

T E N E N B A U M

T E N E N B A U M
L A W G R O U P P L L C

ABC Association

Antitrust Law Staff Training

Jeffrey S. Tenenbaum, Esq.

Managing Partner

Tenenbaum Law Group PLLC

Agenda

- Antitrust Law Basics
- Application of the Antitrust Laws to Associations
- Association Antitrust Compliance Programs
- Q&A

Antitrust Basics

- Basic idea – prevent competitors or groups of competitors from obtaining the power to control a market through means other than competition on the merits
 - Designed to foster fulsome competition which should benefit consumers with lower prices
 - “Concerted” action between two or more competitors is required for “horizontal” antitrust violations
 - Associations are, by definition, combinations of competitors, so one element of a horizontal antitrust violation already exists

Basics – Different Types of Antitrust Laws

- Agreements and other coordinated and multilateral conduct – Section 1 of the Sherman Antitrust Act and Section 5 of the Federal Trade Commission Act (and comparable *state* antitrust laws)
 - Most of the issues for associations relate to these laws
- Monopolization – Section 2 of the Sherman Antitrust Act
- Mergers – the Clayton Antitrust Act
- Price Discrimination – the Robinson-Patman Act

Basics – Agreements and Coordinated Conduct

Sherman Antitrust Act §1:

“Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.”

“Every contract, combination in form of trust or otherwise, or conspiracy,...”:

- This means *agreements* among competitors
- Often it is hard to show that there is an agreement – companies generally don’t enter into formal agreements to fix prices

Proof of Agreement

- Actions of an association are often taken as evidence of an agreement among the members of the association to take that action
- Even actions of an individual working for the association can be evidence of an agreement among the members of the association

Basics – Agreements and Conduct

“...in restraint of trade or commerce...”

Does the agreement harm competition? There are two types of potentially anticompetitive agreements:

- Those that are deemed to be anticompetitive on their face – *per se* illegal agreements
- Those that might or might not be anticompetitive – must be analyzed under the *rule of reason*

Basics – *Per Se* Illegal Agreements

***Per se* illegal agreements**

These are agreements that always or almost always restrict competition and reduce output

- Price fixing – including components of price and price-related terms like discounts, credit terms, and trade-in allowances
- Market allocation – where companies agree to stay out of each others' markets so they don't compete
- Bid rigging – where the parties agree to not bid against each other
- Some group boycotts – competitors get together to enforce a price fixing agreement or harm a rival
- Some exclusive dealing arrangements (but not most; most are analyzed under the rule of reason)

Basics – Criminal Antitrust Violations

- *Per se* violations like price fixing, market allocation, and bid rigging can be crimes, leading to jail time for those found guilty
- Associations have been used as cover for criminal antitrust violations
- Criminal antitrust violations are enforced by the U.S. Department of Justice's Antitrust Division ("DOJ") and state Attorneys General
- Penalties are severe
 - Incarceration for individuals
 - Fines of up to \$1 million for individuals and \$100 million for organizations

Basics – Civil Antitrust Violations

- All antitrust violations can result in civil violations
- Enforcement by the U.S. Department of Justice's Antitrust Division, the Federal Trade Commission ("FTC"), state Attorneys General, and private plaintiffs in civil litigation
- Treble (triple) damages and attorneys' fees are available to prevailing plaintiffs in civil litigation
- Civil litigation suits are often brought by aggrieved competitors

Basics – Agreements and Coordinated Conduct

Rule of Reason – balancing test – an analysis of the restraint to see if it, *on balance*, promotes competition or suppresses competition:

- Look at the restraint itself
- Look at the market power of the companies imposing the restraint
- Look at potential *efficiency* justifications for the restraint; other justifications for the restraint – such as those related to health and safety, environmental protection, and other consumer-focused factors – are sometimes taken into consideration in the rule of reason analysis

Association Antitrust Liability – General

- Where the association directly violates the Sherman Act – *e.g.*, negotiating prices on behalf of members, expelling or denying a member for being a price-cutter, facilitating bid-rigging
- Member violates the antitrust laws through the machinery of the association which doesn't have safeguards to prevent it
 - *Hydrolevel v. American Society of Mechanical Engineers* – members in leadership positions used their positions to harm competitor in the market by interpreting safety standards; apparent authority doctrine and the proactive duties it imposes on associations
- Where association members use the programs, activities or facilities of the association to engage in anticompetitive actions – *e.g.*, using the association's online forum to discuss member pricing issues, the capping of employee salaries, not doing business with a vendor

Antitrust Liability for Association Officers, Directors and Staff

- There **should not** be personal liability for those who exercise ordinary and reasonable care in the performance of their duties, showing honesty and good faith, who do not engage in conflicts of interest harmful to the association, and who do not engage in anticompetitive discussions or actions
- There **may be** personal liability for those who participate in or knowingly approve of an antitrust violation

Specific Application of Antitrust Law to Associations

- Discussions at meetings
- Membership requirements and expulsion/denial of membership
- Services to members and non-members
- Statistical reporting, surveys and information exchanges
- Standard-setting, certification and accreditation programs
- Regulation of member conduct (*e.g.*, codes of ethics and conduct)
- Association-sponsored online forums for member communication
- Lobbying (generally exempt from antitrust liability)
- Antitrust compliance programs

Discussions at Meetings

- Proof of an anticompetitive agreement can start with proof of parallel conduct plus potentially illicit communications between rivals
 - Because association meetings generally involve communications between rivals, care must be taken to avoid illicit communications
- That means that discussions at meetings are often formalized and laid out ahead of time to a great extent through agendas and the like

Discussions at Meetings

- Agendas and presentations reviewed in advance by legal counsel, and distributed in advance of meetings
- Antitrust guidance read at the outset of meetings or calls and included in meeting materials
- Care should be taken to keep to these agendas and materials at the meeting unless there is a good reason to depart
- Minutes of the meetings should be prepared that concisely reflect the discussions
 - Especially where they diverge from the pre-prepared materials
- Have legal counsel present when antitrust-sensitive topics will be discussed

Discussions at Meetings

- There are a number of off-limit topics where discussions could lead to illegal agreements:
 - Pricing, including any discussions of methods, strategies, timing, discounts, advertising, or what constitutes a fair or reasonable price
 - Whether to do business with suppliers/vendors, customers or competitors
 - Complaints about business practices of other companies
 - Confidential business plans regarding output decisions, employee compensation, marketing plans, or decisions regarding future product/service offerings

Statistical Reporting, Surveys and Information Exchanges

- There can be *per se* and rule of reason violations as a result of information collection and dissemination
- Recall that *per se* violations include, among other violations:
 - Price fixing
 - Agreements to restrict output
 - Market allocation

Statistical Reporting, Surveys and Information Exchanges

- These types of communications within an industry are often done through third parties (e.g., associations) to avoid direct contact between rivals; very important from an antitrust perspective
- Important issues for an association when acting as a third party for communications
 - Type of information (price v. cost, current v. older, specific as to parties and transactions v. more general and aggregated, only for sellers v. available to customers also)
 - Purpose of the information reporting – can't be for anticompetitive reasons
- Can you articulate pro-competitive reasons for the information exchange?

Statistical Reporting, Surveys and Information Exchanges

- DOJ/FTC Safe Harbor: Issued for healthcare industry but applicable to all industries; Purpose is to make sure that companies can't derive info about their competitors from the disclosures
 - Aggregate info rather than individual company data; protect raw data
 - Older data rather than current or forward-looking data (at least three months old)
 - Only where there are enough companies that it is not possible to determine who did what (ensure at least five companies per category and that no company's data is more than 25% of the total in that category); Where there are only a few companies in the industry, it might be easy to pick out their data from the distributed information
 - Have a third party (such as an industry association) manage the process without any involvement from member companies
- Avoid unregulated discussions of the results/data
- Consult with legal counsel prior to and during the process

Associations and Group Boycotts

- Group boycott issues can come up in a number of ways for associations (more about each later):
 - Self-regulation and codes of ethics/conduct
 - Standard-setting, certification and accreditation programs
 - Membership requirements
 - Access to association services and activities
 - Online member forums
- Might be illegal *per se* or may be looked at under the rule of reason – usually a rule of reason analysis unless the boycott is enforcing a *per se* violation (like price fixing)

Membership Requirements and Expulsion/Denial of Membership

- These are looked at as potential group boycotts
- Rules and decisions on membership and expulsion are generally considered under the rule of reason – not *per se* violations
- Exception:
 - The rule or decision relates to access to some business input that is essential for effective competition, and
 - There are no plausible justifications stemming from the association's pro-competitive purposes
- In addition, if the membership rule or decision is made to enforce a *per se* violation (such as to exclude or kick out a price-cutter from membership), it itself may be deemed a *per se* violation

Membership Requirements and Expulsion/Denial of Membership

- Under the rule of reason, we look to see the effect of the requirement or decision
- A number of factors depending on the case
 - Are the rules objective and consistently applied?
 - If the rules are subjective, is there a legitimate reason for the rule based on the pro-competitive needs of the association?
 - Is due process given to those expelled or denied membership (especially expulsion)?
- Notice and opportunity to respond
- Appeal process
- Disinterested decision-makers

Services to Members and Non-Members

- Competitive issues closely tied to the membership requirements
 - The more competitively important the services are, the more important that companies are not excluded from those services for anticompetitive reasons
 - Sometimes the courts decide that the service should be provided to non-members rather than requiring that the non-members should be allowed to join the association, but only if the service is an “essential facility” (meaning that access to the service is essential in order to effectively compete in the relevant market – *e.g.*, certification or accreditation that is a prerequisite to legally operating in the relevant market)
- Rule of reason analysis generally applies

Services to Members and Non-Members

- Some general guidelines:
 - Take a look at the services that the association provides periodically to see if any are essential for effective competition by companies in the industry
 - Make sure that services like that are made available to non-members or if not that there is a good reason, tied to the benefits the association provides to members
 - Even if the service is an essential facility, there can be a higher fee for non-members than for members, but the fee should be related to the cost for providing those services to non-members
 - The antitrust risk varies based on how essential/valuable the services are in order for companies to be able to effectively compete in the industry

Services to Members and Non-Members – Trade Shows

- Access to association trade shows
 - Rules of reason analysis generally
 - Important questions and issues:
 - Are the rules objective and reasonable, and objectively and consistently applied?
 - How important is the trade show to competition in the market?
 - Is there is limited room?
 - replacing one company with another is not likely to have an impact on competition
 - Why was the company excluded? – don't exclude a company for competitive reasons
 - Similar rules apply to decisions relating to allocating space or location on the trade show floor

Services to Members and Non-Members – Trade Shows

- Some “don’ts”:
 - Don’t apply rules in a discriminatory, inconsistent or subjective manner
 - Don’t base decisions on whether the company engages in competitive pricing
 - Don’t condition decisions on whether a company agrees to not appear at a competing trade show
 - Generally, don’t use subjective criteria for participation or allocation of resources

Association Regulation of Member Conduct

- Many associations have codes of ethics/conduct regulating various aspects of the businesses of the members of the association; distinguish these from event-based codes of conduct
- This sort of regulation can be beneficial and pro-competitive
 - Industry members themselves often have the best incentives and the knowledge to maintain the reputation of the industry
 - Can improve the services offered to consumers and improve the truthfulness of advertising, for example
 - Can have consumer-beneficial implications in areas such as health and safety and environmental protection

Association Regulation of Member Conduct

- A code of ethics/conduct also can be anticompetitive
 - Restrictions on truthful advertising, especially relating to price
 - Restrictions on competitive bidding
 - Restrictions on the business hours of members
 - Restrictions on the opening of new business locations
 - Restrictions on business relationships with suppliers/vendors or competitors
 - Restrictions on fees set by members
 - Restrictions on output by members (*e.g.*, not offering particular products or services)
- This type of conduct is generally analyzed under the rule of reason

Association-Sponsored Online Forums for Member Communication

- Concern that competitors can use these to violate the antitrust laws in the same way they could at meetings
 - Rules regarding off-limit discussions – and other acceptable and non-acceptable behavior/discussions – on the forum should be clearly laid out, agreed to (click-and-accept) by each participant prior to joining, and sent out to all forum participants each year
 - In appropriate posts can give rise to potential antitrust liability (e.g., price fixing, group boycotts) as well as liability for defamation, tortious interference, copyright or trademark infringement, etc.
 - The boards should be monitored by well-trained and responsible association staff
 - The staff should be able to (and should) promptly take corrective action when inappropriate messages are posted

Lobbying and the Antitrust Laws

- In general, petitioning the government cannot form the basis of an antitrust violation based on the effect of the petition succeeding; rooted in the First Amendment
 - *e.g., bona fide* lobbying of a federal or state legislature or agency to get that body to pass a law or enact a regulation that would block the entry of a competitor is shielded from liability under the *Noerr-Pennington* doctrine
- But if the petitioning is a sham and the petitioning itself (rather than the government policy) has an anticompetitive impact, then that can form the basis of an antitrust violation

Antitrust Compliance Programs

- Antitrust compliance policies have become mandatory for associations
 - Absence of such a policy is viewed as poor business practice and may increase penalties for any violations that occur
 - Antitrust policies can have an antitrust-beneficial effect on the behavior of members; it is important to create a culture of antitrust awareness, sensitivity and compliance
- Examples of prudent association antitrust practices:
 - Board adopts and affirms antitrust compliance policy
 - Include the antitrust compliance policy in all board books
 - Antitrust compliance statement read at start of board meetings and committee meetings (at least those with antitrust-sensitive agenda items)
 - Legal counsel attendance at meeting with antitrust-sensitive agenda items
 - Legal counsel advance review of antitrust-sensitive documents, programs and activities
 - Antitrust training for association staff, boards and sometimes other leaders

Questions?

T E N E N B A U M
L A W G R O U P P L L C



Jeffrey S. Tenenbaum, Esq.
Managing Partner

Tenenbaum Law Group PLLC

1101 K Street, NW, Suite 700

Washington, DC 20005

202-221-8002

jtenenbaum@TenenbaumLegal.com