

# ANTITRUST: AN INDUSTRY OBLIGATION

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# A FUNDAMENTAL LEGAL PRINCIPLE

- ❖ Absent competitive abuse, trade associations are pro-competitive and efficiency-enhancing .
- ❖ This principle is uniformly recognized among antitrust authorities and the courts, including the United States Supreme Court.

# Why Trade Associations Are Important To You.

- ❖ IMnI as a trade association can achieve what Members can not achieve individually. For example:
  - IMnI as industry spokesman and common forum
  - Interests of the industry versus individual vested interests
  - Confidential central collection point for information and data
  - Centralized projects, spreading costs
  - Representation with customers and suppliers; other associations; governmental entities; and the public

# Why Is Antitrust Compliance So Important?

- ❖ IMnI, as a global trade association representing a majority of the industry and a basic commodity, has a high antitrust profile.
- ❖ As a matter of law, trade associations are automatically presumed to constitute joint activity among competitors. The most serious antitrust violations deal with concerted activity among competitors, e.g., price fixing and horizontal division of markets.

# Why Is Antitrust Compliance So Important?

- ❖ Antitrust investigations; subpoenas; government prosecution; and private lawsuits, including class actions, can be horrendously burdensome and expensive.
  - There are over 100 countries with antitrust laws. The most prominent are the US; the EU; Japan; Australia ; Korea; Brazil; and Canada.
  - The United States is the most difficult jurisdiction for antitrust. It features:
    - a. Government criminal and civil prosecution;
    - b. Private legal actions, with automatic treble damages; and
    - c. Class actions

# Why Is Antitrust Compliance So Important?

- ❖ The US Antitrust Division recovered over \$1 billion in antitrust penalties in 2012; prison sentences were extended to four years.
- ❖ The US (quite arrogantly) claims jurisdiction over any violations of USA antitrust laws that affect US commerce no matter where conducted.
- ❖ In addition, the EU has been particularly effective in collecting antitrust fines based on the amount of commerce involved (\$3 billion in past 3 years).

# Real Life Example:

- ❖ The USA Steel Industry Class Actions are presently pending in Federal Court in Chicago.
- ❖ Allegations in the court complaints: conspiracy by major US steel producers to limit production and thereby raise prices of crude steel.
- ❖ The complaints were filed in summer of 2008. Five years later, the court is considering the first major issue: Is there a proper class of crude steel consumers? If so, then the court moves to the second major issue: Was there a violation of antitrust laws? If so, then, third issue: amount of damages caused by conspiracy.

# Real Life Example:

- ❖ How did the class actions affect the World Steel Association?
- ❖ World Steel not sued as a defendant , but allegations of World Steel meetings, used as a vehicle for illegal agreements on capacity.
- ❖ No allegation of direct agreement or conspiracy among members. Rather, inferences from factual statements made at World Steel meetings concerning overcapacity and need for “ market discipline”.
- ❖ World Steel under court document retention letter. Fortunately, plaintiffs’ request for subpoena not ordered by the court.

# Trade Associations Can Not Do Certain Things that Individual Members and Experts Can Do.

- ❖ Remember: trade associations are automatically deemed joint activity versus unilateral decision-making by Members.
- ❖ Trade associations provide a forum for information. Individual members can then take this information and make unilateral decisions in their own business interest and hopefully the interest of the industry.

# Trade Associations Can Not Do Certain Things that Individual Members and Experts Can Do.

- ❖ Independent experts can make predictions on antitrust sensitive topics. However, IMnI must avoid agreements, suggestions, recommendations, and even inferences, to members on competitively sensitive topics.

# Antitrust Sensitive Areas, or “No– No’s” , for Members (Unless Legally Approved)

- ❖ Fundamental Legal Principle: Agreements among competitors that unreasonably restrict competition are presumed illegal.
  
- ❖ Proven sensitive topics are:
  - Prices (or any component thereof, e.g., freight, discounts, credit terms, warranties, etc.);
  - Limiting capacity;
  - Limiting production, or output;
  - Dividing geographical markets, products or customers;
  - Agreements to pass on costs to customers.

# Practical Danger Areas

- ❖ Common danger areas that I have frequently experienced in 40 years of representing trade associations:
  - Conversations during breaks and social sessions (and even on the bus) are not immune.
  - Presenting facts at association meetings is legal. Suggesting or inferring joint action is suspect.
  - Conversations and remarks about customers; suppliers; invasion of territories ;etc. are suspect (e.g., "What do you plan to do about X?"; " You stay out of my area ; I will stay out of yours.")
  - Unsupervised Q and A sessions.

# Practical Danger Areas

- ❖ Finally, completely legal trade association activities can be subverted. Thus, antitrust authorities are commonly suspect that there may be misuse of statistical and other information to track conspiracies.

# Full Circle

## ❖ Fundamental Legal Principle:

- Legitimate trade association activities are pro-competitive and efficiency enhancing.
- But: each of us must be aware of the antitrust limitations.

THANK YOU FOR YOUR ATTENTION,