Trade Associations are Boycott-Prone--Bid Depositories as a Case Study

William H. Orrick Jr.
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BID DEPOSITORIES AS A CASE STUDY

By WILLIAM H. ORRICK, Jr.*

THERE is nothing permanent except change.” This summary of
the basic philosophy of Heraclitus1 is the hallmark of the modern bus-
iness world. The ever-increasing acceleration of the rate of change
in the technology and methods of doing business in this computerized
space age has been a primary cause of the spawning of an ever-
increasing number of trade associations.2 These new trade associa-
tions have been founded largely because of the members’ desire and
necessity for learning the new technology and the new methods.3 The
same cause has resulted in the increased use and rejuvenation of ex-
isting trade associations.

Thus, today it is more important than ever, in a business world
in which there are also changes in antitrust theory and enforcement,
for businessmen who are members of trade associations and trade
association executives to understand fully the antitrust principles
applicable to modern trade associations and to know what they, as
members and executives of trade associations, can and cannot do
under the law.

But why, it may be asked, must the legality of trade association
activities be measured by the sometimes unstable and imprecise yard-
stick of antitrust principles? It was not always so.

Since the time of the Pharaohs in Egypt, the early emperors in
China and the Phoenicians in the Mediterranean, businessmen
have banded together in so-called trade associations to help each other
without having to worry about the antitrust laws.4 Literally,

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1 A. ROGERS, STUDENT’S HISTORY OF PHILOSOPHY 126 (3d ed. 1952). Put
another way by de Tocqueville: “America is a land of wonders, in which
everything is in constant motion and every change seems an improvement.”

2 A trade association is commonly defined as a “nonprofit voluntary
cooperative organization of business competitors.” Brass, The Antitrust Divi-

3 Small Business Administrator Bernard L. Boutin underscored the
problem when in testimony before a Congressional Committee he said: “The
small business man is being left behind in America’s booming economy. He
is caught in a crossfire.” The Oil Daily, Mar. 6, 1967, at 7, col. 1.

4 CHAMBER OF COMMERCE OF UNITED STATES, ASSOCIATION MANAGEMENT
2 (1958).
for centuries they have been in the center of the stream of business history and have flourished as an integral part of the capitalistic system.

And, in the United States, trade associations, far from being something new or an innovation to circumvent the antitrust laws, had their genesis before the American Revolution. The two oldest American trade associations, namely, the Chamber of Commerce of the State of New York, founded in 1768, and the New York Stock Exchange, founded in 1792, continue to be important trade associations today. Indeed, throughout the history of American business, trade associations have been of inestimable value not only to their members but to our whole society. During World War I and World War II they provided an important source of vital statistics for the United States Government covering the rate and extent of production of various goods and machinery.

Today, modern trade associations play a far larger and more important business role in the capitalistic community than those extant even 10, 15 or 25 years ago, let alone their more ancient counterparts. They provide such valuable services for their members as accounting services, suggestions for better business practices, credit information, collection services, economic studies, engineering aids and services, governmental relations, industrial relations, legislative research, legal information, liaisons with governmental agencies, market research, public relations, quality control and research, sales promotion, trade practice studies and many other services.

Antitrust as the Regulator of Trade Association Activities

Why then circumscribe trade association activities by the application of the antitrust yardstick? The answer is very simple. The outstanding characteristic of a trade association is that it is a combination of business competitors. This very important fact—that it is a combination—brings a trade association squarely within one major element of two of the most important antitrust laws, namely, sections 1 and 2 of the Sherman Act. Section 1 proscribes every contract, combination and conspiracy in restraint of trade, and section 2 proscribes every combination or conspiracy to monopolize any part of the trade or commerce of the United States. A trade associa-

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5 Id. at 2-3.
6 Id. at 3.
7 Id. at 5-6; G. LAMB & S. KITTELLE, TRADE ASSOCIATION LAW AND PRACTICE 7-8, 12 (1956) [hereinafter cited as LAMB & KITTELLE].
8 LAMB & KITTELLE 31-168.
9 See note 2 supra.
11 Id.
tion, being a *combination* of businessmen and business organizations, then meets one very important element in proving a violation of section 1 or section 2 of the Sherman Act.\(^{12}\)

The very fact of being one member of a formal combination of competitors makes it much simpler to run afoul of the antitrust rules proscribing joint action in so many areas. During the days when the National Industrial Recovery Act was in full force and effect, trade associations formed the nucleus of the groups that developed and enforced the codes of fair competition. Their members and executives thus became skilled in ways of restraining competition and in ways of enforcing recalcitrant members of a particular trade or industry to abide by the so-called codes of fair competition.\(^{13}\)

It is important at the outset to emphasize that mere membership in a trade association does not violate any statute. There is no such thing as guilt by membership.\(^{14}\) And, thus, mere membership in an association which is engaged in a conspiracy to violate the antitrust laws is not sufficient to establish participation in the conspiracy. It has, however, been held that a member who knows or should know that his association is engaged in an unlawful conspiracy, and who continues his membership without protest, may very well be charged with conspiracy.\(^{15}\)

Trade associations, for the most part,\(^{16}\) have long since ceased

\(^{12}\) It may be here noted that the anticompetitive dangers inherent in a combination of competitors have been recognized since the earliest days of the guilds and other combinations of merchants and craftsmen in medieval England. In a 5-year flurry of vigorous "antitrust" enforcement, associations of coopers, skinners, chandlers, fruiters, carpenters and cordwainers were prosecuted for combinations in restraint of trade in London from 1298 to 1303. Hence, application of statutory and common law rules against restraint of trade to such activity is certainly nothing new. Peppin, *Price-Fixing Agreements Under the Sherman Anti-Trust Law*, 28 *CALIF. L. REV.* 297, 310-11 nn.43, 44 (1940).


\(^{15}\) Phelps Dodge Refining Corp. v. FTC, 139 F.2d 393 (2d Cir. 1943).

\(^{16}\) I say "for the most part" advisedly since on January 26, 1967, the Fuel Oil Dealers' Division of the Central Montgomery County Chamber of Commerce, described as "a trade association whose members are fuel oil dealers," was indicted in the Eastern District of Pennsylvania, along with ten individuals and six companies, and was charged with illegally raising and fixing the prices of fuel oil in Norristown, Pennsylvania (United States v. Fuel Oil Dealers' Division, Crim. No. 22756 (E.D. Pa.)); on March 8, 1967, a proposed consent judgment was filed ending a civil antitrust case against the Chicago Linen Supply Association and 12 of its members. The judgment required that the association be dissolved and the defendants enjoined from stabilizing prices and allocating markets for customers (United States v. Chicago Linen Supply Ass'n, 296 B.N.A., ANTITRUST AND TRADE REGULATION REPORTS, A-4 (Mar. 14, 1967)); and on November 24, 1967, a civil antitrust
being the vehicle by which various and sundry methods of unreasonably restraining trade resulted in per se law violations. Through bitter experience, trade association executives learned early in the history of the Sherman Act that one could not do through membership in a trade association what he was forbidden to do without being a member of a trade association. The experience came from cases which established the guideposts for trade association activities and now serve as reminders of activities in which trade associations and their members may not participate. The case history of trade associations in the antitrust laws indicates that these associations can be used to accomplish nearly all the known antitrust offenses, beginning with price-fixing.

Price-fixing specifically is mentioned here because not only is it the most common antitrust violation, but it is an excellent example of an offense which can be easily accomplished through a trade association. Price-fixing is, of course, illegal per se, no matter how accomplished. In United States v. Gasoline Retailers Association, Inc., a gasoline retailers association was indicted and convicted for entering into a specific agreement with a union local to refrain from advertising the price of retail sales of gasoline in any manner other than the price computing mechanism attached to gasoline pumps; and in United States v. Greater Washington Service Stations Association, Inc., another gasoline retailers association was indicted and convicted for price-fixing accomplished by the adoption by a trade association of a minimum price schedule. There the members of the association agreed to compile, publish and distribute a schedule of minimum automotive service charges. And, of course, price-fixing can be

suit was filed in the federal district court in Milwaukee charging the National Funeral Directors Association with coercing undertakers to prevent them from advertising prices of funerals. Wall Street Journal, Nov. 27, 1967, at 10, col. 1-2.


19 285 F.2d 688 (7th Cir. 1961). Four recent cases involving price-fixing by agreements among members of associations of pharmacists upon a minimum schedule of prices for prescription drugs are as follows: Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir. 1962), cert. denied, 371 U.S. 862 (1962); United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29 (D. Utah 1962); United States v. Idaho State Pharmaceutical Ass'n, Civil No. 3654 (D. Idaho 1963); United States v. Hawaii Retail Drug Ass'n, Civil No. 2064 (D. Hawaii 1963).

accomplished (and proven) by an acceptance, without previous agree-
ment, of an invitation to participate in a trade-restraining plan,²¹ or
by a simultaneous price increase by industry leaders at a time when
sales are declining, even without evidence of any communications
among the participants,²² or by industry-wide adoption of identical
price formulae,²³ or perhaps even by a "knowing wink."²⁴ Trade
associations, by their very nature, form an excellent vehicle for price-
fixing by any of the methods above mentioned.

But the history of trade associations is not simply written in
negative terms. There are many permissible trade association activi-
ties sanctioned by the highest courts. Indeed, the so-called Magna
Charta of trade associations (Mr. Justice Stone's oft-quoted Maple
Flooring²⁵ opinion) bears the imprimatur of the Supreme Court itself,
as follows:

[Quote from Supreme Court opinion]

It was not the purpose or the intent of the Sherman Anti-trust Law
to inhibit the intelligent conduct of business operations, nor do we
conceive that its purpose was to suppress such influences as might
affect the operations of interstate commerce through the application
to them of the individual intelligence of those engaged in commerce,
enlightened by accurate information as to the essential elements of
the economics of a trade or business, however gathered or dissem-
inated. Persons who unite in gathering and disseminating informa-
tion in trade journals and statistical reports on industry, who gather
and publish statistics as to the amount of production of commodities
in interstate commerce, and who report market prices, are not en-
gaged in unlawful conspiracies in restraint of trade merely because
the ultimate result of their efforts may be to stabilize prices or limit
production through a better understanding of economic laws and a
more general ability to conform to them, for the simple reason that
the Sherman law neither repeals economic laws nor prohibits the
gathering and dissemination of information.²⁶

It is under the umbrella of this opinion that statistical reporting,
cost accounting and other important services are frequently rendered
by modern trade associations.²⁷ Some of these services shall be
examined briefly.

Statistical Reporting

Statistical reporting has received much attention from the
courts.²⁸ Collecting, classifying, compiling and distributing data,

²⁴ Cf. Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965).
²⁶ Id. at 583-84.
²⁷ CHAMBER OF COMMERCE OF UNITED STATES, ASSOCIATION MANAGEMENT
17-18 (1958); 2 S. WHITNEY, ANTITRUST POLICIES 413-14 (1958); STOCKING &
WATKINS 233-34.
²⁸ See Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925);
primarily nonprice data such as figures on production, orders, sales, capacity, shipments and stocks on hand, are some of the most important trade association activities. Industry's requirements for statistics are endless, and the best way to meet these requirements is through planned collection and distribution activities by trade associations.

The gathering of such statistics with reference to price data has received close scrutiny, particularly in the Maple Flooring, Hardwood Lumber and Linseed Oil cases. The general rule of thumb applicable to collecting such price data is derived from the holding in Maple Flooring, where the Court said:

It is the consensus of opinion of economists and of many of the most important agencies of government that the public interest is served by the gathering and dissemination . . . of information with respect to the production and distribution, cost and prices in actual sales, of market commodities because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise . . . .

In Hardwood Lumber, the Court pointed out that an arrangement in which harmony on future prices was expected, clearly violated the Sherman Act, and it commented that:

Genuine competitors do not make daily, weekly and monthly reports of the minutest details of their business to their rivals as the defendants did.

Similarly, in Linseed Oil, the Court found that the program there involved, although purporting to foster "intelligent competition," did not provide for "real competition." Other guidelines for statistical reporting which have received judicial approval are contained in the First Cement case, Sugar Institute, and finally in Tag Manufacturers Institute.

The most recent judicial expression on the legality of reporting is expected from the district court in United States v. Container Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921); Tag Mfrs. Institute v. FTC, 174 F.2d 452 (1st Cir. 1949).

Cf. LAMB & KITTELLE 30-33.
31 American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).
36 Id. at 388-90.
39 Tag Mfrs. Institute v. FTC, 174 F.2d 452 (1st Cir. 1949).
Corporation, which was argued January 12, 1967. There the defendants had a continuing agreement to exchange information concerning prices which were charged specific customers. The court has yet to rule on this type of statistical reporting.

In summary, statistical reporting is useful and necessary in the modern day business world. The test as to whether or not it is illegal inevitably is what is the purpose of submitting the information. That is the single most important criterion.

Cost Accounting

Another important trade association activity is cost accounting. Like certain other activities, it is not illegal in and of itself, provided that it is not used for illegal purposes or in conjunction with some arrangement that violates the antitrust laws. This activity also received judicial approval in Maple Flooring, where the members had reported over a period of time their costs of labor, warehousing insurance, taxes, interest, selling and advertising. Cost accounting can, of course, be used as a price-fixing scheme, as in United Typothetae, in which a "standard guide" dealing with uniform cost accounting principles and average-cost analysis was in reality a recommended price list. On the other hand, in Vitrified China, the FTC found there was no intent to fix final selling prices. In this case the average-cost study was held not part of a price conspiracy, in spite of the fact that the survey had been undertaken to enable manufacturers "to bring up the items which were priced too low and to bring down the items too high in relation to the actual costs of production."

Credit Reporting and Combined Buying

Activities to enable members to evaluate credit risks among their customers are a trade association function which received judicial sanction in the First Cement case. Again, credit reporting cannot, of course, be used as part of an illegal scheme. And so, in Swift & Co. v. United States, uniform rules for the giving of credit to dealers, keeping a blacklist of delinquents and refusing to sell meat to them was found to be part of an overall price-fixing arrangement, and held illegal.

Combined buying is an activity of trade associations which must be very carefully reviewed indeed, to be sure that section 2 of the

42 FTC v. United Typothetae of America, 6 F.T.C. 345 (1923).
43 Vitrified China Ass'n, 49 F.T.C. 1571 (1953).
44 Id. at 1573.
46 196 U.S. 375 (1905).
Clayton Act as amended by the Robinson-Patman Act is not violated.\textsuperscript{47}

**Standard-Writing**

The recent controversy over automobile safety standards, culminating in the action filed by the automobile industry March 30, 1967 against the government,\textsuperscript{49} and the recent speeches by the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice,\textsuperscript{50} have focused attention upon the trade association activity related to standardization of product. Standardization of product, of course, can be a part of a price-fixing conspiracy.\textsuperscript{51}

As Assistant Attorney General Turner has pointed out, there are some 300 standards-writing organizations in the United States which have developed more than 13,600 standards and "no serious criticism can be directed at the private formulation of standards designed to reduce clearly excessive and pointless proliferation of product variety."\textsuperscript{52}

Standards have been used, however, to facilitate noncompetitive pricing.\textsuperscript{53}

**Industry-Government Relationships**

It is in the field of influencing legislation that trade association activities are most effective. That such activities are entirely legal has been settled beyond doubt by the Supreme Court holding that concerted activity to influence the passage or enforcement of legislation by a trade association in one industry, even though primarily motivated by predatory intent toward another industry, did not violate the antitrust laws.\textsuperscript{54}

Thus, in trying to bring to the attention of the government problems involved in the Kennedy round of negotiations and in trying to have inserted appropriate provisions with respect to dumping and


\textsuperscript{48} Quality Bakers of America v. FTC, 114 F.2d 393 (1st Cir. 1940). See also General Auto Supplies, Inc. v. FTC, 346 F.2d 311 (7th Cir. 1965).

\textsuperscript{49} Wall Street Journal, April 3, 1967, at 2, col. 3-4.

\textsuperscript{50} Address by Assistant Attorney General Donald F. Turner, Annual Meeting of Antitrust Section of New York State Bar Ass'n, Jan. 26, 1967; address by Mr. Turner, Fifth Annual Corporate Counsel Institute, Chicago, Illinois, October 13, 1966.

\textsuperscript{51} Milk and Ice Cream Can Institute v. FTC, 152 F.2d 478 (7th Cir. 1946).

\textsuperscript{52} Note 50 supra.

\textsuperscript{53} C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489 (9th Cir. 1952).

escape clauses and export licensing, trade associations are very effective indeed.\textsuperscript{55}

Perhaps one of the most effective demonstrations of trade association activity is the concerted activity of many trade associations to defeat the repeal of section 14B in the Taft-Hartley Act,\textsuperscript{56} and also to keep down the provisions in the minimum wage statute.\textsuperscript{57}

Research and Invention

Trade association activity in the field of joint research has likewise received judicial sanction through the Supreme Court dictum in \textit{United States v. Line Material Co.},\textsuperscript{58} and so, to some extent, have patent ownership and patent interchange.\textsuperscript{59}

The foregoing services are useful and important services rendered by trade associations which are fully subject to the antitrust laws. Two particular types of trade associations which are not in all respects subject to the antitrust laws are a Webb-Pomerene association and an agricultural cooperative association.

A Webb-Pomerene association\textsuperscript{60} is exempt from the Sherman Act insofar as acts, combinations and agreements relating to export trade are concerned; but the activity of an association of this type may not be such as to restrain trade within the United States, nor may an exempt association restrain trade among its domestic competitors or intentionally affect prices within the United States.\textsuperscript{61} Because of the limited permissible goals of such an association, the discussions herein regarding permissible and nonpermissible trade association activity are not as pertinent as they hopefully are to a typical domestic trade association, but nevertheless the very narrow scope of activities available to a Webb-Pomerene association requires careful adherence to the guidelines of lawful activity, lest the exemption be lost. It seems clear, for example, that a Webb-Pomerene association could not enforce a boycott of a particular common carrier, wharfinger, manufacturer or processor.\textsuperscript{62}

Similarly, some of the activities of an agricultural cooperative

\textsuperscript{56} 29 U.S.C.A. § 164(b) (1965).
\textsuperscript{58} 333 U.S. 287, 310 (1948).
\textsuperscript{60} That is, an association formed under the Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1964), and engaged solely in export trade.
\textsuperscript{62} Cf. LAMB & KITTELLE 121-31.
association are exempt from the antitrust laws under the Capper-Volstead Act and section 6 of the Clayton Act. However, the exemption for agricultural cooperatives is a narrow one, relating primarily to the formation, organization and operation of the cooperatives within the purpose of the granted exemption. Hence, while a common selling agency for competitors is a probable violation of the Sherman Act, agricultural cooperatives are specifically enabled to form or employ such selling agents. Other activity furthering the purpose of the exemptions is permissible, such as financial assistance to members, agricultural marketing agreements with the Secretary of Agriculture, formation of federations of cooperatives, and horizontal mergers. However, once an agricultural cooperative is formed and operating, it is subject to antitrust attack for price-fixing, boycotts, price discrimination and attempts to monopolize just as much as

65 O'Halloran v. American Sea Green Slate Co., 207 F. 187 (N.D.N.Y. 1913), rev'd on other grounds, 229 F. 77 (2d Cir. 1915); Continental Wall Paper Co. v. Lewis Voight & Sons Co., 148 F. 839 (6th Cir. 1906); Ellis v. Inman, Poulson & Co., 131 F. 182 (9th Cir. 1904); Chesapeake & Ohio Fuel Co. v. United States, 115 F. 610 (6th Cir. 1902).
69 MacIntyre, Cooperatives, 26 ABA ANTITRUST SECTION 125 (1964); Saunders, The Status of Agricultural Cooperatives Under the Antitrust Laws, 20 Fed. B.J. 35, 54 (1960); Comment, 43 Neb. L. Rev. 73, 96 (1963); Note, 36 Ind. L.J. 497, 507-08 (1961). In a recent speech the Assistant Attorney General said: "[W]hile mergers between cooperative and non-cooperative organizations are fully subject to the antitrust laws, somewhat different standards may be used in judging mergers between cooperatives. In particular, as a cooperative appears to be entitled to acquire some degree of market power simply by enrolling new members in its organization, it should have the right to acquire this same power through horizontal merger when the merger is identical for all practical purposes to an increase in the size of one of the cooperatives through the voluntary accession of new members. Thus, if at the time a merger [sic] between cooperatives is to take place each member of the cooperative is free to withdraw and to be reimbursed the value of his share in the organization, the merger seems equivalent to the voluntary enrollment of new members into the organization and as such no more subject to attack under the antitrust laws than that organization would be if it had enlisted the same members originally." Address by Donald F. Turner, Assistant U.S. Attorney General, National Conference of Fruit and Vegetable Bargaining Cooperatives, in Washington, D.C., Jan. 17, 1966, reprinted in THE COOPERATIVE ACCOUNTANT, Summer 1966, at 22, 28 (emphasis added).
72 Cf. id. at 472.
73 North Texas Producers Ass'n v. Metzger Dairies, Inc., 348 F.2d 189 (5th Cir. 1965), cert. denied, 382 U.S. 977 (1968).
any other business.

Boycott by Trade Associations

We turn now to the antitrust violation most easily accomplished through the use of a trade association—a boycott. So far as legal writing is concerned, this is the most ignored trade association activity. Boycotts are illegal per se. They are used by trade associations most frequently to coerce members or nonmembers to follow, or not to follow, a particular plan of action, and when challenged, in most instances have been declared illegal. Thus, trade associations cannot exclude competitors from membership, nor can they attempt to coerce, either directly or indirectly, competitors to become members. Indeed, such associations have been required by the courts to make their services available to members upon reasonable and nondiscriminatory terms, and to admit to membership qualified applicants upon nondiscriminatory terms and conditions. By the same token, a trade association cannot expel its members for the purpose of carrying out an illegal plan or agreement, or require its members

74 An activity named for a victim, Capt. Charles C. Boycott, an English land agent ostracized in County Mayo, Ireland, for refusing to reduce rents. MERRIAM-WEBSTER, NEW INTERNATIONAL DICTIONARY 321 (2d ed. 1951).
76 Fashion Originators Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).
78 On March 29, 1967, the Justice Department filed a civil antitrust suit in Des Moines, Iowa, charging the National Farmers Organization with "threatening, intimidating, harassing and committing acts of violence" in attempting to force nonmember farmers, truckers and processors to join the organization's campaign to keep milk off the market. The suit charged the NFO with attempting to monopolize the interstate sale of milk in 19 states. United States v. National Farmers Organization, Civ. No. 1-273-S (S.D. Iowa, Mar. 29, 1967).
to adhere to so-called fair codes of competition.\(^{82}\)

However, an association may exclude from membership persons not within the trade group represented by the association,\(^{83}\) and indeed may well be prohibited from admitting to membership persons not actually within the trade group represented and whose membership may have anticompetitive effects, as might result from membership of a supplier in a fabricators, jobbers or retailers association.\(^{84}\)

Trade associations are prohibited from compelling their members to conduct their business in a particular fashion. For example, a jobbers association, by argument, persuasion and promises of increased patronage, could not prevent competition from manufacturers who sell directly to retailers and large consumers.\(^{85}\) Nor can trade associations prevent their members from engaging in a particular business.\(^{86}\)

Enforcing anticompetitive agreements by forfeiting pecuniary deposits for infractions of the agreement is illegal,\(^{87}\) as is the method of enforcing such an agreement by means of penalties and fines.\(^{88}\)

Industrywide self-regulation is often attempted by the use of trade associations. Such self-regulation, no matter how high the motive, is often very dangerous.\(^{89}\)

Many antitrust cases contain a defense, convincing or not, that the asserted violations were undertaken to prevent cutthroat competi-

\(^{82}\) United States v. Abrasive Grain Ass'n, 1948 Trade Cas. ¶ 62,329 (W.D.N.Y. 1948).

\(^{83}\) United States v. Southern Wholesale Grocers' Ass'n, 207 F. 434 (N.D. Ala. 1913).


\(^{85}\) Pacific State Paper Trade Ass'n v. FTC, 4 F.2d 457 (9th Cir. 1925).


\(^{89}\) "There are approximately forty organizations composed of producers, distributors or sellers in a particular industry which have adopted some type of program for self-regulation in advertising." \textit{Developments in the Law—Deceptive Advertising}, 80 \textit{Harv. L. Rev.} 1005, 1142 (1967). Attempts to establish codes of ethical practices, advisory panels, product testing and certification programs, and code authority, such as the motion picture code and the cigarette advertising code, have been attempted. \textit{Id.} at 1143-51.
tion, or to eliminate undesirable practices in a particular industry, or to safeguard the public health and safety, or that such violations are otherwise nevertheless in the public interest. Such defenses seldom withstand close analysis, and even more seldom do they prevail.  

Boycotts to restrict price competition were held unlawful as early as 1914. The status of concerted activity to eliminate undesirable or "unethical" industry practices not directly related to pricing, however, was somewhat in doubt until 1941. Then the Supreme Court held in Fashion Originators' Guild of America, Inc. v. FTC that, despite the presumed beneficial purpose of eliminating style piracy, nevertheless it violates the antitrust laws for a group of private persons to band together to enforce rules upon one another, when those rules do not have the sanction of law. The principle was reaffirmed with vigor in Klor's, Inc. v. Broadway-Hale Stores, Inc., in which a unanimous court held it unlawful for a combination of manufacturers and retailers to boycott another retailer, even when there was no damage done to the public. And again, in United States v. General Motors Corp., the Court reiterated this sound premise, and stated:

Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to ... the allegedly tortious conduct against which a combination or conspiracy may be directed ... .

Even where the purpose of the private joint action is to afford protection to consumers, it is unlawful. In Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., the plaintiff charged an unlawful combination to exclude from the market gas appliances not receiving a seal of approval from the testing laboratories of the American Gas Association. As a result, the utilities refused to provide gas for use in equipment which did not bear the seal of approval. The Supreme Court again unanimously held that the collective refusal to supply

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91 Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).
92 312 U.S. 457 (1941).
93 359 U.S. 207 (1939).
95 Id. at 146.
96 In Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912), the Court held it unlawful for a group of manufacturers of enamelware to "protect" the consumer from having to purchase bathroom fixtures and other enamelware which was not of the highest quality. This was an attempt to afford consumers the opportunity to purchase better products than some of them had been purchasing in the past.
gas for use in the plaintiff's burners fell into the category of restraints that are unlawful in and of themselves.\textsuperscript{98}

Few of the defenses based on the premise that the public interest is nevertheless served by anticompetitive activity of the boycott nature have any merit, and this is true even if the extra mantle of religious dictates is added to the cloak of "public good."\textsuperscript{99}

It seems safe to generalize from the above-cited authorities that a trade association, no matter what its reasons and no matter what its type, may not lawfully participate in or effect a boycott of another.

With all of the foregoing examples of illegal boycotts on the books, it is a wonder that misuse by trade associations of the power to boycott should continue. But, despite the plethora of cases outlawing the use of the power, many of which have resulted in the dissolution of the association involved,\textsuperscript{100} and despite the warnings of

\textsuperscript{98} The Assistant Attorney General in Charge of the Antitrust Division has recently emphasized the great skepticism with which his Division views justifications of anticompetitive activities by virtue of protecting the public safety. Address by Assistant Attorney General Donald F. Turner, Annual Meeting of Antitrust Law Section of New York State Bar Ass'n, New York City, Jan. 26, 1967; address by Mr. Turner, Fifth Annual Corporate Counsel Institute, Chicago, Illinois, Oct. 13, 1966.


the Supreme Court in *Fashion Originators' Guild* in 1941, in *Klor's* in 1959, and most recently in *General Motors* in 1966, and the warnings of the nation's principal antitrust enforcer in two recent speeches, many trade associations continue to violate the federal antitrust laws—and in the instances mentioned below, the applicable state laws—by continuing to use, or rather misuse, the boycott power. As a startling example of the extent to which trade associations continue to employ their considerable boycott power, we shall examine a particular industry—the construction industry—and a particular institution of that industry, the bid depository.

**Bid Depositories—Example of Boycott-Prone Trade Associations**

Trade associations abound in the construction industry; there are associations of general contractors, subcontractors, suppliers of materials and combinations of the foregoing. Although there are a few giant general contractors and subcontractors, and many large materials suppliers, this industry nevertheless is predominantly made up of small businessmen, upon whom advanced technology and marked business cycles have great impact. Hence, the trade associations found in the construction industry face many of the same problems, provide many of the same functions, and are just as susceptible to use as tools of boycott as are trade associations in other industries. What singles out the construction industry, making it worth a special study, is the tenacity with which one particular form of institutionalized boycott—the bid depository—has persisted.

Bid depositories are nothing new to antitrust law enforcement. During the last 25 years the Department of Justice has proceeded civilly, criminally, or both, against 29 bid depositories involved in practices or agreements of price-fixing, bid rigging, allocating markets or customers, and of boycotting or otherwise conspiring against or with competitors, suppliers, customers or labor groups in restraint of trade. All of the cases showed elements of coercion or boycotts

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101 Addresses by Donald F. Turner, *supra* note 98.
against competitors of the parties interested in the depository plan. The depositories were either compulsory or exclusionary. In either case, the freedom of competitive action of independent businessmen was restricted. For full understanding of the anticompetitive impact of bid depositories, a description of a typical depository's organization and operation is necessary. No attempt is made to deal with price-fixing, bid-rigging or market allocation activities.

A typical bid depository is a facility established and operated by a trade association of construction subcontractors, which receives bids from the subcontractors for the supplying of construction services or supplies and presents those bids en masse to the general contractors who intend to bid for the prime contract on a public or private construction job. Normally depositories are only used for large construction projects, and seldom are used for home construction jobs. Also, depositories seem to be used more frequently in the mechanical, painting and electrical trades than any others.

A “locked box” procedure is the most common method of depository operation. Subcontractors wishing to bid to one or more general contractors on a certain job submit bids in sealed envelopes to the depository. An envelope containing a bid addressed to each general contractor to whom the subcontractor wishes to bid is placed in the “locked box,” and another envelope containing a copy of that bid is addressed to the depository itself and similarly deposited in the box or another secure receptacle. There will be a cut-off point, typically 4 hours or so before the prime bid opening time (i.e., the time by which all bids must be submitted to the owner or awarding authority), and after that cut-off point (or depository closing time) is reached, no more bids may be received, and none received may be amended or withdrawn.

Promptly at the depository closing time, the locked box is opened, and the envelopes contained therein are dispensed to the general contractors to whom addressed. Each general contractor then prepares his own bid to the owner or awarding authority based upon the subbids received and his estimates of his own work costs.

The “locked box” operation is intended to permit more orderly preparation of bids and estimates by providing a reasonable time for computations, thereby reducing error, and to inhibit practices known

103 Schueller, supra note 102, at 507.
105 Indeed, the “locked box” may be an essential ingredient of a bid depository, for other schemes not using the locked box are usually called a bid registry.
as "bid shopping," "bid peddling," and "bid chiseling." These terms find no common definition in the industry and are used interchangeably to describe the practice of a subcontractor who submits a lower bid to a general contractor than the known bids previously submitted to the general by the sub or any of his competitors, in return for assurance from the general that the sub will receive the subcontract if the general is the successful prime bidder. The terms also refer to the reverse situation where the general contractor discloses his current low bid and seeks an undercutting of that bid by one or more subs anxious to receive the award. Those practices can and frequently do result in lower bids to the general, who will then seek to maximize his chance of winning the prime bid by lowering his bid to the owner or awarding authority. These terms are also used to refer to the activity that occurs after the award of the prime bid to a general, when the general, secure in his position, attempts to "chisel" down subcontractors' bids to figures lower than that used by the general in preparing his already successful prime bid. Whatever may be the industry view of the ethics of such practices, the fact remains that "shopping," "peddling" and "chiseling" represent price competition in its purest form.

To insure proper operation, and to achieve their goals, depositories usually must develop a comprehensive set of rules, with sanctions such as fines or expulsion imposed for violation of the rules.

Although bid depositories are commonly run by subcontractors' trade associations, it is not uncommon to find general contractors participating as directors of a depository. Usually, depositories are open to use by any subcontractor in the applicable trade, even though he is not a member of the trade association, but membership in the depository itself is often required before a subcontractor may use the facilities. Depositories are typically open to use by all general contractors desiring to bid on a particular project, and sometimes "membership" in the depository by the general is required. Usually only an agreement to adhere to depository rules is required.

Most bid depositories have rules or bylaws which include provisions containing generally the following:

1. No subcontractor using the depository for one or more bids may bid to a general contractor except through the depository; in other words, subs must use the depository exclusively or not at all. Additionally, member subcontractors are usually required to use the depository if possible.

2. No general contractor using the depository to receive bids may

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106 Schueller, supra note 102, at 498; cf. Mechanical Contractors Bid Depository v. Christiansen, 352 F.2d 817, 818 (10th Cir. 1965).
107 See, e.g., rules and bylaws in cases cited note 117 infra.
accept a bid from a subcontractor except through the depository; in
other words, generals must use the depository exclusively or not at
all. (Some depositories do permit a general to accept bids from
"outside" subs, but only if the general places the bid in the depository
himself and pays any applicable fees—if the outside sub's bid is the
low bid of all those in the depository, only then may it be used by
the general.)

3. The general contractor, if the successful prime bidder, must
award the subcontract for each trade to the low bidder in the deposi-
tory, if any bids were received from the depository in that trade.

4. Depository fees are based on a percentage of the bid price,
frequently with minimum and maximum dollar amounts, and are
therefore not directly related to the depository's expenses in handling
bids on a particular project.

These provisions clearly and plainly violate the antitrust laws, as
will be seen from the authorities presented below.

The law of the United States regarding the organizational fea-
tures of bid depositories is clearly and authoritatively pronounced by
Mechanical Contractors Bid Depository v. Christiansen. In this
case, plaintiff Christiansen, a subcontractor formerly a member of
the defendant depository, sought damages and injunctive relief
under sections 1, 2 and 15 of the Sherman Act. The district court
held for plaintiff, and the Court of Appeals for the Tenth Circuit af-

tirmed. Three specific depository rules were considered, and held
unlawful: Rule V, which provided that general contractors using
depository facilities may only accept bids received through the deposi-
tory; Rule III, which prohibited "bid splitting"; and Rule VIII, which
was a prohibition on late bids for 90 days, without a 25 percent revi-
sion in specifications. The court held that the cumulative effect of
these three rules provided the antitrust violation. Both the district
court and the court of appeals indicated that Rule V alone would be
per se violation of the antitrust laws, but did not need to decide that
point. The Supreme Court denied certiorari.

The law in California is equally clear. Recent California cases
under the State antitrust laws, which laws are consistent with the
Sherman Act and authorities thereunder, are in agreement with the
Christiansen result. In People v. Inland Bid Depository, an ap-

Trade Cas. ¶ 69,087, 1959 Trade Cas. ¶ 69,266 (S.D. Cal. 1958).
110 352 F.2d at 819 n.5; 230 F. Supp. at 189-90.
112 People v. Building Maintenance Contractors Ass'n, 41 Cal. 2d 719, 264
P.2d 31 (1953).
pellate court squarely held illegal a rule which provided for a bid depository closing time of basically 4 hours before any prime bid closing time. Also struck down were rules that a subcontractor using the depository may not bid to a general contractor who does not use the depository; that a general contractor must himself put into the depository any bid received from an outside subcontractor and himself pay the depository fee if that bid is the successful subbid; and finally a rule that a general contractor may not bid in his own name and then sublet the work to anyone other than the lower bidder in the depository.\textsuperscript{114}

\textit{Inland Bid} has produced several important results. First, it has been referred to as establishing clearly that California adheres to the doctrine of per se illegality of group boycotts.\textsuperscript{115} Second, the Attorney General of California, resting his opinion on \textit{Inland Bid}, has warned all bid depositories to amend their rules to conform to that case.\textsuperscript{116} Third, two superior courts have held illegal per se rules similar to those considered in \textit{Inland Bid} and \textit{Christiansen}.

Finally, the Attorney General has advised the State Office of Architecture and Construction that it not only has the power but would be acting in accordance with the antitrust laws in requiring all general contractors to include in their bids an affidavit that none of the bids obtained from subcontractors were obtained through a bid depository.\textsuperscript{118}

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} People v. Santa Clara Valley Bowling Ass'n, 238 Cal. App. 2d 225, 47 Cal. Rptr. 570 (1965).

\textsuperscript{116} Letter signed for Thomas Lynch, Attorney General, by Wallace Howland, Assistant Attorney General, to all bid depositories, July 1, 1966.


\textsuperscript{118} Letter from Thomas Lynch, Attorney General, signed by Iver E. Skjeie, Deputy Attorney General, to Emil Relat, Chief Counsel, Department of General Services, Sept. 6, 1967, in which the Attorney General said:

"Because there is no express or implied prohibition against the Department's proposal and since the implementation thereof would not only be consistent with the antitrust depository holdings but also consistent with the implementation of the competitive bidding system, it is our opinion that if the Department wishes as a matter of policy to do so it may legally include the proposed certification requirement.

'The proposed certification reads as follows: 'The bidder states that in the preparation of this bid no bid was received by bidder from a bid depository which depository as to any portion of the work prohibits or imposes sanctions for the obtaining by bidder or the submission to bidder by any subcontractor or vendor or supplier of goods and services of a bid outside the bid depository.' "
If then, a depository, with fines or other sanctions employed, has the typical rule that subcontractors and general contractors using the depository must use it exclusively, then a boycott, illegal per se, has occurred. The anticompetitive impact is not lessened substantially by the gesture of permitting a general contractor to receive bids from outside subs if the general agrees to put those bids into the depository himself.

There seems to be no valid purpose to be served by requiring a general contractor to award subcontracts to the low bidder through a depository. Even if a rule-of-reason type argument were permitted as justification for such a requirement, this rule fails to withstand the test of reason. Any desired check on general contractors can be had merely by requiring that some bid tendered through the depository be accepted, not necessarily the low bid. Price alone is frequently not the only factor in a general's choice of a responsible subcontractor, for such other factors as location, experience, solvency, union or nonunion work force, as well as personal friendships or preferences, would often be considered in the making of an unfettered choice.

Similarly, depository fees, which are eventually added to the contract price, violate a rule-of-reason analysis when those fees are unrelated to the services rendered in exchange therefor, but instead are merely percentages of the bid price.

In summary, what is a bid depository? It is a combination of competitors, frequently with great market power, which has as its avowed purpose the restraining of price competition, and which exerts influence on its members and on others to refuse to deal with those who do not adhere to its goals. In short, a bid depository is price-fixing enforced by boycotting.

Some Guidelines for Trade Association Members and Executives

It is of little moment to assert loudly and repeatedly that trade associations, because of their importance to the economy and to our way of life, must be "protected." No one questions the importance of the trade association in the modern business world, nor the extent of its influence, nor the ease with which it can be used, if permitted, by members and trade association executives to violate the antitrust laws. What is important is that trade association members and execu-

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119 Even if, as was suggested in Note, 114 U. Pa. L. Rev. 231, 235-36 (1965), the rules be construed as a mere exclusive dealing agreement, the usual economic power of depositories and the likelihood that member subcontractors will indeed boycott "outside" generals should establish the illegality of such rules under the rule of Standard Oil Co. v. United States, 337 U.S. 293 (1949); cf. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 325-29 (1961).
tives alike not only should recognize and understand the applicability of antitrust principles as a standard of conduct of trade association activities, but also should keep under constant and critical review and evaluation the activities of the association, to make certain that they do not run afoul of the increasingly strict standards.

Particular attention should be paid to the general subject of membership meetings. The need for such meetings should be carefully scrutinized, for membership meetings are traditionally looked upon as an instrumentality through which trade association conspiracies are conceived and developed. Antitrust implications exist in almost every aspect of such a meeting. Trade association meetings, therefore, should be held only as often as discussions are needed on legitimate topics of benefit to the industry. It is inevitable when persons engaged in the same industry meet together that they discuss matters of importance to them in the industry, none of which is more important than price. Under no condition should members be forced to take part in trade association activities, including attendance at meetings. Members should freely admit to their trade association qualified applicants upon nondiscriminatory terms and conditions. All business decisions should be made unilaterally and not as a result of joint action taken as a result of a trade association meeting.

Preparation of the agenda for meetings is very important because trade-restraining topics must be kept off that agenda and must not be discussed. Discussion of production, market, price statistics, merchandising methods and standardization are among the topics to which antitrust risk attaches. If any of these topics are to be discussed, a careful outline should be agreed upon by the chairman and the principal discussants. Minutes of the meetings should summarize the discussion and report accurately all action taken. Brevity (but not at the expense of accuracy) is desirable.

Finally, members should be scrupulously careful in and out of meetings, on social occasions and in the office, to refrain so far as is humanly possible from discussing, even in jest, any common industry problems relating directly or indirectly to any of the antitrust guidelines which have been erected by antitrust enforcement of the past.

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120 See American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).
121 Antitrust enforcement agencies are prone to believe Adam Smith's oft-quoted, if ancient, statement that: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." A. SMITH, WEALTH OF NATIONS 102 (1883).
Trade associations, boycott-prone though they may be, are important, useful and essential to the efficient, effective and ever-changing operation of our capitalistic economy, and they can and will grow in size and in number. They will prosper so long as their members and executives operate independently within the antitrust guidelines.