DEPARTMENT OF JUSTICE

RECENT ENFORCEMENT ACTIONS
BY THE ANTITRUST DIVISION
AGAINST TRADE ASSOCIATIONS

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It is a pleasure to be back here with you to talk about application of the antitrust laws to trade association activities.

Washington, D.C. is the trade association capital of the world. Indeed, it is so chock-full of trade associations that the people who work for trade associations have formed their own trade association.

That is why it is particularly helpful that the D.C. Bar has this symposium every year, because it offers a great opportunity for us at the Antitrust Division to meet with the lawyers who practice in this specialty. And it is important to your clients that the antitrust pitfalls of association activity stay fresh on everyone's mind.

The Antitrust Division has been extremely active in this area since I spoke here two years ago, and I want to say a few words about our recent enforcement activities and what they portend for the permissible scope of trade association conduct.

Recent Trade Association Cases

We have brought four cases against trade associations in the last eighteen months, three of them in the last nine months. We are proud of this record, and believe it provides substantial guidance as to our enforcement views and activism in this important area of the law and economy.

United States v. Association of Retail Travel Agents

We filed the first of these cases in October 1994, here in the District of Columbia, against the Association of Retail Travel Agents, known as "ARTA" for short. We charged ARTA with attempting to organize a boycott of their members against airlines, hotels, and car rental companies who refused to adhere to ARTA's recommended minimum travel agent commission levels. ARTA's 2000 members account for a significant share of the $90 billion in annual sales handled by travel agents in this country.

ARTA's board of directors had adopted what it called "Objectives for the Travel Agency Community" -- an income-preservation manifesto that included a minimum ten-percent commission on hotel reservations and car rentals, elimination of all distribution of airline tickets except through travel agents, and calculation of commissions based on full airline fares even when the traveler actually paid a much lower discount ticket price.

ARTA's president and two of its directors held a press conference to announce the objectives. Soon after that, two of the board members announced that they would cease doing business with travel providers who refused to abide by the objectives, inviting other ARTA members to join them.

Of course, the agents' commissions, while paid by the travelprovider, are ultimately passed along to the traveler. So any coerced increase in commissions is going to come out of the pockets of ordinary consumers. The case was settled by a consent decree, under which ARTA agreed to refrain from this conduct.

United States v. American Bar Association

We filed the second and most significant of our recent trade association cases last June, also here in the District, against the American Bar Association. We charged that its law school accreditation program was controlled by law school faculty, who were using the ABA's power over accreditation to force law schools to inflate faculty salaries and benefits.

The accreditation program run by the ABA's Section of Legal Education -- 90 percent of whose members were law school faculty – involved extensive requirements, enforced by on-site inspections, probationary periods, and periodic renewals. The individuals who served on the Section's Accreditation Committee had been there for many years, and their activities had for a long time largely escaped supervision by the ABA's Board of Governors and House of Delegates.

Among other things, the ABA committee required that the law school's faculty salaries -- the price of teaching talent -- be "comparable" with those of other ABA-accredited schools, and required each accredited school to submit detailed salary information in order to verify compliance with this requirement.

In practice, we charged, the ABA committee further manipulated this price-fixing requirement by permitting the faculty of the law school under review to select their own "peer group" of other law schools to compare salaries with. Not surprisingly, the faculty often chose higher-ranked schools or schools located in higher-cost areas for the peer group, which inflated the salary levels. We found a number of instances in which law schools were placed on probation for having an "inadequate" salary structure.

ABA accreditation is virtually essential to the success of a law school. The bar admission rules in over 40 States require graduation from an ABA-accredited law school as a condition for taking the bar exam.

The ABA committee further flexed its muscle by prohibiting an accredited law school from accepting transfer credits from unaccredited law schools, or from accepting graduates of unaccredited law schools into its graduate programs -- even if the other school was accredited by the State.

That case has also been resolved by a consent decree, which is still being reviewed by the court. Under the decree, the ABA committee cannot impose any comparative requirement, or collect any comparative data, regarding law school faculty compensation. Nor can the ABA

committee prohibit schools from accepting credits or graduates from State-accredited law schools.

The decree also requires a number of reforms to the structure of the Accreditation Committee and the Legal Education Section to ensure that law school faculty no longer dominate, and that accreditation-related activities are subject to effective outside supervision.

Finally, the decree requires that a Special Commission, which had already been established by the ABA, advise the court on the appropriate use of several other accreditation requirements that we looked at. These are requirements that can serve legitimate educational purposes, but that we found had also been used at times to feather the nests of law school faculty. These requirements relate, for example, to faculty teaching-hour limitations, student-faculty ratios, faculty sabbaticals and other leaves of absence, and quality of law school facilities.

Tomorrow is the deadline for the ABA Board of Governors to file the Commission's final report with the court, along with the Board's comments. After a public notice and comment period, we will file our own comments.

United States v. National Automobile Dealers Association

We filed the third of our trade association cases last September, also in the District, against the National Auto Dealers Association, "NADA" for short. We charged that NADA's officers and directors had engaged in a conspiracy to orchestrate group boycotts against auto manufacturers and discount auto brokers.

NADA had sought to stop the auto manufacturers from offering rebates directly to consumers rather than give the discounts to the dealers, and to stop them from offering so-called "fleet subsidy" discounts to volume buyers, who often sold the cars to consumers after a short time, and with low mileage, and at a substantial discount from the new car price. As to the auto brokers, who were in the business of buying at a volume discount and undercutting the dealers, NADA just wanted to put them out of business.

NADA's members include about 84% of the franchised new auto and truck dealers in this country. Together, they sold about $375 billion of products and services in 1993.

The conspiracy to boycott the manufacturers involved a September 1989 "Open Letter to All Dealers." The open letter was drafted by NADA's president, endorsed by its executive committee and board of directors, and published in its official trade journal, as well as in the Automotive News as a two-page ad. It was also sent out to the news media and to major auto manufacturers.

The open letter recited NADA's concerns with the direct-to-consumer rebates and the fleet subsidies, and called on all auto dealers to reduce their inventory levels from the usual

60-90 days' supply to 15-30 days' supply to put pressure on auto manufacturers to end these practices.

At NADA's next annual convention, NADA's president attempted to rally more support for the boycott by observing that:

> "Twenty-five thousand dealerships -- doing anything more or less together -- is bound to come to the attention of our suppliers."

When these activities came to the attention of the Antitrust Division, we acted promptly and vigorously to investigate these and other claims. The case has been resolved by a consent decree ending these and other practices and requiring NADA to set up an antitrust compliance program.

United States v. Scuba Retailers Ass'n, Inc.

Just a few weeks ago, we filed our fourth case, in Florida against the Scuba Retailers Association. We charged this association with coercing manufacturers and distributors of scuba equipment to stop selling directly to consumers through the mail.

Our complaint alleges that Scuba Retailers Association representatives told a popular diving magazine that the association's members would not carry the magazine in their stores if the magazine accepted ads for scuba gear mail-order houses. The mail order houses are a competitive threat to the retailers, because by cutting out the middleman -- that is, the retailer -- they are often able to sell scuba equipment at a discount. We have evidence that, as a result of the threatened boycott, the magazine decided not to accept mail-order ads.

Our complaint also alleges that association representatives threatened a snorkel manufacturer who had just started selling through the mail that unless it stopped, the association's trade magazine would publish a negative article about the company and it would be blackballed in the industry. The company quickly abandoned its mail order program.

That suit is still pending, and has not been settled.

A Perennial Occupational Hazard

What all four of these cases have in common is an effort by an association and its members to use their collective economic clout to threaten a boycott of those they deal with in the marketplace, in order to preserve or improve the members' income, or their profits. These cases demonstrate the Antitrust Division's continuing commitment and resolve to investigate vigorously all complaints we receive of boycotts, price-fixing, or other illegal activities by trade associations.

Group boycotts by trade associations, such as those in our four recent cases, are a perennial problem. Indeed, one of the earliest antitrust cases concerned a very similar conspiracy between the American Publishers' Association and the American Booksellers' Association, and among their members, to boycott retail booksellers who sold books at a discount. The Publishers Association represented about 75 percent of the book publishers in the country, and the Booksellers' Association represented a majority of booksellers in the country.

The two associations had circulated cut-off lists of discount retailers, and dealers who supplied the discounters, and had widely circulated among book retailers the names of the discounters they had destroyed, with a warning to all booksellers against dealing with price-cutters. In 1913, the Supreme Court held that this constituted a clear violation of the Sherman Act.

Why does this problem keep recurring? What is it about trade associations that lends itself to antitrust violations? For those of you who have practiced in this area for any length of time, the answer is obvious. A trade association is by definition a group of competitors who get together to share common interests and seek common solutions to common problems. The members of a trade association, singly and as a group, are sitting on an antitrust powder keg! And the job you have signed up for as their antitrust counsel is to help make sure they don't play with matches.

As many of you know, Adam Smith took a dim view of trade associations, even what you might call an absolutist view. As his famous dictum warned:

> "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."

Today, however, we know that trade and professional associations can and do perform useful functions in modern society. They can help keep the members of their trade or profession abreast of the latest developments in the industry. They can help set standards for products and services to improve quality and safety for the benefit of consumers, or to make it easier for consumers to compare or combine products and services. They can work together to improve the laws that affect their industry.

Each of these activities can bring important benefits to our society at large. But each of them also has the potential to be subverted to restrain healthy competition, raise prices, and restrict consumer choices.

Good antitrust counseling in this area begins with the recognition that the anticompetitive motive is always potentially lurking in the midst of any group of competitors; that the means to devise an anticompetitive campaign are readily available to anyone with a little imagination; and that the opportunity is all-too-readily provided by the trade association -- and by the trade

association meeting in particular. It is not an exaggeration to say that a trade association meeting can be an incubator for antitrust violations.

As you are aware, each new crop of association officers and directors needs to be thoroughly briefed on the antitrust danger zones, and to be made aware of how severe the consequences of an antitrust enforcement action can be. One of the problems we have discovered in our investigations is that sometimes the staff of the association has recognized the dangers, and has tried to warn the officers and directors, but the officers and directors have paid no attention. The officers and directors are very powerful, and the association staff often don't have the ability to stand up to them. That's why your job is so important.

A Trade Association Is Not a Labor Union

Why is it that when a group of professionals or entrepreneurs get together at their trade association meeting, they suddenly think they are at a labor union rally, and start thinking about collective bargaining, and sometimes begin shouting slogans that sound a lot like, "Oppressed workers of the world, unite!"?

These impulses and words marked the beginning of several of the boycott cases we have brought recently. To avoid having to deal with us on behalf of your trade association clients, it might be a useful precaution for you to explain to the association's officers and directors that it is not a union, and it can't do what unions can do. In fact, not even a union can collectively bargain with customers and suppliers in the marketplace; only with its members' employers. Please help us put the mischievous "We're sort of like a labor union" notion to rest.

Conclusion

In closing, I want to emphasize that our door is always open. If your association has questions that you can't answer, give us a call. If there is a particular activity that seems not to be covered by the precedents either way, you can apply for a business review letter, and we will sit down with you, listen carefully, give the matter a lot of thought, and come up with the best judgment we can as to whether it comports with the antitrust laws -- and, if not, if there is a way to revise it so that it does. All our business review letters are published, so everyone who wants to can look through them for his or her own guidance.

But, as a comparison of the 1913 book-selling case with our recent cases demonstrates, many of the antitrust problems trade associations get themselves into are neither difficult nor novel legally. Much of trade association antitrust counseling is simply ensuring that informed and responsible voices are heard, and heard repeatedly, and that the antitrust laws are well understood.

If you can get the officers, directors, and members of your trade association to take seriously the fact that they are dancing on the edge of a slippery slope, that could land them in the middle of an antitrust abyss if they don't keep a safe distance, you will be halfway home.

The rest of the job is convincing them to resist temptation. If you can keep them out of trouble, then their trade association can provide many procompetitive benefits to them and to society, as well as occasional merriment and diversion.

And even Adam Smith might approve.