Avoiding Trade Association Antitrust Pitfalls

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Introduction

Trade Associations and Antitrust – Pro-Competitive Purposes

- Enforcement agencies and courts recognize trade associations perform lawful and useful purposes
  - Develop safety protocols
  - Lobby the government
  - Establish environmental, technical or product standards
  - Certify products
  - Compile industry-wide statistics, or benchmarks, to help members efficiently run their businesses
  - Institute best practices
  - Jointly fund research

Trade Associations and Antitrust – Why Does it Matter?

- Competitor employees in same place at same time can lead to allegations of collusion both in civil and criminal matters.
- The Federal Trade Commission can and has investigated trade association activities as anticompetitive.
- Benchmarking activities implicate the antitrust laws.
- Trade associations that function as Standard Setting Organizations face additional antitrust concerns.

Antitrust Conspiracies: The Basics

Antitrust Conspiracies – The Basics

- Sherman Act Section 1: "Every contract, combination… or conspiracy in restraint of trade or commerce… is declared to be illegal"
- Step One:
  - Was there an agreement?
    - "Conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).
    - Formal or written agreement not required
    - Common purpose or understanding
    - Direct vs. circumstantial evidence

Antitrust Conspiracies – The Basics

- Step 2: Does the agreement unreasonably restrain competition?
- Per se:
  - Agreements so pernicious that they automatically restrain competition and are illegal
  - Courts have found certain types of agreements to be per se illegal: Price fixing; Bid rigging; Restrictions on output or sales volume; Customer, geography, or product allocation; Wage fixing; No-poaching; Group Boycott
- Rule of Reason:
  - If not "per se," then agreements are examined to determine whether the anticompetitive effects of the agreement outweigh the pro-competitive benefits
- Recovery
  - With limited exceptions, civil complainants can seek treble damages and reasonable attorneys fees for violations of the antitrust laws

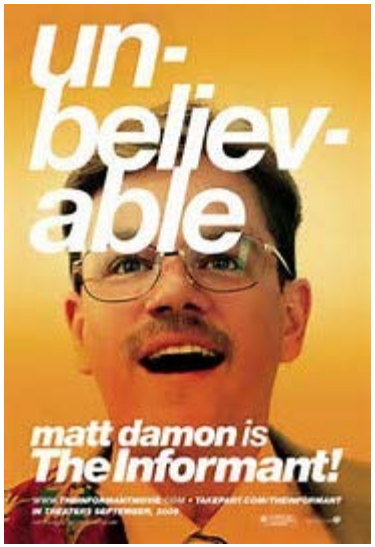
Government Enforcement of Antitrust Laws

Government Enforcement – Criminal Penalties

- Criminal investigations by DOJ may scrutinize behavior at trade association meetings and events for evidence of collusive conduct
- Why is this important?
  - Felony Convictions
    - Criminal fines for individuals up to $1 million or twice the resulting gain or loss (even if > $1 million)
    - Incarceration -- Prison time up to 10 years
      - Average jail sentence from 2010 to 2016 - 22 months
      - 3 times the average sentence in the early 1990s and twice as many individuals are incarcerated now
      - And the DOJ continues to push for bigger sentences
  - Corporate Penalties
    - Criminal fines up to $100 million or twice the resulting gain or loss - largest fine to-date is $925 million
      - more than 25 fines > $100 million
    - Restrictions on future business

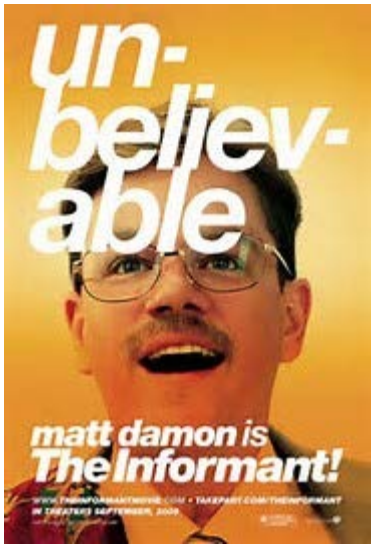
Government Enforcement – A Conspiracy Investigation Made for the Movies!

- Lysine Investigation (late 1990s)
  - Conspirators created a subcommittee of the European Feed Additives Association, a legitimate trade group, as a way to meet and collude regarding lysine prices and production
  - Co-conspirators caught on tape by FBI discussing how they would use the subcommittee as a "perfect cover" for price-fixing meetings
  - Created false agendas and false minutes for subcommittee meetings to send to the European Feed Additive Association
    - "Miscellaneous" topic on agenda was code for discussing price-fixing and allocation of markets
  - Biggest fine was levied upon Archer Daniels - $100 million



Government Enforcement – A Conspiracy Investigation Made for the Movies!

- Practice Pointer: Trade shows and other industry events can face same scrutiny
  - Automobile parts manufacturer executives allegedly attended same auto shows and automobile parts expos
  - To-date, three dozen companies have agreed to pay over $2.5 billion dollars in fines and over two dozen executives have been sentenced to prison



Government Enforcement – FTC Consent Decrees

- Section 5 of the FTC Act prohibits unfair methods of competition
  - The FTC uses Section 5 to challenge and impose prohibitions on trade association actions
- National Association of Music Merchants (2009)
  - Consent decree: prohibited NAMM from encouraging or facilitating the exchange of retail price, pricing policy, margin, and terms of sale information between members
- California Association of Legal Support Professionals (2014)
  - Consent decree: prohibited CALSPro from banning comparative ads and preventing members from offering discounted rates to another member's clients or recruiting another member's employees
- Music Teachers National Association (2014)
  - Consent decree: prohibited MTNA from restricting or declaring unethical music teachers soliciting clients from a competitor teacher
- Note: It remains to be seen whether the FTC under the Trump Administration will be as active in its use of Section 5 as the FTC during the Obama Administration

Private Antitrust Actions

Private Antitrust Actions

- Trade associations and their members also can be a focus in civil litigation.
  - Many Section 1 complaints contain allegations regarding trade association membership and contemporaneous presence of defendants at trade association meetings.
- Civil standard: The "opportunity to conspire," without more, is insufficient to sustain inference of conspiracy
  - However, conspiracy allegations are viewed in entirety
    - *In re Domestic Drywall Antitrust Litigation*: "[O]pportunities to conspire may be probative of a conspiracy when meetings of Defendants are closely followed in time by suspicious actions."

Private Antitrust Actions – Recent Decisions

- *In re Chocolate Confectionary Antitrust Litigation* – SJ granted by MD PA in 2014 (affirmed by Third Circuit in 2015)
  - Ps allegations included that defendant executives attended same Grocery Manufacturers Association meeting
  - District Court was not persuaded by this allegation:
    - "The evidence presented by Plaintiffs shows only that several top executives from defendant manufacturers were among hundreds of other attendees at a Grocery Manufacturers Association trade meeting in June 2004 – plaintiffs have not discovered anything more insidious…The court rejects the suggestion that the contemporaneous presence of defendants' officers at a trade association meeting permits an inference of conspiracy. This suggestion is pure conjecture, and it is insufficient to carry plaintiffs' summary judgment burden."
  - Decision reached on full record (initial complaints filed in 2007 and 2008)

Private Antitrust Actions – Recent Decisions

- *In re Text Messaging Antitrust Litigation* – SJ upheld by Seventh Circuit in 2015
  - History: Seventh Circuit affirmed denial of MTD in 2010. With respect to trade associations, it wrote that "the allegation in the complaint that the defendants belonged to a trade association and exchanged price information directly at meetings" was "of note."
  - After discovery and upon summary judgment briefing, Seventh Circuit determined that case should be thrown out. Regarding trade associations, the court noted:
    - The presence of "non-conspirators" at these meetings made probability of collusion at events less likely
    - "Substantial lag" between meetings and price increases
    - No evidence presented by plaintiffs of what information was exchanged between defendants at meetings

Private Antitrust Actions – Recent Decisions

- *In re Titanium Dioxide Antitrust Litigation* – SJ denied by District of Maryland in 2013
  - Evidence presented by plaintiffs pertaining to trade associations
    - The nature and frequency of defendants' price increases dramatically changed after the Titanium Dioxide Manufacturers Association (TDMA), which previously was exclusive to European producers, opened "associate" membership to DuPont and Japanese manufacturer to allow them to participate in TDMA's Global Statistics Program
    - Program involved monthly reporting of previous month's production and inventory data
    - Price increases announced in close proximity to TDMA meetings
      - 88% of increases announced within 30 days of TDMA meetings
    - Documents related to TDMA and statistics program uncovered:
      - Internal defendant communication called the statistics program "an important effort for us to get the industry to make more informed decisions" and "the best opportunity we have in structuring industry data for all our collective needs"
      - A DuPont email regarding a co-defendant price increase stated, "The timing may be no coincidence [because] their reading of the [Global Statistics] info like ours should give them confidence that [North America] price increases can be prosecuted despite the flat market in [North America] itself."

Private Antitrust Actions – Recent Decisions

- *In re Titanium Dioxide Antitrust Litigation*: In denying SJ, the court explained:
  - "The Defendants contend that the Plaintiffs cannot build a case on this evidence since there is no direct proof that the contacts listed [by Plaintiffs] were anything more than legitimate meetings for procompetitive business purposes. These mere 'opportunities to conspire,' the Defendants argue, are not proof of collusion. Yet the Plaintiffs have presented evidence, not only of the large number of contacts, but also of the content of these communications, that suggests cartel behavior. This is exactly the kind of circumstantial evidence that, when viewed in conjunction with the massive record in this case, could lead a jury to reasonably infer a conspiracy in restraint of trade."

Benchmarking

Benchmarking

- Generally, in the U.S., the exchange of non-price and historical price data is acceptable if certain guidelines are followed:
  - An independent, third-party operates data collection, data compilation, and distribution of report created using data
    - The third-party should maintain appropriate firewalls so that participants cannot access each other's data
  - The older the information provided by participants, the better
    - Preferably more than three months old
  - Benchmark reports should only include aggregated data and should be on blind basis
  - There should be at least five participants reporting data for each statistic in each report and no individual participant's data should represent more than 25% of any particular statistic
- Practice Pointer: Following these guidelines places a reporting program in the "safety zone," meaning the agencies will not challenge the program unless there are extraordinary circumstances AND helps defend against private claims that allege a program was used for conspiratorial purposes

Standard Setting Organizations

Standard Setting Organizations

- While standards create many competitive benefits, they also can lead to anticompetitive harms – barriers to entry, facilitation of collusion, exclusion of competitors, inhibition of innovation.
  - Indeed, competitor groups can use standards to insulate themselves from competition by excluding competing companies and products from conforming to the industry standard.
- Accordingly, SSOs face antitrust scrutiny, and trade associations that also act as SSOs need to ensure that their processes for creating standards are not anticompetitive.
- The Standards Development Organization Advancement Act of 2004 provides some limited protections to SSOs while engaged in standard setting activities.
  - Rule of Reason analysis; no treble damages
  - Protected activities exclude exchanging competitively-sensitive information not reasonably required or entering agreements to fix prices or allocate customers.

Standard Setting Organizations

- Standard Setting Considerations
  - Does standard promote goal it is seeking to advance, such as safety, uniformity, or quality?
  - Is timely notice for standard setting given to all parties believed to have direct and material stake in the standard?
  - Does the standard setting process permit all parties with a direct and material stake in the standard the right to participate in the process?
  - If possible, are members of standard setting process from various parts of industry?
  - Does SSO keep written record of standard setting process?
  - Do SSO procedures provide unbiased review/appeal process if entity complains about chosen standard?
  - Does SSO consistently follow its written standard setting procedures?

SSOs – Standard Essential Patents

- A member of a SSO might hold a patent to certain technologies that are necessary to implement a standard
  - Without limitations, this patent holder could extract supracompetitive royalties from its competitors if the standard is adopted.
  - A standard essential patent holder can face antitrust scrutiny, both from the government and private plaintiffs, if it does not license its required technology upon reasonable and non-discriminatory (RAND) or fair, reasonable, and non-discriminatory terms (FRAND)
- SSOs:
  - Members disclose IP interests involved in any developing standards
  - Members license any standard essential patents on RAND and FRAND basis
- SSO members:
  - Be aware of disclosure obligations regarding standard essential patents
  - Consult with counsel regarding these obligations and RAND/FRAND licensing

SSOs – Standard Essential Patent Cases

- *Rambus, Inc. v. FTC*
  - In June 2002, FTC sues Rambus under FTC Act Section 5 alleging that Rambus failed to disclose its DRAM patent interests to the Joint Electron Device Engineering Council (JEDEC), which standardized DRAM
  - In February 2004, the ALJ dismissed the complaint – (1) Rambus did not withhold material information to JEDEC and (2) insufficient evidence to prove that JEDEC would have standardized alternative if Rambus made full disclosure
  - In July 2006, Commission vacated ALJ decision, determining that Rambus engaged in unlawful monopolization
    - Rambus intentionally misrepresented IP information to JEDEC
    - But for misrepresentation, JEDEC would have excluded Rambus's technologies from standard or demanded RAND assurances

SSOs – Standard Essential Patent Cases

- *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008)
  - DC Circuit reversed, holding that the FTC "failed to demonstrate that Rambus's conduct was exclusionary"
  - The court explained that the Government, as plaintiff, needed to prove an anticompetitive effect – harm to the competitive process, not just one or more competitors
    - Insufficient evidence that JEDEC would have standardized alternative technologies had it known the scope of Rambus's IP
    - Court not convinced that Rambus using deception to avoid RAND licensing terms harmed competition
      - "[A]n otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition."
      - In the "but for" world, if JEDEC had still standardized the same technologies, then Rambus's deception "cannot be said to have had an effect on competition in violation of the antitrust laws"

SSOs – Standard Essential Patent Cases

- *FTC v. Qualcomm, Inc.* – Complaint filed January 17, 2017
  - Qualcomm applied a "no license, no chips" policy and refused to sell its baseband processors to any cellphone/tablet manufacturers that did not agree to the licensing terms. Unlike Qualcomm, most component suppliers did not require these phone producers to pay for a patent license in addition to the price of the processor. Moreover, the customers paid "elevated royalties" if they use chips from a rival of Qualcomm.
    - Device manufacturers could not lose Qualcomm's chips because then their devices would no longer work on certain key networks (e.g. "premium LTE")
  - Qualcomm refused to license its standard essential patents to competitors despite promises to do so during standard-setting process
  - Qualcomm won exclusive deal with Apple in return for billions of dollars in reduced patent royalties to keep Apple from buying processors from rivals
- FTC voted 2-1 to bring suit, but dissent issued by Acting Chairwomen Ohlhaussen
- Private suits followed FTC complaint
- Qualcomm already fined nearly a billion dollars in both China and Korea for IP licensing practices

Questions & Answers

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- Co-chair of the Commercial Litigation Practice Group.
- Focuses her practice on a wide range of complex commercial litigation including antitrust, unfair trade practices, consumer protection, health care litigation, class actions and multi-district litigation.
- Ms. Levine has completed the American Health Lawyers Association's arbitration and advanced mediation training and the International Institute for Conflict Prevention & Resolution's mediation training

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- Practice primarily focuses on antitrust law.
- Experience includes representing clients in class action antitrust litigations at the trial and appellate level, defending mergers and acquisitions before the U.S. antitrust agencies, advocating for clients in anticompetitive conduct investigations by the U.S. government, providing counsel to clients to avoid antitrust liability, and preparing Hart-Scott-Rodino filings.

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