

Legal Edge

Antitrust Primer for WTCA Chapter Associations

by Kent J. Pagel

Be mindful of these antitrust issues as you attend WTCA chapter meetings or commiserate with competitors!

As reported in the April issue, 2005 marks a year of renewed emphasis on WTCA Chapter activity for a stronger, more united industry. In fact, in the first quarter, the association welcomed two new chapters—Minnesota and Oregon—to the existing 30 organized WTCA Chapter associations throughout the U.S. Frequently we find that members have questions about the nature of antitrust laws when gathering with competitors in their market. Trade associations such as WTCA and each of its 32 organized chapters can absolutely play a positive role in the furtherance of a competitive economy. Nonetheless, as WTCA National and Chapter activities by definition are undertaken by a group of competitors, caution must be exercised to comply with antitrust laws. The purpose of this article is to educate those members new to WTCA chapters and re-familiarize veteran WTCA Chapter members of the issues to be aware of and recommendations to follow when participating in trade association activities. This article will explore the antitrust discussion into greater detail than the current WTCA Chapter Antitrust Policies formally adopted in June 1998 (see sidebar on facing page).

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Antitrust Laws by Definition

In short, federal and state antitrust laws are designed to promote competition by describing activities, by type, that are unlawful. Each activity named is viewed as an unreasonable restraint on competition. Remember that competition within all marketplaces is an activity that federal and state legislatures will always encourage, as healthy competition facilitates lower prices and higher quality goods and services.

Conditions of Antitrust Violation

Merely joining together in a trade association to further members' common interests or provide them services is neither a violation of federal antitrust law nor the antitrust legislation that exists in each of the fifty states. You could almost view this as a "safe harbor" for competitors to work together for legitimate purposes. It is only when a trade association or its members engage in agreements, combinations or conspiracies in restraint of trade, or through the implementation of other unreasonable trade restraints, that they run the risk of violating the antitrust laws. Because the penalties and ramifications are so significant if an association or its membership engage in trade-restraining activity, extreme caution must be exercised in all activities undertaken by their membership. This axiom holds true for both WTCA and each WTCA-sanctioned chapter.

Price Fixing: The Ultimate Violation

Price fixing is considered the most damaging of anti-competitive antitrust activities, and it is the area of the law most often violated by trade associations and their members. Price fixing can occur at formal meetings, but is more common during "rump sessions" around a bar or at dinner. Furthermore, price fixing does not require that a specific price be fixed or agreed upon. A price-fixing violation can be inferred from the fact of similar price conduct by members even if no written or oral

at a glance

- ❑ The benefit of belonging to an association is that it is the one place where a group of competitors can work to positively protect and advance the industry in which they are involved.
- ❑ The detriment of belonging to an association occurs when anti-free-market activities begin to take place.
- ❑ Knowing where competitors can collaborate and where not to tread is extremely important.

Chapter Antitrust Policies

As the legitimate goals of WTCA and its chapters can be achieved consistently with a properly formulated antitrust compliance program, each chapter should specifically adopt an approved antitrust compliance program. Such program should contain some or all of the following elements:

A chapter's board of directors or other governing body should adopt a written statement confirming that it is the chapter's policy to comply fully with federal and state antitrust laws. The statement must be clear, concise, and strongly worded. The statement should leave no doubt in the minds of the members of the chapter that antitrust compliance is a first priority. A statement similar to the antitrust statement used by WTCA nationally could be adopted by the chapters.

AGENDAS, MEETINGS AND MINUTES: A detailed agenda should be prepared for each meeting of the chapter, and if there are any potential antitrust implications, it should be reviewed in advance by legal counsel. Counsel should furthermore be present at all meetings where antitrust sensitive issues are discussed. Accurate minutes must also be kept for all chapter meetings. They should include statements to show the interest of the members in complying with the antitrust laws. If antitrust sensitive issues are discussed, the minutes should be approved by counsel before adoption.

ANTITRUST GUIDELINES: An effective way of insuring that all members of a chapter follow the antitrust compliance policy is to issue the following specific guidelines, in the form of do's and don'ts to which they could refer as needed:

- **Do not** discuss current or future prices (be very careful of discussions of past prices).
- **Do not** discuss what a fair profit level is.
- **Do not** discuss an increase or decrease in price.
- **Do not** discuss standardizing or stabilizing prices.
- **Do not** discuss pricing procedures.
- **Do not** discuss cash discounts.
- **Do not** discuss credit terms.
- **Do not** discuss controlling sales.
- **Do not** discuss allocating markets.
- **Do not** complain to a competitor that his prices constitute unfair trade practices.

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agreement exists. A "wink and a nod" can amount to persuasive evidence that an illegal agreement to fix prices exists.

To avoid any charge of price fixing, members of all trade associations should refrain from engaging in discussions or communications regarding current or future prices or payment terms. Also, members should not discuss discounts, rebates, credit terms, or information about upcoming bids or invitations to bid. A simple way of looking at price fixing is to state that agreeing to any or all of the following can land you in jail and cost your company significant dollars to defend:

- What price to sell or buy at.
- How much to sell or buy.
- Whom to sell to or buy from.

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- Whether or not to deal with a particular customer.
- Who will win a bid.

Collaborative Agreements: Stay Away

Another classic antitrust activity is a collaborative agreement to engage in anti-competitive activity. An example is a group boycott among competitors not to sell to a particular customer or buy from a particular vendor. This activity is unlawful on the selling side when it is used to force the buyer to pay higher prices and on the buying side when it prevents a vendor from entering the market. Therefore, stay away from agreements that prohibit the selling to, purchasing from, or dealing with another business.

Dividing Markets: Just Say No!

Market division is an anticompetitive and illegal activity whereby competitors agree to divide markets or allocate customers. It is thus important that association members avoid communications regarding the refusal to sell to particular customers or in particular territories and markets.

The notion of market division should also be carefully considered as an association determines whether to accept a competitor's application to join such association. A company should not be denied membership solely for the reasons that it competes with a member or is affiliated with another association. Denial of membership may constitute a restraint of trade since members can derive an economic benefit from membership. Denial of such benefit limits a competitor candidate's right to compete. A trade association's rules regarding membership should be reviewed so that membership is available to all qualified businesses. Membership requirements, as well as the reasoning behind application refusal or expelling a member, must also be kept reasonable and non-discriminatory.

Setting standards by a trade association that unreasonably restrict market entry or exclude competitors from the market also constitutes an antitrust activity. While standard setting by a chapter without the input or involvement of the national organization is not a good idea (the standard may negatively impact members of other chapter organizations), close supervision of standardization and allowing voluntary participation in the process are good ways for trade association chapters to dodge possible antitrust law violations. Standards have many pro-competitive benefits to consumers by providing them with information, ensuring products of different manufacturers are compatible with each other, and keeping unsafe products out of the marketplace. On the other hand, the setting of such standards has the potential to erect barriers to market entry, exclude competitors from the market, reduce market choice and raise market prices.

Collecting Economic Data & Statistics Can Comply with the Antitrust Laws

With supervision and careful antitrust planning, trade associations can engage in the statistical reporting on economic and business factors affecting the industry, including past sales and production costs. When an association seeks to collect data, the purpose of the data collection program should be defined and the pro-competitive benefits of collecting such data should be communicated to the membership. Generally this will mean that only historical data is collected and in the process, customer-specific information and the identity of industry suppliers and customers should not be disclosed. When data collection is undertaken, consider the following antitrust planning:

- Set it up to prevent even the appearance of using the data or the collection process to fix prices.
- Generally only “historical” prices, costs, capacity and output levels data should be gathered.
- Aggregate sufficiently before publication—make sure that a sufficient number of survey respondents exist.
- Collect and gather the data through the association itself or more preferably use a third-party contractor.
- Implement firewalls and other measures to ensure raw data isn’t shared among competitors in an online reporting scenario.
- Consider making the data available to the public.

Let’s conclude with a few DOs and DO NOTs to ensure that all WTCA members and chapters remain compliant with the antitrust laws. Some of these may already exist in the current WTCA Chapter Antitrust Policies; others are new.

DO NOT discuss price or terms or conditions of sale among competitors.

DO report any attempt by a competitor to discuss or otherwise exchange price information to the officers and Board of Directors of the association so they can undertake (if applicable) a proper, formal investigation.

DO NOT agree among competitors to divide markets, territories, customers or products.

DO NOT at any time induce, support or engage in the practice of disclosing a bid or proposal to any other bidder. There shall not be any discussion with a competitor regarding either party’s intention to bid or refrain from bidding. Even informal agreements in which one member agrees to stay out of another member’s territory will constitute a violation of the antitrust laws.

DO NOT agree formally or informally, to avoid selling to, purchasing from, or doing business with another firm.

DO engage in developing standards applicable to the industry or products sold ONLY in accordance with pertinent guidelines and ONLY if the setting of such standards does not have the potential to erect barriers to market entry, exclude competitors from the market, reduce market choice and raise market prices.

DO NOT develop standards or create policies within a regional Chapter environment that is not vetted so that it is applicable to all industry markets and whose intent is to restrict access to that regional market.

DO avoid at all gatherings the discussion of current or future prices and be very careful of discussions of past prices.

DO NOT discuss what is a fair profit level, and increases or decreases in price, standardizing or stabilizing prices, pricing procedures, or cash discounts.

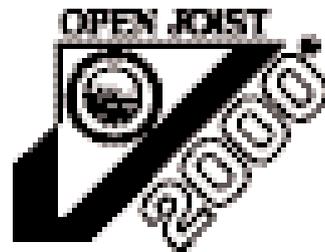
DO NOT complain to a competitor that his prices are too low.

DO NOT control sales, allocate markets or discuss with competitors refusing to deal with a particular seller or a particular buyer.

DO NOT use the association to negotiate jointly with customers or suppliers. **SBC**

Kent J. Pagel is the President and Senior Shareholder of Pagel, Davis & Hill, a professional corporation. Mr. Pagel serves as the outside counsel for WTCA.

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