

TREAT YOUR ASSOCIATION LIKE A HOME APPLIANCE: READ THE OWNER'S MANUAL BEFORE USING.

BY MICHAEL P. DONNELLY

I. INTRODUCTION

Regardless of what type of business you may be in, chances are there is an association which represents your industry. Chances are that you or someone in your company represents the company in that association. In an increasingly crowded marketplace, trade and professional associations are excellent ways to increase your company's visibility as well as pursue common goals on behalf of your industry to promote profitability. However, because the members of a trade or professional association are typically competitors, membership in a trade or professional association is not without its potential pitfalls. And, just like when we plug that new microwave in before we make sure everything is in place to ensure it is safe to use, we tend to become very active in associations before we have made sure that everything is in place to operate the association safely.

Because the nature of an association is to bring together competitors to promote the welfare of the industry as a whole, its activities must be carefully monitored and structured to ensure that the activities do not run afoul of any antitrust laws. Therefore, anyone involved in an association must be sensitive to the antitrust risk involved in such participation and ensure that their association has put in place adequate protection for its members and its staff.

II. ANTITRUST LAWS

There are numerous State and Federal antitrust laws that apply to associations. While a full examination of all antitrust laws is beyond the scope of this article, the basic purpose of the laws is similar. The simplest expression of

antitrust law in America is contained in Section 1 of the Sherman Act, which states

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

The fundamental purpose of antitrust laws is to facilitate open and free trade. In 1958, the U.S. Supreme Court said that "the Sherman Act rests on the premise that the unrestrained interaction of competitive forces will yield

the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions." See *Northern Pacific Railway v. United States*, 456 U.S. 1 (1958).

Since trade and professional associations are, by their very nature, a "combination" of competitors, their activities will be given the highest scrutiny by Federal and State regulators and courts. Every trade and professional association, regardless of its size, should have an antitrust compliance program. An antitrust compliance program can range from a simple draft of an antitrust policy that is complied with during the course of all association activities to active ongoing supervision by outside counsel, including yearly antitrust audits, attendance at all association meetings and events, and review of all materials produced by the association. Larger, highly organized associations may regularly have ongoing antitrust counseling. In contrast,

TREAT YOUR ASSOCIATION LIKE A HOME

APPLIANCE: continued

smaller, more informal associations may get little or no antitrust counseling. However, importantly, the risks to each association and its members are exactly the same. Therefore, if you belong to an association, regardless of how small, your participation should be conditioned upon your satisfaction that there is an adequate antitrust policy in place.

III. ANTITRUST COMPLIANCE PROGRAMS

Mere membership in a trade association does not, itself, create any antitrust liability. Associations are generally considered pro-competitive. They work on behalf of their members to increase the availability of their product to a

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wider market. However, even if the members of an association do not intend to participate in any anti-competitive behavior, the mere fact that they continue to participate in activities that violate the antitrust laws may be enough to expose the individual members to liability. If a member is aware of anti-competitive behavior by other members and fails to formally object, the member may be seen as approving of the activity and thus be considered part of the “conspiracy”. Association members must understand that they have to take quick and decisive action if they become aware of any anticompetitive behavior by members of the association, including leaving any meeting where such anti-competitive behavior is taking place, formally objecting to the association, its counsel and the member’s own counsel immediately after learning of such behavior.

Each association will differ in the type and extent of antitrust compliance program it will need to adequately protect its officers, director, staff and members. The nature and extent of the antitrust compliance program will depend largely on the nature of the industry involved as well as the types of activities undertaken by the association. At a minimum, a member of an association should ensure that

their association has in place an antitrust policy which ensures the following:

1. That competitively sensitive information is not shared between the members.
2. That requirements for membership do not unreasonably exclude other competitors in the specific industry or trade from joining the association.
3. That any program undertaken by the association is sufficiently reviewed to ensure that it does not disclose any competitively sensitive information to its members or give the appearance of impropriety.
4. That the dues structures and governance of the association allows for reasonable participation by all relevant members of the industry.

While this list is not exhaustive, any antitrust compliance program should address these issues.

IV. CONCLUSION

Trade and professional associations are an important part of maintaining visibility and high standards in many industries. However, membership is not without its risks. Often times, because of budgetary constraints, associations do not adequately address antitrust concerns and fail to implement proper antitrust compliance policies. As a member of any association, you or your company may run the risk of being subjected to both civil and criminal liability should you participate in, or approve of, any anti-competitive behavior by the association or its members. Any member of an association has the right to raise concerns about antitrust compliance to the officers or staff of the association. Therefore, if you or your company choose to be involved in an association, proceed only once you are comfortable that antitrust concerns are being properly addressed by the



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UPDATING YOUR TRUST AGREEMENT

BY RYAN M. WILSON

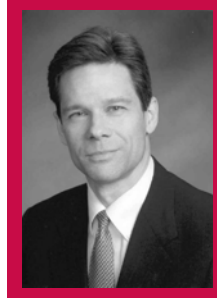
Many individuals establish revocable living trust agreements for estate planning purposes. The creator of the trust is called the grantor or settlor. There are several reasons for creating a trust, including, but not limited to, avoiding probate and reducing federal estate taxes. Quite often, however, the grantor puts his or her trust documents in a secure place and forgets about them. This is a mistake. Like all estate plan documents, trust agreements should be reviewed on a regular basis, i.e., every three to five years.

In April of 2000, the Estates and Protected Individuals Code (EPIC) was enacted, and it replaced the Revised Probate Code. EPIC brought about many changes and all trust agreements executed before 2000 should be reviewed. For example, EPIC confers very broad powers on trustees. The typical revocable living trust agreement incorporates those statutory powers. One of those powers is the power to borrow money for any purpose and to mortgage or pledge trust property. However, this is generally interpreted to mean that the trustee can borrow on behalf of the trust and mortgage or pledge trust property for loans to the trust. Here is the problem: the trustee is not specifically authorized to mortgage or pledge trust property for loans to the grantor or settlor of the trust. As a result, the trustee does not have the necessary authority to execute a mortgage or pledge other property to secure the grantor's personal loans.

In order to avoid this problem and a possible surprise just before closing, your trust agreement should specifically authorize the trustee (1) to mortgage or pledge trust property to secure loans of the grantor or settlor; and (2) to guarantee loans or debts of the grantor or settlor. If your trust contains this language or similar language, the trustee would have the necessary authority for the loan transaction. If you are missing the requisite language, you will need to have an attorney prepare an amendment to your trust.

Another common problem with trust agreements is the funding process. A normal part of this estate planning technique involves transferring or re-titling assets in the name of the trust. This is a continuous process. Frequently, additional assets are purchased after the trust agreement is established and are not properly titled. Also, the values of various assets fluctuate. As a result, it is very important to revisit the funding of the trust on a regular basis.

This article originally appeared in the February issue of *Golden Bullets*, a monthly newsletter dedicated to covering various estate planning topics. If you would like to be added to the mailing list, please email Ryan M. Wilson at rwilson@fraserlawfirm.com and indicate whether you would like to receive *Golden Bullets* by email or snail mail.



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ATTORNEY ACTIVITIES OF NOTE

- Through aggressive pretrial discovery, Gary Rogers was able to convince the Plaintiff's attorney that his client's personal injury claim against Gary's client should be dismissed with prejudice without any payment to the Plaintiff. The case involved a "mini-riot" at a MSU fraternity party where two groups were involved in a drunken brawl. The Plaintiff was struck in the head by a rock thrown by a member of Gary's client's group. The plaintiff suffered a fractured skull and required emergency brain surgery to save his life.
- Robert Nelson testified before the Senate Technology and Energy Committee on behalf of the Customer Choice Coalition on February 15th regarding whether ratepayers should finance the construction of new utility plants. Mr. Nelson and the Coalition believe that too much of a utility plants risk will rest with the ratepayers.

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