonably restrain trade. An association gathering is often a meeting of competitors where agreements (express or implied) could be interpreted as constituting unlawful restraint of trade.

The Clayton Antitrust Act of 1914 prohibits certain types of price and related discrimination. Although the Department of Justice enforces both laws, it is not the only government agency observing non-profit activities and scrutinizing non-profit programs for anti-competitive effects. The Federal Trade Commission (FTC) Act grants the FTC the authority to enforce antitrust laws by issuing cease and desist orders or by seeking other relief from courts against unfair methods of competition.

Association Autonomy Challenged for Decades

The 1970s were a challenging time for many non-profits. Federal and state governments were increasingly concerned about anti-competitive environments created by the normal procedures of non-profits. Aggressive antitrust enforcement efforts targeted trade associations and professional societies, which were seen as enabling constricted competition in an unlawful

manner. Part of the effort was aimed at protecting association members from themselves under the tenet that they should be free to make business decisions based on market dictates, not the dictates of the association.

Codes of Ethics and Price Fixing

Professions and their societies survived for years as independent regulators. Through membership admission policies, constraints on advertising and other self-promotion efforts, specialty certification procedures, and codes of ethics, professional societies often dictated entry into a profession and the activities of professionals. In the 1970s, such professional societies came under attack for fostering unreasonable anti-competitive activities. Forms of "self-regulation" that were often embodied in codes of ethics were challenged. From engineers to attorneys, ethical provisions that restricted price competition or price-based advertising were the focus of antitrust activities. Pure price-fixing agreements are illegal under federal law regardless of any public benefit or pro-competitive rationale. Many codes of ethics and professional association policies have been judged to achieve the same effect as pure price-fixing agreements even though the provisions were justified by the professional societies as protective of the public.

One of the classic association cases is the Supreme Court decision in *National Society of Professional Engineers v. United States*, decided in 1978, after nearly a decade of challenges to professional societies for anti-competitive behavior. In the NSPE case, the Supreme Court upheld the Justice Department's challenge to an ethical rule forbidding members of the professional society from engaging in competitive bidding. The ethical rule, NSPE argued, protected the public since competitive bidding could constrict the ability of an engineer licensed under state law from ensuring the health, safety, and welfare of the public when providing services. While

the Supreme Court acknowledged that engineering was a learned profession and therefore could be subject to a code of ethics, such a code could not prohibit individual engineers from competing on the basis of price.

Certification Programs and Standards Setting

Associations can be guilty of actions designed to restrict competition between favored firms and disfavored firms. While some activities can be viewed as collusion, many certification programs or standard-setting efforts can be challenged as having the effect of exclusion. This can happen with any program that provides a "seal of approval" valued in the marketplace or a standard-setting activity that allows undue influences. Standard-setting activities arouse suspicion if they are unreasonably skewed to favor one product or service over another.

A significant Supreme Court case where a standard-setting process was fundamentally flawed was *American Society of Mechanical Engineers v. Hydrolevel Corp.* (1982). One manufacturer used the position of one of its employees as vice chair of the relevant standard-setting subcommittee to manipulate the process by which Hydrolevel's safety device for water boilers was assessed as being unsafe and in violation of the ASME standard. The association was held liable because the member firm's employee appeared to be acting under the authority of the association. The Supreme Court agreed that this was "apparent authority" even though the association's volunteer and executive leadership were unaware of the activity. The court determined that an association is at fault when it fails to prevent antitrust violation through the misuse of the association's reputation by its agents.

Both standard-setting and certification programs have many pro-competitive benefits to consumers: providing consumers with a metric for

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competence; ensuring that products of different manufacturers are compatible with each other; and keeping unsafe products or services out of the marketplace. But setting a standard or creating a certificate program can have an anti-competitive effect and be unlawful. For instance, if certification by a particular group is only one among many ways to be recognized by consumers as acceptable, deprivation of the certification is unlikely to have a significant competitive effect. If failure to adhere to the particular standard would result in effective exclusion from the market, then there is a much greater reason to be concerned about the appropriateness of such exclusion.

Membership Admission Policies

If belonging to an association is beneficial, competitors of the association's members may be at an unfair disadvantage if they are not allowed access to association information or products and services. The general rule is that non-members should also be permitted to purchase the association's products and services, and any discrepancy in cost should not be so high as to compel membership. Furthermore, members-only benefits or services should not give members a competitive or economic benefit.

Traditionally, it was suggested that trade associations should admit all qualified applicants, provide due process before rejecting an applicant or expelling a member, and offer certain membership benefits to non-members. These suggestions, designed to minimize the risk of antitrust violations, were based upon the assumption that associations controlled essential or unique resources that could not be denied to an applicant without foreclosing competition. Antitrust laws no longer assume that association membership confers a competitive advantage. Under the current analysis, courts will employ a "Rule of Reason" when evaluating a challenged activity or restriction unless it is unambiguously anti-competitive or the association has market power or control of an essential facility within the trade or industry.

Associations can restrict membership on the basis of trade, profession, and geographic area. Other qualifications may or may not be acceptable. If the evidence shows that restrictions have an anti-competitive effect and lack reasonable business justification, associations that deny membership to certain qualified competitors will face antitrust challenges.

Specific membership criteria have historically been evaluated on whether there was intent to limit competition or disadvantage to a potential member. The analysis has shifted to determining whether the exclusion of a potential member from an association would have an anti-competitive effect on the market. In the absence of a *per se* offense, such an anti-competitive effect requires that the association possess market power or exclusive access to an element necessary for effective competition. An association that provides certification of industry products must not discriminate between products of members and non-members. Similarly, an association may not exclude a non-member from an association-sponsored trade show when that exclusion would restrict the right or ability of the non-member to effectively compete in the industry.

Cooperative Activities

Organizations have important information-gathering functions that would be difficult for members to carry out on their own. Organizations may represent members before legislative bodies and governmental agencies—a competitively-neutral activity that may improve the information upon which governmental decisions are made. If done carefully, this goal can be accomplished without undue antitrust risk. However, non-profits, especially trade associations, may go beyond legitimate functions and organize anti-competitive activities. A trade association can serve pro-competitive ends by collective action. When associations begin to resemble a traditional, economically motivated joint venture, there is a danger that they will be seen as involved in anti-competitive behavior.

Now more than ever associations need to minimize their exposure to antitrust violations by implementing an antitrust compliance program for staff and volunteers. An association must have a formal, written policy that contains clear details of special consideration for the association and its members. The policy should be reviewed and approved by the association's governing body and circulated to staff, volunteer leadership, and members so that all who deal with the association are informed and educated about potential antitrust damages and know when to identify those damages when they arise.

Eternal Vigilance

In spring of 2009, the FTC took action against the National Association of Music Merchants (NAMM). NAMM signed a consent order from an FTC complaint stating that the organization, comprising over 9,000 manufacturers, distributors, and retailers of musical instruments, enabled and encouraged discussion among members regarding competitively sensitive pricing information, policies, and strategies in violation of federal antitrust law. According to the FTC, NAMM facilitated discussion of strategies for implementing manufacturers' minimum advertised pricing policies, restrictions of retail price competition, and the need for higher prices.

The consent decree offers key guidance on antitrust compliance for trade associations and their members. The decree makes clear that the FTC expects trade associations to adopt clear antitrust compliance measures and to enforce them rigorously. The decree required an appointment of antitrust legal counsel for NAMM, annual antitrust training for the board of directors and staff, the presence of antitrust counsel at all association events and meetings, and the review and approval of agendas and materials prior to distribution at meetings.

The complaint and consent order could have significant implications on association activities. Establishing or updating properly structured and specific antitrust compliance programs and strict adherence along the lines of the FTC's order to NAMM seems prudent. Trade and industry associations should expect even higher scrutiny of their activities.

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