Trade & Professional Associations: What You Need to Know About Antitrust Law

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Panelists

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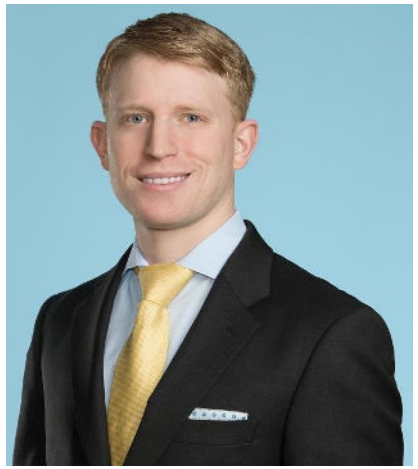


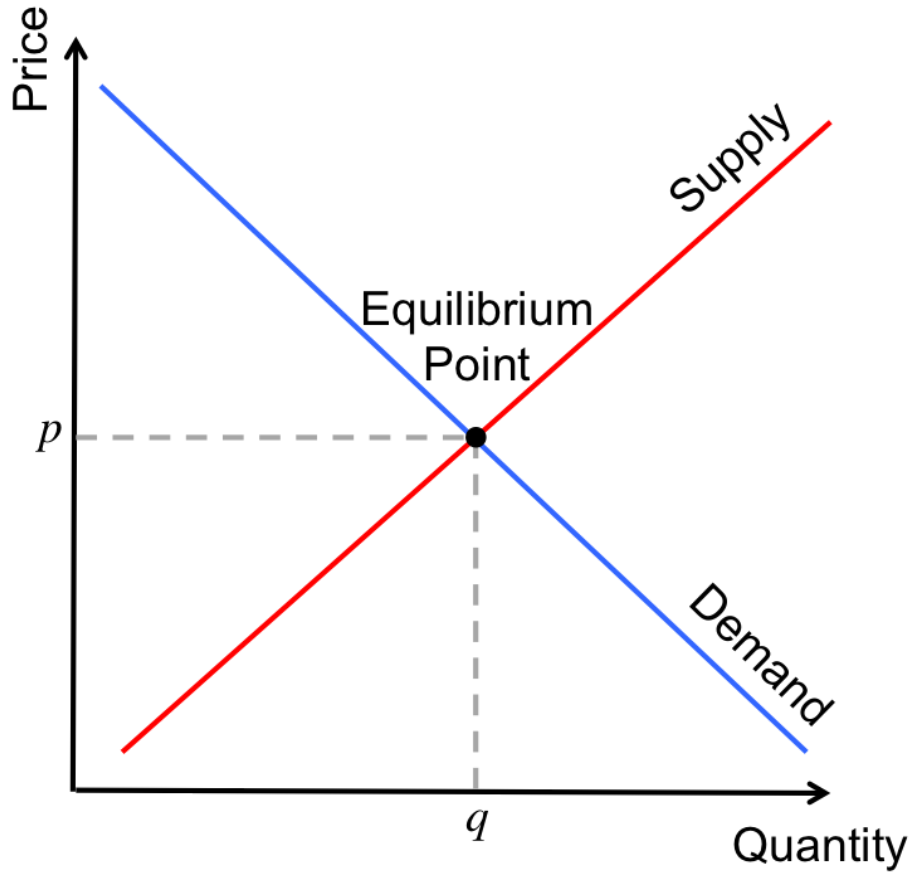
Brian Scarpelli

ACT | The App Association

Panelists

1. Antitrust Laws & Principles
2. Antitrust Applied to Associations
3. Recent Trends – Algorithmic Collusion
4. Recent Trends – Information Sharing
5. Recent Trends – Second Trump Administration

- Antitrust law protects competition & free market
- Prohibits businesses from **improperly acquiring or exercising *market power*** either ***alone*** or ***in concert*** with others
- ***Market power*** is the ability to raise prices (or lower wages/input costs) above (below) competitive levels, reduce output, or exclude rivals from a relevant antitrust market



Antitrust Enforcement and Penalties

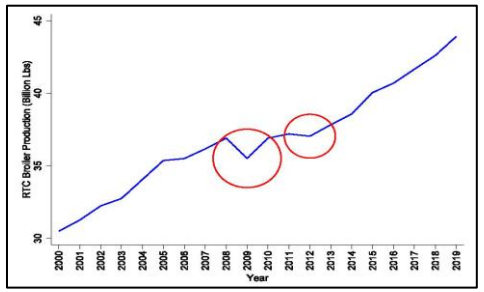
- Criminal Felony Charges
  - 10 years in prison
  - Fine: $1M individual, $100M corporate, or if larger, double the gain/loss at issue
- Federal Antitrust Agencies (FTC/DOJ)
  - Civil investigations
  - Administrative or court cases
  - FTC can impose cease & desist orders, outside monitors, reporting obligations and other remedies
- State Attorneys General

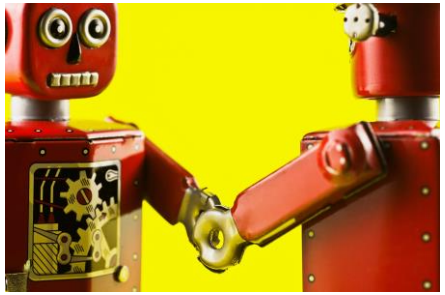
- Litigation
  - ***Treble damages, attorneys fees***, injunctions (gov't & civil)
  - Plaintiffs may be customers, competitors or suppliers
  - Class actions
- Discovery/Investigation Scope
  - ***Antitrust discovery is broader than anything you've ever seen before***

Antitrust Laws & Principles: Major Antitrust Laws

Law	Prohibited Conduct
Sherman Act, Section 1 (1890)	***Agreements*** with competitors, customers, or suppliers that unreasonably restraint trade and harm competition
Sherman Act, Section 2 (1890)	***Monopolization***/attempts to monopolize. Prohibits ***independent***, anticompetitive/exclusionary conduct (i.e., predatory, below-cost pricing) by firms to obtain or maintain market power, as well as ***conspiracies*** to do so.
Federal Trade Commission Act ("FTC Act") (1914)	Unfair methods of competition and ***unfair/deceptive acts and practices*** (i.e., false advertising)
Robinson-Patman Act (1936)	Certain forms of ***price discrimination*** and ***promotional allowances*** in sales of commodities.
Clayton Act, Section 7 (1914) Hart-Scott-Rodino Act ("HSR") (1976)	Prohibits ***mergers & acquisitions*** that substantially lessen competition, and certain interlocking directors
State antitrust law	Often mirrors federal standards, but some states (California in particular) go further than federal law.

"Agreements" Under Sherman Act Section 1





- Law prohibits "contracts," "combinations," and "conspiracies" that unreasonably restrain trade.
- Courts *infer* agreements even without a written contract
  - Business behavior that is irrational absent unlawful agreement
  - Sharing/exchanging competitively sensitive information
  - Conscious parallel behavior coupled with "plus factors"
  - Conduct – winks, nods, thumbs up, etc.

Antitrust Standards: *Per Se* vs Rule of Reason

- Activity is evaluated under either *per se* or "rule of reason" standard
- ***Per se***: Conduct is condemned without inquiring into the potential benefits of the action or its actual harmful effects.
  - More likely to draw criminal prosecution and follow-on class actions
- **Rule of Reason**: A flexible inquiry, weighing the purpose, potential benefits, and competitive effects of the action
  - Scope varies widely from "quick look" to full scale inquiry
  - Defendants' market power is often critical factor

Common Agreements

Rule of Reason

- Standard setting
- Benchmarking/information exchanges with appropriate firewalls on competitively sensitive information
- Joint purchasing
- Contract manufacturing
- Ancillary restraints on joint ventures

Per Se

- Price fixing (including price levels, rebates, discounts, etc.)
- Bid rigging
- Fix/limit output levels
- Fixing wages (or other input costs)
- Geographic market allocation
- Customer allocation
- Group boycotts

Antitrust Applied to Associations

- Association directly violates the Sherman Act, such as negotiating prices on behalf of members, expelling or denying a member for being a price-cutter, facilitating bid-rigging
- Member violates the antitrust laws through the machinery of the association which doesn't have safeguards to prevent it
  - *Hydrolevel v. American Society of Mechanical Engineers* – members in leadership positions use their positions to harm competitor in the market by interpreting safety standards; apparent authority doctrine
- Members use the programs, activities or facilities of the association to engage in anticompetitive actions – *e.g.*, using the association's online forum to discuss member pricing issues, the capping of employee salaries, not doing business with a vendor

Antitrust Applied to Associations: Staff Liability

- There **should not** be personal liability for those who exercise ordinary and reasonable care in the performance of their duties, showing honesty and good faith, and who do not engage in anticompetitive discussions or actions

- There **may be** personal liability for those who participate in or knowingly approve of an antitrust violation

Antitrust Applied to Associations: Membership, Sanctions & Expulsion

- Rules and decisions on membership and expulsion are generally considered under the rule of reason – not *per se* violations
- Exception:
  - The rule or decision relates to access to some business input that is essential for effective competition, and
  - There are no plausible justifications stemming from the association's pro-competitive purposes
- In addition, if the membership rule or decision is made to enforce a *per se* violation (such as to exclude or kick out a price-cutter from membership), it itself may be deemed a *per se* violation

Antitrust Applied to Associations: Membership, Sanctions & Expulsion

- Rules and decisions on membership are generally considered under the rule of reason
  - Are the rules objective and consistently applied?
  - If the rules are subjective, is there a legitimate reason for the rule based on the pro-competitive needs of the association?
  - Is due process given to those expelled or denied membership?
    - Notice and opportunity to respond
    - Appeal process
    - Disinterested decision-makers
- Membership and sanctions may become *per se* violations when:
  - The rule or decision relates to access to some business input that is essential for effective competition, and there are no plausible justifications stemming from the association's pro-competitive purposes
  - If the membership rule or decision is made to enforce a *per se* violation (such as to exclude or kick out a price-cutter from membership), it itself may be deemed a *per se* violation

Antitrust Applied to Associations: Regulation of Member Conduct

- Many associations have codes of ethics/conduct regulating various aspects of members' business.
- This can be beneficial and pro-competitive
  - Industry members themselves often have the best incentives and the knowledge to maintain the reputation of the industry
  - Can improve the services offered to consumers and improve the truthfulness of advertising
  - Can have consumer-beneficial implications in areas such as health and safety and environmental protection
- Because of the potential benefits, this type of conduct is generally analyzed under the rule of reason

Antitrust Applied to Associations: Regulation of Member Conduct

- A code of ethics/conduct also can be anticompetitive
  - Restrictions on truthful advertising, especially relating to price
  - Restrictions on competitive bidding
  - Restrictions on the business hours of members
  - Restrictions on the opening of new business locations
  - Restrictions on business relationships with suppliers/vendors or competitors
  - Restrictions on fees set by members
  - Restrictions on output by members (*e.g.*, not offering particular products or services)

Antitrust Applied to Associations: Services to Members & Non-Members

- Services must be available to those who would be competitively harmed if denied the services only because they are not members.
  - The more competitively important the services are, the more important that companies are not excluded from those services for anticompetitive reasons
  - Sometimes courts decide that the service should be provided to non-members (at a cost-justified price, which can still be higher than members pay) rather than requiring that the non-members should be allowed to join the association
- Periodically review association services, whether they are available to non-members, and their cost/price, to determine if access to the service is essential to competition and access is fairly available to non-members.
  - Make sure that services like that are made available to non-members or if not that there is a good reason, tied to the benefits the association provides to members
  - There can be a higher fee for non-members than for members, but the fee should be related to the cost for providing those services to non-members

Antitrust Applied to Associations: Discussions at Meetings

- Because association meetings involve communications between rivals, care must be taken to avoid illicit communication
  - Discussions at meetings should have agendas pre-cleared by counsel
  - Antitrust guidance at start of discussions
  - Concise/accurate minutes to document conversations in-bounds
  - Legal monitoring for sensitive topics
- Topics where discussions could lead to illegal agreements (or the appearance thereof):
  - Pricing, including methods, strategies, timing, discounts, advertising
  - Whether to do business with suppliers/vendors, customers, or competitors
  - Complaints about other companies
  - Confidential plans re: output, employee compensation, marketing, or future product/service offerings

Antitrust Applied to Associations: Lobbying & *Noerr-Pennington*

- In general, petitioning the government cannot form the basis of an antitrust violation based on the effect of the petition succeeding; protection is rooted in the First Amendment
  - *Bona fide* lobbying of a federal or state legislature or agency to get that body to pass a law or enact a regulation that would block the entry of a competitor is shielded from liability under the *Noerr-Pennington* doctrine
  - Actions taken by the government in response to lobbying do not result in antitrust liability for the petitioners
- But if the petitioning is a sham and itself (rather than the government policy) has an anticompetitive impact, then that can form the basis of an antitrust violation

Antitrust Applied to Associations: Standard Setting

- Two broad types of association standards
  - **Health and Safety** – Industry gets together as experts to figure out best practices for consumer health or safety
    - Example: fire safety for building materials standards from the National Fire Protection Association
  - **Compatibility** – members of a variety of related industries get together to develop a standard that will make sure that their products work together
    - Example: Wall outlets and plugs on electrical devices – different companies make the different devices but they have to work together
- Sometimes association standards are adopted as law or regulation by federal, state or local governments, and sometimes they are merely promulgated and made available by the association

Antitrust Applied to Associations: Health & Safety Standards

- There should be a justification for the standard at the outset
- To the extent that the standard is going to limit access to the market for some companies, that exclusion must be justified
- Avoid allowing the process to be dominated by economically interested parties
- Ensure that all parties with a stake in the standard have an opportunity to participate meaningfully in the process
- If possible, avoid any concerted efforts to enforce the standard

Antitrust Applied to Associations: Compatibility Standards

- Same general rules as health & safety standards apply to development
- Compatibility standards often involve standard or pooled patents. Patent policies should be clear, consistently enforced and regularly announced
  - When should there be disclosure of patent rights/applications?
  - What should be disclosed (patent applications or just patents)?
  - Is there a requirement to search a member's patent portfolio?
  - What sort of commitments are required by the patent holder, if any, after disclosure?
    - FRAND / RAND (Fair, Reasonable, And Non-Discriminatory terms)
    - License negotiations
    - Disclosure of most onerous terms
    - License offer

Recent Trends – Algorithmic Collusion: Housing & Vacation Rental Cases

"RealPage has built a business out of frustrating the natural forces of competition. … RealPage sells software to landlords that collects nonpublic information from competing landlords and uses that combined information to make pricing recommendations. In its own words, RealPage … ***'ensures that [landlords] are driving every possible opportunity to increase price even in the most downward trending or unexpected conditions.'***"

Complaint, *United States v. RealPage, Inc.*, No. 1:24-cv-00710 (M.D.N.C. filed Aug. 23, 2024) (emphasis in original)

REALPAGE®

Maximize the Prospect and Resident Experience

Allegations:

- RealPage software balances supply and demand to maximize revenue growth
- RealPage urges customers to accept its pricing, which is necessary to increase revenue
- RealPage encourages keeping units vacant to increase revenue

Rental Housing

- ***In re RealPage, Inc., Rental Software Antitrust Litig.***, No. 3:23-MD-3071 (M.D. Tenn. Nov. 15, 2023)
- ***Duffy v. Yardi***, No. 2:23-cv-01391 (W.D. Wa. March 1, 2024)

Hotels

- ***Gibson v. Cendyn Group LLC***, No. 2:23-CV-00140-MMD-DJA (D. Nev. Jan. 25, 2023) [Las Vegas Hotels]
- ***Cornish-Adebiyi v. Caesars Entertainment***, D. N.J., No. 1:23-cv-02536-KMW-EAP (D.N.J. filed May 9, 2023) [Atlantic City Hotels]

Recent Trends – Information Sharing: **Withdrawn** "Safety Zone"

Withdrawn

1993 DOJ/FTC Antitrust Enforcement Policy Statements Policy in the Health Care Area

- Exchange of "factual" and "historical" information on fees and discounts can promote efficient development of the market:
  - Third-Party Managed: trade association, government, data purchaser, academic institution, or consultant
  - Historical: at least 3 months old
  - Aggregated: at least 5 firms; not one over 25% of weighted data (added 1996)
  - Anonymized: incapable of deriving individualized prices of a specific company
- Even prior to withdrawal in 2023, these were very very conservative guidelines (and were applied outside the nominal health care industry)
- Government specifically identified information sharing as an area where modern technology made the guidance potentially too permissive

Negative Factors

- Express/Implied Price Agreements
- Enforcement Tools (i.e. Audits)
- Joint Market Forecasts
- Actual Effects Irrational or Inconsistent with Economic Expectations
- Market Susceptible to Coordination (i.e. High Concentration, Fungible Products)

Positive Factors

- Free Deviation from Reported Prices
- Public Availability of Data/Results
- Anonymized/Aggregated by 3rd Party
- Proper Use & Active Price Competition
- Monitoring by Counsel @ Meetings
- Efficiency Enhanced by Data Sharing
- Historical Data is Safer

Recent Trends – Information Sharing: *Agri Stats* Cases

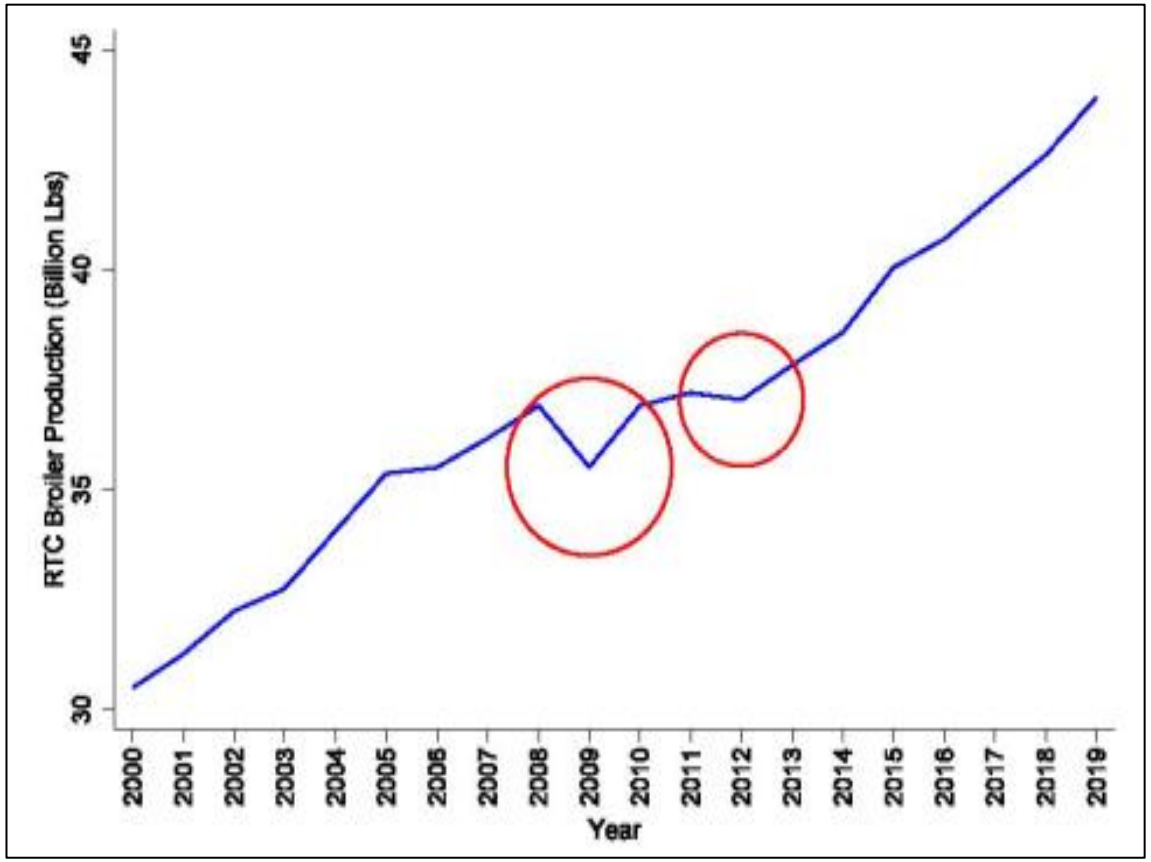
"Agri Stats operates its information exchanges to promote total industry profits at the expense of competition. It does this by providing processors with unique insights about their competitors' production, costs, and pricing—and refusing to sell the same information to processors' customers, farmers, workers, or consumers. Agri Stats enables and encourages processors to use its asymmetrical information exchanges to weaken competition, curb production, and increase prices for purchasers."

Second Amended Complaint ii, *United States v. Agri Stats, Inc.*, No. 0:23-cv-03009 (D. Minn. filed Nov. 15, 2023)

- Information exchange allegations:
  - Agri Stats advised processors how to use its reports to increase prices
  - Agri Stats encouraged producers to limit output
- Ignores Agri Stats summary judgment win in N.D. Ill.
- Agri Stats loses motion to transfer or dismiss (May 28, 2024)

More Agri Stats Litigation

- ***In re Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637 (N.D. Ill. Sept. 2, 2016)**
- ***In re Pork Antitrust Litig.*, No. 0:18-cv-01776 (D. Minn. Nov. 16, 2019)**
- ***In re Turkey Antitrust Litig.*, No. 19-8318 (N.D. Ill. Dec. 19, 2019)**



Plaintiffs' Graph of Ready to Cook production

Does a new President mean a new antitrust enforcement policy?

It's complicated!

Andrew Ferguson

Nominee as FTC Chair

Mark Meador

Nominee, FTC
(3rd Republican vote)

Gail Slater

Nominee to head DOJ Antitrust Division

Recent Trends – Second Trump Administration: Government Investigations

- Increasing trend of investigations into industry-wide practices under Biden Administration
  - Robinson-Patman Act investigations into retail price discrimination in beverage industry
  - FTC study into targeted pricing data collection and vendors in retail industry
  - Information sharing investigations
  - “No-poach” and wage-fixing investigations (including criminal cases)
- Investigations likely to continue, focus more likely on more ‘traditional’ and well-established antitrust harms like price-fixing, output restrictions, and boycotts

Questions?