ADDRESS

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Of continuing interest to you as trade association executives are antitrust problems. Among them are trade association statistical programs; and the extent to which courts will infer illegal conduct to a company by reason of its membership in a trade association which has violated the antitrust laws; and service by Trade Association officials on various Government Advisory Committees.

At the outset, the recent report of the Attorney General's Committee to Study the Antitrust Laws, I believe, well states a sound antitrust approach to trade association activities. "Antitrust", that report states, "requires distinguishing constructive trade association activities operating to promote competition from those which unduly limit competition among members or with outsiders. * * * On the one hand, there should be swift and certain antitrust prosecution of trade associations utilized to fix prices, restrict production, allocate markets or limit channels of distribution in violation of the Sherman Act. On the other, if their activities actually tend to promote, rather than hinder competition and preserve the individual firm's independence of decision, antitrust should not inhibit their growth."

Some of you, of course, may recall the testimony of one of the respondents before the Federal Trade Commission in the Chain Institute case. In response to a question, this ingenuous gentleman stated:

> Well, frankly, you know how you do at these meetings. You hear a lot of tripe and a lot of crap and red tape which they put through, and they put on a lot of rigamarole and put you on these committees doing a lot of different things. . . * * *

I could go on and on and on -- but I want to say that when any two business men get together whether it is a Chain Institute meeting or a Bible class meeting, if they happen to belong to the same industry, just as soon as the prayers have been said, they start talking about the conditions in the industry, and it is bound definitely to gravitate, that talk, to the price structure in the industry. What else is there to talk about?

Well, I believe there is plenty else to talk about. For example, I start with statistics.

Statistics may, of course, relate to production, inventory, sales, orders, shipments, capacity, import and export, as well as to price and components of price. When I use the word "statistics", I refer to non-price data.

What, then, distinguishes the permissible from the questionable statistical program?

An initial safeguard is wide dissemination of data compiled. Thus it may be wise to insure that information is accessible to those who want it on reasonable terms.

The Supreme Court in Maple Flooring, upholding a statistical program, stressed that those statistics were published in trade journals, were sent to the Department of Commerce for publication in a monthly basis survey, and were forwarded to the Federal Reserve and other banks.. More recently, in the Tag Manufacturers case, the court considered a plan for gathering information which, though not published, was available to all at reasonable cost. Approving the plan the court observed, "we agree with petitioners that availability does not mean that the information must be crammed down the throats of buyers who are not interested in seeing it."

As a second safeguard, data should not be gathered with an eye towards subordinating independent action in favor of group decision. The courts, of course, recognize that individual action may be influenced by dissemination of trade data. Indeed, it seems only wise for a businessman to base his future conduct on what he knows about the present and past. If he does not, he probably will not stay in business long. Thus, a unilateral decision, individually carried out, does not become illegal just because it was based on data disseminated by a trade association.

Care must be exercised, however, to avoid the charge that association activities aim to fix individual price production percentages or market shares. Toward this end it may be helpful to submerge individual company data in industry totals. And to keep all statistical discussion as general as possible by avoiding analysis of any one firm's production figures.

Beyond problems of industry's statistical programs, all of you are concerned, I know, with the relevance of trade association membership to a holding of antitrust conspiracy. So it is that you may be interested in the recent District Court decision in United States v. National Association of Leather Glove Manufacturers. In that case, all but one of the defendants had, prior to trial, negotiated consent settlements. The remaining defendant, Milwaukee Glove, chose to stand trial.

The complaint there charged a conspiracy, violating Section 1 of the Sherman Act, to stabilize glove prices by agreeing on "terms of sale" as well as "exchange of information concerning cost, production and sales." Milwaukee defended on the ground that it had innocently joined the Association; that the purpose of the Association was, not to stabilize prices, but "the elimination of evils or ills of the industry," (i.e. a "good" purpose); that, after subscribing to the original agreement, it committed "no overt act"; and, most important, that during five crucial years of conspiracy, Milwaukee had quit the Association.

Rejecting these contentions, the Court held Milwaukee part of the illegal combination. Crucial was a 1936 "Fair Trade Practices" written agreement setting credit and discount terms and signed by Milwaukee. "At that time," the Court noted, "the then President of Milwaukee expressed himself strongly in favor of the Fair Trade Practices, as adopted and agreed upon, and in substance, urged that they be made effective by concerted action." True, the Court noted, "Milwaukee ceased to be a member of the Association" from 1938 until 1943. Further, the Court felt it was "doubtless correct that Milwaukee's rejoining the Association in 1943 was occasioned by reason of the number and complexities of wartime regulations. It would also appear to be correct that from 1943 to 1947 the Fair Trade policies of the Association were not stressed, due to the seller's market which continued throughout the wartime period." Nonetheless the Court held that: "Milwaukee's acceptance of the agreement is sufficient to establish an unlawful conspiracy ***"

The teachings of that case, I feel sure, interest responsible Association leadership.

Apart from statistical programs and conspiracy issues, I know some of you have from time to time served on various government industry advisory committees. Initially, various statutes including the Small business, National Security, Civil Defense and Defense Production Acts authorize creation of industry advisory committees. At present, some 1,000 such committees exist. About 300, formed pursuant to Executive Order, have no statutory basis. Of the remaining 700 committees authorized by statute, nearly 600 have been established under the Defense Production Act. That Act provides for business advisory committees with "fair representation for independent small, for medium, and for large business enterprises, for different geographical areas, for association members and non-members and for different segments of the industry."

When properly conducted, such groups may greatly aid in advising Government officials and perform a genuine public service. But industry advisory committees have participated in practices raising questions under the antitrust laws. For example, a 1951 study by a House Judiciary Subcommittee revealed some industry advisory committees had:

(1) Participated in "informal" agreements for allocation of production, shipments and exports;

(2) Conducted discussions of matters freighted with antitrust significance through informal meetings, telephone conversations and correspondence, as well as through;

(3) Discussion of committee business, held without benefit of official supervision, prior or subsequent to formal committee gatherings.

Such industry advisory committee practices could form an integral part of a scheme for antitrust violation. When members of such groups violate the antitrust laws, of course, they risk suit not only by the Government, but also by private parties for treble damages. Accordingly, industry representatives may be reluctant to participate in advisory committees unless possibilities of antitrust violations are minimized. And lacking such assurance by Government, the public may lose the valuable assistance advisory committees can render.

It is our belief that both Government and industry may benefit from adoption of a few basic advisory committee procedures to protect against antitrust violation. Indeed, the Congress in its most recent pronouncement on the subject requires that the Atomic Energy Commission, establishing advisory boards, issue "regulations setting forth the scope, procedure and limitations of the authority of each such board."

To safeguard against antitrust involvement, the Department of Justice has suggested the following standards for operation of industry advisory committees. First, there must be either statutory authorization or an administrative finding, that such groups are necessary to perform prescribed statutory duties. Second: the agenda for committee meetings must be administered and formulated by Government representatives. Third: meetings should be called and chaired by full-time Government officials. Fourth: at such meetings, full and complete minutes should be kept. Fifth: any conclusions reached should, of course, be purely advisory, with final decisions as to action left solely in the hands of Government representatives.

If these safeguards are followed, as I wrote to the Secretary of Commerce in November of last year, "this Department raises no objection to

trade association representatives serving on the advisory groups." And last February, Assistant Attorney General Barnes, reiterated this position. Thus, we have sought to encourage legitimate participation by trade association officials in properly safeguarded advisory committee work.

Beyond these antitrust questions Association executives, like most Americans, have a vital stake in antitrust enforcement, for antitrust has become a distinctive American means for assuring that competitive economy on which our political and social freedom in part depend. These laws have helped release energies essential in our world leadership. They reinforce our idea of careers open to superior skills and talent, a crucial norm of a free society.

General agreement on antitrust goals, must not obscure important differences in means. Here, this administration parts company with its immediate predecessors on perhaps three important scores. First, cases brought have aimed not at mere doctrinal perambulation but at making real strides towards either cracking restraints on entry of new businesses into an industry or controls over price. Second, because businessmen know this difference in policy will spell greater Court success, pre-trial settlements have jumped sharply. Thus, this administration aims to secure more results for each enforcement dollar. Finally, in those foggy unsettled reaches of law and policy, we have sought to help businessmen who seek in good faith to live within the law.

To ease the hazards of uncertainty, soon after this administration took office, I appointed a national committee to study the antitrust laws. That group's some 60 members included practicing lawyers, law professors and economists. Our aim was to gather articulate spokesmen for responsible points of view to formulate future antitrust policy.

On March 31 of this year that group submitted to me its final report. For the first time since the Sherman Act was passed, the report surveys major decisions under the Sherman, Clayton, Robinson-Patman and Federal Trade Commission Acts. Thus, gathered in one place is a coherent statement of a prevailing view on major antitrust issues. This report should be a real help to businessmen and their counsel who seek in good faith to live within the law. I commend it to your consideration for it is an important milestone in clarification of antitrust law.