

## Articles

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### Association Membership and Program Restrictions and the Antitrust Laws: Don't Stumble Out of the Gate

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Trade and professional associations benefit society by promoting various industries, professions, and other interests. To realize their goals, however, associations must sometimes limit membership in the association or association-sponsored programs. A recent court decision, *Abraham v. American Quarter Horse Association*, No. 2:12-cv-00103-J (E.D. Tex.), highlights how association restrictions can sometimes run afoul of the antitrust laws, especially where the restrictions are intended to, or have the effect of, foreclosing a competitor's ability to compete in the market. In this regard, the case shines a light on the tightrope that associations walk when trying to balance membership and programmatic needs against the limits imposed by the antitrust laws.

This article provides a brief overview of the case, followed by suggested best practices for associations to minimize the antitrust risk of membership and program restrictions.

#### Summary of *American Quarter Horse Association*

In *American Quarter Horse Association*, the plaintiffs, who breed cloned horses, alleged that "Rule 227 (a) of the American Quarter Horse Association ["AQHA"] Regulations, which prohibited the registration of any horses produced by the cloning process and their offspring, violates Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2)...." Specifically, as explained by the court, the plaintiffs argued that elite Quarter Horse breeders controlled the Association's rules committee, and that "[t]hese breeders" opposed cloning and sought to exclude clones from the registry to "keep prices for their own horses high by avoiding competition...."

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade. Most association conduct, including membership and program restrictions, is analyzed under the rule of reason, which balances the procompetitive benefits of the challenged conduct against the potential anticompetitive harm. Section 2 of the Sherman Act prohibits monopolization and attempted monopolization, claims that require proof of both monopoly power (the power to control prices or exclude competition) and the willful acquisition or maintenance of that power through "predatory" or "exclusionary" conduct.

In *American Quarter Horse Association*, the plaintiffs argued that the registry restriction "precluded competition" from cloned horses and "established unnecessary and insurmountable barriers to entry into the market." In terms of competitive harm, the plaintiffs alleged that most shows and races required horses to be registered with AQHA in order to compete. The AQHA defended the rule, in part, on grounds that the registry restriction was designed to promote and preserve the integrity of the breed and to further the association's internal management – goals to which most, if not all, trade associations can relate. The AQHA also cited a number of cases that upheld similar breed registries or membership requirements. *Jack Russell Terrier Network of Northern California*, 407 F.3d at 1032, 1035, for example, held that a breed registry and its local clubs had a common goal in pursuing the best interests of the Jack Russell Terrier breed and protecting the current and future value of that breed as determined by the breed registry's standards.

#### Managing Your Association's Membership and Program Requirements and the Antitrust Laws

In light of the *American Quarter Horse Association* decision, associations should review their current membership standards and the requirements for participating in an association-sponsored program (such as a certification or accreditation program) for compliance with the antitrust laws. This is particularly important for "dominant" associations or those that control access to a facility deemed (fairly or not) to be essential to competing in a market. Even smaller associations should be mindful of the potential impact of a rule limiting membership or program participation. No association – no matter its size – wants to end up with the fate of its membership or program standards in the hands of a jury. The

following are basic steps that every association should keep in mind when promulgating or enforcing association membership or program restrictions.

In denying the defendant's summary judgment motion, however, the court found that "a factfinder could determine that the AQHA has monopoly power over the economically viable Quarter Horse market because its rules control not only market participation but whether, in turn, a horse is valuable or relatively worthless." The court also found that the question of the rule's alleged procompetitive benefits could "best be dealt with at trial." The jury, following trial, rendered a verdict against AQHA, concluding that the rule was exclusionary and not reasonably tailored to achieve AQHA's legitimate procompetitive goals.

***Consider the Antitrust Risks Before Imposing a Restriction.***

An association's membership or program restrictions should be, to the greatest extent possible, narrowly drawn, nondiscriminatory, objective, fully articulated, and uniformly applied. Restrictions should be implemented only to the extent necessary to further a legitimate procompetitive purpose. In addition, to limit the risk of "disgruntled" members or others raising due process or other similar arguments, associations should provide prospective members/participants with (a) a clear statement of the association's requirements, (b) notice of a potential adverse decision, (c) an opportunity to respond, and (d) an opportunity to appeal any adverse final decision.

***Maintain Oversight of Committee Activities.***

A subtle, but important, takeaway from *American Quarter Horse Association* is the need for an association's officers, directors, and staff management to exercise oversight of committee activities. According to the court, "Plaintiffs...produced evidence that the AQHA actually made its decisions to defend Rule 227(a) through the competitor-controlled SBR Committee, and that even if the Board did not relegate control to the Committee on cloning matters, it did not review or question the Committee's unanimous recommendations."

In practical terms, associations should exercise oversight by implementing the following basic steps:

- Adopt a formal antitrust policy in which the association affirms its commitment to abide by the spirit and the letter of federal and state antitrust laws. The policy should be distributed to (and possibly signed by) the association's officers, directors, employees, and representatives. An association should refrain from enforcing "unwritten" policies that restrict membership or program participation.
- All restrictions should be reviewed for full compliance with the association's governing documents.
- Require association meetings to have an agenda circulated in advance, and that minutes of all meetings properly reflect the actions taken at the meeting. Stop any meeting (formal or informal) where improper subjects are being or will be discussed.
- Ensure that any proposed board, committee, or staff recommendations or decisions with potential antitrust implications are reviewed in advance by in-house or outside counsel.

***Be Careful What You Say and Do.***

From both the antitrust and corporate perspectives, an association should operate in a transparent manner subject to written policies and procedures. At the same time, however, anything said or written by a member or employee, including e-mails, text messages, and the like, may end up before a jury in the event of litigation. In *American Quarter Horse Association*, for example, the plaintiffs presented evidence that AQHA members had previously expressed concerns about competition from cloned horses. Needless to say, an association's statements, actions, and writings should be as clear and unambiguous as possible to avoid misinterpretation or misconstruction after the fact. This rule carries through to statements made and actions taken at or in connection with association-sponsored conferences, trade shows, cocktail parties, dinners, and social events, and on association-sponsored electronic communication services such as listservs and other similar forums.

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The *American Quarter Horse Association* case is a reminder for associations of the potential antitrust risk of membership and program restrictions. To minimize this risk, associations should review their membership and program eligibility and participation rules carefully to ensure that they are appropriate for the market and narrowly drawn to further a legitimate procompetitive purpose of the association.

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