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Avoiding Antitrust Problems

By John J. Eklund

For most businesses, facing antitrust claims is like being struck by lightning. The odds of it happening are very small, but the consequences are dire.

Many antitrust claims arise only when a business has acquired, or is in a position to acquire, "market power" — the ability to control price or output in a relevant market. Most firms can only dream of having that sort of economic clout.

However, the most serious antitrust offenses do not require a business to have such market

power, so no firm can afford to assume that it is beyond the reach of the antitrust laws.

These most serious antitrust violations involve certain agreements among competitors: price fixing (agreements on the prices competitors will charge); customer allocation (agreements to stay away from each other's clientele);

market division (agreements to limit the geographic areas in which firms compete); and bid rigging (agreements about what or whether to bid or who will win bids.)

The consequences of committing one of these violations are severe. They carry potential jail sentences of up to five years in prison and criminal fines of up to \$100 million for corporations and up to \$10 million for individuals. Moreover, any per-

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Price Fixing Case Study

United States v. Foley, 598 F.2d 598 (4th Cir. 1979) demonstrates the dangers associated with seemingly idle discussions among competitors about prohibited topics. The head of a real estate agency arranged a dinner meeting of his competitors at the Congressional Country Club in Bethesda, Maryland. After dinner, he told the group that he did not care what they did, but his agency was going to raise real estate commission fees. The evidence about what, if anything, the others said after that was disputed. However, the evidence showed that, after the dinner, the other realtors raised their rates as well, and that they all knew that a rate increase would not "stick" unless they all went along with it.

Under these circumstances, a jury convicted the defendants of a conspiracy to fix prices, which was affirmed on appeal. Of course, there was much more to the case, but the important thing to observe is that there need not be a specific expression of agreement in order for the crime of price fixing to occur. How much better off these defendants would have been if they had never even discussed the subject of their prices, and, in fact, had declined their competitor's invitation to an unsupervised dinner in the first place.

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son or business that is injured as a result of the violation can recover three times the amount of damage suffered plus attorney fees. Also, experience shows that these cases are among the most expensive to defend.

The federal government takes the investigation and prosecution of antitrust violations very seriously. The Justice Department's Antitrust Division has seven field offices, one located in Cleveland, that are devoted exclusively to identifying, investigating and prosecuting antitrust violations. Like most states, Ohio's Attorney General's Office also has an entire Section devoted to pursuing antitrust violators.

In Ohio, many antitrust investigations and prosecutions have involved relatively small businesses without "market power." Electrical contractors, scrap metal dealers, funeral homes, supermarkets, real estate brokers, dairies and steel container

manufacturers have been the subject of investigations, many of which have resulted in prosecutions and convictions.

Like a lightning strike, antitrust violations are relatively easily avoided by following a few common sense rules.

■ Never make any agreements with your competitors about prohibited subjects (your prices, customers, territory or bids). The law prohibits any kind of agreement on these topics — written, oral, handshakes or even

unspoken, informal "understandings."

■ Never discuss these prohibited subjects with your competitors. Juries can infer the existence of agreements from what might seem like innocent circumstances. For example, if you discuss your pricing with a competitor and later both of your prices become similar, someone might infer that you did more than just discuss them, but rather agreed on what they would be.

Application of the antitrust laws can be very complex, but businesses often can achieve their legitimate goals while staying well within the bounds of these laws.

■ Instruct all of your employees never to make such agreements or have such discussions. Agreements a sales person makes with your competitors' sales force about the prohibited subjects will bind the company, and the company will bear the consequences.

■ Adopt a written policy that mandates compliance with the antitrust laws and explains how to do so. This will help impress upon your personnel the importance of compliance and provide a reference guide.

Application of the antitrust laws can be very complex, but businesses often can achieve their legitimate goals while staying well within the bounds of these laws. Detailed analysis and careful planning sometimes are necessary, but, when it comes to the most serious potential antitrust problems, the rules are fairly clear and easily obeyed. Following these steps will help you and your business stay out of the storm and avoid the lightning.

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From the Supreme Court of Ohio:

On Sept. 14, 2006, Chief Justice Thomas J. Moyer delivered an address on the State of the Judiciary to the Ohio Judicial Conference. As part of that address, he shared information about "business courts." Business courts are dockets within the common pleas court system that hear commercial or business-related cases.

Chief Justice Moyer explained that commercial or business dockets can be useful in managing cases that present new and unique issues produced by emerging technology and new business models, adding that Pennsylvania and New York are two states that have reported positive results from the establishment of commercial case dockets. He also reported that a concurrent resolution of the West Virginia legislature observed that

states with a business court system report having successfully used business courts to persuade businesses to locate or remain in those states.

He went on to say, "Advocates of a commercial litigation docket emphasize that most kinds of business litigation is different from other litigation in the number of documents and witnesses required, the extent of the motion practice, discovery disputes, other applications to the court, and the complexity of the legal issues. Often such cases benefit from advanced case management techniques, the availability of dispute resolution and technology.

"We in Ohio are living with a dramatically changed economy. We should be able to say to the entities of a new economy that the court system

in this state is prepared to facilitate the resolution of legal disputes presented in complicated business and technology cases."

Chief Justice Moyer announced that the Commission on the Rules of Superintendence, chaired by Justice Judith Lanzinger, will form a subcommittee to design a pilot project in one or more of Ohio's common pleas courts to assess the feasibility of adopting commercial litigation dockets in the appropriate common pleas courts in the state. Pat Fischer, president of the Cincinnati Bar Association and representing the Ohio State Bar Association, has been named as a co-chair of the subcommittee. Chief Justice Moyer expects that by the end of the year he will name a common pleas judge to serve as the other subcommittee co-chair.