Resources and Required Reading:
ACPA - Antitrust Guidelines for Members
An Antitrust Guide for Trade Association Professionals and Members, American Bar Association – can be purchased through the ACPA.

Required for Completion:
- On-line test

Introduction

The ACPA is vigilant in educating its members regarding what may be legally discussed or agreed to among competitors. Any person involved in a trade association risks liability for the association, its members and themselves unless they know and comply with antitrust laws. This module outlines the basic workings of the federal antitrust laws, providing you with a basic understanding of antitrust issues and the policies the ACPA follow in order to keep the association, its executives and its members out of trouble.

While this module is designed to educate you on the basics of antitrust, it is in no way a substitution for counsel from an attorney. If you have antitrust concerns about any association activities, you are encouraged to contact the association’s attorney or your company’s legal counsel.

Please note that references to court cases are used in this module because, while statutes contain the law, the law itself evolves via court interpretation. Therefore, in order to keep up to date, one must review the most recent activity in any given legal field.

Antitrust law is designed to protect competition. Competition is protected when the consumer is offered the best possible product or service at the lowest possible price. Harm to competition occurs when the consumer’s choice of product is limited, or the cost at which he or she may purchase a product or service is higher than it otherwise should be. This is also called a restraint on trade.

Consider the following table, where each horizontal line represents competitors, and each vertical line represents the logistics of moving competitive products to market.

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<tr>
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<th>Manufacturer</th>
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<td>1</td>
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<td>2</td>
<td>Manufacturer</td>
<td>Distributor</td>
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<td>3</td>
<td>Distributor</td>
<td>Distributor</td>
<td>Distributor</td>
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<tr>
<td></td>
<td>Consumers</td>
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In this simple chart, the three manufacturers compete with each other on Level 1. They distribute their products utilizing six different distributors, who compete with each other on Level 2. Those distributors sell to consumers, who occupy Level 3.
This chart will be helpful later in determining whether a potential violation is “vertical” or “horizontal.”

The antitrust laws are designed to protect consumers from “unreasonable restraints of trade.” If the activity nearly always causes harm to competition (remember – higher prices or less choice), the activity will always be unlawful. If the activity sometimes brings about beneficial changes in the marketplace, such as higher quality or increased safety, then the particular conduct will be analyzed to determine whether it harms or helps society as a whole.

The penalties for antitrust violations can be severe:

- Criminal prosecution (may be prosecuted as felonies)
- Fines up to $1 million per violation for individuals
- Fines up to $100 million for corporations
- Prison terms of up to 10 years
- Civil remedies that include up to triple actual damages, attorney fees and costs, and injunctive relief

Violations of the Sherman Act, the most important antitrust law, occur when there is “concerted action” which results in an unreasonable restraint of trade. “Concerted action” requires an agreement between two or more parties to undertake an action that results in an unreasonable restraint of trade. However, it doesn’t take explicit words. Courts have stated that “a knowing wink can mean more than words”\(^1\) and may find an implicit agreement based on the conduct of the alleged participants.

One company or one firm acting independently cannot act in concert with itself. While a parent corporation and its wholly owned subsidiary might be two separate legal entities for many considerations, under antitrust law they are also incapable of concerted action under the Sherman Act. While it can be a little overwhelming when reading through the following material, just keep in mind that if you have not formed an agreement with your competitor, there is no issue under Section 1 of the Sherman Act. Also remember that an agreement does not have to be in writing and can be either express or implicit, including that knowing wink. There have also been claims under the FTC Act that don’t require an agreement, but an invitation to collude is enough when the issue at hand is price fixing.

**Liability**

**Association liability**

Trade associations like the ACPA can be found liable due to the conduct of their agents when their unlawful actions are within the scope of their apparent authority. Trade associations are generally liable for the actions of members (including board members and committee members) that are performing work for the association, even if the specific actions were not authorized by the trade association. For a finding of liability, the trade association does not have to approve or sanction the illegal conduct of the agent. Associations can be held liable for the anticompetitive actions of their members, when their members are acting with “apparent authority,” although the association did not approve the action, and the actions were of no economic benefit to the association.\(^2\) A trade association can be considered a co-conspirator when it knowingly aids or acquiesces in “concerted action.” The focus is always on agreements in these cases, and the

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important thing to remember is that circumstantial evidence in the form of an exchange of words or economic data could be enough to infer an agreement.

**Membership Liability**

A court finding that a trade association has engaged in illegal anticompetitive behavior may be used to allege that members were complicit in the unlawful behavior, and therefore liable themselves. Fortunately, if the trade association, its board members, is employees or some members have committed anticompetitive actions, all members of the association are not automatically liable. Courts require a showing of evidence that the member had knowledge of and participated (actively or passively) in the anticompetitive activity in order to assess liability. Needless to say, the ACPA takes antitrust violations very seriously and you should as well, in order to protect your company, yourself and the ACPA.

**Personal Liability**

Association officers and directors, including board members are required to hold themselves to a standard of care akin to that of officers and directors of corporations. A corporate officer may be prosecuted under the Sherman Act if the officer “knowingly participates in effecting the illegal contract, combination or conspiracy - be he one who authorizes, orders, or helps perpetrate the crime – regardless of whether he is acting in a representative capacity.” Thus, association officers, committee members and board members who “participate in or knowingly approve” a violation of antitrust laws can be held personally liable. For association’s officers, committees and boards to steer clear of personal liability, they should act with knowledge of the law, in good faith, and exercise reasonable care while performing their association duties.

**Antitrust Overview**

The antitrust laws related to trade associations are fairly straightforward. The laws act to balance the potential for advancement of industry that a trade association can foster with potentially anticompetitive activities that may restrain competition and ultimately harm consumers by unlawfully increasing price or decreasing choice.

Trade associations provide numerous benefits. Among the most important are:

- setting industry standards;
- providing education;
- promoting cooperation to improve industry’s efficiencies; and
- promoting technological advances

All of these serve to ultimately provide better value for consumers. While trade associations have many benefits, it is illegal activity that can infringe on competition that can result in prosecution.

Due to trade associations’ essential structure of bringing competitors together, they have been suspected of doing ill deeds even before the United States of America became a nation. In 1776, Adam Smith in Wealth of Nations wrote:

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People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible, indeed, to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary.  

Trade associations are the subject of close scrutiny under both federal and state antitrust laws because by their very purpose, trade associations act to bring together competitors to share information.

Antitrust laws have been crafted and enforced over the years to protect and encourage competition in the marketplace, and they apply to nonprofit trade associations just as they do to for-profit firms. These laws were derived from common law that banned anticompetitive actions such as the formation of monopolies (one controls price or quantity) and cartels (group controls price or quantity), and those same activities are still actively enforced in today’s markets. To understand the relationship of trade associations and antitrust a general understating of the relevant federal antitrust statutes is needed. The antitrust laws are centered around the Sherman Act of 1890, then as amended by the Clayton Act, the Robinson-Patman Act and other laws.

**The Sherman Act**

The Sherman Act is the principal federal antitrust statute. The Sherman Act in broad terms acts to prohibit “every contract, combination… or conspiracy” in restraint of trade, as well as any attempt to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce.

There are two substantive sections that are in the Sherman Act. Section 1 the Sherman Act addresses concerted action and Section 2 addresses monopolization.

The language of Section 1 of the Sherman Act, which the laws of antitrust revolve around are:

> 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 declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.  

Under Section 1 the simple idea that acts as the lynch pin is that contracts, combinations, or conspiracies that restrain trade are illegal. By their very nature, trade associations are a "combination" of competitors, so one element of a possible antitrust violation is already present. There needs to be only some action by the association that illegally restrains trade for there to be

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5 15 U.S.C. § 1
an antitrust violation. Consequently, associations are common targets of antitrust plaintiffs and prosecutors.

Certain conduct is considered to be “per se” unlawful -- that is conduct that so inherently likely to cause harm to competition that a court will not consider justifications. Traditional “per se” offenses have included price fixing and market or customer allocation. To claim a “per se” offense, a plaintiff only needs to establish that the defendant has engaged in the proscribed practice. The illegality follows as a matter of law.

Section 2 of the Sherman Act encompasses monopolization -- the activities between a single dominant firm and its suppliers or customers.

The offense of monopolization has two elements:

1) the possession of monopoly power in the relevant market
2) the willful acquisition or maintenance of the power.

Market power generally means the ability of one competitor to set price or otherwise control the flow of a product from manufacturer to consumer.

However, it can apply to a trade association, where the association has the power to set required standards for that industry. Section 2 claims can also include claims of unfair membership criteria or disciplinary rules, allegations of illegal group boycott denying admission or causing expulsion from membership, or the denial of certain membership benefits deemed vital to remain competitive within that industry.

**Clayton Act**

The Clayton Act prohibits exclusive dealings and tying arrangements, as well as corporate mergers or acquisitions that could substantially lessen competition.

Section 3 prohibits tying arrangements, such as when a seller uses its strength to force a customer to buy an additional product that the customer would not otherwise purchase. The Act also prohibits exclusive dealing agreements. An example of exclusive dealing would be if all the Pepsi informed a retailer that it could only sell Pepsi products if the retailer did not sell Coke products. As you can see, these arrangements could be very powerful, resulting in a significant portion of the market being foreclosed to other competitors. The unlawful restraint of trade in this example is the loss of choice to consumers, and the likely higher prices Pepsi could charge because of the elimination of its competition.

Section 4 of the Clayton Act authorizes private parties to sue for damages for economic injury suffered as a result of a violation of the federal antitrust laws. This allows private parties to sue for violations of the Sherman Act, even though the Sherman Act itself does not provide for private remedies. If a plaintiff is successful it can recover three times its actual damages, plus reasonable attorney fees.

Section 8 of the Clayton Act forbids officers and directors from sitting on the boards of competing companies unless the competition between the two companies is minimal.

**Robinson-Patman Act**
The Robinson-Patman Act prohibits a seller of goods from discriminating in price between different buyers when the discrimination may have an adverse effect on competition. The Robinson-Patman Act applies to only the sale of products, not services or intangibles.

The Robinson-Patman Act is an amendment to the Clayton Act and makes it unlawful for a seller “to discriminate in price between different purchasers of commodities…where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly.”

A buyer could be held liable under the Robinson-Patman Act if it “knowingly…induce[d] or receive[d] a discrimination in price which is prohibited” by the Robinson-Patman Act. If a trade association sponsors purchasing groups or acts as a purchasing agent for its members, it and its members must be aware of the potential Robinson-Patman Act claims that could arise if it charged different prices to different consumers, without adequate justification.

An example of a Robinson-Patman Act violation would occur if Kroger insisted on purchasing Wonder bread at .25 per loaf, even though Wonder charged Tom Thumb .45 per loaf. Unless Kroger can justify a marked difference in efficiencies (such as delivery to one warehouse rather than to each store, etc.), both Kroger and Wonder would be liable under the Robinson-Patman Act.

It is interesting to note that in the above example, consumers would likely benefit from cheaper bread, yet the conduct is still unlawful. This is the only antitrust act not to have protection of consumers, via lower prices or increased choice, as its essential goal. It was passed during the Depression, to better ensure that Mom-and-Pop stores could compete with the new chain stores. For this reason, Robinson-Patman “gets no respect” among legal scholars. While it is still on the books, however, we must ensure compliance.

Federal Trade Commission Act

Section 5 of the Federal Trade Commission (FTC) Act prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” Thus, the scope of this Act has broad powers that encompass the Sherman, Clayton and Robinson-Patman Acts. Under this Act, the FTC may challenge “unfair or deceptive acts or practices,” even if the actions have not actually harmed competition. Section 5 does not provide for private causes of actions or treble damages.

In the past, Section 1 of the Sherman Act was the go-to standard to prosecute collusive behavior. However, Section 5 has been used increasingly to challenge potentially “unfair methods of competition” because neither an agreement need be proven nor harm to competition. Actions constituting “deceptive, collusive, coercive, predatory, unethical, or exclusionary conduct or any course of conduct that causes actual or incipient harm to competition” is covered under Section 5.

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6 15 U.S.C. § 13(a)
7 15 U.S.C. § 13(f)
8 15 U.S.C. § 45
The FTC has stated that “[i]nvitations to collude are the quintessential example of the kind of conduct that should be – and has been – challenged as a violation of Section 5 of the Federal Trade Commission… In contrast to conspiracy claims that would violate Section 1, invitations to collude do not require proof of an agreement; nor do they require proof of an anticompetitive effect.”\textsuperscript{11} In the Matter of \textit{U-Haul Int’l, Inc. and AMERCO} (U-Haul’s parent company), the FTC accused U-Haul’s CEO and chairman of inviting major competitor Avis Budget Group to match U-Haul’s price increases for truck rentals on multiple occasions. The FTC complaint did not allege that the two competitors reached an agreement. The FTC pursued U-Haul and ultimately settled the complaint against U-Haul with a consent decree that barred U-Haul from colluding or inviting collusion.

In another use of Section 5 to challenge anti-competitive behavior – this time against an association, the FTC settled a complaint against the National Association of Music Merchants (NAMM). NAMM is a trade association comprised of more than 9,000 members, including most US distributors, dealers and manufacturers of musical instruments. The FTC accused NAMM of Section 5 violations that included encouraging and enabling its members to exchange and share competitive pricing information and discuss pricing strategies during NAMM meetings between 2005 and 2007. At these NAMM meetings, the FTC alleged that competitors discussed retail pricing and margins as well as enforcement of minimum advertised pricing policies. According to the FTC, NAMM representatives acted as moderators, setting the agenda for the meetings in question, and assisting in choosing topics would be discussed. The FTC alleged that NAMM’s conduct “could facilitate the implementation of collusive strategies among competing retailers to raise prices.”\textsuperscript{12} The FTC summed up its position by stating that “[t]rade associations properly provide many services for their members, but enabling competing sellers to work together to coordinate higher prices for their products is not a legitimate function.”

\textbf{Antitrust Law Violations that Concern Associations}

\textbf{Per-Se Violations}

As discussed above, the Sherman Act prohibits contracts, combinations, or conspiracies that unreasonably restrain trade. Over the years the Supreme Court has developed “per se” violations that are unlawful without having to prove any anticompetitive effects.\textsuperscript{13} The doctrine of per se illegality states that there are violations so blatantly harmful to competition that the court presumes they are illegal without having to prove harm.

Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.\textsuperscript{14}

With a per se violation all the government needs to prove a Section 1 violation is to show that the defendant engaged in the unlawful practice. It doesn’t matter what the defendant’s motives were or if there were any observable anticompetitive effects. Plain and simple, per se violations are the most dangerous and should be avoided under all circumstances.


Rule of Reason
Every agreement that affects trade will in some extent restrain trade, as every contract forecloses other opportunities. The key is whether that restraint is unreasonable. While there is no bright line that defines “unreasonable”, the U.S. Supreme Court suggests that trial courts review information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature, and effect.\footnote{15}

Horizontal Restraint of Trade

A horizontal restraint of trade occurs when two or more competitors at the same level of distribution (remember the chart back at the Introduction?) enter agree to restrain trade. Horizontal restraints of trade include price fixing, where all competitors agree to all charge the same (usually inflated) price, or market allocation, where competitors chop up the market so there is no competition within each territory. These violations have traditionally been considered the most serious, and most likely to receive criminal penalties, because an agreement on the same economic level nearly always causes an increase in price or a decrease in choice.

Price Fixing (horizontal restraints)

If there is a capital violation in antitrust, price fixing might be it. An agreement between competitors to charge the same price for services or products is an unlawful per se violation. Interestingly, price fixing may be found even where there is no specific agreement regarding the price to be set. It also doesn’t matter if the price is reasonable or unreasonable, or if the prices ultimately benefitted its customers.\footnote{16} Any agreement that competitors make that will affect price is presumed illegal. Agreements to restrict discounts, credit terms\footnote{17}, shipping charges and trade-in allowances or down payment requirements all affect price or a component of price and are viewed as price fixing, and are therefore illegal without a showing of harm. The Court in \textit{NCAA v. Board of Regents} summed it up well:

\begin{quote}
As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, “no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.”\footnote{18}
\end{quote}

Since an agreement may be inferred, one must be careful to avoid suspicious conduct. Therefore, competitors should never discuss prices or pricing components.

Division of Markets / Customer Allocation

Any agreement (directly or indirectly) between competitors or members of an association to divide markets or allocate customers is also prohibited by antitrust laws and illegal per se.\footnote{19} This includes informal agreements where one competitor agrees to stay out of another competitor’s territory or geographic market area. Any agreement to not pursue a competitor’s customers or group of customers is considered customer allocation and is also illegal per se violation.

\begin{footnotesize}
\footnote{15} State Oil Co. v. Khan, 522 U.S. 3 (1997).
\footnote{17} Catalano. Inc. v. Target Sales, 446 U.S. 643 (1980).
\end{footnotesize}
Rigging of Bids
Bid rigging is any agreement to share information in order to cause bids to be artificially high or to allocate market share. The typical bid arrangement occurs when competitors agree that one competitor will submit the low bid, while other competitors submit higher bids in order to rig who wins. The effect is that the winning bid is higher than it would be without the agreement. This may also be done to allocate market shares – Bob wins all bids in Oklahoma while Jim wins all bids in Texas. In both markets the prices paid by consumers for the products sold by Bob and Jim will be higher than without the agreement, as they won’t be driving down the price by competing with each other. Price fixing and market allocation are the essentials components of bid rigging, so it should be no surprise that bid rigging is an illegal per se violation.

Concerted Refusal to Deal -- Group Boycotts
Concerted refusals to deal or group boycotts occur when a group of competitors (horizontal) agree not to purchase or otherwise do business with a specific company or companies, in order to drive them out of business or coerce them into taking certain action. Group boycotts were at one time considered so likely to harm competition that these violations were considered as being per se illegal.

Historically, courts have been more cautious in applying the per se rule of illegality to concerted refusal to deal cases. While the inquiry may be fact dependent, any agreement that would cause a lack of competition in a supplier or customer transaction would be illegal per se. The Supreme Court offers no bright line test for what facts would make concerted refusals to deal or group boycotts an illegal per se violation:

“Group boycotts” are often listed among the classes of economic activity that merit per se invalidation under §1 [of the Sherman Act]. Exactly what types of activity fall within the forbidden category is, however far from certain. 20

As it stands any concerted refusals to deal or group boycotts would be examined under the rule of reason and at worst would be considered illegal per se.

Vertical Restraint of Trade
A vertical restraint of trade occurs when two or more competitors at different levels of distribution (see chart in the Introduction again) enter into an agreement to restrain trade. Since vertical agreements are agreements that are not between direct competitors, they are considered less severe than horizontal restraints. But make no mistake about it -- these are still serious antitrust violations.

Price Fixing (Vertical Restraints)
Vertical price-fixing occurs when a seller and a buyer agree to a price for which the buyer will ultimately resell the product or service. For the entirety of the last century, these arrangements were per se illegal. Thus, you’d see “Manufacturer’s Suggested Retail Price” or “MSRP” on many different products. However, in 2007, the Supreme Court changed its position, and now analyzes these arrangements under the Rule of Reason test. This certainly does not mean that

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these agreements are legal; it does mean that the court will look at the reasons behind the agreement before determining its legality.

**Non-Price Vertical Restraints**

Non-price vertical restraints are marketing arrangements. Some of these agreements are:

- Exclusive selling agreements
- Territorial and customer restrictions
- Exclusive dealing agreements

Agreements among competitors that are not subject to per se prohibition are analyzed under the rule of reason and will be challenged only if their overall effect is anticompetitive.

**So What Can We Do?**

**Lobbying**

One of the most important legal doctrines trade associations is the Noerr-Pennington Doctrine. The Noerr-Pennington doctrine is a defense to liability for activities resulting from the defendant’s petitioning governmental bodies, whether local, state or federal that may have anticompetitive effects. The Court has stated that the foundation of Noerr-Pennington rests within the United States Constitution itself:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.\(^\text{21}\)

The Noerr-Pennington doctrine “protects businesses and other associations when they join to petition legislative bodies, administrative, or courts for actions having anticompetitive consequences.”\(^\text{22}\) The Noerr-Pennington protection does not extend to “purely private action, not genuinely aimed at prompting governmental action”\(^\text{23}\)

\(^{22}\) Wilk v. American Medical Association, 895 F.2d 352 (7th Cir. 1990).
\(^{23}\) Ibid.
While Noerr-Pennington offers important protections for the activities of trade associations, it is not a free pass. The doctrine does not protect the incidental use of lobbying if the real goal is to harm one’s competitor. 24 In City of Columbia v. Omni Outdoor Advertising the Supreme Court succinctly stated what it considered a lobbying sham to be:

The "sham" exception to Noerr encompasses situations in which persons use the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, not one "who genuinely seeks to achieve his governmental result, but does so through improper means". 25

However, so long as trade associations act in good faith, the Noerr-Pennington Doctrine provides the foundation on which trade associations petition their government to promote their products over their competitors.

**Standard Setting**

One of the most important functions of a trade association is to assist in the setting and maintenance of standards of a particular product or industry. Industry standards provide consumers important information and ensure that products are manufactured to the highest safety standards, are compatible with related products, and are efficiently manufactured, thereby reducing costs.

The action of setting standards brings together competitors; therefore, there is risk that through the process, competitors might share sensitive information beyond what is necessary. Standard setting inquiries are usually confined to two areas of concern:

- Sherman Act Section 1, which involves concerted actions which have anticompetitive effects.
- Sherman Act Section 2, covering anticompetitive unilateral conduct.

In determining if a standard will have an anticompetitive effect, the primary analysis is the market power of the standard. Market power is defined as the ability to control sales. Thus, if the standard is one of exclusion, for instance, “all pipes must be manufactured by entities having at least $100 million in revenues per year,” the court will view whether there is good reason for the standard, or whether it is simply trying to unnecessarily control sales. In my example, there seems to be no reason other than to prohibit smaller competitors from producing saleable pipe. However, a standard that requires a high level of quality is likely to be beneficial to society, and thus legal.

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Certification, such as ACPA’s Cast program, is also an area of concern. If certification is required for a product to be sold (rather than simply desirable), then that certification process will be held to a stricter standard, and may have to prove its benefits to society.

Exclusion by a group certifying a product or excluding a product from a standard is not necessarily illegal, depending on the reasoning. At issue will be the fairness of the process.

Two significant Supreme Court cases have considered the fairness of the standard-setting process. In *American Society of Mechanical Engineers v. Hydrolevel Corporation*, a manufacturer was found to have unlawfully misused the standard setting process of the American Society of Mechanical Engineers (ASME). A manufacturer’s employee sat on a standard setting committee of the ASME. The employee, having arranged this with the committee chairman in advance, sent a letter to the chairman asking if Hydrolevel’s product satisfied code requirements. The chairman issued an unofficial response on ASME stationary declaring Hydrolevel’s product unsafe. This “unofficial response” was then used by Hydrolevel’s competitors to discourage customers from purchasing Hydrolevel’s products. The trial court deemed ASME’s conduct unlawful, which was upheld by the Supreme Court.

In the case of *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, a manufacturer of steel conduit for electrical wiring “packed” a meeting of the National Fire Protection Association with newly recruited members in order to vote against a new standard. The manufacturer was successful in defeating a vote to approve a competitor’s plastic conduit as being safe for use in electrical wiring. The Supreme Court held that the Noerr-Pennington doctrine did not protect the steel conduit manufacturer from liability under the antitrust laws, because the manufacturer’s intent was to harm the competitor, not promote high industry standards.

The Court noted that standard setting can have a procompetitive effect: “private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard setting process from being biased by members with economic interest in stifling competition… those private standards can have significant precompetitive benefits.” The Court found that the act of packing the meeting by the defendants to defeat the standard was unprotected commercial activity:

> The dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious. But where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action.

**Enforcement**

Most antitrust laws can be enforced by either public or private parties. Federal enforcement occurs through the actions of the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC). Both agencies also review proposed mergers. While there is no

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formal agreement between the DOJ and FTC, the agencies typically divide their resources to industries they have investigated in the past.

State attorneys general also have the authority to enforce state antitrust laws, which are usually nearly identical to their federal counterparts. They may also investigate matters arising under federal antitrust laws as part of a joint investigation with the DOJ or the FTC. State attorneys general also have the authority to seek restitution on behalf of citizens of their states that have been harmed as a result of violations to federal or state antitrust laws.

Most antitrust laws may also be enforced by private parties. Under federal law any person “injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”

If the plaintiff prevails in the private action, the plaintiff may recover three times his damages as well as all his court costs and attorney fees. Private parties can also seek to obtain injunctive relief, which is a directive from a court to stop a certain behavior. Private party antitrust actions often take the form of class actions, seeking damages and restitution for consumers across the country that have been harmed by unlawful anticompetitive behavior.

**Association Meeting Guidelines**

All ACPA association members as well as ACPA consultants that are involved in association activities or participate in association meetings should be sensitive to the legal issues that can ensnare members as well as the association, and should take all actions necessary to comply with antitrust laws. Please consult the ACPA Antitrust Guidelines for Members and review it frequently. It contains important information and useful guidelines for how ACPA meetings should be conducted with regards to antitrust. The ACPA Antitrust Guidelines for Members as well as the ACPA Antitrust Statement can be found on the ACPA Members Only website.

As a general rule at ACPA gatherings the following topics should be avoided:

- Current or future prices (be very careful when discussing past prices)
- Increases or decreases in price
- Profit level
- Standardizing or stabilizing prices
- Procedures or policies for setting prices
- Discount credit terms
- Allocating markets
- Your views on a competitor’s prices
- Refusals to deal with a corporation because of its pricing or distribution practices

This list is not all-inclusive, but should give you an idea of what topics should be avoided.

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30 15 U.S.C. § 15(a)
These topics should not be discussed formally or even informally while with your competitors at an ACPA gathering. Many antitrust violations originate in informal settings such as bars and golf courses. Be aware at all times whom you are associating with, and what you are discussing.