



Antitrust Lunch & Learn

Virginia Asphalt Association
July 27, 2017

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Presentation Overview

- ❖ Antitrust Basics
- ❖ Antitrust Law and Trade Associations
- ❖ History of Antitrust Violations in Virginia
- ❖ The Virginia Asphalt Association's Current Antitrust Policies
- ❖ Recent Antitrust Cases



Part I: Antitrust Basics



The Sherman Act § 1

“Every contract, combination in 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.”



Acts Forbidden by the Sherman Act

Price fixing

Agreements on output

Bid rigging

Market division

Boycotts



Step 1: Was there an agreement?

- ❖ “Not every instance of cooperation between two people is a potential ‘contract, combination ... or conspiracy, in restraint of trade.’” *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 189-90 (2010).
- ❖ To be an ‘agreement’ under Section 1 of the Sherman Act, there must be a concerted arrangement “fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decision-making that competition assumes and demands.” *Id.* at 190.



Step 2: Does the agreement unreasonably restrain competition?

- ❖ Two types of agreements that may constitute unreasonable restraint on competition:
 - Per Se: Agreements so plainly anticompetitive that they are deemed illegal *per se* and anticompetitive on their face
 - Rule of Reason: Agreements that must be analyzed under the “rule reason” to determine whether the agreement’s anticompetitive effects outweigh the pro-competitive benefits



Per se Illegal Agreements

- ❖ Courts have identified certain types of agreements that qualify as illegal *per se*:
 - **Price Fixing:** agreements to raise or fix prices, as well as agreements regarding discounts, credit terms, trade-in allowance, refusal to advertise prices, or adopting standard formulas for computing prices
 - **Output Agreements:** agreements to reduce or restrict output
 - **Market Allocation:** competitors agreeing to divide markets and not compete in each other's markets
 - **Bid rigging:** competitors agreeing not to bid against each other
 - **Some group boycotts:** competitors combine to enforce a price fixing agreement or harm a rival



Rule of Reason

- ❖ Most agreements are tested under the rule of reason.
- ❖ Under this analysis, courts determine whether the pro-competitive benefits of questioned conduct outweigh the anti-competitive effects
- ❖ Courts consider many factors in this analysis, including:
 - Facts peculiar to the industry;
 - The restraint itself, including its scope and purpose;
 - Actual and probable effects of the restraint; and
 - The market power of the companies imposing the restraint.



Detection

- ❖ How does the government detect antitrust violations?
 - Identical prices may indicate a price-fixing conspiracy, especially when:
 - Prices stay identical for a long time;
 - Prices previously differed; or
 - Price increases do not appear to be supported by increased costs.
 - Discounts are eliminated, particularly in a market where discounts are typical.



- Bid or price patterns are at odds with a competitive market:
- Same company always wins a particular bid
 - Same suppliers submit bids and each company takes a turn being the low bidder
 - Some bids are much higher than the published price lists, previous bids by the same company, or engineering cost estimates
 - Fewer companies submit bids
 - Company bids significantly higher on some bids than others, with no apparent cost difference
 - Bid prices drop when a new or infrequent bidder submits a bid
 - Successful bidder subcontracts work to competitors that unsuccessfully bid on the same project
 - Company withdraws its successful bid and later receives a subcontract from the winning bidder



Enforcement: Penalties

- ❖ Penalties for antitrust violations are significant:
 - Incarceration: prison time for up to 10 years
 - Between 2010 and 2016, average sentence was 22 months
 - Criminal Fines:
 - Individuals: can be fined up to \$1 million
 - Organizations: can be fined up to \$100 million
 - Civil Damages: can include treble damages and attorneys' fees



Part II: Antitrust Law and Trade Associations



Behavior at Association Meetings

- ❖ The Department of Justice may examine behavior of trade association members at association meetings and events for evidence of collusive conduct. This is why it is so important that all VAA rules, policies, and procedures be followed at all meetings and other VAA events.



Antitrust Issues for Associations

❖ Price fixing

- Through statistical reporting by the association
- Through inappropriate communications between members at meetings

❖ Group boycotts

- When competitors get together and agree not to deal with a competing firm
- You may decide on your own not to do business with an entity, but you cannot agree with others that none of you will do business with that entity



Association Liability

- ❖ *An association may be directly liable under the Sherman Act if it negotiates prices on behalf of its members.*
- ❖ **Liability of Association Officers and Directors**
 - Those who, honestly and good faith, exercise ordinary and reasonable care in the performance of their duties likely will not be personally liable for violations of association members.
 - Those who participate in or knowingly approve an antitrust violation may be personally liable.



Association Activities to Be Aware of

- ❖ Discussions at meetings
- ❖ Membership requirements and expulsion
- ❖ Services to members and non-members
- ❖ Standard-setting and certification programs
- ❖ Statistical reporting
- ❖ Lobbying
- ❖ Regulation of business conduct
- ❖ Antitrust and the internet activities of associations



Discussions at Meetings

- ❖ Proof of parallel conduct and potentially illegal communications between competitors may be deemed proof of anticompetitive agreements.
 - Association meetings generally involve communications between competitors; therefore, you must be cautious and take care to avoid illegal communications.



Discussions at Meetings

- ❖ To avoid any potentially illegal communications, meetings are formalized and generally planned ahead of time.
 - Agendas and presentations are prepared and distributed before meetings.
 - Care should be taken to stick to these materials at the meeting absent a good reason for departure.
 - Meeting minutes should be prepared and should concisely reflect discussions held, particularly when there is a divergence from the pre-prepared materials.



Discussions at Meetings

- ❖ Avoiding illegal communications means avoiding off-limit topics where discussions could lead to illegal agreements such as:
 - Pricing (including any discussions of methodology, strategies, timing, discounts, advertising, or fair/reasonable pricing);
 - Whether to do business with suppliers, customers, or competitors;
 - Complaints about the business practices of other firms; and
 - Confidential company plans regarding output decisions or decisions regarding future offerings.



Statistical Reporting

- ❖ Statistical reporting can lead to both *per se* violations and rule of reason violations.
- ❖ Association statistical reporting programs should not allow members to derive information about specific competitors, especially pricing or output information.



Membership Requirements and Expulsion

- ❖ These are viewed as potential group boycotts.
- ❖ Rules and decisions regarding membership and expulsion are generally examined under the rule of reason; they are not *per se* illegal
 - Exception:
 - The rule or decision relates to access to some business input essential for effective competition; and
 - There are no plausible justifications stemming from the association's pro-competitive purposes



Membership Requirements and Expulsion

- ❖ Under the rule of reason, we look at the effect of the membership requirement or expulsion, which involves a number of case-specific factors:
 - Are rules objective and consistently applied?
 - If the rules are subjective, is there a legitimate reason for the rule based on the association's pro-competitive needs?
 - Is due process given to expelled members?
 - Requires an inquiry into notice and opportunity to respond; the appeals process and disinterested decision-makers



Membership Requirements and Expulsion

❖ *Vermont Dairy Herd Improvement Ass'n Case*

- The Vermont Dairy Herd Improvement Association held a milk tasting program that members could participate in
- A herd owner who was suspended from participating in the milk testing program argued that the program was necessary for him to compete in the industry
- The court held that the expulsion had to be evaluated under the rule of reason because the expulsion may improve competition if the exclusion was to protect the testing program, which was intended to encourage competition



Services to Members

- ❖ Competitive issues are closely tied to membership requirements
 - The more competitively important the services are, the more important it is that firms do not exclude from those services for anticompetitive reasons
 - Sometimes courts decide a service should be provided to non-members, rather than requiring that non-members should be permitted to join the association
- ❖ Generally, the rule of reason analysis applies here



Services to Members: General Guidelines

- ❖ Periodically look at the services the association provides to see if any are essential for effective competition by companies in the industry.
- ❖ Ensure that such services are made available to non-members, or if they are not, make sure there is a good reason tied to the benefits the association provides members.
- ❖ There can be a higher fee for non-members than for members, but the fee should be related to the cost for providing those services to non-members.



Services to Members: Trade Shows

- ❖ Access to Association-sponsored trade shows generally falls under rule of reason analysis.
- ❖ Important questions and issues:
 - Are the rules objective?
 - How important is the trade show to competition in the market?
 - Is there limited room?
 - Replacing one firm with another likely will not impact competition.
 - Why was the firm excluded?
 - Don't exclude a firm for anticompetitive reasons
 - Similar rules apply to decisions relating to allocating space or location.



Services to Members

❖ Some “Don’ts” to keep in mind:

- Don’t apply rules in a discriminatory manner
- Don’t base decisions on whether the firm engages in competitive pricing
- Don’t condition decisions on whether a firm agrees to not appear at a competing trade show
- Generally don’t use subjective criteria for participating or resource allocation



Standard Setting

- ❖ While standards create many competitive benefits, they can also cause harm rooted in anti-competition (such as barriers to entry, facilitation of collusion, exclusion of competitors, and inhibition of innovation).
- ❖ For this reason, standard setting organizations (“SSOs”) face antitrust scrutiny, and trade associations that act as SSOs must ensure that their processes for creating standards are not anti-competitive.
- ❖ The standards Development Organization Advancement Act of 2004 provides some limited protections to SSOs.
 - Rule of Reason analysis; no treble damages.
 - Protected activities *exclude* exchanging competitively-sensitive information not reasonable required or entering agreements to fix prices or allocate customers.



Standard Setting Considerations

- ❖ Does the standard promote the goal it is seeking to advance, such as safety, uniformity, or quality?
- ❖ Is timely notice for standard setting given to all parties believed to have a direct and material stake in the standard?
- ❖ If possible, are members of the standard setting process from various parts of the industry?
- ❖ Does the SSO keep written records of its standard setting process?
- ❖ Do SSO procedures provide an unbiased review/appeal process if an entity complains about a chosen standard?
- ❖ Does the SSO consistently follow its written standard setting procedures?



Compatibility Standards

- ❖ Some of the same rules apply:
 - To the extent that the standard is going to limit access to the market for some firms, that exclusion must be justified.
 - Avoid allowing the process to be dominated by economically interested parties.
 - Ensure that all parties with a stake in the standard have an opportunity to participate meaningfully in the process.



Certification

- Certification programs can determine whether products comply with a standard or whether professionals have sufficient ability, education and experience
- Not certifying a product or a professional can create competitive harm
- Courts look at the process of how a certification program is implemented to ascertain whether they help customers or are a way to harm rivals



Internet Activities of Associations

- ❖ Rules regarding internet activities of associations should be extensions of the real world rules
- ❖ Discussion boards: concern that competitors can use these to violate antitrust laws the same way they could do so at meetings
 - Rules regarding off-limit discussions should be laid out clearly
 - Discussion boards should be monitored by well-trained, responsible association staff.
 - The staff should promptly take corrective action should inappropriate messages be posted.



Internet Activities of Associations

- ❖ Certain steps should be taken on association-sponsored B2B sites:
 - There should be no limitations imposed on the number of buyers or sellers permitted to utilize the site
 - Firewalls should be established to prevent each site participant from being able to view the transactions of others
 - No conditions should be placed on buyers or sellers that require them to conduct business through the site or only through the site



Lobbying

- ❖ In general, petitioning the government cannot form the basis of an antitrust violation based on the success of the petitioning.
 - ✓ E.g., lobbying a legislature or agency to get that body to pass a law to strengthen the industry, which may have the effect of creating a barrier to entry by competitors.
- ❖ But if the petitioning is a sham and the petitioning itself, rather than the subsequent government policy, has an anticompetitive impact, the lobbying may that can form the basis of an antitrust violation.



Compliance Programs

- ❖ Antitrust policies are a good practice for associations.
 - Lack of a policy may evidence wrongdoing, and could increase penalties for any violations that occur.
 - Antitrust policies can impact the behavior of members.
- ❖ Responsible Antitrust Practices:
 - Prepare meeting agendas ahead of time
 - Legal review of agendas and minutes
 - Legal counsel attendance at meetings



Part III: History of Antitrust Violations in Virginia



Past Antitrust Law Infractions

- ❖ In the 1980s, some asphalt contractors found themselves in trouble after communications between competitors were held to be anticompetitive.
 - These included communications regarding pricing, project bids, etc.



Liability for Anticompetitive Violations

- ❖ Contractors held to be in violation of antitrust laws found themselves on the hook for significant fines, and in some cases, incarceration.
- ❖ In addition to fines and incarceration, some contractors had to enter into consent decrees and could only remain members of the VAA if legal counsel attended VAA meetings.



Part IV: The VAA's Current Antitrust Policies



The VAA's Current Antitrust Policies

- ❖ The VAA intends to strictly comply with all federal and state antitrust laws.
- ❖ To accomplish strict compliance, the VAA Board requests that:
 - All members who attend meetings familiarize themselves with the VAA's General Rules of Antitrust Compliance;
 - Each meeting agenda be followed and permission be obtained by the chair before any other business matters are introduced; and
 - During each meeting, there is no discussion of pricing, methods, costs, volume or conditions of production or sale, allocation of territories or customers, or any discussion which might be construed as limiting any person from free access to any market, customer, or source of supply.



The VAA's Antitrust Policy Statement

- ❖ The VAA is a not-for-profit non-stock Virginia corporation organized to provide a common meeting ground to those in the asphalt industry so that they can become informed of current technical developments and share professional interests.
- ❖ The VAA is not intended to, and may not, play any role in the competitive decisions of its members or their employers or in any way restrict competition among contractors, producers, subcontractors, or others involved with the asphalt industry the VAA serves.



The VAA's Antitrust Policy Statement

- ❖ The VAA advances its goals through various activities, including seminars, educational courses, and technical committee meetings. These activities are principally educational in nature and are in no way an attempt to restrain competition.
- ❖ Any knowing violation of the VAA's General Rules of Antitrust Compliance or its Antitrust Policy Statement will result in that member's suspension from membership of that member or the member's employer, and removal from any VAA office held.



The VAA's General Rules of Antitrust Compliance

1. The VAA, its Board, and any VAA committee or activity, shall not be used for the purpose of bringing about or attempting to bring about any anticompetitive understanding or agreement.
2. No VAA activity or communication shall include talk of pricing methods, production quotas, volume of production or sale, and/or allocations of territories or customers, regardless of the communication's purpose.
3. No VAA activity or communication shall include discussion that may be construed as an attempt to prevent a person or business from gaining access to a market or customer or to prevent any entity from obtaining a supply of goods or otherwise purchasing goods or services freely in the market.
4. The VAA shall make no effort to bring about standardization of any product for the purpose of preventing the production, installation or sale of any product not conforming to specific standards.



5. No VAA activity or communication shall include any discussion that may be construed as an agreement or understanding to refrain from purchasing any raw materials, equipment, services or other supplies from any supplier.
6. In conducting VAA board meetings, the chairperson shall prepare and follow a formal agenda. Minute meetings shall be distributed to all Board members and approval of the minutes shall be obtained at the following meeting.
7. Speakers at all VAA meetings shall be informed of the need to comply with the VAA's antitrust policy in preparing and presenting their talks.
8. During any informal discussions at a VAA meeting that are outside the control of officers or committee chairpersons, all members are expected to observe the same standards of personal conduct as required of the VAA in compliance of these antitrust guidelines.



Part V: Recent Antitrust Case



*W. Va. Dep't of Transp. & Div. of Highways
v. W. Va. Paving, Inc., et al.*

- ❖ In October 2016, the West Virginia Department of Transportation & Division of Highways (“DOH”) filed an antitrust suit against eight asphalt companies.
- ❖ The DOH alleged that the companies conspired to gain a monopoly in the asphalt industry by conspiring to do away with competitors while maintaining the appearance of a competitive marketplace.
 - The DOH alleged that the companies secretly acquired or combined to gain control of numerous paving companies.



Acquiring or Combining to Attain a Monopoly

- ❖ The DOH alleged that the Defendants engaged in a number of actions in order to achieve their objective of creating a monopoly in the asphalt industry, including:
 - Acquiring or combining with competitors in the asphalt industry and asphalt paving industry and acquiring asphalt plants;
 - Entering into joint ventures with competitors in the asphalt industry and asphalt paving industry;
 - Threatening potential competitors and entrants into the market for asphalt and asphalt paving services; and
 - Obscuring the true nature of the entity or entities bidding on asphalt paving jobs.



Additional Illegal Conduct Alleged by the DOH

- ❖ The DOH alleged not only that Defendants acted secretly to become virtual monopolists, but once they attained that goal, the Defendants purposefully acted to maintain and further their market dominance through predatory actions, such as:
 - Bullying and boycotting competitors
 - Threatening to put new competitors out of business;
 - Breaking federal and state laws regarding truckload weights to gain a competitive advantage; and
 - Only agreeing to sell to competitors at unreasonable prices and/or providing competitors with an inferior and unusable product.



Claims Brought in the Complaint

- In its Complaint, the DOH brought a number of claims against the Defendants:
 - Restraints of trade in Violation of West Virginia law;
 - Monopolization in violation of West Virginia law;
 - Unjust enrichment; and
 - Civil conspiracy.



Recovery Sought by the DOH

- ❖ The DOH alleged that the actions of the Defendants caused the citizens of West Virginia economic damage and public safety risks, and for those reasons, sought the following remedies:
 - Compensatory damages;
 - Punitive damages;
 - An order enjoining Defendants from engaging in the alleged unfair and unlawful acts and practices; and
 - That the Defendants pay DOH's legal costs and attorneys' fees.