

ASSOCIATION LAW HANDBOOK

Third Edition

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Books on Association Law by the Author:

Association Law Handbook, 1981, 1986, and 1996

Association Issues (Editor and Author), 1983, 1989

Federal Lobbying Law Handbook (Editor and Author), 1989, 1993

Certification and Accreditation Law Handbook (Editor and Author), 1992

Legal Risk Management for Associations (Co-Author with
David O. Ogden, Esq.), 1995

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Chapter 65

Approaches to Government

Associations universally recognize that government is playing increasing roles in the business and professional endeavors of their members. The roles have not only grown quantitatively but have changed qualitatively. Until recent years most new federal legislation and regulation were concentrated in specific commercial areas (i.e., food and drugs, communications, transportation, etc.). Even government agencies with broad statutory authority, such as the Federal Trade Commission and the Securities & Exchange Commission, generally attended to one industry or profession, or even one firm, at a time. More recent federal laws and rules are more sweeping in scope. For example, they can apply uniformly to almost any firm that has employees (Occupational Safety and Health Administration), that makes discharges into the air or water (Environmental Protection Agency), or that makes or sells products to consumers (Consumer Product Safety Commission). State and local government influence has likewise increased in size and scope.

As a result of this proliferation of government activity, very few associations do not actively represent their members before legislatures or agencies—or even in court occasionally. Association approaches to government often seek laws, rules, or decisions favorable to association members. Alternatively, these approaches may be designed to change or avoid laws, rules, or decisions unfavorable to association members. These approaches affect the very purposes for which association government affairs activities are conducted. But occasionally, in advancing a position favorable to its members, an association directly or indirectly advances a position unfavorable to competitors of its members. The question is raised whether a particular united association government affairs effort, which because of its nature is necessarily harmful to competitors of members, is an unlawful “combination or conspiracy” in restraint of trade.

A series of Supreme Court cases have said no. The First Amendment to the Constitution gives citizens—acting alone or in groups—the right to petition their government. The Court has said that legitimate approaches to government ordinarily are protected by the First Amendment, even when they result in competitive harm to others. Similarly, the resulting action of a government entity itself may carry exemption from antitrust.

Some exceptions to this constitutional protection for association approaches to government have been carved out. To avoid coming under the exception, and because it is sensible to establish long-term mutual respect between an association and the government entities with which it deals, care should be taken to ensure that

association government activities or presentations are legitimate, factual, reasoned, thoughtful, and articulate.

Quite apart from the antitrust implications of association approaches to government, the Lobbying Disclosure Act of 1985 requires that associations that have employees who engage in lobbying must register and file semiannual reports with Congress. These federal lobbying disclosure provisions are covered in Chapter 45.

This chapter describes the state of the law on association antitrust protection for approaches to government as well as the exceptions to that protection.

Summary

- Approaches by associations to legislative, administrative, or judicial arms of government ordinarily are protected from being considered antitrust violations even when they necessarily result in competitive disadvantage to those not represented by the associations, such as competitors of members.
- The Supreme Court has held that the Constitution's First Amendment right to petition government ordinarily supersedes the antitrust prohibitions against joint action that results in injury to competitors when that First Amendment right is legitimately used. Government action by states resulting from these petitions also has been given antitrust exemption in some circumstances.
- Protection from antitrust laws for groups of competitors, such as in an association, making presentations to government was articulated in two Supreme Court cases where:
 - ♦ A group of railroads successfully influenced a state legislature to impose laws, and strengthen enforcement of them, restricting or impeding the activities of competing truckers, which, the Court held, was protected from antitrust challenge because it was only solicitation of government action to pass and enforce laws and was political activity rather than business activity (*Eastern Railroad Presidents Conference v. Noerr Motor*).
 - ♦ A mine workers' union and a group of large coal operators successfully convinced the federal government to set the minimum wage so high as to injure smaller coal operator competitors, which, the Court held, was joint effort to influence public officials that does not violate the antitrust laws even though intended to eliminate competition (*United Mine Workers of America v. Pennington*).

- The antitrust exemption for joint approaches to government, known as the Noerr-Pennington doctrine, is subject to several qualifications that also have been laid down in court decisions such as these:
 - ♦ A group of truckers agreed to oppose every new trucking application filed with a state government regardless of the merits of the applications, in order to restrict additional competition. The Supreme Court held that this was an attempt to use government processes to directly restrain trade and, therefore, was a “sham” not protected by the First Amendment from antitrust challenge (*California Motor Transport Co. v. Trucking Unlimited*).
 - ♦ A group of building products company representatives sought to influence the development and adoption of product standards by a nongovernment standards-making body, which was not considered a government entity even though its standards are used extensively by governments (*Allied Tube & Conduit Corp. v. Indian Head, Inc.*).
 - ♦ A group of swimming pool builders and suppliers was successful in convincing government bodies to write procurement specifications favoring only it. A Court found that this activity concerned the government’s commercial purchasing and specification roles rather than its political role and was not protected from antitrust challenge (*George R. Whitten, Jr. v. Paddock Pool Builders.*).
 - ♦ A situation in which the approaches to government had to be considered attempts to influence the policy-making functions of the government rather than the administrative or regulatory functions (*Aluminum Co. of America v. Wood Exploration & Producing Co.*).
- To ensure constitutional protection from antitrust laws for joint approaches to government the following guidelines should be followed:
 - ♦ “Sham” use of government process merely designed to restrain competition must be avoided.
 - ♦ Joint attempts to influence government commercial activities, such as procurement, rather than political activities, must be carefully considered.
 - ♦ Unethical or improper activities in influencing government always must be avoided. Particularly when such activities are made in areas other than the political arena, they may not have antitrust protection.

- Another exemption from antitrust laws exists for actions of state governments that restrain trade or result in anticompetitive situations that, if undertaken by private firms or associations rather than by state governments, would violate antitrust laws. The existence of this exemption has led some associations to consider whether otherwise anticompetitive programs could be shielded from antitrust liability if state governments could be convinced to become involved in the programs.
- The "state action" exemption to the antitrust laws was most broadly set out by the Supreme Court in a 1943 case where a state government adopted and enforced an agricultural marketing program that resulted in restraint of trade but, which, the Court held, did not violate antitrust laws because it was state government action rather than action by individual firms or associations (*Parker v. Brown*). Since that decision, the Supreme Court has severely limited the applicability of the state action exemption to situations where anticompetitive activities are directly compelled by a state government acting in its sovereign capacity. It is not clear exactly when state government involvement in an activity, such as one encouraged by association lobbying, will be sufficient to invoke the state action exemption to shield the activity from antitrust laws.
- Exceptions to antitrust laws for joint approaches to government and for state action are highly complicated and subtle legal areas where observance of merely a few guidelines such as those given here may not be enough to avoid antitrust challenges. Associations should be advised by experienced antitrust counsel in these areas to help avoid challenges.

Chapter 65 Resources

Books

- Epstein. "Lobbying and Antitrust." In *Federal Lobbying Law Handbook*, 2d ed., edited by Jacobs. Washington, D.C.: American Society of Association Executives, 1993, p. 105.
- . "Lobbying and Defamation." In *Federal Lobbying Law Handbook*, 2d ed., edited by Jacobs. Washington, D.C.: American Society of Association Executives, 1993, p. 129.
- Herold. "Antitrust, Trade Regulation, and Other Non-tax Aspects of Association Activities." In *Managing Membership Societies*, edited by Grief. Washington, D.C.: American Society of Association Executives, 1979, p. 123.

- Jacobs. "Avoiding Antitrust Dangers from Lobbying." In *ASAE 2nd Annual Management Conference Proceedings*. Washington, D.C.: American Society of Association Executives, 1984, p. 300.
- . "The Law of Lobbying." In *ASAE 3rd Annual Management Conference Proceedings*. Washington, D.C.: American Society of Association Executives, 1985, p. 330.
- Lamb & Shields. *Trade Association Law and Practice*. Boston: Little, Brown, 1971, p. 162.
- MacArthur. *Associations and the Antitrust Laws*. Washington, D.C.: U.S. Chamber of Commerce, 1984, p. 73.
- Shields. "Lobbying and the Antitrust Laws." In *Associations and the Law, Book IV*. Washington, D.C.: U.S. Chamber of Commerce, 1981, p. 8.

Periodicals

- "Application of the Sherman Act to Attempts to Influence Government." *Harvard Law Review* (1968): 847.
- Costilo. "Antitrust's Newest Quagmire: The Noerr-Pennington Defense." *Michigan Law Review* (1967): 333.
- Jacobs. "Association Appearances at Legislative and Regulatory Hearings." *Association & Society Manager* (June/July 1979): 29.
- Jacobs & Epstein. "Association Standard-Setting in the Wake of the Allied Tube Case." *ASAE Association Law & Policy* (1 July 1988): 6.
- Komarow. "Back to the Future: Putting Allied Tube into Historical Perspective." *ASAE Association Law & Policy* (15 July 1988): 7.
- Kushner. "Challenging Federal-Agency Rulemaking: A Four-Tiered Approach." *Association & Society Manager* (December/January 1980): 17.
- Richardson. "Lobbying and Public Relations-Sensitive, Suspect or Worse?" *Antitrust Bulletin* (1965): 507.
- Sulzer. "Supreme Court Torches Conduit Maker's Noerr-Pennington Immunity in Fire Protection Association Standard-Setting Dispute." *ASAE Association Law & Policy* (15 June 1988): 5.
- Vandestar. "Presenting the Industry Viewpoint." *Antitrust Bulletin* (1967): 565.
- Verman. "Indian Head: A Healthy Outlook for Standard Making, Part I." *ASAE Association Law & Policy* (15 Dec. 1988): 5.
- . "Indian Head: A Healthy Outlook for Standard Making, Part II." *ASAE Association Law & Policy* (1 Jan. 1989): 5.

Cases

- Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). Exemption from antitrust laws for approaches to government.
- United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Exemption from antitrust laws for approaches to government.

- California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). Sham exception to antitrust exemption for approaches to government.
- Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). Improper attempts to influence nongovernment bodies not protected from antitrust scrutiny.
- George R. Whitten, Jr. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970). Exemption from antitrust laws for approaches to government not applicable in pure commercial dealings with government.
- Wood Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). Noerr-Pennington exemption applicable only to government's political rather than administrative functions.
- Parker v. Brown*, 317 U.S. 341 (1943). State action exemption from antitrust laws.
- Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). State action exemption not applicable in bar association minimum fee case.
- Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). State action exemption applicable although ban on lawyer advertising overturned on constitutional grounds.
- LaFayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). State action exemption not applicable to political subdivisions of a state.
- National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978). No state action exemption from alleged state government encouragement of a professional society's ban on competitive bidding.

Other Resources

- DOJ Business Review Letter 84-13. Licensors and licensees of music copyright to discuss legislation.
- DOJ Business Review Letter 94-14. Sharing of information for use in approaching government approved.
- D. Barker. "Exchange of Information for Presentation to Government Agencies: The Interplay of the *Container* and *Noerr Doctrines*." Speech before the American Bar Association National Institute (27 Feb. 1975).