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Antitrust Developments in Trade Associations and Competitor Collaborations

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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 interact openly, collaborate, exchange information and 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.

Cases against trade associations or their members that allege conspiracies or collusion to engage in anti-competitive conduct are typically brought by private plaintiffs under section 1 of the Sherman Antitrust Act (section 1).² Under section 1, contracts, combinations, or conspiracies that unreasonably restrain trade or commerce are illegal.³ While the scope of section 1 private suits are varied, these suits are often filed by customers who believe that competitors have used the trade association as a means to conspire or who believe that the trade association has actively coordinated its members’ activities to the detriment of consumers. Scorned association members whose product or process was not adopted or favoured by the association or whom are adversely affected by an association rule or regulation will also often file suit against the trade association itself.

Trade association membership alone or mere participation in trade association activities, however, is 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 decisions in *Bell Atlantic Corp v Twombly*⁴ and *Ashcroft v Iqbal*⁵ have 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 provide factual specifics regarding the alleged agreement and details indicating that the competitors’ actions were coordinated. In addition, plaintiffs must plead plausible conspiracies. Short, general recitations of the law are insufficient.⁶

Traditionally, the Agencies have rarely pursued civil actions against trade associations or other competitor collaborations for antitrust violations.⁷ The FTC, however, has signalled a change in this direction, having recently filed several complaints and consent orders against trade associations and other professional groups or cooperatives pursuant to section 5 of the Federal Trade Commission Act (section 5).⁸ Section 5 generally prohibits ‘unfair methods of competition’ that affect commerce, and generally covers much, if not all, of the same conduct evaluated by section 1.⁹ While section 1 remains a viable option for the FTC to prosecute collusive behaviour, the FTC has issued several statements and consent orders within the past year that indicate the FTC’s proclivity for, and growing use of, section 5 to challenge acts that are potentially ‘unfair,’ even where no definable agreement has been made, and therefore,

no antitrust violation under section 1 to speak of. Accordingly, the same conduct that may survive *Twombly* scrutiny under section 1 – because it is generally insufficient to establish the existence of an actual anti-competitive agreement – may still be an antitrust violation under section 5.

This article will provide a discussion of several recent section 1 cases that involve trade associations, including suits in which consumers pled trade association membership as evidence of a plausible antitrust conspiracy, as well as claims against trade associations for facilitating or committing anti-competitive behaviour themselves. The article will further discuss the FTC’s continuing trend in challenging trade associations for unfair methods of competition under section 5.

Section 1 association member joint conduct actions

The following recent parallel pricing cases illustrate antitrust plaintiffs’ high pleading requirements in bringing section 1 claims against trade association members and the types of evidence that are required or are insufficient to establish liability. Although *Twombly* and *Iqbal* now require plaintiffs to plead the existence of a plausible antitrust conspiracy to survive dismissal, recent cases suggest that allegations of participation in trade association activities and, therefore, an opportunity to collude, followed by parallel behaviour in an economic market that is not ordinarily conducive to parallel behaviour may be sufficient.

On appeal of the district court’s decision in *In Re: Text Messaging Antitrust Litig*,¹⁰ the Seventh Circuit upheld the lower court’s ruling that a section 1 claim brought by text message customers against several wireless providers had alleged a conspiracy to fix prices on per-message text messages with sufficient plausibility to satisfy the *Twombly* pleading standard.¹¹ The plaintiff customers initially alleged that the defendants had the opportunity to collude through a trade group at industry meetings, engaged in parallel pricing, and failed to deny a price-fixing conspiracy when responding to congressional inquiries into the matter. After initially granting the defendants’ motion to dismiss, and holding that these initial allegations pled nothing more than a mere possibility of an agreement, the district court granted the plaintiffs leave to amend and replead their claims.¹² The plaintiffs’ second amended complaint alleged that the defendants’ high-level executives actually conspired during the ‘leadership council’ meetings of the Wireless Internet Caucus (WIC), a division of the industry’s trade association. The plaintiffs contended that the meetings had ‘narrowly focused on text messaging delivery and pricing’ and that the defendants expressly agreed to adopt a uniform per-unit price of text messaging services. In denying the defendants’ subsequent motion to dismiss the second amended complaint, the district court explained that the plaintiffs’ new allegations added specificity and detail that fortified the plausibility of the plaintiffs’ claim of a conspiracy to fix prices.

The Seventh Circuit held that the second amended complaint sufficiently alleged a mixture of parallel behaviours, details of industry structure and industry practices that facilitated collusion. Although the court noted that the practice of exchanging price information

through trade association meetings is not itself illegal, it found that the plaintiffs alleged additional plus factors sufficient to give rise to a plausible inference of illegal price fixing. The plaintiffs contended that the defendants could not have achieved such a quick transition to a drastically new price structure without colluding as to the form, timing and price of the new system. The court agreed, finding that the complex and historically unprecedented changes in text message price structure made at the same time by multiple competitors for no discernable reason amounted to the ‘parallel plus’ factors sufficient to support a plausible claim of conspiracy. The court further rejected the defendants’ argument that the complaint lacked direct evidence, holding that direct evidence of conspiracy was not an indispensable element of conspiracy. It is worth noting that the court acknowledged that the factual allegations contained in the second amended complaint were only marginally different from those contained in the first amended complaint, which the district court had previously dismissed. However, in affirming the district court’s ruling that the factual allegations in the second complaint were sufficient to survive a motion to dismiss, the court noted that a judge may reconsider his previous rulings in the course of litigation.

In *Haley Paint Co v EI Dupont De Nemours and Co*,¹³ customers of titanium dioxide filed a class action lawsuit alleging a conspiracy to fix prices in violation of section 1 against the product’s five leading producers who control approximately 70 per cent of the worldwide titanium dioxide market. The plaintiffs’ customers noted that the defendant producers had announced price increases for titanium dioxide multiple times over five years – including during periods of reduced costs, increased production capacity and a decline in demand for the product – shortly after their attendance at industry and association conferences and meetings. The plaintiffs argued that the producers had engaged in a conspiracy to fix prices, supply and capacity for titanium dioxide at the conferences, where the defendants allegedly discussed industry conditions and titanium dioxide pricing privately at dinner meetings before and after the various official meetings. The plaintiffs additionally claimed that the defendants furthered the conspiracy through industry publications and conversations with industry consultants and customers, whom the defendants used as conduits to signal intended pricing or other actions.

Ruling on the defendants’ motion to dismiss, the court held that the plaintiffs’ allegations constituted a plausible, if not probable, case for liability under section 1. The court noted that the plaintiffs’ allegations of the defendants’ lock-step price increases, as well as their opportunities to collude at trade association meetings and through publications, although not dispositive, were a strong indication of an illegal agreement to set prices. Citing the Seventh Circuit Court of Appeals’ decision in *In Re: Text Messaging Antitrust Litig*,¹⁴ the Court held that allegations of attendance at industry conferences, while not illegal in itself, established a practice that can facilitate price fixing that would be difficult to detect. The court found plaintiffs’ allegations that the price increases occurred when demand was dwindling and manufacturing costs had decreased of critical importance in their pleadings and surviving the motion to dismiss.

In *Kleen Products, LLC v Packaging Corp of America*,¹⁵ the plaintiffs brought a class action lawsuit against eight major companies in the containerboard industry for alleged conscious parallel behaviour in violation of section 1. The plaintiffs claimed that, between 2005 and 2010, the defendants engaged in a practice of contemporaneous supply restrictions and price increases, even when the economy and demand for containerboard began to decline. The plaintiffs pled that each of the defendants belonged to one or two

of the containerboard industry’s prominent trade associations and had attended numerous industry conferences and meetings during that period. The plaintiffs claimed that at these meetings the defendants had discussed pricing strategies and decided to implement price increases. Soon after each meeting, the defendants subsequently instituted identical price increases.

The court held that the plaintiffs had sufficiently alleged a section 1 claim. The court noted that the temporal proximity between the trade association meetings and the price increases implemented by the defendants was the plaintiffs’ most persuasive evidence of a section 1 violation.¹⁶ The court rejected the defendants’ argument that opportunities to conspire at a trade meeting should not suggest an agreement to collude because trade association participation is presumed legitimate. Citing the Seventh Circuit Court of Appeals’ decision in *In Re: Text Messaging Antitrust Litig*,¹⁷ the court noted that while merely belonging to a trade association or attending trade association meetings and exchanging pricing information is ‘not illegal in itself,’ trade associations facilitate price fixing and collusion. Here, the court found it ‘striking’ that the defendants raised their prices shortly after each of six industry meetings between 2005 and 2008, allegations that gave ‘significant weight’ to plaintiffs’ conspiracy claim and denied the defendants’ motion to dismiss.

In *In Re: Currency Conversion Fee Antitrust Litig*,¹⁸ holders of Visa and MasterCard-branded credit cards issued by various banks that compete with American Express (Amex) filed a section 1 class action lawsuit against Amex alleging that it conspired with the banks to fix foreign currency conversion fees and impose arbitration clauses in the plaintiffs’ cardholder agreements. In the months following a May 1999 meeting, which was hosted by Amex’s outside counsel and attended by the in-house counsel and other representatives of Amex and its competitors, Amex and the banks implemented or announced a uniform 2 per cent rate for the fees. The plaintiffs claimed that Amex and its competitors agreed to raise the fees at the meeting. Amex moved for summary judgment and argued that it could not have conspired with the competitor banks at the May 1999 meeting because it had previously finalised its decision to increase its own fee in early 1999 in response to a revenue study conducted earlier. Amex additionally argued that the plaintiffs lacked antitrust standing to assert a conspiracy involving Amex’s arbitration clauses because they could not demonstrate ‘threatened loss.’ However, the court denied Amex’s motion for summary judgment, holding that there was a genuine dispute of material facts regarding whether Amex and its competitors had agreed to the fee increase at the May 1999 meeting and that the plaintiffs had antitrust standing to assert their arbitration clause conspiracy claim.

The court found that, based on the evidentiary record, a jury could reasonably infer that Amex did not finalise its decision to increase its fee until after the May 1999 meeting and, therefore, could have engaged in a price-fixing conspiracy with its competitors. The court found it particularly notable that Amex could not produce internal documentation pinpointing the precise date of its decision to increase its fee and that the only internal documents in the record that memorialised Amex’s decision to raise the fee were published after the May 1999 meeting. An additional document in the record indicated that Amex would increase the fee regardless of the revenue study that Amex was conducting. The plaintiffs also submitted evidence that Amex had a financial motive to engage in such a conspiracy because it wished to raise its own fee to increase revenue, but it was disinclined to lead the market. The court found that it made ‘economic sense’ that Amex would need assurances from its competitors that it would not be a market leader and,

accordingly, would use the meeting as an opportunity to collude. The court further ruled that the plaintiffs had antitrust standing for their arbitration clause conspiracy claim even though they were not Amex cardholders because they nevertheless suffered reduced choice in the market place as a result of Amex's collusion with its competitors.

Section 1 trade association liability

The following recent cases discuss the parameters of section 1 liability against the trade association itself as a participant in the alleged conspiracy.

In *In Re: Plasma-Derivative Protein Therapies Antitrust Litig*,¹⁹ 17 separate class action plaintiff-purchasers of plasma-derivative protein therapies (PDPT) accused the two largest US producers of PDPT of conspiring with the Plasma Protein Therapeutics Association (PPTA) – a trade association – to restrict plasma therapy supplies and keep prices artificially high in violation of section 1. The plaintiffs alleged that the PDPT producers met regularly to discuss PDPT pricing and supply issues, and that the producers' executives were involved in managing the PPTA, which facilitated collusion between the two companies to restrict production, in part, by collecting price and supply data. The PPTA meeting minutes were allegedly edited to remove any incriminating dialogue, and the executives also allegedly met privately after official meetings to discuss production schedule coordination. To further the conspiracy, the producers made public statements during investor calls and industry conferences to 'signal' that each was adhering to agreed-upon supply levels and additionally incorrectly reported data to the government. It is worth noting that the multiple class action lawsuits were triggered by an FTC complaint seeking to block a merger between one of the defendants and its competitors. Although the FTC dismissed the complaint after the merger was called off, the plaintiffs' complaint in *In Re: Plasma-Derivative Protein Therapies Antitrust Litig* contained many of the same factual allegations.

Ruling on the defendants' multiple motions to dismiss, the court held that the plaintiffs had plausibly alleged an antitrust conspiracy against all defendants. The court found that interdependence between the two producers could be plausibly inferred because the producers allegedly reduced production capacity to keep profits high despite rising demand. In addition, the court held that several of the 'plus factors' that plaintiffs had alleged could establish that the conscious parallel behaviour was the result of an illegal agreement. While the court found that the public statements made to signal adherence to the conspiracy were too vague to plausibly assert a conspiracy, it found allegations of attendance at PPTA meetings and other private meetings to discuss PDPT prices and supplies, as well as to monitor the producers' agreements, showed that the industry was ripe for collusion, and that the producers and trade association had sufficient opportunities to carry out their conspiracy.

In its own motion, the PPTA additionally argued that because the plaintiffs merely alleged in the complaint that the deception occurred 'via' the PPTA and not 'by' the PPTA, the trade association could not be liable under section 1. The PPTA further argued that it could not be liable under Noerr-Pennington because deception used while lobbying a legislative body is not subject to antitrust liability. The court rejected both arguments. The court declined to read the plaintiffs' complaint as narrowly as the PPTA requested, and it noted that the Noerr-Pennington doctrine was inapplicable because the plaintiffs did not allege the PPTA sought anti-competitive regulation but, rather, accused the trade association of assisting the producers to facilitate and conceal their conspiracy. Consequently, the

court denied the defendants' motion to dismiss for failure to state a claim.

In *Keller v Greater Augusta Association of Realtors, Inc.*,²⁰ the plaintiff, a licensed real estate agent, alleged that the Greater Augusta Association of Realtors (GAAR) violated section 1 by implementing and enforcing one of the National Association of Realtors' (NAR) rules and regulations against the plaintiff. NAR is a self-regulatory organisation for real estate brokerage that governs Multiple Listing Services (MLS) websites – a series of real estate databases listing an agent's available properties for sale. Through an MLS, potential buyers may view the listings through virtual office websites (VOWs), an online version of an agent's traditional physical office. While the plaintiff properly submitted his real estate listings to the MLS operated by GAAR, he also listed his name, website address and phone number in sections of GAAR's MLS listings in violation of the NAR rules. After GAAR fined the plaintiff for violating this MLS advertising rule, the plaintiff filed a six-count complaint claiming, in part, that the rule was an unlawful restraint of trade. Granting GAAR's motion to dismiss, the court held that the plaintiff failed to plead sufficient facts to show that the implementation and enforcement of the MLS advertising rule caused anti-competitive harm to the market of real estate brokers who utilised VOWs.

First, the court found that the plaintiff failed to allege any facts tending to show how the NAR rule on MLS advertising injured the market, such as any possible effect on an agent's ability to show listings to clients on a VOW or that traditional agents had a competitive advantage over agents using VOWs to show their listings. Instead, the plaintiff had merely alleged harm to his own business. The court additionally rejected the plaintiff's contention that prior NAR litigation had established that the MLS advertising rule caused anti-competitive harm. The court noted that the previous litigation challenging NAR rules and regulations involved a different policy that allowed traditional brokers to opt out of publishing their listings on VOWs, to the detriment of agents using VOWs.²¹ Here, the MLS advertising rule simply dictated the listings' form and substance rather than excluding any listings from the MLS market. Finally, the court rejected the plaintiff's argument that the MLS advertising rule also harmed smaller agents because larger agents could fund more attractive websites that might mislead consumers into believing that the plaintiff's MLS listings belonged to the larger agents. The court reasoned that the plaintiff made this allegation for the first time in his reply brief and had failed to allege any such supporting facts in his complaint.

In *K&S Associates, Inc v American Association of Physicists in Medicine*,²² K&S Associates, Inc (K&S), one of three Accredited Dosimetry Calibration Laboratories (ADCLs) in the United States, asserted a claim against the American Association of Physicists in Medicine (AAPM), a trade association that accredits ADCLs, for conspiring to restrain trade in violation of section 1. K&S alleged that two of its competitors engaged in a concerted refusal to deal or boycott. When K&S sought re-accreditation after it agreed to be acquired by a foreign corporation, K&S contacted the AAPM committee responsible for recommending accreditation to seek guidance on any changes that would be necessary to K&S's policies and procedures to ensure re-accreditation. After expressing concerns regarding conflicts of interest and a lack of sufficient separation between K&S and its new parent, the committee issued a report recommending re-accreditation. However, at a subsequent AAPM meeting to discuss conflict of interest procedures across the industry, the attendees instead discussed the acceptability of K&S's ownership structure and K&S's two competitors declared that the structure was

unacceptable notwithstanding any conflict of interest procedures. Shortly thereafter, the AAPM rejected K&S's re-accreditation despite the earlier recommendation report, without providing any reasons for the rejection. AAPM moved to dismiss the section 1 claim on the grounds that K&S had failed to plead sufficient facts of a conspiracy and that K&S had merely alleged parallel conduct. Rejecting the motion to dismiss, the court found that K&S had pled a plausible conspiracy because K&S had alleged facts that its competitors had used the AAPM meetings and AAPM-run re-accreditation process to deny plaintiff the certification necessary to compete in the highly concentrated ADCL market.

In *Universal Grading Service v eBay, Inc.*,²³ plaintiff coin dealers and graders brought a multi-count class action complaint against defendants eBay and two coin-related trade associations – the American Numismatic Association (ANA) and the Professional Numismatists Guild (PNG) – asserting violations of section 1, including conspiracy to restrain trade, tying, price fixing, and group boycott; section 2 of the Sherman Antitrust Act (section 2), including abuse of monopoly power, maintenance of monopoly power and attempted monopolisation; and multiple state antitrust statutes. The plaintiffs' claims arose from eBay's implementation of a policy that permitted coins to be listed on eBay as 'certified' only if graded by specific approved grading services. The plaintiffs alleged that eBay and the trade associations conspired to approve five grading services to the exclusion of smaller coin graders including the plaintiffs, which would inflate both the prices of coins certified by those five services and the commissions that eBay received from the sales of those coins. The five grading services were allegedly selected based on seminars conducted by an organisation co-created by eBay and the ANA, as well as a survey conducted by the PNG, an association of coin dealers of 'significant net worth,' and the ANA's former president.

The court granted the defendants' multiple motions to dismiss in their entirety. First, the court rejected the plaintiffs' claim that the PNG, the ANA and eBay engaged in a per se conspiracy to restrain trade. The court reasoned that the defendants' actions, in providing safer online auction service platforms for graded coins, were equally consistent with lawful conduct. The court further reasoned that eBay's policy did not have the same harmful effect as an absolute ban on competition because it regulated only what could be posted as 'certified,' and the plaintiffs did not plead that their services were completely excluded from eBay or other markets. Moreover, because the defendants were not in the coin-grading business, the plaintiffs failed to plead that they were the plaintiffs' competitors. The court also rejected the section 1 claim under the rule of reason finding that the plaintiffs failed to allege a plausible claim of harm to competition because their allegations did not make 'economic sense.' Plaintiffs failed to allege that the certified coin graders charged more than the smaller grading companies; that eBay received higher commissions; or how excluding smaller coin grading services amounted to manipulation or bad faith. The court dismissed the plaintiffs' tying claim – that eBay's policy tied the provision of a platform for online auctions of certified coins, as the tying product, to the provision of coin grading services, as the tied product – for the same reasons the court dismissed the conspiracy to restrain trade claim. The court additionally dismissed the price-fixing and group boycott claims, reasoning that plaintiffs failed to plead that eBay and the trade associations were competitors of each other.

The court also rejected plaintiffs' section 2 claim, holding that the plaintiffs did not allege facts showing 'causal antitrust injury' where eBay's policy harmed competition among competing online auction services. eBay's refusal to deal with non-authorized

coin-grading companies did not alone establish an antitrust injury and the plaintiffs failed to explain how eBay's actions on its own website reduced consumers' choices or diminished the quality of their experience on other auction websites.

FTC act trade associations liability

The FTC has challenged the behaviour of several trade associations themselves for facilitating anti-competitive behaviour in violation of section 5. The FTC has challenged several health and medical-related trade associations for their attempts to fix rates for their members when negotiating on their behalf.

For example, in *In Re: Minnesota Rural Health Cooperative*,²⁴ the FTC accused the Minnesota Rural Health Cooperative (MRHC) – a health-provider cooperative whose membership includes most of the hospitals, half of the physicians, and numerous pharmacies in Southwestern Minnesota – with eliminating competition in violation of section 5 between its members through a practice of price fixing, refusals to deal and coercive negotiating tactics. The FTC's complaint alleged that the MRHC, acting both as a combination of its members and in collusion with them, implemented and entered into numerous illegal agreements with third-party payors – including health insurers and managed care organisations – to fix health insurance reimbursement rates at artificially high prices. When negotiating new rates, the MRHC threatened to terminate contracts with payors if they did not agree to higher reimbursement rates. In addition, the MRHC instructed its members not to deal individually with payors and that the MRHC would conduct all contracting and negotiating on their behalf. The MRHC further informed the payors that the cooperative's members would not negotiate individually and that the MRHC 'expected [the] group to be accepted or rejected as a group.'²⁵ Due to these coercive tactics, some payors were forced to pay up to 27 percent more under certain MRHC contracts than they paid to non-MRHC providers. In December 2010, the parties entered into a consent order, in which the MRHC was enjoined from further refusing to deal with payors and required to renegotiate all existing contracts and submit any renegotiated contracts for state approval.²⁶ Although the consent order prevents the MRHC from facilitating further collusion to secure favourable rates, it did not bar the MRHC from negotiating future contracts with payors on behalf of its members or from exchanging information to facilitate those negotiations.

Similarly, in *In Re: Southwest Health Alliances, Inc.*,²⁷ the FTC accused Southwest Health Alliances, Inc (Southwest Health) – a physician hospital organisation and independent practice association consisting of more than 900 physicians in Northern Texas – of violating section 5 when it conspired to fix the prices for physician services that its members charged health-insurance providers and other third-party payors. The complaint alleged that Southwest Health had eliminated competition among its member physicians and harmed consumers by facilitating and entering into agreements to fix the higher reimbursement rates and other terms in the payors' health-plan contracts with member physicians. Since 2000, Southwest Health had maintained a fee schedule negotiated with its members that it used to signal to its members whether to accept or reject offers it received from payors on their behalf. Southwest Health had also unilaterally renegotiated payor contracts on behalf of certain members and had periodically increased the rates in its fee schedule, each without member input. The FTC further asserted that Southwest Health had failed to clinically or financially integrate its member's practices to produce beneficial efficiencies for consumers that would justify its joint conduct.

The consent order prohibits Southwest Health from facilitating or entering into agreements with physicians:

- to negotiate on behalf of the physicians;
- to negotiate with any physician as an insurer;
- to deal, refuse to deal, or threaten to refuse to deal with any insurer; and
- to not deal individually with any insurer.²⁸

The order also prohibits Southwest Health from further facilitating any exchange of information between physicians regarding payor contract terms. The consent order does not, however, prohibit agreements that only involve doctors in similar practices or from engaging in conduct reasonably necessary for legitimate ‘qualified risk-sharing’ or ‘qualified clinically integrated’ agreements.²⁹ The order requires Southwest Health to terminate current contracts at the request of the payors and to meet certain notification requirements. Finally, the proposed order requires Southwest Health to report or provide the FTC with information access in its continued monitoring of the association.

In light of these developments, trade associations should continue to exercise caution when facilitating communications among their members and coordinating their members’ conduct. Similarly, trade association members should be mindful of their conduct at trade association events, as well as of any actions they take around the time of the event. While the refined pleading standard imparted in *Twombly* and *Iqbal* has made it more difficult for plaintiffs to succeed in establishing section 1 conspiracy claims against trade associations and their members, allegations of participation in trade association meetings followed by parallel conduct may be sufficient to survive a motion to dismiss. Furthermore, the increasing trend in FTC prosecutions under section 5 indicates that trade associations should continue to be mindful of the statements they make, the communications they facilitate and the actions they take on behalf of their members. Although their actions may survive a section 1 challenge, those same actions might be fodder for a section 5

complaint for facilitating unfair methods of competition. 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 trade associations or 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 15 USC section 1.
- 3 *State Oil Co v Khan*, 522 US 3 (1997).
- 4 550 US 544 (2007).
- 5 129 S Ct 1937 (2009).
- 6 *Twombly*, 550 US 545, 570.
- 7 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.’).
- 8 See, eg, *In Re: Nat’l Ass’n of Music Merch, Inc*, FTC File No. 001-0203 (2009).
- 9 15 USC section 45.
- 10 No. 08-7082, MDL No. 1997, 2010 US Dist LEXIS 43576 (ND Ill 30 April 2010).
- 11 630 F3d 622 (7th Cir 2010).
- 12 No. 08-7082, MDL No. 1997, 2009 US Dist LEXIS 115513 (ND Ill 10 December 2009).
- 13 No. 10-318, 2011 US Dist LEXIS 33349 (D Md 29 March 2011).
- 14 630 F3d 622 (7th Cir 2010).
- 15 No. 10-5711, 2011 US Dist LEXIS 38546 (ND Ill 8 April 2011).
- 16 In addition, the court noted that the plaintiffs’ allegations that the defendants’ actions were against their self-interests and that they had

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engaged in industry-wide consolidation was further proper evidence of anti-competitive conduct.

- 17 630 F3d 622 (7th Cir 2010).
- 18 No. 04-5723, MDL No. 1409, 2011 US Dist LEXIS 37355 (SDNY 29 March 2011).
- 19 No. 09-7666, MDL No. 2109, 2011 US Dist LEXIS 13279 (ND Ill 9 February 2011).
- 20 760 F Supp 2d 1373 (SD Ga 2011).
- 21 Final Judgment, *United States v Nat'l Ass'n of Realtors*, No. 05-5140 (ND Ill 2008), www.justice.gov/atr/cases/f219800/219889.htm.
- 22 No. 09-1108, 2011 US Dist LEXIS 7710 (MD Tenn 26 January 2011).
- 23 No. 09-2755, 2011 US Dist LEXIS 25193 (SD Cal 8 March 2011).
- 24 Complaint, *In Re: Minnesota Rural Health Coop*, FTC File No. 051-0199 (2010).
- 25 FTC Press Release, Minnesota Health Care Provider Group Settles FTC Price Fixing Charges (18 June 2010), www.ftc.gov/opa/2010/06/ruralhealth.shtm.
- 26 FTC Press Release, FTC Approves Final Order Settling Charges that the Minnesota Rural Health Cooperative Fixed Healthcare Reimbursement Rates (4 January 2011), www.ftc.gov/opa/2011/01/ruralhealth.shtm.
- 27 Complaint, *In Re: Southwest Health Alliances, Inc, d/b/a BSA Provider Network*, FTC File No. 091-0013 (2011).
- 28 FTC Press Release, FTC Settlement Order Bars Texas Doctors' Group from Joint Price Negotiations (10 May 2011), www.ftc.gov/opa/2011/05/southwest.shtm; Decision and Order, *In Re: Southwest Health Alliances, Inc, d/b/a BSA Provider Network*, FTC File No. 091-0013 (2011).
- 29 FTC Press Release, FTC Settlement Order Bars Texas Doctors' Group from Joint Price Negotiations (10 May 2011), www.ftc.gov/opa/2011/05/southwest.shtm.



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