



Antitrust Brush Up

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Presentation Overview

- ❖ Antitrust Basics
- ❖ Antitrust Law and Trade Associations
- ❖ The Virginia Asphalt Association's Antitrust Policies



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.



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.



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: The VAA's 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.