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Go on Offense With Antitrust Law

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Summary: Antitrust litigation often puts associations and their members on the defensive, but not always. Don't overlook opportunities to advance your members' interests by making antitrust law work in their favor.

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Historically, "antitrust" has been a dirty word for industry and professional associations, bringing only compliance expense and potential liability. In recent years, however, forward-thinking associations have found ways to turn the antitrust laws into a tool to advance their mission and the collective interests of their membership. These associations have found new and creative ways to provide value to their members without adding to costs, creating a win-win for associations and their members.

Not all antitrust allegations are false. It is the nature of markets that unlawful price-fixing conspiracies can be profitable and extremely expensive for industry participants. These conspiracies can cause prices on essential products, commodities, and services to spike, hurting an entire trade or industry that requires that product. Associations may help their members by engaging the court system to obtain injunctive relief or, if they choose not to litigate, by helping members determine their own course by informing them about antitrust issues and providing valuable information that may only be available to the association.

Litigating on Members' Behalf

As established by the U.S. Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, an association has standing to bring suit on behalf of its members when the interests at stake are germane to the organization's purpose, where members would have standing to sue in their own right, and where neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit.

Rather than sitting on the sidelines, numerous associations have actively championed their members' causes by acting as plaintiffs or by filing amicus briefs before appellate courts. Because this type of litigation is usually brought on a contingency-fee basis, the plaintiff association pays no out-of-pocket attorneys' fees to their lawyers.

For example, the National Retail Federation, the world's largest retail trade association, brought suit against Visa, Mastercard, and numerous banks to enjoin them from fixing credit card fees. Retailers in the *Payment Card* litigation have alleged tens of billions of dollars in damages, demonstrating the importance of the issue to NRF members.

There are numerous other examples:

- The Government Employee Health Association, which provides health and dental insurance to federal employees, filed an unlawful-monopolization action against manufacturers of the drug Lidoderm for attempting to defraud the U.S. Patent and Trademark office, seeking both damages and injunctive relief.
- The Association of Retail Travel Agents sued the major airlines to obtain injunctive relief against an alleged conspiracy to eliminate travel agent commissions.
- In *Association of Taxicab Operators, USA v. Yellow Checker Cab Company of Dallas/Forth Worth*, an association representing taxi drivers filed suit to enjoin an alleged price-fixing conspiracy among taxi stand operators, to whom the cabbies paid fees.

At the appellate level, associations often file amicus briefs in cases involving issues important to their members. For example:

- In 2014 the American Medical Association filed an amicus brief in *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, which involved the acquisition of one hospital by another. The AMA argued that hospital competition is important to physicians and patients and urged the Supreme Court to be cautious in interpreting the state-action doctrine in a way that could impede the ability of professional licensure boards to perform their functions.
- Also in 2014, the Computer and Communications Industry Association, which represents companies in the high-tech products and services sector, filed a brief in *American Broadcasting Companies, Inc. v. Aereo, Inc.*, arguing that cloud computing must be protected.
- In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, the Association for Competitive Technology, which represents over 3,000 application software developers and small and mid-sized technology companies, submitted an amicus brief arguing that damages should be limited in patent infringement cases where the plaintiff delayed in bringing a claim—an issue vital to its members.

Help Outside of Court

Sometimes, it is impractical for associations to bring litigation due to political concerns or because the unlawful conduct may have ceased, so injunctive relief is no longer needed. Association members, however, may nevertheless have been injured and may still be owed millions of dollars.

Experienced associations have found ways to provide behind-the-scenes assistance so that members may resolve these issues on their own. This approach is often beneficial for a large association whose members may not all have been injured in the same manner or who may not have access to all the facts. Associations may inform their members of alleged conspiracies, so that members may decide for themselves what action may be in their own best interests, or work with members (or members' attorneys) to develop the facts to fully understand the situation.

Providing information. It is the nature of antitrust conspiracies that they are conducted behind closed doors and hidden from the public. Associations may benefit their members by simply informing them of antitrust allegations so that they may decide for themselves whether and how to get their money back. Armed with this information, members have a substantial array of tools at their disposal that associations lack, including using their market power to negotiate more beneficial terms in the future or bringing suit for damages. Even a paragraph in an association newsletter can give members valuable information that they require to determine their best course of action.

Developing the facts. Associations generally have a much broader perspective on issues affecting their industry than individual members may have. As members focus on their own businesses and their own geographic areas, they can miss the big picture. Associations may be able to provide their members' counsel with valuable background information and other insider knowledge that members may lack.

As antitrust issues tend to affect entire industries, associations have increasingly turned to the courts to use the antitrust laws on their members' behalf. Even when they do not actively litigate, they can keep members informed of alleged antitrust violations and work with members' counsel so that each member may decide for itself what action is in its own best interests.

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