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Trade Associations: Collaboration, Conspiracy and Invitations to Collude

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Generally, the US courts, as well as the two US antitrust enforcement agencies, the Antitrust Division of the US Department of Justice (DoJ) and the Federal Trade Commission (FTC) (together, 'the Agencies'), view the conduct of trade associations and their members as pro-competitive or competitively neutral.¹ Trade associations can perform difficult information gathering, set useful standards that would otherwise elude an industry, petition governments and inform the legislative and legal process. Because trade associations provide forums for competitors to communicate and to interact openly, to collaborate, to exchange information and to set standards, among other things, trade associations or their individual members can unwittingly run afoul of US antitrust statutes and regulations if they are not mindful of their activities.

The parameters of permissible collaborative conduct are dictated by a collection of state and federal statutes, including the Sherman Antitrust Act ('Sherman Act'), the Clayton Act and the Federal Trade Commission Act ('FTC Act'). These statutes are open to interpretation by the US courts under principles of common law. To supplement this statutory regime, the Agencies have further provided additional guidance on permissible conduct in their jointly issued Competitor Guidelines. The Competitor Guidelines provide trade associations and other information exchanges with an 'analytical framework to assist businesses in assessing the likelihood of an antitrust challenge.'² The Agencies have also issued Statements of Antitrust Enforcement Policy in Health Care ('Health Care Statements'). The Health Care Statements generally discuss antitrust enforcement in the health-care industry but offer significant insights that go beyond health care, including a very useful framework for analysing information exchanges.³

Conspiracy cases against trade associations are typically brought by private plaintiffs under Section 1 of the Sherman Act ('Section 1').⁴ While the scope of these private suits are varied, suits are often filed by customers who believe that competitors have used the trade association as a means to conspire, or by scorned association members whose product or process was not adopted or favoured by the association. While the Agencies rarely pursue civil actions against trade associations or other competitor collaborations for antitrust violations,⁵ the FTC has potentially signalled a change in this direction, having recently filed a complaint and consent order against a trade association in *In re National Association of Music Merchants, Inc.*,⁶ pursuant to Section 5 of the Federal Trade Commission Act ('Section 5').⁷

This article will first provide an overview of Section 1 and a short summary of recent antitrust cases that involve trade associations. It will then discuss the FTC's recent efforts to expand Section 5 to challenge information exchanges that may not fall within the ambit of Section 1.

Joint conduct

Contracts, combinations or conspiracies that unreasonably restrain trade or commerce are illegal under Section 1.⁸ Membership of a trade association or merely participating in trade association activities alone are not sufficient evidence of collusion or a conspiracy.

Antitrust plaintiffs must provide sufficient evidence to suggest that the trade association's members reached an actual explicit or tacit agreement. The Supreme Court's recent decision in *Bell Atlantic Corp v Twombly*⁹ has made it more difficult for plaintiffs to plead that trade associations or their members have conspired to act anti-competitively. To plead a successful conspiracy under Section 1, plaintiffs must now provide factual specifics regarding the time, place and parties of the alleged agreement, as well as other details indicating that the competitors' actions were coordinated. In addition, plaintiffs must plead plausible conspiracies. Short, general recitations of the law are insufficient.¹⁰

The following three recent cases illustrate antitrust plaintiffs' high pleading requirements, and the types of evidence that are required or are insufficient to establish liability.

Parallel pricing

In *In re Text Messaging Antitrust Litigation*,¹¹ text message customers filed a Section 1 complaint against four wireless services providers for conspiring to fix prices on per-message text message sales. The plaintiffs alleged that the defendants conspired to conduct a parallel pricing scheme where within a two-year period, they twice raised the price of text messages to match each others' rates within months of each rate increase; first from 10 to 15 cents, and then from 15 to 20 cents. As evidence of the price-fixing conspiracy, the plaintiffs pointed to the wireless service providers' membership and activities in multiple trade associations, as well as their failure to deny their involvement in a price-fixing conspiracy when responding to congressional inquiries, the 'historically unprecedented' nature of the parallel pricing and economic factors creating a collusion-prone market.¹² The court, however, dismissed the complaint, finding that it failed to plead that the defendants had an express or tacit agreement and that the complaint lacked any specific factual allegations regarding the alleged conspiracy.

In granting the wireless services providers' motion to dismiss, the court stressed that mere evidence of trade association membership, and a corresponding opportunity to conspire, was alone insufficient to support an inference of conspiracy. The court noted numerous factors that, if alleged, could establish an inference of a tacit conspiracy, including:

- specifics about the parties, purpose, or approximate dates of the conspiracy;
- details about the structure and content of the meetings;
- details about the type of employees who attended the meetings;
- statements by any defendant indicating an express or tacit agreement was made; and
- an indication of the terms of the agreement.¹³

The court then rejected the plaintiffs' other circumstantial evidence of anti-competitive behavior, concluding that the allegations did not rise to the level of plausibility and it was more likely that the defendants' price matching was 'more likely the result of independent decision-making in the defendants' unilateral best interests.'

The plaintiffs subsequently moved to amend their complaint to include more detailed allegations of the conspiracy.¹⁴ Granting the plaintiffs' motion, the court found that the facts alleged in the proposed amended complaint were sufficient to state a claim for conspiracy to fix prices. These new pleadings included the following allegations:

- the defendants expressly agreed to adopt a uniform per-unit price for text messages;
- a trade association formed committees for the defendants' high-level executives who conducted meetings on pricing;
- the express purpose of the trade association was to allow the competitors to 'profit together by placing the interests of the industry above and before the individual companies' individual interests';
- names of trade association meeting attendees who participated in the alleged conspiracy; and
- participants used the trade association meetings to disseminate pricing information.

It is worth noting that despite basing a substantial portion of the factual basis for their Section 1 claims on the defendants' trade association activities, the plaintiffs did not name the trade associations themselves as defendants in this action.¹⁵

Group boycotts

In *RealNetworks, Inc v DVD Copy Control Association*,¹⁶ RealNetworks alleged that the DVD Copy Control Association (DVDCCA), a joint venture trade association of movie studios, electronics companies and computer manufacturers; and seven of the DVDCCA's movie studio members, conspired to conduct a group boycott of RealNetworks' DVD-copying software in violation of Section 1. After failing to reach licensing or marketing agreements with any of the individual studios, who were themselves working on digital copy projects technologies, RealNetworks independently released its software and filed an action for declaratory judgment that it neither violated the Digital Millennium Copyright Act¹⁷ nor its licence agreement with the DVDCCA. Seven months later, it amended its complaint to include the conspiracy claims. The court then granted the defendants' motion to preliminarily enjoin RealNetworks from manufacturing or distributing the software.

Ruling on the defendants' motion to dismiss, the court first denied RealNetworks' conspiracy claims finding that it lacked Section 1 standing. Because its injuries stemmed from the court's injunction and not from the defendants' conduct, RealNetworks had failed to allege antitrust injuries. Holding in the alternative, the court further rejected RealNetworks' group boycott conspiracy claim because it had failed to allege any specific facts that any conspiracy existed. RealNetworks' lone allegation that any conspiracy existed – that one of the studios backed out of licensing negotiations with RealNetworks because it would not break with 'the studio cartel' without a substantial financial incentive for doing so – was insufficient evidence to establish an anti-competitive agreement to exclude RealNetworks.

Coercive conduct/product disparagement

In *TYR Sport, Inc v Warnaco Swimwear, Inc*,¹⁸ TYR Sport accused the defendants USA Swimming (the sport's governing body in the US), Mark Schubert (head coach of the national and Olympic teams) and Speedo USA of violating Sections 1 and 2 of the Sherman Act. TYR Sport alleged that the defendants conspired to have Schubert, who was also a paid spokesman for Speedo, restrain trade by dispar-

aging the swimsuits of Speedo's competitors and coercing members of the USA swimming team to use Speedo suits during Olympic trials and the Beijing Olympics. As evidence of the defendants' conspiracy, TYR Sport referenced several coercive acts and statements made by Schubert in his position as head coach, including a statement that swimmers who did not wear Speedo suits 'may end up at home watching [the Olympics] on NBC.' Having allowed the action to survive the defendants' motion to dismiss,¹⁹ the court ultimately granted summary judgment on both the disparagement and coercions claims, finding that the facts did not support the existence of a conspiracy to restrain trade.

First, the court rejected the contention that USA Swimming or Schubert's actions were anti-competitive because TYR Sport could not prove actual coercion – namely, that USA Swimming or Schubert had set a standard for the association's members and threatened to punish participants who deviated from that standard.²⁰ The court reasoned that mere '[p]romotion and persuasion are not actionable as antitrust violations, even where the speaker holds extraordinary prestige and influence. Such speech is just part of the warfare of competition.²¹ The court was further unpersuaded by TYR Sport's assertion that as a national governing body, unlike a normal trade association, USA Swimming could exercise 'monolithic control' over its sport and members. Because USA Swimming did not have any enforcement mechanism in place to punish members who chose not to use Speedo's swimsuits, neither Schubert's statements touting the benefits of Speedo suits over its competitors, nor his attempts to have swimmers switch suits, were anything more than speech. USA Swimming's own rules and policies allowed the swimmers to choose their own suits. Furthermore, members of the USA team were selected based on their swim times at the Olympic trials. Schubert had no discretion to pick team members, whether based on their swimsuits or otherwise. Although Schubert had the authority to punish swimmers (because he had access to their discretionary funds, could choose which swimmers competed in relays or other events and could designate certain swim clubs for additional funding), TYR Sport failed to provide any evidence that Schubert actually exercised this authority. In a subsequent decision, the court further dismissed TYR Sport's Sherman Act product disparagement claim, finding that it did not provide evidence that the defendants' statements had a 'significant and enduring adverse impact on competition.'²² The court considered Schubert's statements – that TYR Sport's products were 'inferior' and that swimmers should 'wear Speedo... to compete at the highest level' – as puffery and not commercial speech.

Federal Trade Act invitations to collude

Section 5 of the FTC Act generally prohibits 'unfair methods of competition' that affect commerce. Section 5 is more limited than other antitrust statutes in that it does not provide for treble damages or private causes of action. Traditionally, this expansively worded statute covered much, if not all, of the same conduct as Section 1 of the Sherman Act. The FTC, and several of its Commissioners, have recently argued that Section 5 has even wider reach.²³ According to the FTC, conduct covered by Section 5 broadly includes 'deceptive, collusive, coercive, predatory, unethical, or exclusionary conduct or any course of conduct that causes actual or incipient harm to competition.'²⁴ While Section 1 remains a viable option for the FTC to prosecute collusive behaviour, several statements and consent orders issued by the FTC within the past year indicate the FTC's proclivity for, and growing use of, Section 5 to challenge potentially 'unfair' acts, even where no definable agreement has been made and therefore no antitrust violation to speak of. Accordingly, the same conduct

that may withstand *Twombly* scrutiny under Section 1 – because it is generally insufficient to establish the existence of an actual anti-competitive agreement – may still be a violation under Section 5.

In *re U-Haul Int'l, Inc and AMERCO*,²⁵ the FTC accused U-Haul's CEO and chairman of inviting the company's closest competitor, Avis Budget Group ('Budget'), to match U-Haul's price increases for truck rentals on multiple occasions. During a conference call with industry analysts, the FTC alleged that U-Haul made statements suggesting that it would raise its rates if Budget raised its own rates to within 3 to 5 per cent of U-Haul's rates. Although the complaint does not allege that the two competitors reached an agreement, the FTC pursued U-Haul and AMERCO, ultimately settling the case. The consent order barred U-Haul and its parent company from colluding or inviting collusion.²⁶ In a separate statement, the FTC elaborated that '[i]nvitations to collude are the quintessential example of the kind of conduct that should be – and has been – challenged as a violation of Section 5 of the Federal Trade Commission... In contrast to conspiracy claims that would violate Section 1, invitations to collude do not require proof of an agreement; nor do they require proof of an anti-competitive effect.'²⁷ The FTC brought the case exclusively under Section 5.

The FTC's use of Section 5 to challenge anticipatory anti-competitive behaviour is of particular importance to trade associations. In fact, in March 2009, the FTC issued a consent order that settled a Section 5 complaint against the National Association of Music Merchants (NAMM), a trade association whose 9,000-plus members include the majority of US distributors, dealers and manufacturers of musical instruments.²⁸ The FTC accused NAMM of violating Section 5 by enabling and encouraging its members to exchange competitively sensitive price information and to discuss strategies for restricting retail price competition, securing higher retail prices and implementing manufacturer's minimum advertised pricing policies, during NAMM's biannual meetings and other programmes between 2005 and 2007.²⁹ According to the FTC, NAMM representatives acting as moderators allegedly set the agenda for these meetings and helped determine what topics would be discussed. Significantly, the FTC did not allege that any anti-competitive conduct occurred among NAMM's members. Instead, the FTC alleged that NAMM's conduct 'could facilitate the implementation of collusive strategies among competitors – conduct that would harm consumers. Such conduct could, for example, result in an agreement among competing retailers to raise prices.'³⁰

The FTC's consent order enjoins NAMM from encouraging or facilitating the exchange of retail pricing information for musical instruments among the musical instrument manufacturer and dealer members of NAMM, including information regarding price terms, margins, profits, minimum advertised price policies, or resale price maintenance policies. It further enjoins NAMM from facilitating any agreements among its members relating to

- the retail price of any musical instrument;
- the conditions or requirements that manufacturers or dealers will deal with any other manufacturers or dealers, including the aforementioned pricing and policy information; and
- the refusal to deal or reduce business with other manufacturers or dealers.³¹

While private plaintiffs have no standing to bring a Section 5 action against trade associations or their members, complaints alleging similar facts, but brought pursuant to a Section 1 theory of actual collusion instead, will likely follow FTC consents premised on Section 5 grounds. Within months of the FTC issuing its consent order against

NAMM, multiple class action lawsuits were filed against NAMM and several of its members. In July 2010, a consolidated complaint was filed on behalf of all injured parties alleging that NAMM, Guitar Center and several of its fretted instrument and amplifier-manufacturing members engaged in a price-fixing conspiracy in violation of Section 1 and multiple state statutes.³² The plaintiffs claim that beginning in 2004, the defendants conspired to raise, fix, maintain or stabilise the prices of fretted instruments and other music equipment through strict enforcement of the minimum advertised price policies.³³ Although the complaint alleges a different cause of action based on the actual collusion of the defendants, it quotes extensively from the FTC's Section 5 invitation to collude complaint, consent order and Analysis of Agreement Containing Consent Order to Aid Public Comment.³⁴

In light of these developments, trade associations should continue to exercise caution when engaging with and facilitating communications among their members. While the refined pleading standard imparted in *Twombly* has now made it more difficult for plaintiffs to succeed in establishing Section 1 conspiracy claims against trade associations and their members, the recent trend in FTC prosecutions under Section 5 indicates that trade associations should be increasingly mindful of the statements they make, the information they exchange or the communications they facilitate. Although their actions may survive a Section 1 claim for collusion, those same statements might be fodder for a Section 5 complaint for facilitating anti-competitive behavior or invitations to collude. Additionally, Section 5 consent orders against trade associations may further open the door to private plaintiff actions brought pursuant to Section 1 or state statutes by emboldened plaintiffs seeking to challenge the conduct of their members.

Notes

- 1 See, eg, *Maple Flooring Mfrs. Ass'n v United States*, 268 US 563 (1925): 'We do not conceive that the members of trade associations become such conspirators merely because they gather and disseminate information... bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses.' FTC and DoJ, Antitrust Guidelines for Collaborations Among Competitors (2000), www.ftc.gov/os/2000/04/ftcdojguidelines.pdf (hereinafter, 'Competitor Guidelines') ('Such collaborations often are not only benign but procompetitive. Indeed, in the last two decades, the federal antitrust agencies have brought relatively few civil cases against competitor collaborations.').
- 2 Competitor Guidelines, supra note 1, at preamble.
- 3 DoJ and FTC, Health Care Statements (1996), www.ftc.gov/reports/hlth3s.pdf.
- 4 15 USC section 1.
- 5 See, eg, Competitor Guidelines, supra note 1, at preamble ('Indeed, in the last two decades, the federal antitrust agencies have brought relatively few civil cases against competitor collaborations.')
- 6 *In re National Association of Music Merchants, Inc.*, FTC Dkt No. C-4255 (2009).
- 7 15 USC section 45.
- 8 *State Oil Co. v Khan*, 522 US 3 (1997).
- 9 550 US 544 (2007).
- 10 *Id* at 545, 570.
- 11 No. 08-7082, MDL No. 1997, 2009 US Dist. LEXIS 115513 (ND Ill. 10 December 2009).
- 12 *Id* at 17.

- 13 See id at 18-19.
- 14 No. 08-7082, MDL No. 1997, 2010 US Dist. LEXIS 43576 (ND Ill. 30 April 2010).
- 15 The court noted that the plaintiffs spent a 'substantial portion' of their complaint describing the various trade organisations that the defendants were members of. See id at 18.
- 16 No. 08-4548, 2010 US Dist. LEXIS 1433 (ND Cal. 6 January 2010).
- 17 17 USC sections 1201 et seq.
- 18 See Complaint, Dkt. No. 08-539 (CD Cal).
- 19 679 F. Supp. 2d 1120 (CD Cal. 2009).
- 20 No. 08-529, 2010 US Dist. LEXIS 27566 (CD Cal. 16 March 2010).
- 21 Id at 15.
- 22 No. 08-529, 2010 US Dist. LEXIS 47582 (CD Cal. 3 May 2010) (citing *American Professional Testing Service, Inc. v Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 108 F.3d 1147, 1151 (9th Cir. 1997)).
- 23 Statement, Chairman Leibowitz and Commissioner Rosch, In the Matter of Intel Corporation, at 2 (16 December 2009), www.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf ('Section 5 was clearly a Congressional effort to bolster enforcement and provide protection for competition and consumers beyond the parameters of the Sherman Act.').
- 24 Complaint, *In re Intel Corp.*, FTC Dkt. No. 9341 (16 December 2009), at para. 1, www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.
- 25 FTC Dkt No. C-4294 (9 June 2010), www.ftc.gov/os/caselist/0810157/100609uhauldo.pdf.
- 26 FTC Press Release, U-Haul and its Parent Company Settle FTC Charges That They Invited Competitors to Fix Prices on Truck Rentals (9 June 2010), www.ftc.gov/opa/2010/06/uhaul.shtm.
- 27 FTC Statement, Statement of Chairman Leibowitz, Commissioner Kovacic and Commissioner Rosch, In the Matter of *U-Haul Int'l, Inc. and AMERCO* (9 June 2010), www.ftc.gov/os/caselist/0810157/100609uhaulstatement.pdf.
- 28 See Consent Order, *In re National Association of Music Merchants, Inc.*, FTC Dkt No. C-4255 (2009) (hereinafter 'NAMM Consent Order').
- 29 Complaint paras. 5, 8, *In re National Association of Music Merchants, Inc.*, FTC Dkt No. C-4255 (2009).
- 30 FTC Press Release, National Association of Music Merchants Settles FTC Charges of Illegally Restraining Competition (4 March 2009), www.ftc.gov/opa/2009/03/namm.shtm.
- 31 See NAMM Consent Order, at 4-5.
- 32 Complaint, *In Re: Musical Instruments and Equipment Antitrust Litigation*, Dkt No. 09-2121 (SD Cal. 16 July 2010).
- 33 Id para. 3.
- 34 Id paras. 6, 116-28.

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