

Legal Alert

January 27, 2015

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QUESTION: HOW CAN NOT-FOR-PROFIT TRADE ASSOCIATIONS GET IN TROUBLE FOR VIOLATING THE ANTITRUST LAWS?

ANSWER: EVEN BYLAWS OR ETHICS CODES, NOT PROPERLY DRAFTED, CAN LEAD TO ANTITRUST CLAIMS.

Both the Professional Lighting and Sign Management Companies of America, Inc. ("PLASMA") and the Professional Skaters Association ("Skaters Association") have agreed to settle actions by the Federal Trade Commission ("FTC") challenging restraints on competition through bylaws provisions. Both organizations are not-for-profit trade associations.

Generally, corporate documents such as bylaws, membership rules, policies and ethics codes help protect associations from problems. What went wrong in these cases?

The PLASMA Bylaws Needed a Transfusion

The FTC's complaint said that PLASMA's bylaws restrained competition by:

- 1) prohibiting members from providing commercial lighting or sign services in the designated territory of another member unless that member declines to perform the work;
- 2) imposing a price schedule on work performed in the designated territory of another member; and
- 3) barring former members from soliciting or competing for clients of current members for one year after leaving the group.

According to the FTC, "the purpose and effect" of the PLASMA bylaws was to discourage and restrict competition among PLASMA members. The FTC is making PLASMA change its bylaws. It will also be required to have a process to sanction any violations of the revised and corrected bylaws.

Skating on Thin Ice

The FTC charged the Skaters Association with banning its members from soliciting students of other members. The 6400 ice skating teachers and coaches belonging to the Skaters Association were not allowed to compete to take students from other skating teachers and coaches who were association members.

The offending language in the Code of Ethics stated: "No member shall in any case solicit pupils of another member, directly or indirectly, or through third parties."

The FTC said that the Skaters Association:

instructed its members that this code provision prohibited coaches from many types of direct and indirect communications with skaters and parents, and actively enforced the ban through a variety of penalties, including suspension, even over the objections of skating students and their parents who wanted to switch coaches.

The FTC will require the Skaters Association to allow its members to solicit work and compete on the basis of price. The Skaters Association must change its code of ethics and let its members and their students know about the FTC settlement. The Skaters Association will also be required to implement an antitrust compliance program.

How Do You Keep from Becoming the Next Target of the FTC and the U.S. Department of Justice?

Adopt a formal antitrust policy. Some basic training in antitrust law compliance should be provided to management, employees and members. Anytime competitors communicate with each other, there is a risk that someone will someday characterize the situation as an antitrust violation. The antitrust laws have severe civil remedies, including treble damages, as well as possible criminal sanctions. To reduce antitrust risks, here are some general guidelines. You should consult with counsel with respect to specific situations.

DON'T

1. Do not discuss or exchange information with any competitor regarding:
 - (a) Individual company prices, price changes, price differentials, markups, discounts, allowances, credit terms, etc., or data that bear on price, such as individual company costs, productions, capacity, inventories, sales or the like.
 - (b) Industry pricing policies, price levels, price changes, differentials, or the like.
 - (c) Changes in industry production, capacity or inventories.
 - (d) Bids on contracts for particular customers or procedures for responding to bid invitations.
 - (e) Plans of individual companies concerning the design, production, distribution or marketing of particular products, including

- proposed territories or customers.
- (f) Individual suppliers that might result in excluding them from the market or influencing the business conduct of firms toward such suppliers or customers.
2. Do not discuss or exchange information regarding the above matters during social gatherings incidental to meetings, even in jest.

DO

1. Adhere to prepared agendas for meetings at trade association meetings.
2. Insist that meeting minutes be prepared and distributed to all participants, and object whenever meeting minutes do not accurately reflect what happened.
3. Find out the purposes and authority of each industry committee or other group before you participate.
4. Consult with your company counsel on antitrust questions related to meetings.
5. Protect against any discussions or meetings that appear to violate the antitrust laws, disassociate yourself from any such discussions or activities, and leave any meetings in which they continue.

Obviously, we cannot cover all situations with these general guidelines. We would be very happy to advise you concerning situations specific to your business, however.

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