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Business Developments

How Trade Associations Can Comply with the Antitrust Laws and Still Benefit Their Members

By Kenneth D. Morris, Esq.

Industry trade associations perform many valuable functions for their members, but the activities of the association can easily lend themselves to breeding grounds for illegal antitrust activity if the association does not have an antitrust compliance plan and the necessary standards already established. Associations of all types can legitimately undertake research, market surveys, development of new uses for products, group insurance, publication of trade journals, advertising, and joint representation or lobbying before legislative and administrative agencies. In a survey performed in 2000, for example, approximately 80% of the associations surveyed did not have an antitrust compliance plan. Among other things that also probably means no lawyer ever reviews the associations agendas or minutes. Does anyone ever audit the association's books? Does the group have a document retention plan? Does the association even have a lawyer? A well-run association will have its publications, policy statements, minutes, and agendas reviewed by a lawyer before release. But, of course, a review of by-laws, minutes, policies, and agendas is only a starting point, particularly in cases where the association's activities are really a cover for conspiratorial conduct. After all, official meetings provide both the opportunity and camouflage for secret, unofficial meetings where prices are fixed, markets allocated, or group boycotts born.

A good example of the sort of circumstance in which an association's activities were really camouflage for conspiracies can be seen in the Department of Justice's Antitrust Division's investigation of Archer Daniels Midland and its competitors between 1991 and 1995. All of the conspirators belonged to the European Citric Acid Manufacturers Association ("ECAMA"). ECAMA, of course, is a legitimate trade association based in Brussels. It legitimately addresses a host of topics, such as tariffs, trade and regulatory issues, research on possible new markets for citric acid, and environmental issues. The Association also compiles audited sales figures on a monthly basis and reports aggregated sales statistics to each member on a monthly and cumulative basis. It has rules designed to prevent its statistics gathering activities from causing any competitive harm. An outside accounting firm is engaged as well. The Association's rules strictly prohibit the disclosure of any sensitive information, such as the release to one company of another company's sales data. ECAMA also has an antitrust compliance policy which, among other things, prohibits members from exchanging information related to pricing, territories, or customers. Yet, its rules and policy notwithstanding, prosecution of the conspirators revealed substantial evidence that the Association's meetings provided "good cause" to meet other company representatives and hold "unofficial" conspiratorial meetings preceding official ECAMA events. Investigation into the conspiracy disclosed evidence showing price-fixing and volume-allocation agreement in the world market impacting over $1 billion in sales. More than once, conspirators concocted sham agendas to conceal the real activities. None of the items on the phony agenda were ever discussed.

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In an example closer to home, in 1993 the U.S. Court of Appeals for the Third Circuit (covering Delaware, Pennsylvania, and New Jersey) looked at the activities of the National Decorating Products Association ("NDPA") and its members. (See *Alvord-Polk, Inc. et al. v. The National Decorating Products Association, et al.* 37 F. 3d 996 (3rd Cir. 1994)) Noting that concerted action does not take place every time a trade association member speaks, the Court noted that all the facts and circumstances must be examined to determine whether the particular action was the result of some agreement among members. NDPA is composed of traditional wallpaper retailers in which the customer may view the merchant's books of wallpaper in the store and select the type most appropriate, as well as "800-number" dealers. Once a customer visits a merchant's store and walks away with the name and code number of the specific wallpaper desired, he may then call the 800-number dealer and purchase the wallpaper at discounted prices. The 800-number dealers were discussed at Association meetings and the plaintiffs' allegations claimed that the individual retailers, acting through NDPA, entered into a horizontal conspiracy to eliminate the competition posed by the 800-number dealers. The plaintiffs also alleged that one of the leading traditional retailers, FSC, joined with NDPA in creating a vertical conspiracy also designed to thwart competition in that FSC put in place surcharges and other techniques applicable only to 800-dealers ordering wallpaper from it, thereby reducing the profitability enjoyed by the discount dealers.

The Court noted that action of a group of competitors undertaken in one name present the same antitrust violations as do the same competitors who do not bother to form an association through which to operate. If an association exists, its activities are subject to Sherman Section 1 scrutiny to insure that its members do not seek to secure unfair advantage over their competitors. In this case, the Court reversed the District Court and remanded the case since a reasonable juror could conclude that FSC was authorized by NDPA to act on its behalf. The record of the lower court also indicated concerted activity between FSC and the Association. Discovery revealed internal memos within FSC which stated that the "objective" of the surcharges was to "make a statement to the industry that we are trying to help them" and, as its rationale, argued that it was seeking to "protect legitimate customers, to increase margins in this area." The press release of FSC, however, claimed that the surcharge was not aimed at the discounting "pirates," but rather to help insure that FSC's customers received the best possible service "in the most effective and appropriate manner at retail."

Trade associations have also been held liable under the antitrust laws where group boycotts were organized, customers and territories were allocated, and other competitors were suppressed. Trade associations can only be held liable in circumstances where some of its members are using it to unreasonably restrain trade. Since a trade association is normally controlled by its members, it is usually not difficult to show agreement among members. This also means, as Judge Stapleton noted in the concurring opinion in *Alvord-Polk* that members who neither participate in nor knowingly consent to the association's anticompetitive activities will not be held liable with the association and its members who do act in concert.

Trade associations can also run afoul of the antitrust laws through standard-setting and certification activities. In 1994 the Antitrust Division brought a case against the Association of Retail Travel Agents ("ARTA"). ARTA was charged with orchestrating a boycott of travel providers that did not conform to ARTA's vision of an appropriate travel agent compensation system. ARTA's Board of Directors had adopted the "ARTA Objectives for the Travel Agency Community". The document sought to establish a 10% commission on hotel and car rental sales by travel agents, the elimination of distribution outlets for airline tickets other than travel agents, and

the payment of commissions based on full fares—as opposed to discounted fares. After the adoption of the Association's policy, one of its board members announced his travel agency would cease doing business with certain travel providers whose commission and sales practices did not comply with ARTA's Objectives and sought other travel agents to join him. In essence, this was an invitation to other members to engage in price-fixing. In many ways an association is a type of joint venture of different entities. It can foster competition through horizontal action of competitors, but it can also have significant adverse impacts on competition. Typically, an association will either amass significant market power through the number of competitors who join, or it will impose collateral restraints to restrict competition. Industry codes of conduct, or standards setting, is one such collateral restraint.

Typically, failure to adhere to a particular standard will be used for an anticompetitive purpose if it excludes competitors from the market. Standards may also be procompetitive, of course, and provide benefits to consumers by ensuring that products of different manufacturers are compatible with one another (as where one company's tubes need to fit within the device made by another in order to manufacture the end product), as well as by keeping unsafe products out of the marketplace. In the case of the exclusion of a company from the marketplace, often the process employed by the association provides the telltale signs as to the illegitimacy of the exclusion. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), a manufacturer of safety devices for water boilers had one of its employees (who was serving the Society as Vice-Chair of the standards-setting committee of ASME) request an opinion from ASME regarding the competitor's product. The Chair of the committee, after helping draft the letter requesting the advice, then replied on ASME's letterhead stating that the competitor's product violated ASME's code. The U.S. Supreme Court upheld a finding of liability against ASME.

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