

Antitrust Issues for Associations To the American Coatings Association

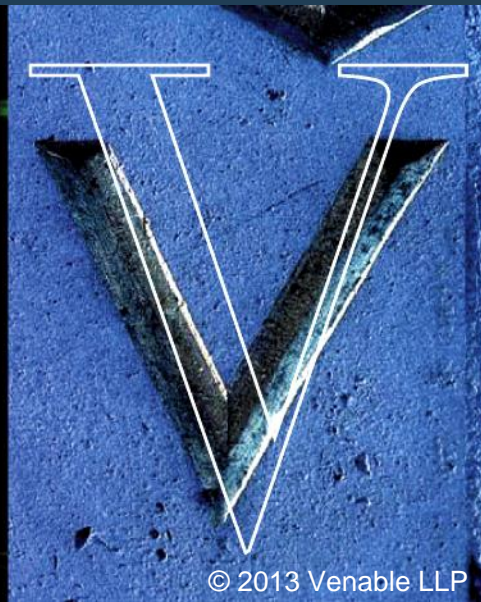
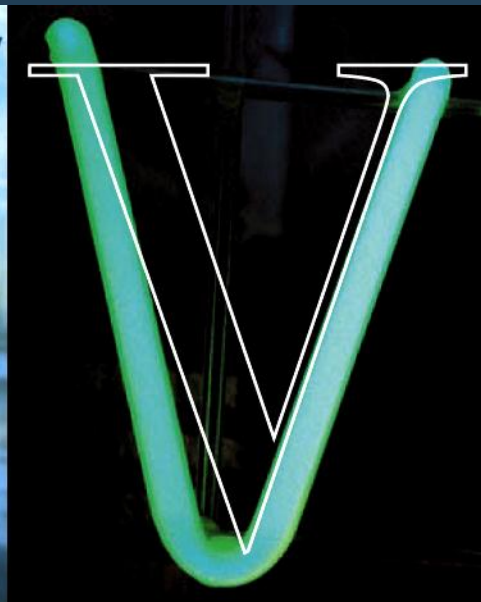
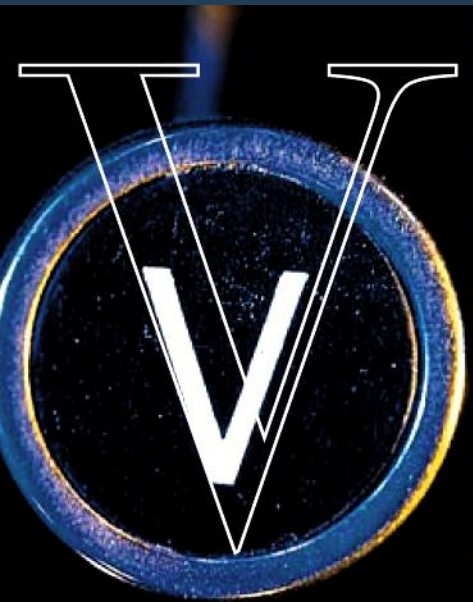
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Roadmap

- Antitrust Basics
- Application of the Antitrust Laws to Associations
- Compliance Programs and Associations
- Discussion and Q&A



Antitrust Basics

- Most countries use the term “competition law” rather than antitrust
- Basic idea – prevent firms or groups of firms from obtaining the power to control a market through means other than competition on the merits
 - Not a violation to exercise that power
 - Nothing wrong with winning by innovating or running a better business



Basics – Different Types of Antitrust Rules

- Agreements and other coordinated and multilateral conduct – Section 1 of the Sherman Act
 - Most of the issues for associations relate to this
- Monopolization – Section 2 of the Sherman Antitrust Act
- Mergers – the Clayton Antitrust 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.”



Basics – Agreements and Coordinated Conduct (cont'd.)

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

- This means agreements
- Often it is hard to show that there is an agreement – Firms generally don't enter into formal agreements to fix prices



Basics – Proof of Agreement

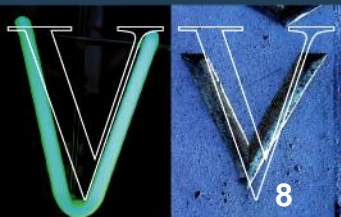
- Actions of an association are often taken as evidence of an agreement among the members of the association to take that action
- Even actions of an individual working for the association can be evidence of an agreement among the members to the association



Basics – Anticompetitive Effect

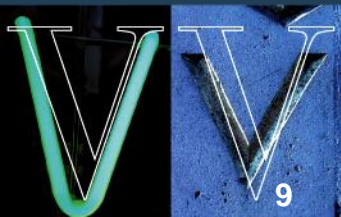
“...in restraint of trade or commerce”

- Does the agreement harm competition?
- Two types of potentially anticompetitive agreements:
 - Anticompetitive agreements that are clear on their face – *per se* illegal
 - Those that might be anticompetitive but that must be analyzed under the “rule of reason”



Basics – *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 firms 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



***Per se* violations like price fixing, market allocation and bid rigging can be crimes, leading to jail time for those found guilty**



Basics – Criminal Violations

- Associations have been used as cover for criminal antitrust violations
 - Lysine price fixing cartel created a subcommittee of the European Feed Additives Association as a pretext for meeting at association meetings to fix prices
- Penalties are severe
 - Incarceration
 - Fines of up to \$1 million for individuals and \$100 million for organizations
- Evidence of criminal violation needs to be reported to the responsible officer of the association immediately



Basics – Rule of Reason

- A more or less detailed look at the restraint to see if it promotes competition or suppresses competition:
 - Look at the restraint itself
 - Look at the market power of the firms imposing the restraint
 - Look at potential efficiency justifications for the restraint



Basics – Common Competitive Issues

- Price fixing through inappropriate communications between members at meetings
- Price fixing through statistical reporting by the association
- Group boycotts – competitors get together and agree not to deal with a competing firm – sometimes membership issues



Associations and Group Boycotts

- Group boycott issues can pop up in a number of ways for associations:
 - Self-regulation and codes of ethics
 - Standard-setting and certification
 - Membership requirements and access to association services and activities
- Might be illegal *per se* or may be looked at under the rule of reason



Basics – Association Liability

- Where the association directly violates the Sherman Act – negotiating prices on behalf of members
- Member violates the antitrust laws through the machinery of the association which doesn't have safeguards to prevent that
 - Hydrolevel – members in leadership positions use their positions to harm competitor in the market by interpreting safety standards
 - TruePosition – standard setting misconduct by leading members can create liability for the association



Basics – Antitrust Liability for Officers and Directors of Associations

- 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
- There may be personal liability for those who participate in, or knowingly approve of, an antitrust violation



Application of Antitrust Law to Associations

- Standard-setting and certification programs
- Membership requirements and expulsion
- Services to members and non-members
- Regulation of business conduct
- Discussions at meetings
- Statistical reporting
- Lobbying



Standard-Setting and Certification Programs

Two kinds of standard setting (with different issues)

- Health and safety standards
- Compatibility or interface standards



Health and Safety Standards

- Industry gets together as experts to figure out best practices for health or safety
- Example: Fire safety for building materials by the NFPA
- Environmental standards like those covered by the FTC's Green Guides



Compatibility Standards

- Members of a variety of related industries get together to develop a standard that will make sure that their products work together
- Example: Wall outlets and plugs on electrical devices – different companies make the different devices but they have to work together
 - Happens a lot in computer technology (e.g., JEDEC)
 - Happens in telecommunications (e.g., IEEE and ETSI)



Standard-Setting

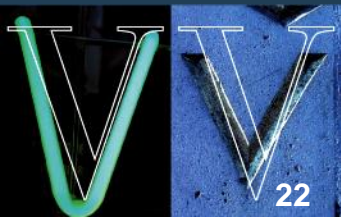
The difference between compatibility standards and health and safety standards?

- Health- and safety-type standards restrict variety in the market
- Compatibility standards replace standards wars and establish what the one standard will be



Standard-Setting Health and Safety

- Allied Tube & Conduit Corp
 - Misconduct in the setting of a safety standard that caused certain classes of manufacturers to be excluded from the market
- Radiant Burners
 - Certification program controlled by market competitors where no certification meant exclusion from the market
- Hydrolevel
 - Misuse of machinery of SSO to create letter from the SSO that harmed rival in the market – led to association liability



Certification

- Certification programs can determine whether products comply with a standard or whether professionals have sufficient ability, education and experience
- Not certifying a product or a professional can create competitive harm
- Courts look at the process of how a certification program is implemented to ascertain whether they help customers or are a way to harm rivals



Standard-Setting and Certification for Health and Safety

Guidelines:

- There should be a justification for the development of a standard at the outset
- To the extent that the standard is going to limit access to the market for some firms, that exclusion must be justified
- Avoid allowing the process to be dominated by economically interested parties
- Ensure that all parties with a stake in the standard have an opportunity to participate meaningfully in the process
- Avoid, if possible, any concerted efforts to enforce the standard



Some Factors

- Who are the decision-makers – competitors, customers, or a mix?
- Are the criteria objective and related to the function being certified?
- Were the criteria applied consistently and without discrimination?
- Were the association's procedures followed?
 - Important to the extent that it might show that a refusal to certify was due to anticompetitive goals



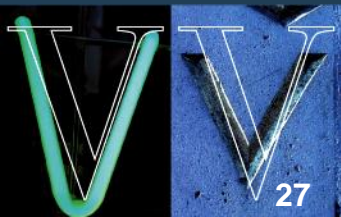
Compatibility Standards

- Some of the same rules apply –
 - To the extent that the standard is going to limit access to the market for some firms, that exclusion must be justified
 - Avoid allowing the process to be dominated by economically interested parties
 - Ensure that all parties with a stake in the standard have an opportunity to participate meaningfully in the process



Membership Requirements and Expulsion

- 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*
- 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.



Membership Requirements and Expulsion (cont'd.)

- 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?
 - Notice and opportunity to respond
 - Appeal process
 - Disinterested decision-makers



Services to Members

- Competitive issues closely tied to the membership requirements
 - The more competitively important the services are the more important that firms 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
- Rule of reason analysis here too



Services to Members (cont'd.)

- 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
 - 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



Services to Members – Trade Shows

- Trade show sponsored by association
- Rule of reason analysis generally
- Important questions and issues:
 - How important is the trade show to competition in the market?
 - Are the rules objective?
 - Is there is limited room?
 - Why was the firm excluded? Don't exclude a firm for competitive reasons
 - Similar rules apply to decisions relating to allocating space or location



Services to Members – Trade Shows (cont'd.)

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



Regulation of Business Conduct

- Many associations have codes of ethics regulating various aspects of the businesses of the members of the association.
- This sort of regulation can be good
 - 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



Regulation of Business Conduct (cont'd.)

- This sort of code of conduct can also be anticompetitive
 - Restrictions on truthful advertising especially relating to price
 - Restrictions on competitive bidding
 - Restrictions on the business hours of members
 - Restrictions on business relationships with suppliers or competitors
 - Restrictions on fees or output set by members
- This type of conduct is often viewed by the courts under an intermediate level of scrutiny



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 discussions at meetings are often formalized and laid out ahead of time to a great extent



Discussions at Meetings (cont'd.)

- Agendas and presentations prepared and distributed in advance of meetings
- Care should be taken to keep to these 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



Discussions at Meetings (cont'd.)

- 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, customers or competitors
 - Complaints about business practices of other firms
 - Confidential company plans regarding output decisions or decisions regarding future offerings



Statistical Reporting

- There can be *per se* and rule of reason violations as a result of information collection and dissemination
- Recall that *per se* violations include:
 - Price fixing
 - Agreements to restrict output – which is really the same thing as price fixing
 - Market allocation



Statistical Reporting – *Per Se* Violations

- It is hard to succeed at committing these violations unless you know what your competitors are doing
- What if you and your rival agree to raise prices by \$10 but you can't tell what they are actually charging?
 - They might have tricked you into raising prices but didn't themselves
- So when competitors are communicating pricing information it is always possible they are doing that to help make a price fixing agreement stick



Statistical Reporting

- These types of communications within an industry are often done through 3rd parties (e.g., associations) to avoid direct contact between rivals.
- Important issues for an association when acting as a 3rd 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?



Statistical Reporting (cont'd.)

- Make sure that firms can't derive info about their competitors from the disclosures
 - Aggregate info rather than individual firm data
 - Old data rather than forward looking data
 - Only where there are enough firms that it is hard to guess who did what
 - Where there are only a few firms in the industry, it might be easy to pick out their data from the distributed information



Statistical Reporting Example

- Ductile Iron Fittings Research Association FTC Case
- Three big firms in the industry
- Data aggregated by a third party but it was very current data
- If a firm was losing sales it would have been able to look at the data to see if the market was losing sales
 - If not then that firm would know that the others were competing aggressively – detecting cheating is one of the critical functions of a cartel
 - FTC has sued all three companies and two have settled so far



Lobbying

- In general petitioning the government cannot form the basis of an antitrust violation based on the effect of the petition succeeding
 - Lobbying a legislature or agency to get that body to pass a law that would block the entry of a competitor is shielded from liability
- But if the petitioning is a sham and itself has an anticompetitive impact then that can form the basis of an antitrust violation.



Compliance Programs

- Antitrust policies have become mandatory for associations
 - Absence of a policy is viewed as poor business practice, can be evidence of wrongdoing and may increase penalties for any violations that occur
 - Antitrust policies can have an effect on the behavior of members
- Responsible antitrust practices
 - Legal review of agendas and minutes
 - Legal counsel attendance at meetings



Questions?

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