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# Antitrust Risks for Trade Associations and Members: Ensuring Compliance Amid Intensive Federal Scrutiny

Avoiding Civil Forfeitures, Treble Damages and Sanctions Due to Anti-Competitive Conduct

TUESDAY, MAY 16, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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# Antitrust Compliance Considerations for Trade Associations

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Strafford Webinar
May 16, 2017

# Why should associations worry about antitrust laws?

- Potential for association, member, and individual liability
  - **Association** may be liable for anticompetitive actions by the association or by members acting with "apparent authority."

    *FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (association's own conduct)

    *Am. Soc'y of Mechanical Engineers v. Hydrolevel Corp*., 456 U.S. 556 (1982) (members acting with apparent authority)

  - **Members** may be liable for agreements with other members, but mere membership in an organization is not enough.

    *Allied Tube & Conduit v. Indian Head Inc.*, 486 U.S. 492 (1988) (member company liable for role in standard setting)

  - **Association officers and directors** who knowingly participate in violation of antitrust laws may be liable.

    *Reifert v. S. Cent. Wis. MLS Corp*., 368 F. Supp.2d 912 (W.D. Wis. 2005) (directors of association liable for ratifying and approving unlawful tying arrangement)

# Examples of past and current antitrust actions

- *United States v. ABA*, Civ. No. 95-1211 (D.D.C. June 25, 1996) (prohibiting certain ABA accreditation conduct that excluded competitors of existing accredited law schools)

- *United States v. Nat'l Ass'n of Realtors*, Civ. No. 05C-5140 (N.D. Ill., Nov. 18, 2008) (consent decree prohibiting rules that restrict real estate brokers' ability to use certain online technologies)

- *In re Nat'l Ass'n of Music Merchants, Inc*., FTC File No. 01-0203 (April 10, 2009) (consent decree barring association from facilitating exchanges of price information and business strategies between music instrument manufacturers)

- *Kissing Camels Surgery Ctr., LLC v. Centura Health Corp.*, 111 F.Supp.3d 1180, 1186-87 (D. Colo. 2015) (finding it plausible that a trade association was itself a conspirator rather than merely a venue for the conspiracy, based primarily on a single email between the alleged member conspirators)

# FTC Bureau of Competition – May 1, 2014

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

## Antitrust by association(s)

**Geoffrey Green, Bureau of Competition**
**May 1, 2014**

TAGS: trade association | Bureau of Competition | Competition | Nonmerger | Horizontal

Antitrust enforcers have always been concerned about the potential for harm arising from the groups made up of competitors. From its earliest days, the FTC has examined the conduct o associations. For example, here's a passage from the FTC's first annual report circa 1916:

> One of the most important questions of trade policy at the present time relates to the trade associations. Their activities are of a varied character, and many of them are of benefit not only to the branch of trade concerned therein, but also to the public. Never their activities have sometimes involved them in practices which have been condemn courts as violations of the antitrust laws.

In one of its very first decisions, *FTC v. Association of Flag Manufacturers of America*, 1 FTC newly-formed FTC ordered a voluntary association of flag manufacturers to stop engaging in to raise the prices of American flags sold in the U.S. Once the collusive scheme was expose the FTC, the trade association dissolved, having had no purpose other than coordinating pri members.

It is a fundamental principle of antitrust law that competitors – whether businesses or individuals – cannot join together to limit the way that they offer products or services to potential customers, especially where there is no legitimate business purpose other than avoiding competition. Strictly speaking, competitors are expected to compete.

Today's trade associations typically serve many legitimate purposes, and from an antitrust perspective, most trade association activities are procompetitive or benign. But sometimes, trade association rules, codes, or bylaws can cross the line into forbidden antitrust territory. When such conduct or rules regulate or restrict the activities of members, it pays to remember that they will be viewed by antitrust enforcers and courts as joint decision-making by otherwise independent competitors. Trade association conduct or rules that restrict competition in a way that harms consumers will continue to invite antitrust scrutiny.

"…there are no special antitrust rules for trade associations."

https://www.ftc.gov/news-events/blogs/competition-matters/2014/05/antitrust-associations

# FTC Bureau of Competition – May 1, 2014

- *“[T]he Commission, as it was a century ago, remains vigilant about trade association activity that restrains competition among the members without a legitimate business justification.”*

- *“Trade association rules, codes, or bylaws that seek to override the normal give-and-take among competing members may interfere with the competitive process and risk antitrust review.”*

# Primary antitrust statutes involved

- Sherman Act § 1 (and possibly § 2 as well)
- Federal Trade Commission Act § 5 ("unfair methods of competition")
- State antitrust laws
- European Union and laws of other nations outside the US

# Sherman §1:  agreements

- "Every contract, combination . . . , or conspiracy, in restraint of trade . . . is declared to be illegal."
- Requires proof of agreement between independent actors that <u>unreasonably</u> restrains trade.
- Two principal concerns for associations:
  - Most, but not all, association conduct involves concerted action by association members – therefore subject to scrutiny under § 1.
  - Competitors may use association meetings or events as venues to "conspire"

# Most serious risk is horizontal agreement among competitors

- Greatest risk is agreement in areas traditionally held to be *per se* illegal.
  - Agreement on price or other terms of relationship with customers or other third parties. [*Freeman v. San Diego Ass'n Realtors,* 322 F.3d 1133 (9th Cir. 2009) (fixed service fee for realty service held illegal)]
  - Customer allocation. [*In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F.Supp.2d 141 (D. Conn. 2009) (denying motion for summary judgment against claim that members of a manufacturers' association conspired to allocate customers and fix prices)]
  - Geographic allocation. [*U.S. v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) (allocation of territories by regional supermarket chains in a supermarket trade association held *per se* unlawful)]
  - Output restrictions. [*Tenn. Ex rel. Leech v. Highlawn Mem'l Cemetery*, 489 F. Supp. 65 (E.D. Tenn. 1980) (agreements not to perform burials on Sunday held *per se* illegal)]
- Agreements that are *per se* illegal violate antitrust laws regardless of their competitive effects.

# Most serious risk is horizontal agreement among competitors (cont.)

- Refusals to deal with competitors, suppliers, or customers (boycotts) are sometimes *per se* illegal.

  *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (boycott to fix prices *per se* illegal regardless of market power or exclusive access to a necessary input)

  *Nw. Wholesale Stationers v. Pac. Stationary & Printing Co.*, 472 U.S. 284 (1985) (termination of member from buying organization not *per se* illegal where organization did not have market power or exclusive access to input necessary to compete)

- Other agreements subject to rule of reason analysis.

  *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (advertising restrictions subject to rule of reason analysis)

- Rule of reason analyses are based on competitive effects (less attractive targets for private plaintiffs and antitrust enforcement agencies).

# More subtle risks of agreement

- Agreements need not be explicit.
  - Statements on a sensitive topic that speaker (and other attendees) never dream could be construed as leading to an agreement.
    - “There’s too much capacity chasing too few sales in this industry.”
    - “These customer warranty and indemnification demands have gotten ridiculous.”
    - “The best practice is to ….”
- “If you can’t agree on it, don’t discuss it” unless you have the advance approval of experienced counsel.
- Recommend that counsel provide advice on how to avoid more subtle risks prior to discussion.

# Common Antitrust Issues for Associations

- Information exchanges
- Membership decisions
- Codes of ethics and advertising rules

# Information exchanges

- Includes exchanges of information for better-informed member business decision making, benchmarking, safety and security purposes, public relations, and to facilitate industry legislative efforts.

- Can be pro-competitive and lawful if done correctly, even in areas that are competitively sensitive (e.g., price).

- Could also lead to claim that exchange is being used to coordinate member competitive decision making.
  - *In the Matter of Sigma Corp*., FTC (January 4, 2012) (alleging that association information exchange used to enforce member price fixing agreement)
  - *United States v. Container Corp. of Am*., 393 U.S. 333 (1969) (exchanges of current price data on specific orders held a violation of antitrust laws despite the absence of an explicit agreement to fix prices)

# Information exchanges (cont.)

- Key recommended safeguards
  - Identifiable, legitimate purpose for the exchange
  - Information that is:
    - Historical (at least 3 months old)
    - Collected by third party (e.g., industry consultant, accounting firm, or even the association itself)
    - Disseminated or shared only in aggregated form

# Information exchanges (cont.)

- Other safeguards
  - Destroy individual responses after aggregation
  - Have information request reviewed in advance by counsel
  - Have draft report of aggregated information reviewed in advance by counsel
  - Don't discuss results among members without advance approval of counsel

*Fact that not all of these safeguards are met won't necessarily mean that information exchange unlawful, but will likely mean that exchange is subjected to closer scrutiny*

# Membership decisions

- Includes decisions on membership applications and terminations of existing members
- The antitrust laws recognize that trade associations "must establish and enforce reasonable rules in order to function effectively."

  *Nw. Wholesale Stationers v. Pac. Stationary & Printing Co*., 472 U.S. 284 (1985)

- Certain membership decisions could nonetheless lead to group boycott claims.

  *Big Bear Lodging Ass'n v. Snow Summit*, 182 F.3d 1096 (9th Cir. 1999) (reversing a district court's dismissal of group boycott claims relating to, *inter alia*, membership exclusion and termination practices)

# Membership decisions (cont.)

- Legitimate restrictions
  - Industry restrictions (i.e., member must be participant in relevant industry or certain level in chain of distribution)

    *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988) (upholding pipe manufacturing trade association's limitation of membership to pipe manufacturers)

  - Geographic location

    *Ralph C. Wilson Indus. v. Chronicle Broad. Co.*, 794 F.2d 1359 (9th Cir. 1986) (approving geographic-based fees for association's news feeds to members based on member station's location)

  - Adherence to legitimate code of ethics (more detail below)
  - Other

# Membership decisions (cont.)

- Recommended safeguards
  - Objective rules
  - Uniform and consistent enforcement (e.g., don’t play favorites or single out a discounter or unusually aggressive competitor)
  - Procedurally fair
  - Provide disinterested decision makers

# Membership decisions (cont.)

- Excluded applicant or member will likely need to show competitive injury to prevail.
- More likely where association or its members collectively have market power and membership necessary in order to compete effectively.
- Similar rules may apply in the case of certification and accreditation decisions.

  *K&S Assocs., Inc. v. Am. Ass'n of Physicists in Medicine*, No. 3:09-01108 (N. D. Tenn., Jan. 26, 2011) (denying motion to dismiss boycott allegations against association that denied reaccreditation)

# Codes of ethics and advertising rules

- Can serve important self-regulatory purposes and preserve the reputation and integrity of the association and industry it represents.

  *In re Appraiser Found. Antitrust Litig.*, 867 F. Supp. 1407 (D. Minn. 1994) (holding that trade group created to uphold ethical code and standards was lawful under the antitrust laws)

- Can also be misused to reach unlawful agreement or restrict competition and prompt boycott or other claims.

  *Nat'l Soc'y of Prof'l Engineers v. United States,* 435 U.S. 679 (1978) (holding that industry code of conduct restricting certain competitive bidding practices was unlawful)

# Codes of ethics and advertising rules (cont.)

- Subject to earlier discussion on substance and enforcement
- Key recommendations for lawful adoption and enforcement
  - Legitimate purpose
  - Objective standards
  - Uniform, consistent, and fair enforcement
  - Can forbid unlawful conduct but should generally avoid restricting or prohibiting lawful conduct that some may find objectionable.
    - Conduct viewed as objectionable or "unethical" may in fact be aggressive competition.
    - Also avoid
      - "veto power" by one member over a troublesome competitor
      - other means by which association may exclude discounters

# Recent FTC interest in codes of ethics

- California Association of Legal Support Professionals, Apr. 3, 2014
- Music Teachers National Association, Apr. 3, 2014
- National Association of Residential Property Managers, Oct. 1, 2014
- National Association of Teachers of Singing, Oct. 1, 2014
- Professional Lighting and Sign Management Companies of America, Mar. 3, 2015
- Professional Skaters Association, Mar. 3, 2015
- National Association of Animal Breeders, Nov. 6, 2015

# FTC Complaint: California Association of Legal Support Professionals (CALSPro)

III. NATURE OF THE CASE

5. Respondent maintains a Code of Ethics applicable to the commercial activities of its members. Respondent's members agree to abide by the Code of Ethics as a condition of membership.

6. Respondent has acted as a combination of its members, and in agreement with at least some of those members, to restrain competition by restricting through its Code of Ethics the ability of its members to compete on price, to solicit legal support professionals for employment, and to advertise. Specifically, Respondent maintains the following provisions in its Code of Ethics:

- "It is not ethical to cut the rates you normally and customarily charge when soliciting business from a member firm's client . . ."
- "It is not ethical to . . . speak disparagingly of another member."
- "Never discuss the bad points of your competitor."
- "It is unethical to contact an employee of another member firm to offer him employment with your firm without first advising the member of your intent."

7. In furtherance of the combination alleged in Paragraph 6, Respondent established a Dispute Resolution Committee to uphold and maintain industry standards and ethical business practices as set forth in Respondent's Bylaws, Code of Ethics and Manual of Policies and Procedures. The Dispute Resolution Committee provides an avenue for resolving alleged violations of the Code of Ethics, including by encouraging Respondent's members to resolve privately disputes arising out of the Code of Ethics, and also by establishing a mechanism by which Respondent may sanction violations of the Code of Ethics.

# FTC Complaint: Music Teachers National Association (MTNA)

### III. NATURE OF THE CASE

6. Respondent maintains a Code of Ethics applicable to the commercial activities of its members, and encourages its members to follow its Code of Ethics. Some MTNA Affiliates have the same Code of Ethics that MTNA has, and some have adopted different codes of ethics.

7. Respondent has acted as a combination of its members, and in agreement with at least some of those members, to restrain competition by restricting through its Code of Ethics the ability of its members to solicit the customers of competing music teachers. Specifically, in 2004 MTNA added the following provision to the section of its Code of Ethics titled "Commitment to Colleagues":

   > The teacher shall respect the integrity of other teachers' studios and shall not actively recruit students from another studio.

8. In furtherance of the combination alleged in Paragraph 7, Respondent established a process for resolving alleged violations of the Code of Ethics, including by encouraging its members to resolve privately disputes arising out of the Code of Ethics, and also by establishing a mechanism by which Respondent may sanction violations of the Code of Ethics.

# FTC Complaint: Professional Skaters Association

10. Respondent created an Ethics Committee to develop educational materials and programs in the area of ethics, and to educate its members about the types of conduct that it considers prohibited solicitation. Education occurs through required continuing education programs, publications, web postings, and the fielding of questions by Respondent's staff, including Respondent's Executive Director and General Counsel.

11. Respondent disseminates publicly and to its members a variety of documents that interpret and apply the Code of Ethics, including *Proper Procedures for Changing Coaches*, *Ethics Issues When Changing Coaches*, and *Tenets of Professionalism*.

12. Respondent defines the following statements as solicitation prohibited by the Code of Ethics:

    - "I am a much more qualified coach than __________ is."
    - "Join our program. That other program isn't very good."
    - "We'll give your child free lessons, ice time, equipment, etc."

13. Respondent published in its magazine, *Professional Skater*, articles stating that handing to a student a business card that reads, "one free lesson" is prohibited solicitation.

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# Antitrust Compliance Considerations for Trade Associations: *Standard Setting & Immunities*

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# Trade Associations

**Standard Setting**

# Standard Setting

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**Types of standards**

- Technical standards
- Quality standards
- Safety standards
- Seals of approval
- Certifications

# Standard Setting

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## Section 1 of the Sherman Antitrust Act

To prove a violation of Section 1 of the Sherman Antitrust Act, the following must be established:

1. The existence of a contract, agreement, combination, or conspiracy among two or more separate entities that,
2. Unreasonably restrains trade, and
3. Affects interstate/foreign commerce

# Standard Setting



- Section 5 of the FTC Act
  - Broader than Section 1 of the Sherman Act
  - Broad scope of coverage:
    - "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."
- State law claims
- Unfair Competition
  - Tortious Interference With Prospective Economic Advantage and/or Contract

# Standard Setting



Under the Obama administration there has been a significant increase in antitrust enforcement, including for trade associations and standard setting organizations.

# Standard Setting

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- The DOJ and FTC have already reinvigorated antitrust enforcement, including anticompetitive standard setting conduct.
- The FTC Commissioners have increasingly remarked that Section 5 of the FTC Act would be particularly useful against unfair standard setting conduct.

# Standard Setting



***Allied Tube & Conduit Corp. v. Indian Head*, *Inc.***, 486 U.S. 492 (1988)

- Supreme Court recognized that when trade associations promulgate safety standards based on objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling competition, the standards can have pro-competitive advantages.

# Standard Setting



**Other benefits**

- Facilitating interoperability
- Public safety
- Creating open networks based on objective criteria
- Making it easy for consumers to identify the appropriate product and be confident of its standard setting applicability

# Standard Setting



**Per Se Analysis vs. Rule of Reason**

- Generally, courts will apply the rule of reason absent some showing that the standard was deliberately distorted by competitors and market foreclosure. *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 501 (1988) (noting that most lower courts apply the rule of reason analysis because private standards can have significant pro-competitive advantages).

# Standard Setting



- Courts recognize that every trade association must have rules or criteria.
- Membership rules or criteria can restrict trade, at least incidentally.
- When a trade association promulgates industry standards, it runs the risk of being accused of *unlawful horizontal and vertical concerted refusal to deal*.

# Standard Setting



Trade associations promulgating standards should understand the risks, particularly when the trade association has a large share of the relevant market and the membership is closed:

- The standard setting could be viewed as a cover for agreements to fix prices, limit output, or allocate markets.
- The standard setting could unreasonably limit competition on quality and innovation.
- The standard setting could be used by members to harm or exclude competitors from the relevant market.

# Standard Setting



## What should NOT be part of a standard setting discussion

- Confidential business information, including research and development
- Members’ prices and pricing methods
- Members’ profit margins
- Members’ levels of output and geographic sales territories
- Price advertising
- Complaints about certain entities’ business practices
- Whether to do business with particular entities

# Standard Setting

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When a standard promulgated by a trade association is challenged as an unlawful concerted refusal to deal, courts will generally examine the real goal behind the standard and evaluate the standard to determine if it is *reasonably related* to that goal and if it is *objective*.

- In doing so, courts will perform a balancing test → pro-competitive benefits versus anticompetitive harm

# Standard Setting



**Key factors court will examine in determining whether a standard promulgated by a trade association unreasonably restrains trade**

- The economic detriment imposed on non-qualifying (excluded) entities
- The scope of the restrictions in relation to need
- Market structure
- The application of the standard
- Whether members are forced to adopt the standard → standards should be voluntary

# Standard Setting

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**Other important factors**

- Who is the party enforcing the standard?
  - The trade association itself? Courts will be suspicious if this is the case.
  - Consumers?
  - Government regulatory agencies?
- Procedural safeguards → notice and the right to be heard before being excluded.

# Standard Setting



**Special industries require self-regulation**

- Sports Leagues and Associations
  - Standards required in order to maintain competition within the league or association.
  - Standards must still serve a legitimate purpose.
- Healthcare
  - Exclusion of doctors allowed for lack of professional competence or conduct.
  - Ethical rules required.
  - Standards must still serve a legitimate purpose.

# Select Cases



***Plant Oil Powered Diesel Fuel Systems, Inc. v. ExxonMobil Corp.***,
801 F. Supp. 2d 1163 (D.N.M. 2011)

- Manufacturer of triglyceride diesel fuel brought action against competing oil companies and quality standard-setting organization arguing that defendants' involvement in a proposed standard for biofuels that would limit the use of trygliceride diesel fuel and related products violated antitrust law. The court granted defendants' motion to dismiss noting that the standard had no anticompetitive effect because "compliance with the standard at issue is not required to compete in the relevant markets."

# Select Cases

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***Santana Products v. Bobrick Washroom Equipment, Inc.***, 401 F.3d 123 (3d Cir. 2005), cert. denied, 546 U.S. 1031 (2005)

- The Third Circuit affirmed the lower court's decision to enter judgment in favor of defendants because there was no "restraint of trade." Defendants merely criticized the safety of plaintiff's product. Defendants did not engage in coercive measures that prevented plaintiff from selling its products to any willing buyer or prevented others from dealing with plaintiff. Furthermore, plaintiff's allegations of fraud in the manner in which the hazards of its products were portrayed were irrelevant because "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned."

# Select Cases



***TruePosition v. LM Ericsson Telephone Co.***, 2012 WL 3584626 (E.D. Pa. 2012)

- Motion to dismiss denied in case involving defendants who were members of telecommunications non-profit standard setting organization that passed standards excluding plaintiff's product. Court let case proceed citing allegations that defendants abused their "positions of power within that organization" which lead to the "stalling and preclusion" of plaintiff's technology in the standard setting process.

# Select Cases



***Advanced Technology Corp. v. Instron, Inc.***,
925 F. Supp. 2d 170 (D. Mass. 2013)

- Motion to dismiss granted in case alleging defendants abused their positions in standard setting organization involving mechanical testing equipment. Court found no plausible allegation of motive to conspire, alleged voting irregularities were unilateral and not conspiratorial, and alleged off-the-record meetings, standing alone, did not indicate collusion.

# Select Cases



***American Institute of Intradermal Cosmetics v. Society of Permanent Cosmetic Professionals***, 2013 WL 1685558 (C.D. Cal. 2013)

- Competitor in tattoo industry sued trade association for enacting “quality and safety” guidelines that stifled competition from plaintiff’s products and services, alleging that guidelines referenced non-existent FDA standards and were selectively enforced. Section 1 claim survived motion to dismiss.

# Trade Associations Immunities

***Noerr-Pennington***
**Antitrust Immunity**

# *Noerr-Pennington* Immunity

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- What is *Noerr-Pennington*?
- What conduct is protected?
- Exceptions to *Noerr-Pennington*
- Specific Application to Trade Associations
- Related State Action Immunity

# *Noerr-Pennington* Immunity

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- Competitors often petition government entities to restrict the ability of rivals to compete in the marketplace.
- This petitioning often occurs through trade associations.
- Courts have conferred antitrust “petitioning immunity” on a wide range of conduct designed to induce the government to restrain competition.

# *Noerr-Pennington* Immunity



- The *Noerr-Pennington* doctrine provides antitrust immunity for individuals, businesses and ***trade associations*** petitioning for competition-restricting government action.
- The doctrine was established by the courts, not Congress. Flows from the First Amendment.
  - *Eastern Railroad Presidents Conference v. Noerr Motors*, 365 U.S. 127 (1961), and
  - *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

# *Noerr-Pennington* Immunity



**Protected Conduct**

Efforts to influence the legislative process (lobbying)

*Eastern R.R. Conf. v. Noerr Motors*, 365 U.S. 127 (1961)

A group of railroads lobbied the legislature to restrict competition from the trucking industry. The Supreme Court held that a violation of the Sherman Act cannot be based on attempts to influence the passage or enforcement of laws; the Sherman Act does not prohibit two or more persons from acting together to influence legislation even if it would result in a restraint on trade or a monopoly.

# *Noerr-Pennington* Immunity

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**Protected Conduct**

Efforts to influence the administrative process

*United Mine Workers v. Pennington*, 381 U.S. 657 (1965)

Coal mine operators and their union tried to persuade the Secretary of Labor to establish a higher minimum wage for coal workers. The Supreme Court held "(j)oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."

# *Noerr-Pennington* Immunity



**Protected Conduct**
**Efforts to influence the adjudicatory process**

- *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)
  - The Supreme Court extended *Noerr-Pennington* to adjudicatory processes, including litigation. "The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to the courts."
- *But see Sykes v. Mel Harris and Associates, LLC*, 757 F. Supp. 2d 413 (S.D.N.Y. 2010)

# *Noerr-Pennington* Immunity

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## ***Sykes v. Mel Harris and Associates***

- Class action under the Fair Debt Collection Practices Act (FDCPA), Racketeer Influenced and Corrupt Organizations Act (RICO), and state law alleging that debt buying company, debt collection agency, process service company, and others engaged in scheme called "sewer service" whereby defendants failed to serve a summons and complaint and then filed a fraudulent affidavit attesting to service and then obtaining default judgments when the debtors "failed" to appear in court.
- Defendants moved to dismiss arguing, *inter alia*, immunity under the *Noerr-Pennington* doctrine's protection for a party's commencement of a prior court proceeding. Citing *California Motor Transport*, the court denied this portion of the defendants' motion to dismiss noting that the sham exception excludes from immunity any abuse of process that bars access to the courts, such as unethical conduct in the setting of the adjudicatory process or the pursuit of a pattern of baseless, repetitive claims.

# *Noerr-Pennington* Immunity

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## Specific Application to Trade Associations

- Trade associations take action, on behalf of their members, with the government in a variety of ways:
  - Association executive testifying to a subcommittee regarding proposed legislation
  - Political action arm of an association coordinating support of legislation
  - Association bringing legal action for or against a license application

  This is all protected conduct under *Noerr-Pennington.*

# Exceptions to *Noerr-Pennington*

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## Sham Exception

- Using the government process as an anticompetitive weapon, not genuinely seeking favorable government action, by engaging in objectively baseless conduct

## Supplying False Information

- Misrepresentations and false information are usually not protected by *Noerr-Pennington* but some courts have gone further allowing even fraudulent or deceptive conduct in order to avoid government decision-making scrutiny. *See Bobrick* (3d Cir.), *supra.*

## Conspiracies with Public Officials

- Government officials conspiring with private parties is not protected conduct

# Exceptions to *Noerr-Pennington*

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## ***FTC v. Superior Court Trial Lawyers Association***, 493 U.S. 411 (1990)

- Defense attorneys in Washington, D.C. jointly refused to represent indigents until the city raised its rates. The attorneys agreed that absent *Noerr-Pennington* immunity their actions would be per se illegal.
- The Supreme Court held that *Noerr-Pennington* did not apply. "(I)n the *Noerr* case the alleged restraint of trade was the intended consequence of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation." Means versus outcome.
- Trade associations may lobby the government for action that will restrain trade, but you cannot use an illegal restraint of trade as the means to try to get government action.

# Exceptions to *Noerr-Pennington*

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## ***Carpet Group Int'l v. Oriental Rug Importers Assoc., Inc.***, 256 F. Supp. 2d 249 (D.N.J. 2003)

- Corporation that arranged sales of oriental rugs from foreign manufacturers to U.S. retailers sued trade association of oriental rug importers and wholesalers, asserting Sherman Act violations and tortious interference with prospective business relationship.
- Plaintiffs claimed that defendants conspired to sabotage plaintiffs' efforts to facilitate direct sales between foreign manufacturers and U.S. retailers by attempting to convince foreign governments rug trade associations not to provide financial assistance to trade shows, and by boycotting retailers and manufacturers that supported the trade shows.
- On defendants' motion for summary judgment, the court held, *inter alia*, that the restraint alleged was "largely the result of private action directed at the government, rather than governmental action, and that consequently, most of Defendant's conduct is not subject to *Noerr-Pennington* protection."

# Trade Associations Immunities

## **The State Action Doctrine**

# State Action Immunity

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- *Noerr-Pennington* protects efforts by citizens and groups of citizens (i.e. trade associations) that encourage the adoption of government policies that suppress competition.
- State Action Immunity similarly protects the government policies themselves from antitrust liability.
- *Noerr-Pennington* also stems from State Action Immunity to not suppress legitimate petitioning of governmental officials.

# State Action Immunity



***Parker v. Brown***, 317 U.S. 341 (1943)

- Established the State Action Doctrine
- State of California developed an agricultural marketing plan to stabilize the price of raisins by allowing raisin producers and distributors to determine what percentage of the raisin crop would be withheld from the market. The Supreme Court held that Congress did not intend the Sherman Act to apply to such state action even though the plan allowed restraint on competition.

# State Action Immunity

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## ***North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015)**

- The state of NC established the Board as the state's agency "for the regulation of the practice of dentistry."
- Eight members – six must be actively practicing dentists.
- In early 2000s, non-dentists in NC began offering teeth whitening services, charging less than dentists.
- The Board opened an investigation and, in 2006, sent dozens of cease-and-desist letters to these non-dentists, warning that the unlicensed practice of dentistry is a crime.
- The letters stated or implied that teeth whitening was part of the practice of dentistry, though the Act creating the Board said nothing about teeth whitening.

# State Action Immunity



***North Carolina State Board of Dental Examiners v. FTC***, 135 S. Ct. 1101 (2015) (cont'd)

- In 2010, the FTC charged the Board with violating Section 5 of the FTC Act through its concerted action to exclude non-dentists from the teeth whitening market
- The Board asserted state-action immunity, which was rejected by the ALJ, the FTC, and the 4$^{th}$ Circuit.
- The U.S. Supreme Court affirmed in a 6-3 opinion by Justice Kennedy, holding that the Board could not invoke state-action immunity

# State Action Immunity

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## ***North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015) (cont'd)**

- The Court held that a state agency "controlled by market participants" can claim *Parker* immunity only if:
    1. The challenged restraint is "clearly articulated and affirmatively expressed as state policy"; and
    2. The policy is "actively supervised by the State."
- The parties assumed that the first requirement was met.
- However, the "active supervision" requirement was not met because the Board's enforcement actions, interpreting "the practice of dentistry" to include teeth whitening, were not supervised or reviewed in any way by the State.

# State Action Immunity

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***North Carolina State Board of Dental Examiners v. FTC***, 135 S. Ct. 1101 (2015) (cont'd)

- *Parker* immunity applies when the actions in question are an exercise of the State's sovereign power
- State agencies are not necessarily sovereign actors for purposes of state-action immunity, which is not automatic when "a state delegates control over a market to a non-sovereign actor"
- Supervision requirement protects against risk that an agency will enact anticompetitive regulations to further its members' private interests.

# State Action Immunity

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## ***North Carolina State Board of Dental Examiners v. FTC***, 135 S. Ct. 1101 (2015) (cont'd)

- "Active supervision" requires:
  - Substantive review of the decision, not merely procedural
  - Supervisor must have ability to veto or modify decisions
  - The "mere potential for state supervision" is not sufficient
  - Supervisor may not itself be an active market participant
- Alito dissent:
  - A state agency acts as a sovereign for purposes of state-action immunity – the inquiry should end there
  - The majority opinion will cause confusion: What is a "controlling number"? What is an "active" market participant? What is the relevant market?

# Select Cases



***Health Care Equalization Committee of the Iowa Chiropractic Society v. Iowa Medical Society***, 851 F.2d 1020 (8th Cir. 1988)

- Health care service organization complied with legislative mandate to refuse to deal with certain chiropractors; assignee of 120 chiropractors sued health care service organization for violations of the Sherman Act; organization sought immunity under state action doctrine
- Court held conduct of private organization was protected under the state action doctrine because: 1. the challenged restraint was one “clearly articulated and affirmatively expressed as state policy” and 2. the policy was “actively supervised by the State itself.”

# Select Cases

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***FTC v. Phoebe Putney Health System, Inc.***, 133 S. Ct. 1003 (2013)

- FTC brought action against a hospital authority – a public entity under Georgia law that owned one hospital in the county – to enjoin Authority's acquisition of its only competitor in the county. District Court and 11th Circuit found that the Authority, as a local government entity, was entitled to state-action immunity.
- The Supreme Court unanimously reversed, finding no evidence of a "clearly articulated and affirmatively expressed" state policy to allow a hospital authority to lessen competition through consolidation.
- The powers granted to the hospital authorities by the State mirrored the powers granted under state laws to private corporations – "general corporate power" to allow them to participate in the market.
- "A state that has delegated such general powers can hardly be said to have contemplated that they will be used anticompetitively."

# Select Cases



***Dintelman v. Chicot County Memorial Hospital***, 2011 WL 1213116 (E.D. Ark. Mar. 23, 2011)

- Plaintiffs alleged, *inter alia*, that hospital violated antitrust laws by complying with direction of the City of Lake Village stemming from its participation in an ambulance services contract creating an exclusive ambulance franchise in the City.
- The hospital moved for summary judgment responding that this claim must fail as a matter of law under the State Action Doctrine. The court granted the hospital's motion, holding that the provisions of the Municipal Ambulance Licensing Act "demonstrated a state policy allowing municipalities to establish exclusive franchises for all ambulance services within the city."

# Select Cases



***Lawline v. American Bar Association***,
956 F.2d 1378 (7th Cir. 1992)

- Unincorporated association of lawyers and laypersons challenged American Bar Association's Model Rules of Professional Responsibility prohibiting lawyers from forming partnerships with non-lawyers
- The challenged rules were immune from antitrust liability because the Illinois Supreme Court, a state actor, adopted the rules, NOT because the ABA drafted them

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Strafford Webinar
May 16, 2017

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# Outline

- Recent Trends in Antitrust Litigation Against Associations and Members
- Compliance:  Policies and Procedures to Minimize Risk for Associations and Members

Recent Trends in
Antitrust Litigation Against
Associations and Members

- **§ 1 class action litigation brought by a group of shepherds alleging antitrust conspiracy to suppress wages**
- **Defendants:**
  - Western Range Association(WRA)
  - Mountain Plains Agricultural Service (MPAS)
  - “Rancher Defendants” -- members of WRA and/or MPAS
- **Allegations:**
  - WRA, MPAS and their members agreed to fix shepherds’ offered and paid wages, by agreeing to offer domestic and foreign shepherds only the minimum wage.

# *Llacua et al. v. Western Range Association et al.* (cont'd)

- Background: Under the H2-A Visa Program, the Department of Labor ("DOL") sets a monthly wage floor for shepherds.
- Plaintiffs asserted that Defendants conspired to fix wages by agreeing to pay wages only at the minimum wage floor set by DOL. Plaintiffs alleged five categories of concerted action, including:
  - (1) membership in WRA and MPAS;
  - (2) opportunities to communicate regarding recruitment of shepherds;
  - (3) job orders detailing identical wages paid;
  - (4) common motives among ranches to depress wages; and
  - (5) a history of low wages paid to shepherds.

# *Llacua et al. v. Western Range Association et al.* (cont'd)

- The Magistrate Judge, in his report and recommendation, held that plaintiffs' allegations were based solely on allegations of circumstantial evidence, and not on direct facts establishing an agreement between Defendants.
- Evaluating each category of allegations in turn, the Magistrate held that, stripped of plaintiffs' conclusory verbiage, plaintiffs' claims were "factually neutral" and were equally likely to result from independent action in light of DOL regulations and the H-2A program that set the wage floor.



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# *Llacua et al. v. Western Range Association et al.* (cont'd)

- The Magistrate Judge evaluated allegations that the decision of ranches to delegate the hiring of shepherds to trade associations was suggestive of a conspiracy.
- Plaintiffs could not impute a ranch's rule violation to an association under the H-2A regulations, unless an Office of Foreign Labor Certification Administrator determined that the association also participated in the violation, which was not alleged.
- Moreover, the court held, "an association is a vehicle for concerted antitrust activity when it **requires** its members to actively participate in the association's anticompetitive conduct; ***this generally requires showing association rules, canons or agreements that prohibit members from competing***."
  - "The [Complaint] does not point to any rules, canons or membership agreements of WRA or MPAS that prohibit members from offering above the minimum wage."



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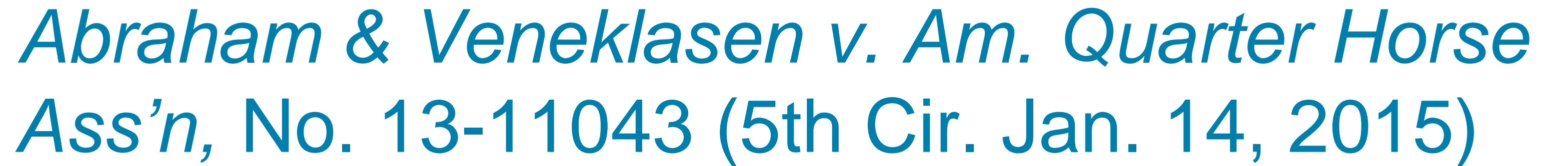
# *Llacua et al. v. Western Range Association et al.* (cont'd)

- The Court also discussed the intersection between the relevant statutes and association activity.
  - Because H-2A regulations authorize associations to handle recruiting and hiring of members, the fact that associations set wages for members did not mean that the associations were walking conspiracies. Rather, it was equally plausible that the members delegated hiring to associations so that they could participate in the H-2A program and enjoy the efficiencies of outsourcing hiring.



# *Abraham & Veneklasen v. Am. Quarter Horse Ass'n*, No. 13-11043 (5th Cir. Jan. 14, 2015)

- **§ 1 and § 2 litigation alleging antitrust conspiracy to exclude owners of cloned horses from competing in the elite Quarter Horse market and monopolization**
- **Defendant:**
  - American Quarter Horse Association (AQHA)
- **Allegations:**
  - AQHA – world's largest quarter horse breed registry – passed and enforced an association rule to not admit cloned horses or their offspring to its registry.
  - AQHA denied Plaintiffs' requests to change the rule so that Plaintiffs could register their horses, which are born through "somatic cell nuclear transfer" (*i.e.*, cloning).



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# *Abraham v. Am. Quarter Horse Ass'n* (cont'd)

- Plaintiffs alleged that AQHA, its Board of Directors, and its Stud Book Registration Committee members conspired to prevent new competitors from entering the Quarter Horse market and also monopolized the market by agreeing to prevent registration of clones.
- AQHA argued that there was no conspiracy and that the market was not harmed by exclusion of clones.
- AQHA claimed it had legitimate reasons for denying registration of clones.

# *Abraham v. Am. Quarter Horse Ass'n* (cont'd)

- AQHA alleged various legitimate justifications for the rule:
  - Members overwhelmingly oppose clone registration; and, non-profit membership organizations need to effectuate the lawful will of its membership.
  - AQHA has not solved the issue of parentage verification for clones – AQHA's purpose as a breed registry cannot be accomplished without ability to verify parentage of all horses.
  - Risks of genetic diseases in clones outweigh potential benefits of cloning.
  - AQHA and its rules are based upon the sire/dam paradigm, whereby a Quarter Horse must be "bred" from a mother and a father, and it cannot be registered with AQHA unless it has a registered mother and a father.

# *Abraham v. Am. Quarter Horse Ass'n* (cont'd)

- Jury returned a verdict for Plaintiffs; awarded no damages.
- Court enjoined AQHA from enforcing the rule that precludes registration of clones and ordered AQHA to "immediately amend its Registration Rules and Regulations."
  - Court's final judgment included a redlined version of the rules, and ordered that the rules "shall be amended to include" specific language the Court drafted.
- Fifth Circuit later characterized the lower court's broad injunction as "sweeping."



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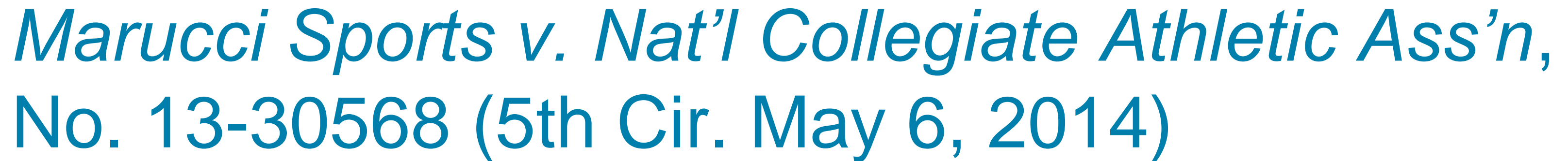
# *Abraham v. Am. Quarter Horse Ass'n* (cont'd)

- Fifth Circuit reversed the jury's finding, ruling that plaintiffs had not demonstrated sufficient evidence of a conspiracy.
  - Circumstantial evidence was unsubstantiated.
  - One-sided complaints by a member at a meeting – even if coupled with veiled economic threats – were "insufficient to infer the second party's intent to enter into a conspiracy" because did not exclude possibility of independent conduct.
  - No showing that standard-setting committee members would benefit financially from banning cloned horses: "[M]ore than the existence of the financial interests of a few is required to prove a conspiratorial agreement among them."
- No monopolization because AQHA did not compete in the relevant market.



# *Marucci Sports v. Nat'l Collegiate Athletic Ass'n*, No. 13-30568 (5th Cir. May 6, 2014)

- **§ 1 litigation alleging conspiracy to impose regulation restraining trade in non-wood baseball bat market**
- **Defendants:**
  - National Collegiate Athletic Association (NCAA)
  - National Federation of State High School Associations (NFHS)
- **Allegations:**
  - NCAA and NFHS used certification standard regulating non-wood baseball bats to exclude smaller bat manufacturers
  - Bat-Ball Coefficient of Restitution Standard (the "BBCOR Standard")
  - Several (but not all) of plaintiff Marucci's bats decertified
  - Conspiracy to exclude Marucci and unnamed smaller bat manufacturers to protect sponsorships from larger bat manufacturers

# *Marucci Sports v. NCAA, et al.* (cont'd)

- Underlying Facts
  - Trade associations implemented BBCOR certification standard to enhance player safety and reduce technology-driven big hits.
  - 4 of Marucci's 7 bat models failed compliance testing – too "hot" (BBCOR > .5).
  - Marucci alleged the defendants conspired to exclude it and other unnamed smaller bat manufacturers from competing with larger bat manufacturers so that the NCAA could protect its interest in receiving sponsorship money from those larger bat manufacturers.
- Three strikes and you're out – Motion to dismiss granted and affirmed
  - Marucci had filed amended complaint following prior dismissal.
  - Lower court again granted defendants' motion to dismiss on basis that complaint still did not contain sufficient facts.
  - Fifth Circuit agreed that defects in claim could not be cured and affirmed.
  - Marucci denied an opportunity to again amend complaint.

- Fifth Circuit agreed with the lower court that Marucci's third complaint fell short of stating a claim upon which relief could be granted.
  - Relied on Supreme Court's 1984 holding in NCAA v. Bd. of Regents of Univ. of Okla., 469 U.S. 85 (1984) → under rule of reason, certain NCAA rules or regulations are "presumptively procompetitive."
  - Such rules include "rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture." *Id.* at 117.
- Fifth Circuit held that "[t]he liveliness of a baseball bat falls squarely within the framework of the rules and conditions" described by the Supreme Court in *NCAA v. Bd. of Regents*.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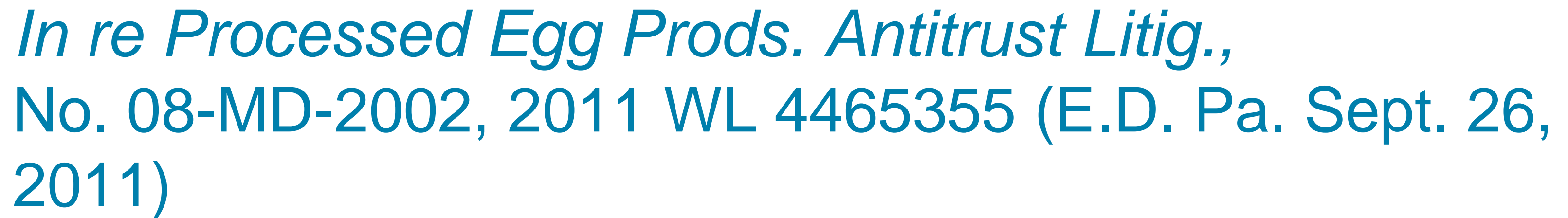
# *Marucci Sports v. NCAA, et al.* (cont'd)

- Fifth Circuit affirmed that Plaintiff's claim was fatally deficient.
- Plaintiff "failed to provide the identity of the 'new market entrants' or demonstrate when and how the BBCOR Standard ha[d] been arbitrarily and unfairly applied to their products.
- Plaintiff did not "allege any specific facts demonstrating an intention on the part of the NCAA, NFHS, WSU, the Incumbent Manufacturers, or any other party to engage in a conspiracy."
- Plaintiff did not sufficiently allege harm to competition in the non-wood baseball bat market, instead focusing only on its own alleged injury.
- Some of Marucci's products were certified for use in NCAA and NFHS competition that year.



# *In re Processed Egg Prods. Antitrust Litig.,* No. 08-MD-2002, 2011 WL 4465355 (E.D. Pa. Sept. 26, 2011)

- Defendants
  - Various egg producing entities
  - United Egg Producers (UEP) (cooperative)
  - United States Egg Marketers (USEM) (export organization)
  - United Egg Association (UEA) (trade association)

- Multidistrict § 1 litigation in EDPA alleging conspiracy to restrict domestic supply of eggs through various mechanisms, including ...

* Note: Stephen Chuk is counsel of record for a defendant in this case.

# *In re Processed Egg Prods. Antitrust Litig.* (cont'd)

- Trade Association / Cooperative Programs

  Allegations:

  – Various agreements to reduce production, allegedly coordinated through association
  – Association-run certification program
  – Association standards programs
  – Association export program



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# *In re Processed Egg Prods. Antitrust Litig.* (cont'd)

- Plaintiffs specifically pointed to association membership to support conspiracy allegations.
- Court looked at defendants individually:
  - "[C]omplaint must plausibly suggest that the individual defendant actually joined and participated in the conspiracy."
  - "[M]ere repetitive generic reference to 'Defendants'" is insufficient.
  - **But,** "plaintiffs need not plead each defendant's involvement in …conspiracy in elaborate detail."

# *In re Processed Egg Prods. Antitrust Litig.* (cont'd)

- At the MTD stage, the Court noted the traditional view:
  - "[P]articipation in a trade group association and/or attending trade group meetings, even … meetings where key facets of the conspiracy allegedly were adopted or advanced, are **not enough** on their own to give rise to the inference of *agreement* to the conspiracy."
- Court held that:
  - One defendant's comments at meetings linking certification program to increased egg prices showed, "at best," opportunity to conspire, not conspiracy.
  - Another defendant's (1) **board membership**, (2) **presence at meetings where certain actions alleged to advance the conspiracy were adopted** or where comments were made urging attendees to participate in promoting conspiracy, and (3) alleged public and private **comments noting effect on prices of the challenged conduct** were all **insufficient** to state claim of conspiracy.
- Court focused on "**active participation**, rather than merely passive presence, [as] **key in inferring agreement to the conspiracy**."



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# *In re Processed Egg Prods. Antitrust Litig.* (cont'd)

- But, court *did* expressly consider (a) membership, (b) board membership, (c) meeting attendance, (d) voting record on key issues, (e) participation in association programs, and (f) adherence to/certification under association guidelines. These factors "must be considered in light of" and "in conjunction with" allegations of participation in challenged conduct.
- One defendant's MTD denied because
  - it chose to participate in the association certification program (which had features the court found were not justified explained by any procompetitive reasons)
  - **and** did so *after* attendance at key meeting where challenged conduct was allegedly agreed to, and where it made comments re pricing
- Court noted: "once attendance is coupled with a consistent later act, an inference of knowing participation is permissible."

# *In re Processed Egg Prods. Antitrust Litig.* (cont'd)

- Court stated that a second defendant's participation in the certification program "does not exist in a vacuum," as the complaint also alleged:
  - That the defendant "was represented at meetings at which decisions were made and actions taken that advanced the conspiracy" and "where conspirators openly acknowledged the virtues of various coordinated actions" and
  - Its "representative allegedly made comments evincing awareness of certain features of the egg market that could be manipulated by actions that impacted supply."
- "Thus, the allegations as to [that defendant's] mere attendance at meetings and public and private comments, when coupled with the allegation of certification under the … Certification Program and participation in the export program, **plausibly suggest" knowing agreement to join conspiracy.**

# *In re Processed Egg Prods. Antitrust Litig.* WL 5539592, at *1 (E.D. Pa. Sept. 28, 2016)

- Court subsequently denied Defendants' motions for summary judgment, finding it "distinguishable from cases where courts have held that mere membership in a trade group or trade association, even when coupled with implementations of suggestions made by that group, does not qualify as concerted action."
  - "[T]he evidence shows that the various Defendants agreed to comply **not just with recommendations, but requirements** developed by the UEP."
- In support of its decision, the court distinguished the facts at issue from the Supreme Court's holding in *Maple Flooring*, which held that simply meeting and discussing information without reaching a decision is not unlawful. Instead:
  - "The UEP Certified Program was much more than a set of recommendations from the UEP or a dissemination of information to its members"
  - "In exchange for receiving UEP Certification, the Defendants were obligated to comply with the various requirements of the program"
  - "Defendants (all members of the UEP) were well aware that their fellow certified producers were required to play by the same rules"

- *S. Collision & Restoration, LLC v. State Farm Mut. Auto. Ins. Co.*, 173 F. Supp. 3d 1293 (M.D. Fla. 2016) (noting that the complaint did not clearly allege that defendants belong to the same association or organization, and affirmed that "participation in trade associations and similar organizations provides no indication of a conspiracy")
- *B & R Supermarket, Inc. v. Visa, Inc.*, 2016 WL 5725010, at *11 (N.D. Cal. Sept. 30, 2016) (dismissing allegations against a company, jointly owned by defendants, which develops standards by which credit card chip transactions are processed and maintained, after the court noted the complaint contained "no specific allegations as to acts taken by" the company)

# Other Recent Noteworthy Antitrust Opinions Regarding Associations

- *Persian Gulf Inc. v. BP W. Coast Prod. LLC*, 2016 WL 4574357, at *1 (S.D. Cal. July 14, 2016) (finding that allegations of membership in trade associations were insufficient to state a claim under California's antitrust laws, and ultimately dismissing those claims)
- *Brewer Body Shop, LLC v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 2758990, at *1 (M.D. Fla. May 12, 2016) (denying motion for reconsideration of order dismissing plaintiff's price-fixing claims, and noting "participation in trade associations and similar organizations provide no indication of a conspiracy")

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# Trade associations and their members are prime targets

» Plaintiffs seek to clear the bar set by *Twombly* by including trade association information in their antitrust conspiracy complaints

- Associations have rich and available information and data on their websites and public issuances

- Associations provide a "plausible" venue for agreements among competitors to have occurred

- Associations often run certification, standard setting, statistical reporting and similar programs

- Things are said and done in a free-wheeling atmosphere at associations

# Compliance

- The following are still, without more, insufficient to keep a company in a lawsuit alleging a Section 1 conspiracy:
  - Belonging to a trade association or similar group
  - Attending its meetings, even meetings where alleged conspiracy discussed
  - Participating in Board of Directors or committees
  - Making public or private comments observing features of your market.
- Except …
  - (1) Courts might consider these as “plus factors” and context when defendant has taken some other action in furtherance of or otherwise participated in an alleged conspiracy. *In re Egg Products Antitrust Litig.*
  - (2) Alleged membership (at least, being a founding member) can be sufficient to allege conspiracy **where association allegedly founded for express purpose of carrying out conspiracy**. *In re Fresh and Process Potatoes Antitrust Litig.*

# Compliance

- What can a member do to avoid creating “plus factor” evidence?
  - (1) At meetings where alleged conspiracy is subject of discussion or vote:
    - If you have concerns or objections to a proposal, ensure that minutes reflect the fact that you raised objections;
    - If you vote “no,” to a proposal, ensure your “no” vote is recorded;
    - If you abstain from voting, ensure that minutes reflect your abstention (often, notes might say simply that a measure “passed unanimously” and not take account of abstentions from voting members who are present);
    - If you have pro-competitive, legitimate, self-interested reasons for supporting a measure, ensure this reasoning is reflected in minutes and your own records.

# *Compliance*

- (2) In making comments (public or private) about your market, industry, or programs of the association:
  - Avoid suggesting that trade association programs or actions will reduce supply, will increase price, or are contrary to producers' independent self interest.
- (3) When participating in association's Board of Directors or committees:
  - You may be presumed to have knowledge of association activities, plans, and strategies, to a greater degree than members *not* involved in BOD or committees.
  - Your subsequent actions may be judged as having been undertaken with that knowledge.
- (4) In *forming or joining* a trade association, take care with description of the organization's purposes.

# Conclusion

- Traditional law regarding participation and standard setting in a trade association is still in effect
- But, because the Supreme Court raised the bar in *Twombly* regarding the level of detail required in a complaint, plaintiffs—particularly in conspiracy cases—are pointing to trade association membership and participation in activities as part of their first line of attack
- Therefore, associations and their members need to asses the impact of:
  - Purpose of standard setting
  - Disparate impact
  - Due process
  - Composition of the standard setting committee
  - Board of Directors membership
  - Participation in association programs
  - Member statements and comments