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TRADE AND PROFESSIONAL ASSOCIATIONS: AN OVERVIEW OF HORIZONTAL RESTRAINTS

*Murray S. Monroe**

I. INTRODUCTION

In the antitrust realm, horizontal restraints—restraints on business imposed through the concerted conduct of competitors—offer one of the quickest and surest roads to civil, and possibly criminal, penalties. Moreover, "businesses," narrowly defined, have not alone suffered under the antitrust laws. Because members of trade and professional associations are generally competitors, their practices may also be considered horizontal in nature, and thus within the ambit of the antitrust laws. Section 1 of the Sherman Act[1] and, in Ohio, the Valentine Act,[2] are the statutes under which the legality of such horizontal restraints are measured.

This article will discuss the basic purpose of section 1 of the Sherman Act, the essential elements of an offense under section 1, and the remedies or penalties accompanying such an offense. It will then examine the application of section 1 to trade association activities, noting the potential for increased trade association antitrust liability implied by a recent Supreme Court case, *American Society of Mechanical En-*

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* Partner, Taft, Stettinius & Hollister. B.E., Yale University (1946); B.S., Yale University (1947); LL.B., University of Pennsylvania (1950). This article has been adapted from a speech given by the author in conjunction with the 103d Annual Meeting and Convention of the Ohio State Bar Association, before the Antitrust Law Section. It was and is conceived as a primer on horizontal restraints as applied to trade and professional associations and not as an in-depth study. The author wishes to thank Bill Markovits, associate, Taft, Stettinius & Hollister, for his valuable assistance in the research and writing of this article.

1. 15 U.S.C. § 1 (1982).

2. OHIO REV. CODE ANN. §§ 1331.01–.14 (Page 1979). While the Valentine Act does have a degree of importance to Ohio practitioners, Ohio courts have held the statute to be patterned after the Sherman Act, and thus decisions under the Sherman Act have repeatedly been used as guidelines in deciding issues under the Valentine Act. *E.g.*, C.K. & J.K., Inc. v. Fairview Shopping Center Corp., 63 Ohio St. 2d 201, 407 N.E.2d 507 (1980); George Ast Candy Co. v. Kling, 121 Ohio St. 362, 169 N.E. 292 (1929); List v. Burley Tobacco Growers' Coop., 114 Ohio St. 361, 151 N.E. 471 (1926); State *ex rel.* Monnett v. Buckeye Pipe Line Co., 61 Ohio St. 520, 56 N.E. 464 (1900); Superior Dairy, Inc. v. Stark County Milk Producers' Ass'n, 89 Ohio App. 26, 100 N.E.2d 695 (1950); H. Lipman & Sons v. Brotherhood of Painters, 63 Ohio App. 157, 25 N.E.2d 853 (1939); State *ex rel.* Brown v. Zayre Inc., 41 Ohio Misc. 117, 324 N.E.2d 186 (C.P. Ct. Cuyahoga County 1974); State *ex rel.* Brown v. Palzes Inc., 39 Ohio Misc. 155, 317 N.E.2d 262 (C.P. Ct. Cuyahoga County 1973). *See generally* Matto, Firestone, Rothstein & Wiseman, *Antitrust Enforcement in Ohio*, 37 OHIO ST. L.J. 559 (1976); [1974] ST. ANTITRUST L. (ABA Antitrust Sec.) 35-1. In view of this judicially imposed similarity in the statutes, this article will deal primarily with Sherman Act cases.

gineers, Inc. v. Hydrolevel Corp.[3] Next the article will examine the application of the antitrust laws to professional associations, concentrating on the increasing scope of liability for those in the professions since *Goldfarb v. Virginia State Bar.*[4] The article will conclude with some practical suggestions on how those in both trade and professional associations can avoid antitrust liability.

II. SECTION 1 OF THE SHERMAN ACT

A. Purpose

The sweeping language of section 1 declares that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal."[5] The purpose of this broad condemnation of concerted activity is to provide, in the words of the United States Supreme Court, "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition . . . rest[ing] on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . ."[6]

B. Essential Elements

The essential elements of an antitrust claim under section 1 are as follows: (1) an agreement; (2) trade or commerce; and (3) a restraint which is (a) unreasonable *per se* or (b) unreasonable on the facts under the rule-of-reason treatment.

1. The Agreement

To establish a horizontal conspiracy there must be proof of an agreement among competitors involving a commitment to a common scheme.[7] Such a conspiracy may be an agreement to do an unlawful act or to achieve a lawful end by unlawful means. While it is necessary to prove an agreement, it is elementary that the assent does not have to be written in blood nor, for that matter, even written. The assent does not even have to be oral. As one court colorfully put it, "A knowing wink can mean more than words."[8] The agreement may also be inferred from circumstantial evidence, such as the parties' conduct or

3. 456 U.S. 556 (1982).
4. 421 U.S. 773 (1975).
5. 15 U.S.C. § 1 (1982).
6. Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).
7. The terms "contract," "combination," and "conspiracy" are often used interchangeably to refer to the requisite concerted action and agreement.
8. Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965).

course of dealing.[9] For example, contact among competitors closely followed by a price increase of like amount will probably be sufficient to create an issue for the jury as to whether there was an agreement.[10]

2. Trade or Commerce

To be illegal, the restraint must affect trade or commerce.[11] This involves a determination of the character of trade which is involved and the extent of the impact of the restraint across state lines or upon foreign commerce. As to the character of "trade" or "commerce," the words are broadly interpreted. Included are the medical profession,[12] the legal profession,[13] and, presumably, all other professions[14] as well as whatever businesses have been historically considered trades. As to the extent of "trade" or "commerce," the Supreme Court has said that the Sherman Act extends "to the utmost extent of . . . constitutional power."[15] Namely, the Act covers goods and services in the stream of

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9. *See, e.g.*, United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (agreement inferred from pattern of price-fixing by film distributors); American Tobacco Co. v. United States, 328 U.S. 781 (1946) (conspiracy to fix prices by cigarette-producing companies inferred from identical price changes); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) (common agreement inferred from uniform action of film distributors to restrict subsequent showings of first-run movies); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914) (conspiracy inferred from lumber associations' circulation of a list of wholesalers who sold directly to consumers).

In *Paramount*, the Court stated that "[i]t is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement." 334 U.S. at 142.

10. *See* United States v. Foley, 598 F.2d 1323 (4th Cir. 1979) (after a dinner party attended by defendant real-estate brokers, all defendants adopted substantially the same commission rate), *cert. denied*, 444 U.S. 1043 (1980); Continental Baking Co. v. United States, 281 F.2d 137, 143 (6th Cir. 1960) (defendants met together preceding each price change of bakery products); Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397, 400–01 (4th Cir. 1958) (phone conversation and meetings between plate-glass manufacturers followed by identical price increase), *aff'd*, 360 U.S. 395 (1959). Cases of this nature led to rise of the doctrine of "conscious parallelism." The "conscious parallelism" doctrine suggests that knowing participation in behavior which is parallel to one's competitors with the effect of restraining commerce is unlawful under § 1. *Interstate*, 306 U.S. 208 (1939). Yet shortly after *Interstate*, the Court laid to rest the possibility that parallel action of competitors would be enough to determine § 1 liability without some additional factor evidencing proof of agreement. Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954). The often-quoted phrase from that opinion states: "Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." *Id.* at 541 (footnote omitted). *See generally* Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

11. *See generally* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 709–10 (1977).

12. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982). *See infra* text accompanying notes 121–23.

13. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). *See infra* text accompanying notes 109–12.

14. *See infra* text accompanying notes 104–28.

15. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944). This

commerce[16] as well as local restraints which affect interstate commerce.[17]

Section 1 of the Sherman Act also reaches foreign commerce. A restraint which adversely affects exports by a United States company is covered,[18] as are activities in foreign countries which adversely affect imports into the United States.[19] Unlawful acts of foreign firms in foreign commerce which are intended to affect United States imports and exports are also covered.[20]

3. The Restraint

Section 1 requires that there be a restraint of trade or commerce which reduces competition.[21] Yet every agreement by its very nature restrains, in some fashion, those a party to it or their competitors. The

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case extended the reach of the Sherman Act to insurance businesses. In the famous case of Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), the Court had previously held that "[i]ssuing a policy of insurance is not a transaction of commerce." *Id.* at 183. *South-Eastern* decided that insurance *was* commerce which could be regulated under the commerce clause, and was therefore also subject to the Sherman Act. 322 U.S. at 553–62.

16. *See, e.g.*, United States v. Shubert, 348 U.S. 222 (1955) (trade or commerce includes the production, distribution, and exhibition of motion pictures); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (production of crude oil in interstate commerce). The *Shubert* case provides a good compilation of the various activities that have been held to be trade or commerce. 348 U.S. at 226–27.

17. *See, e.g.*, Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976) (commerce affected by a local hospital's interstate purchase of medicines, interstate patents, and other interstate connections); *Goldfarb*, 421 U.S. 773 (1975) (attorney's title searches and opinions in single county affect interstate real-estate market); Burke v. Ford, 389 U.S. 320 (1967) (intrastate territorial division by liquor wholesalers affects imports from other states); United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460 (1949) (Boston-area women sportswear jobbers' activities affected interstate commerce because 80% of material bought from out of state and 80% of products sold out of state). In *Women's Sportswear*, the Court stated: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Id.* at 464.

18. *See, e.g.*, United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968) (11 sales of concentrated phosphate by association to Republic of Korea), *on remand*, 1969 Trade Cas. (CCH) ¶ 72,719 (S.D.N.Y. 1969); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (conspiracy in trade of vanadium ore restrained export business of another firm); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950) (manufacturers who controlled four-fifths of export trade in abrasives agreed not to export to certain areas of foreign countries).

19. *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268 (1927) (American corporations monopolized the import of sisal fiber used in twine manufacturing and found only in Mexico); Thomsen v. Cayser, 243 U.S. 66 (1917) (steamship lines conspired to restrain trade by setting freight rates between the United States and Africa); United States v. United Fruit Co., 1958 Trade Cas. (CCH) ¶ 68,941 (E.D. La. 1958) (entering consent decree which generally prohibited company from engaging in activities which restrained importation and sale of bananas in United States).

20. United States v. Aluminum Co. of Am., 148 F.2d 416, 443–44 (2d Cir. 1945) (foreign aluminum cartel fixed prices on imports into the United States).

21. L. SULLIVAN, *supra* note 11, at 165–66.

courts must look further and determine if the restraint is competitively reasonable.[22] For this determination, the courts use two different tests: the *per se* and rule-of-reason tests.

a. *Per Se* Illegality

There are certain practices which for years have been considered so inherently pernicious that proof of the actual practice alone carries with it proof of the unreasonableness and illegality of the restraint. These practices are *per se* illegal.[23] Such cases are a bane to defendants since the defendant cannot offer any defense of competitive reasonableness. *Per se* cases are, in turn, a boon to plaintiffs for the very same reason. *Per se* restraints generally fall into three basic categories:

i. Price-Fixing

The greatest number of *per se* cases involve price-fixing.[24] This includes fixing maximum or minimum prices or fixing any other element involved in the terms and conditions of sale which affect price,

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22. I E. KINTNER, FEDERAL ANTITRUST LAW § 8.2, at 361–62 (1980).

23. For a general discussion of the *per se* doctrine, see I E. KINTNER, *supra* note 22, § 8.3; L. SULLIVAN, *supra* note 11, §§ 67–72.

24. *See, e.g., Maricopa*, 457 U.S. 332 (1982) (medical society set maximum fees that doctors could claim in full payment for health services they provided to policyholders of insurance plans); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (beer wholesalers agreed to eliminate short-term trade credit to retailers); *Goldfarb*, 421 U.S. 773 (1975); Albrecht v. Herald Co., 390 U.S. 145 (1968) (newspaper publisher set maximum price at which an independent news carrier could sell its morning newspaper); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951) (liquor manufacturer set maximum price for wholesalers); *Paramount Pictures*, 334 U.S. 131 (1948); *Socony-Vacuum*, 310 U.S. 150 (1940); Plymouth Dealers' Ass'n v. United States, 279 F.2d 128 (9th Cir. 1960) (automobile dealers' association published and circulated a price list), California Retail Grocers & Merchants Ass'n v. United States, 139 F.2d 978 (9th Cir. 1943) (retail grocers published and circulated a minimum-price list), *cert. denied*, 322 U.S. 729 (1944); Food and Grocery Bureau v. United States, 139 F.2d 973 (9th Cir. 1943) (trade association published statements of minimum prices for retail grocers); United States v. Nationwide Trailer Rental Sys., Inc., 156 F. Supp. 800 (D. Kan.) (rate-schedule guide suggested prices although did not rigidly fix), *aff'd per curiam mem.*, 355 U.S. 10 (1957).

The *Socony-Vacuum* case is perhaps the seminal *per se* case and, in addition, is a price-fixing case. A number of oil refineries combined to stabilize gasoline prices by buying the gasoline of small competitors. Justice Douglas stated:

> The elimination of so-called competitive evils is no legal justification for such buying programs. . . . If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. . . .
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> . . . .
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> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.

310 U.S. at 220–21, 223. For a discussion of price-fixing in general, see II E. KINTNER, *supra* note 22, §§ 10.2–.18; L. SULLIVAN, *supra* note 11, §§ 73–78; Briggs, *What is Price Fixing?*, 41 ANTITRUST L.J. 74 (1971).

such as discounts and credit terms.[25] The offense includes not only the fixing of prices, but also the stabilizing of or tampering with prices.[26]

It is clear that price-fixing is condemned as *per se* illegal.[27] But what constitutes price-fixing? Almost any arrangement among competitors may have some effect on price competition. For example, a horizontal merger[28] will almost certainly result in the stabilization of prices between the former competitors. This does not mean, however, that all cooperative arrangements come under the rubric of "price-fixing," subjecting defendants to *per se* treatment. It is not clear how courts make this crucial distinction; it appears, however, that the Supreme Court is expanding the amount of price-related activity that will be given *per se* treatment.[29]

ii. Group Boycotts

The group boycott, or, as it is also called, the "concerted refusal to deal," is an attempt by a group of competitors to exclude a fellow competitor or group from competition.[30] This conduct has also been thought sufficiently opprobrious to warrant *per se* treatment. By way of example, boycotts may be accomplished by a group of buyers threatening to no longer purchase from suppliers if the suppliers continue to deal with an excluded competitor, by a group of sellers threatening to no longer sell to buyers if the buyers continue to buy from an excluded competitor, or simply by an agreement of a group of competitors that no member will deal with an excluded competitor.[31]

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25. *See, e.g., Maricopa*, 457 U.S. 332 (1982) (maximum price); *Catalano*, 446 U.S. 643 (1980) (credit terms); *Albrecht*, 390 U.S. 145 (1968) (maximum price); *Kiefer-Stewart*, 340 U.S. 211 (1951) (maximum price); United States v. United Liquors Corp., 149 F. Supp. 609 (W.D. Tenn. 1956) (wholesale association agreed to eliminate quantity discounts and retail association set minimum prices), *aff'd mem.*, 352 U.S. 991 (1957).

26. *See, e.g., Socony-Vacuum*, 310 U.S. 150 (1950) (stabilization of gasoline prices); *Plymouth Dealers*, 279 F.2d 128 (9th Cir. 1960) ("suggested price list" influenced prices); *Nationwide Trailer*, 156 F. Supp. 800 (D. Kan. 1957).

27. *Maricopa*, 457 U.S. at 348–51.

28. A horizontal merger is a merger between two companies at the same competitive level.

29. *Compare* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 23–24 (1979) *with Maricopa*, 457 U.S. at 354–55.

30. For a discussion of group boycotts in general see II E. KINTNER, *supra* note 22, §§ 10.29–.38; L. SULLIVAN, *supra* note 11, §§ 83–92; Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979); McCormick, *Group Boycotts—Per Se or Not Per Se, That Is the Question*, 7 SETON HALL L. REV. 703 (1976).

31. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966) (auto dealers attempted to prevent GM sales to discount outlets); Silver v. New York Stock Exch., 373 U.S. 341 (1963) (broker-dealers of securities excluded plaintiff broker-dealer from exchange); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (defendant appliance retailer conspired with manufacturers to boycott plaintiff retailer); Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404 (6th Cir. 1982) (combination of distributors and manufacturer to boycott competing distributor of sound equipment).

The biggest problem, as with price-fixing, is in the characterization of the action taken by the group. Any given activity can arguably be termed a "boycott," or, alternatively, an instance of "reasonable self-regulation." In *Molinas v. National Basketball Association*,[32] the National Basketball Association—arguably made up of a group of competitors—expelled a basketball player from league play because of gambling.[33] This action could have been characterized as a boycott, but the court instead held that this action was a reasonable self-regulation which did not fall within the *per se* category.[34]

iii. Horizontal Market Allocation

An agreement among competitors to allocate their geographic, product, or customer market among themselves is a *per se* offense under section 1.[35] Early market allocation cases tended, however, to shy away from a strict *per se* approach, and appeared to require that there be market power, an anticompetitive effect, or an allocation linked to price-fixing for there to be a violation of section 1.[36] For example, in *United States v. Sealy*,[37] a geographic market allocation for the manu-

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In some of the cases the courts have had to stretch to find horizontal action. Some boycotts seem to be more vertical than horizontal. For example, in *Com-Tel* the court held that when codistributors succumbed to manufacturer pressure they joined in the boycott, lending the horizontal element. 669 F.2d at 412–13. *See also Klor's*, 359 U.S. 207 (1959) (department store conspired with manufacturers to keep rival department store from entering household appliance market). At least two commentators have suggested that a *per se* boycott may be perpetrated by a single firm at one level and a single firm at another level, such as distributor and manufacturer. *See* L. SULLIVAN, *supra* note 11, at 231 n.1 (1977); Bauer, *supra* note 30, at 713.

32. 190 F. Supp. 241 (S.D.N.Y. 1961).

33. *Id.*

34. *Id.* at 243–44; *cf.* Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973). In *Blalock*, the plaintiff was suspended from play for alleged cheating. The court held that this was not a reasonable self-regulation but was rather a *per se* boycott because the suspension was voted on by player-competitors and they had "unfettered, subjective discretion." *Id.* at 1265–66.

35. United States v. Topco Assocs., 405 U.S. 596 (1972) (geographic market allocation among grocery stores); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (worldwide allocation of market for antifriction bearings); United States v. Associated Patents, 134 F. Supp. 74 (E.D. Mich. 1955) (product-market allocation for machine tools), *aff'd per curiam mem. sub nom.* Mac Inv. Co. v. United States, 350 U.S. 960 (1956); United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961) (customer allocation); Gray Line, Inc. v. Gray Line Sightseeing Cos., 246 F. Supp. 495 (N.D. Cal. 1965) (customer allocation). For a general discussion of horizontal market allocation, see II E. KINTNER, *supra* note 22, §§ 10.39–.43; L. SULLIVAN, *supra* note 11, §§ 79–82.

36. *See, e.g., Timken Roller Bearing*, 341 U.S. at 598 (geographic allocation as part of aggregation of trade restraints where market power and anticompetitive effects evident); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898) (geographic allocation held unlawful where court finds market power and anticompetitive effects), *modified and aff'd*, 175 U.S. 211, 240–41 (1899).

37. 388 U.S. 350 (1967).

facture of mattresses was held *per se* unlawful, largely because the allocation was part of a broader anticompetitive scheme. Specifically, the geographic arrangement before the Court was part of an "aggregation of trade restraints" which included price-fixing.[38] Moreover, the Court in *Sealy* suggested that there might be *lawful* market divisions, such as a division of territory between small grocers as part of an agreement establishing joint advertising and a common name.[39]

In 1972, the Supreme Court decided what may be deemed its first strict *per se* horizontal market allocation case, laying to rest any possibility of the *lawful* division of markets as hypothecated in *Sealy*. In *United States v. Topco Associates*,[40] the Court held *per se* unlawful a geographic market division incident to an agreement among small independent grocery chains. The chains had agreed to unite under the "Topco" name for the purpose of advertising, purchasing, and distributing a private brand of products in competition with the brands of larger national and regional chains. The precedent is clear: the *Topco* decision will preclude any defendant from arguing against a *per se* approach (and for a rule-of-reason approach) even if the defendant's market allocation is ancillary to an arrangement which produces economies of scale or facilitates competitive entry.[41]

In order to minimize the apparent harshness of the *per se* rule in horizontal market allocation cases, the courts will once again have to resort to semantic characterizations of the restraints as "naked" divisions of markets (so that the *per se* rule applies) or as divisions ancillary to arrangements with a lawful purpose (so that the *per se* rule cannot apply). Many would in fact argue that the *Sealy* and *Topco* cases should have fallen into the latter category.[42] Where the courts

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38. *Id.* at 356–58.

39. *Id.* at 357.

40. 405 U.S. 596 (1972).

41. *Topco* and *Sealy* have drawn heavy criticism from antitrust commentators. *E.g.*, R. POSNER, ANTITRUST LAW, AN ECONOMIC PERSPECTIVE 165–66 (1976); R. BORK, THE ANTITRUST PARADOX 270–79 (1978). Posner argues that the territorial allocation in *Sealy* was based on the desire to encourage the advertising of a joint trademark, not the desire to reap monopoly gains. He argues that *per se* treatment in this type of case is inappropriate, and suggests that plaintiffs have the burden of proving the anticompetitive nature of the agreement. Moreover, where a defendant's market share is too small to generate monopoly problems (as he argues was the case in *Sealy*), Posner suggests a presumption of lawfulness for the market division. R. POSNER, *supra*, at 270–79.

Bork characterizes *Sealy* as a "needless destruction of an efficiency-creating system of ancillary restraints." R. BORK, *supra*, at 270. He feels that the contract integration in *Sealy* would have created economic efficiency. "[Sealy] and similar cooperative groups had efficiency-creating agreements dismantled by inappropriate legal doctrine." *Id.* at 274. For a good primer on the interrelationship of horizontal restraints and economic theory, see *The Economics of Horizontal Restraints*, 52 ANTITRUST L.J. 551 (1983).

42. *See supra* note 41.

find that the market division is in fact ancillary, they will apply what is termed a "rule-of-reason" approach.[43]

b. Rule-of-Reason Inquiry

If a practice does not fall within the *per se* category above, its legality is measured against the rule-of-reason test.[44] This test explores whether the restraint is, on balance, competitively reasonable. The basic issue in rule-of-reason cases is whether the restraint merely regulates (and thereby perhaps promotes competition), or whether the restraint may suppress or even destroy competition.[45] While the articulation of the "rule" is relatively simple, its application is extremely difficult. One caveat is in order. The rule-of-reason test does not open an antitrust inquiry to every argument in favor of a challenged restraint. The test focuses only on the impact of the challenged restraint on competitive conditions.[46]

C. Remedies and Penalties

If a court finds a defendant liable under either the *per se* or rule-of-reason tests, there are substantial fines and criminal penalties which the court may impose. Individuals may be sentenced to incarceration for a period of up to three years per count and fined up to $100,000.[47]

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43. *See, e.g.*, United States v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D.N.Y. 1960) (rule of reason applied to combination of producers using same subsidiary to market films and finding no market power, and little integration between defendants); *cf.* Hospital Bldg. Co. v. Trustees of Rex Hosp., 691 F.2d 678 (4th Cir. 1982), *cert. denied*, 104 S. Ct. 231 (1983). *But cf.* Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978) (rejected ancillary argument where plain effect of licensing agreement and organizational structure was to restrain trade), *cert. denied*, 440 U.S. 930 (1979). For an analysis of ancillary restraints, see Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do* Sealy *and* Topco *Logically Survive* Sylvania *and* Broadcast Music?, 66 VA. L. REV. 879 (1980).

44. *See generally* I E. KINTNER, *supra* note 22, § 8.2; L. SULLIVAN, *supra* note 11, §§ 65–69.

45. Board of Trade v. United States, 246 U.S. 231, 238 (1918) ("call rule" of Chicago Board of Trade prohibiting members from purchasing commodities at a different price between sessions was legal). Justice Brandeis stated:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id.

46. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978). *See infra* text accompanying notes 115–20.

47. 15 U.S.C. §§ 1–3 (1982).

Corporations may be fined up to $1 million per count.[48] This is not, however, the practical extent of criminal penalties. An indictment may involve more than one count, and, in addition, what appears to be an industry practice may be considered to be a number of conspiracies divisible into a number of separate claims.[49] In addition, charges of mail fraud,[50] wire fraud,[51] and even violations of the Racketeer Influenced and Corrupt Organizations Act[52] may be included against a defendant in addition to the antitrust charge.

On the civil side of liability, aggrieved plaintiffs are entitled to recover three times their damages, plus costs and reasonable attorneys' fees.[53] Damages can therefore be astronomical.[54] In some cases the damages seem limited only by the imagination of the attorneys and experts handling the plaintiff's case. If liable, defendants can also count on paying large amounts in attorneys' fees for the plaintiff. Generally speaking, attorneys' fees are based on a complex set of criteria in which the amount of time spent in preparation is a critical factor.[55] However salutary this may seem in some cases, from the defendants' point of

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48. *Id.*

49. *See, e.g.*, United States v. Wilshire Oil Co., 427 F.2d 969 (10th Cir.) (no double jeopardy because defendants had distinctively separate conspiratorial purposes for each violation), *cert. denied*, 400 U.S. 829 (1970); United States v. Ashland-Warren, Inc., 537 F. Supp. 433 (M.D. Tenn. 1982) (prosecution of defendants for bid-rigging in Virginia and Tennessee was not double jeopardy because not a single conspiracy for both violations).

50. 18 U.S.C. § 1341 (1982). *See* United States v. Azzarelli Constr. Co., 612 F.2d 292 (7th Cir. 1979) (bid-rigging on Illinois highway projects), *cert. denied*, 447 U.S. 920 (1980).

51. 18 U.S.C. § 1343 (1982). *See* United States v. J. Ray McDermott & Co., [1970–1979] U.S. Antitrust Cases — CCH Summaries ¶ 45,078 (Case 2678) (E.D. La. 1978). *See generally RICO and the Antitrust Laws*, 52 ANTITRUST L.J. 299 (1983).

52. 18 U.S.C. §§ 1961–68 (1982). *See* United States v. Arcole-Midwest, Inc., [1970–1979] U.S. Antitrust Cases — CCH Summaries ¶ 45,077 (Case 2570) (N.D. Ill. 1977).

53. 15 U.S.C. § 15 (1982).

54. The largest judgment is the approximate $1.8 billion judgment against AT & T rendered after a jury trial in M.C.I. Communications Corp. v. AT & T Co., Civ. No. 740C-633 (N.D. Ill. 1981). This judgment was reversed over a vigorous dissent. AT & T Co. v. M.C.I. Communications Corp., 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983). However, an approximate $277 million verdict was recently affirmed in Litton Sys., Inc. v. AT & T Co., 700 F.2d 785 (2d Cir.), *cert. denied*, 104 S. Ct. 984 (1984).

55. Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Although these cases deal with civil rights violations, in some circuits the same criteria for determining attorneys' fees are used in antitrust violations. *E.g.*, Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980). The *Johnson* case outlines twelve different factors to take into account: the time and effort involved; novelty and difficulty of the questions; skill needed to prepare the case; preclusion of other employment; customary fee; whether fixed or contingent fee; time limitation; amount involved and result of case; expense, ability and reputation of attorneys; "undesirability" of the case; nature and length of attorney-client relationship; and similar awards in such cases. *Johnson*, 488 F.2d at 717–19. An excellent example of the complexities involved in fee determinations is *In re* Fine Paper Litig., 98 F.R.D. 48 (E.D. Pa. 1983) (fee petitions from 41 different firms in a class-certified antitrust proceeding).

view the scheme may be unfortunate. If defendants are successful in proving that their practices had little impact on the plaintiff, the defendants still may be required to pay very substantial attorneys' fees—fees which may be disproportionate to the amount of recovery.[56]

III. TRADE ASSOCIATIONS

A. Application of Section 1

> "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."[57]

Fortunately for trade associations,[58] the courts do not share Adam Smith's cynical view of their activities. In fact, it is recognized that trade associations, which often allow competitors a chance to discuss common problems, obtain expert advice, or exchange industry information, may increase economic efficiency.[59] The courts thus have applied a rule-of-reason analysis to trade association practices—such as membership arrangements in the nature of a boycott[60]—which might otherwise fall under a *per se* category. Of course, other trade association activities, such as joint decisions with the effect of price-fixing, are still held *per se* unlawful.[61]

The first hurdle in a section 1 trade association case is proof of an agreement. Membership in a trade association alone will not give rise to an inference of a conspiracy.[62] Moreover, some cases suggest that

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56. *See, e.g., Copper Liquor*, 624 F.2d 575 (5th Cir. 1980) ($45,000 treble-damage award, but trial judge abused discretion in awarding only $45,000 for attorneys' fees in light of *Johnson* criteria).

57. A. SMITH, WEALTH OF NATIONS 128 (1937).

58. For further research into the antitrust problems of trade associations, see II E. KINTNER, *supra* note 22, § 10.4; G. LAMB & L. SHIELDS, TRADE ASSOCIATION LAW AND PRACTICE (2d ed. 1971); 16A BUSINESS ORGANIZATIONS (MB) § 61 (Mar. 1981); *Trade Associations and the Antitrust Laws*, 46 BROOKLYN L. REV. 179 (1980); *Symposia*, 13 ANTITRUST BULL. 537 (1968).

59. United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1977).

60. *See* Phil Tolkan Datsun v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, 672 F.2d 1280, 1285 (7th Cir. 1982) (dealer's association refusal to admit plaintiff dealer not an antitrust violation because no injury); Florists' Nationwide Tel. Delivery Network v. Florists' Tel. Delivery Ass'n, 371 F.2d 263, 268–69 (7th Cir. 1967) (florist association advertising rule impaired membership in rival florist association), *cert. denied*, 387 U.S. 909 (1973); Smith v. Pro Football, Inc., 593 F.2d 1173, 1178–81 (D.C. Cir. 1978).

61. *E.g.*, Vandervelde v. Put and Call Brokers and Dealers Ass'n, 344 F. Supp. 118 (S.D.N.Y. 1972) (association's rule requiring discount in certain commodity sales, and defendant's suspension for violating the rule were together unlawful).

62. *See* Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976) (evidence that oil executives from two companies met at trade association meeting not sufficient by itself), *cert. denied*, 429 U.S. 1074 (1977); Kline v. Coldwell, Banker & Co., 508 F.2d 226, 231 (9th Cir. 1974) (mere membership in real-estate board not enough), *cert. denied*, 421 U.S. 963 (1975); Hunt v. Mobil Oil Corp., 465 F. Supp. 195, 231 (S.D.N.Y. 1978) (more is required than mere

even a member's knowledge of his or her comembers' conspiracy is not sufficient to impose liability, for there must be both knowledge and active participation by a member in the illegal activity.[63] Conversely, as will be discussed later, associations may be liable for members' activities conducted with apparent authority.[64]

Generally, the critical issue in trade association cases is whether the activities of the association and its members restrain trade.[65] The issue of whether activities restrain trade divides itself into two broad categories of analysis: trade association programs and trade association membership practices. Certain trade association programs carry a presumption of legality and are generally upheld. These include activities designed to influence the passage or enforcement of laws,[66] joint bargaining with labor or other cooperation on labor problems,[67] joint research and development,[68] and joint advertising.[69] Other trade association practices, such as the exchange of price information and other data as well as product standardization or certification, can be controversial and possibly illegal. Trade association *membership* practices are generally problematic as will be demonstrated more fully below.

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association and presence), *aff'd mem.*, 610 F.2d 806 (2d Cir. 1979); *cf.* Mardirosian v. American Inst. of Architects, 474 F. Supp. 628, 636 n.16 (D.D.C. 1979) ("It is clear that the requisite element of concerted activity under section 1 can be found in joint associational activities . . . .").

63. *See Kline*, 508 F.2d at 232; *Hunt*, 465 F. Supp. at 231. *See generally* Herold, *Guilt by Association: The Risks Involved in Trade Association Activity*, 46 ANTITRUST L.J. 466 (1977).

64. "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." RESTATEMENT (SECOND) OF AGENCY § 8 (1957). *See* American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982) (association liable under antitrust laws for the violation its agents committed with apparent authority). For a discussion of *Hydrolevel*, see *infra* text accompanying notes 90–103.

65. The "trade or commerce" element of a § 1 offense poses no unique difficulties of proof in trade association cases. *See supra* notes 11–20.

66. Trade association lobbying or petitioning activities are judicially exempt from Sherman Act scrutiny even if they have an anticompetitive intent or effect. This is known as the *Noerr-Pennington* immunity doctrine. *See* United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). The rationale is that businesses and trade associations should be able to seek changes through the legislative or administrative process since such lobbying efforts are legal in any other sense (disregarding antitrust) when practiced by any other parties. This exception to the application of the Act does not apply, however, where the activities are a "mere sham" or an attempt to directly restrain trade. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972); *Noerr*, 365 U.S. at 144.

67. *See* 16A BUSINESS ORGANIZATIONS, *supra* note 58, §§ 6I-6–6I-7.

68. *See* United States v. Line Material Co., 333 U.S. 287, 310 (1948) (tension between valid patent monopoly and price limitation on patented devices in determining antitrust implications); United States v. Manufacturers Aircraft Ass'n, 1972 Trade Cas. (CCH) ¶ 45,072, at 53,464 (S.D.N.Y. 1972); 1976-1 Trade Cas. (CCH) ¶ 60,810 (S.D.N.Y. 1976) (entering consent decree involving patent, royalty, and licensing agreements).

69. *See Phil Tolkan*, 672 F.2d 1280 (7th Cir. 1982); *but cf.* United States v. Sealy, Inc., 388 U.S. 350, 350 (1967) (joint ads including price).

The exchange of data, including price data, without more, does not render a trade association liable under section 1.[70] Early cases tended to infer from such price exchanges a price-fixing agreement, holding the price exchange unlawful.[71] Later cases, however, tended to allow such data exchanges after considering the structure of the industry and the nature of the information exchanged and determining the procompetitive or anticompetitive effects of the data exchanged.[72] The Supreme Court's apparent indecision in this area stems in large part from the varying consequences of such exchanges. That is, information exchanges may enhance competition in competitive markets, while such exchanges may depress competition[73] in oligopolistic markets.[74]

Product standardization or certification practices, like information exchanges, can undoubtedly have beneficial effects on competition.[75] Standardization programs allow easier price comparison by consumers, with a concomitant increase in price competition. Because of this and other possible beneficial effects, such as improved product safety, improved product quality, and lower product costs, standardization and certification programs are often upheld against antitrust charges.[76] However, these programs may also lead to an increased ability to stabilize prices or output, thus decreasing competition. The courts have struck down these programs where this was their apparent purpose or effect.[77]

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70. *See Gypsum Co.*, 438 U.S. at 441 n.16; United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 113 (1975) (the dissemination of price information is not in itself a *per se* violation of the Sherman Act); *but cf.* United States v. Container Corp., 393 U.S. 333, 337–38 (1969) (implying *per se* rule for exchange of price information in corrugated container industry). Fortas' concurrence in *Container* interprets the majority opinion as not announcing a *per se* rule. *Id.* at 338–39.

71. *See* United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). In both cases the reporting included information on individual sales so detailed that the Court believed that there was an attempt to restrict competition and increase prices.

72. *See Gypsum*, 438 U.S. at 441 n.16; Cement Mfrs.' Protective Ass'n v. United States, 268 U.S. 588 (1925); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

73. *Container Corp.*, 393 U.S. at 342–43 (1969) (Marshall, J., dissenting); P. AREEDA, ANTITRUST ANALYSIS 13–16 (1974).

74. "Oligopoly simply means that there are few sellers." Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523, 528 (1983).

75. *See* 16A BUSINESS ORGANIZATIONS, *supra* note 58, § 61.03, at 61-18–61-19.

76. *See, e.g.*, Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154 (D. Or. 1966) (commercial standards and certification for plywood benefit public), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); United States v. Johns-Manville Corp., 259 F. Supp. 440 (E.D. Pa. 1966) (restrictive specifications for pipe).

77. *See, e.g.*, National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421, 426 (7th Cir. 1965). In *National Macaroni*, manufacturers agreed to a set reduction in the use of durum wheat in their products in an attempt to depress the price of this ingredient. The court held that this was tantamount to price-fixing. *Id. See also* C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489 (9th Cir.) (standardization of fire extinguishers not usually standardized brought about price uniform-

A trade association can also run afoul of antitrust laws through its policies of admission, discipline, and expulsion of members. Membership regulations in trade associations based on reasonable standards form an exception to the general *per se* group boycott rule.[78] The conventional wisdom, however, is that a trade association cannot deny membership to any individual or enterprise if that denial unreasonably restricts commerce. In *Associated Press v. United States*,[79] the Associated Press had, over the years, developed a far-flung and effective wire service for gathering the news. To compete effectively, it was essential for newspapers to have access to the Associated Press wire service. The Court found that it was illegal under these circumstances for the Associated Press to deny membership in its association to otherwise eligible newspapers.[80]

Codes of conduct for members may also be controversial. The disciplinary or ethical rules of a trade association will be struck down when their primary effect is anticompetitive.[81] Thus, an association rule governing the timing of bid submissions for the purpose of preventing unethical behavior has been upheld,[82] while a code preventing *all* competitive bidding for the same purpose has been held to violate the Sherman Act.[83] Of course, the way such codes of conduct are enforced may also generate antitrust liability.[84]

The courts will closely scrutinize the actual discipline of trade association members, particularly if such discipline results in expulsion. In order for a disciplinary action to be upheld, it generally will have to meet a three-prong test: (i) the action taken against a member must have a justifiable self-regulatory purpose; (ii) the action taken must be

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ity), *cert. denied*, 344 U.S. 892 (1952); Milk and Ice Cream Can Inst. v. FTC, 152 F.2d 478 (7th Cir. 1946) (milk cans and containers not usually uniform).

78. *See Phil Tolkan*, 672 F.2d at 1285; *Florists Nationwide*, 371 F.2d at 268–69; *Pro Football*, 593 F.2d at 1178–81. *See also supra* text accompanying notes 30–34.

79. 326 U.S. 1 (1945).

80. *Id.* at 17–20; *cf.* Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir.) (exclusion from PGA tour competitively reasonable in light of necessity to limit playing field), *cert. denied*, 385 U.S. 846 (1966).

81. *See, e.g.*, Fashion Originator's Guild of Am. v. FTC, 312 U.S. 457 (1941) (a guild rule forbade dealing with certain parties); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914) (association rule prohibiting direct contact between wholesalers and consumers was held anticompetitive).

82. Cullum Elec. & Mechanical, Inc. v. Mechanical Contractors Ass'n, 569 F.2d 821 (4th Cir. 1978) (rule governing timing of bids was designed to avert chaotic prebid situations).

83. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); *cf. Mardirosian*, 474 F. Supp. 628 (D.D.C. 1979).

84. *See, e.g.*, Feminist Women's Health Center Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978) (use of coercion and intimidation), *cert. denied*, 444 U.S. 924 (1979); Mechanical Contractors Bid Depository v. Christiansen, 352 F.2d 817 (10th Cir. 1965) (sanctions and fines were used to coerce), *cert. denied*, 384 U.S. 918 (1966).

objectively necessary to achieve that purpose; and (iii) the action must be taken with adequate procedural safeguards in place, such as notice, the right to be heard, and probably the right to appeal.[85]

A similar but related problem concerns the trade association's manner of dealing with nonmembers when they seek to use association facilities or programs. If the association has developed a program in which it is important (even if not necessarily indispensable) for a manufacturer in a given industry to participate, in order to compete effectively, the association may be required to make that program available to nonmembers.[86] An example of this situation is found in the case *Radiant Burners, Inc. v. People's Gas, Light & Coke Co.*[87] In *Radiant Burners*, the association label affixed to a product was vital to manufacturers of certain types of equipment in order to compete in their industries. The Supreme Court held the association's denial of this seal of approval to a nonmember was a "concerted refusal to deal" unlawful under section 1. The Court suggested that the association would have to make the "association-approved" label available to nonmembers on nondiscriminatory terms.[88] Presumably, nonmembers would be required to meet the same objective test specifications as the members and required to pay a fair share of the costs of the testing.[89]

B. The Hydrolevel *Case*

Recently, another Supreme Court decision broadened the scope of potential antitrust liability with which associations must contend. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*[90] is a case with potentially enormous impact on trade association antitrust liability. In *Hydrolevel*, the Court held that a trade association is liable for the unauthorized anticompetitive acts of its members if those

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85. *See* Silver v. New York Stock Exch., 373 U.S. 341 (1963) (notice and hearing needed before stock exchange connection could be removed from broker); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646 (5th Cir. 1977) (membership requirements were arbitrary and unreasonable); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973). The three-prong test is applicable to product standards and membership requirements as well as to disciplinary actions.

86. A trade association does not merely need to make "indispensable" programs available to other competitors. Denial of any unique facilities to a competitor would be a restraint of trade. *See Associated Press*, 326 U.S. at 18.

87. 364 U.S. 656 (1960).

88. *Id.* at 658. The utilities would refuse to provide gas for use in Radiant's burners if the burners were not approved in tests by the American Gas Association (AGA). Therefore, potential customers would not buy the gas burners. Radiant alleged that AGA's tests were not based on objective standards and that Radiant's burners were as safe, efficient, and durable as other burners which AGA had approved. *Id. See also* Tag Mfrs. Inst. v. FTC, 174 F.2d 452, 462–63 (1st Cir. 1949) (up-to-date records of tag prices were open and available to anyone at any time).

89. *See* 16A BUSINESS ORGANIZATIONS, *supra* note 58, § 61.04, at 61-26.

90. 456 U.S. 556 (1982).

acts are conducted by members with apparent authority,[91] regardless of actions taken by the association to prevent such anticompetitive actions.

The defendant in this case, the American Society of Mechanical Engineers, Inc. (ASME), was a trade association with over 90,000 members from various fields of mechanical engineering.[92] One of ASME's functions was to promulgate codes governing the production and use of certain products. The plaintiff, Hydrolevel, produced a safety device for use in water boilers, in competition with McDonnell & Miller, Inc. (M & M).[93] A vice president of M & M, Mr. James, also happened to be vice chairman of ASME's subcommittee which dealt with the code section governing the boiler safety devices.[94] Mr. James, along with the chairman of that subcommittee, Mr. Hardin, drafted a letter which was sent by another M & M official to the subcommittee, asking whether Hydrolevel's safety device complied with the code.[95] Hardin drafted an "unofficial" response, sent by the secretary of the subcommittee on ASME stationery, effectively declaring Hydrolevel's product unsafe.[96] This response was subsequently used by M & M employees to discourage buyers from purchasing the Hydrolevel device, and these actions indeed had that effect.[97]

The question before the Court was what standard should be applied to determine ASME's liability. ASME urged that it should only be held liable if it ratified its conspiring members' actions or if the members acted in furtherance of ASME's interests—neither of which occurred in this case.[98] Hydrolevel argued that ASME should be held liable for the acts of its members if they acted within the scope of their apparent authority, as James and Hardin had done.[99] The Court agreed with Hydrolevel's arguments. The Court stated that imposing liability on the association would deter antitrust violations by encouraging the association to take action to prevent such violations by its members. "Only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps."[100] The Court also held that imposing treble damages on the as-

91. *See supra* note 64.
92. *Hydrolevel*, 456 U.S. at 559.
93. *Id.* at 560.
94. *Id.*
95. *Id.* at 561.
96. *Id.*
97. *Id.* at 562–63.
98. *Id.* at 564.
99. *Id.*
100. *Id.* at 572.

sociation was proper on the same basis.[101]

Justice Powell's dissent, however, raises serious questions as to the soundness of *Hydrolevel*.[102] The decision seems to create a virtual rule of strict liability for trade associations because almost any member or officer who acts in violation of the antitrust laws can bring the full penalties of the Sherman Act down upon the association. The primary rationale espoused by the Court for imposing liability—deterrence—is unlikely to be furthered by a rule of liability which applies regardless of any action taken by associations to prevent unlawful conduct. It is likely, in fact, that by increasing the risk of antitrust liability, *Hydrolevel* will deter beneficial conduct of associations—in particular, product standardization or certification programs. However, the precise reach of *Hydrolevel* is still uncertain and must await further interpretation by the courts.[103]

IV. PROFESSIONAL ASSOCIATIONS

Professional associations,[104] unlike other trade associations, have historically enjoyed a virtual exemption from antitrust scrutiny under the Sherman Act.[105] This *de facto* exemption was based on the theory that the practice of a profession was not "trade or commerce" as defined by the Sherman Act.[106] The courts further rationalized this distinction by suggesting that the professions had a special need for ethi-

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101. *Id.* at 574–76.

102. Justice Powell's vigorous dissent, joined by Justices White and Rehnquist, is actually far more compelling than the majority opinion. 456 U.S. at 578–94. Justice Powell felt that imposing the heavy punitive burden of treble damages on a nonprofit organization through the doctrine of apparent authority was "launch[ing] on an uncharted course" and unprecedented. *Id.* at 582–84. After examining the legislative history of the Sherman Act, he concluded that such a holding had "no relevance to the furtherance of the purposes of the antitrust laws." *Id.* at 592. "One must be concerned whether the new doctrine and the sweep of the Court's language will be read as exposing the array of nonprofit associations—professional, charitable, educational, and even religious—to a new theory of strict liability in treble damages." *Id.* at 594.

103. *See* Appleson, *Errant Volunteers Put Associations in Peril*, 68 A.B.A. J. 796 (1982). The *Hydrolevel* case has been analyzed by many commentators. 1983 B.Y.U. L. REV. 483; 87 DICK. L. REV. 465 (1983); 7 NOVA L.J. 641 (1983); 13 SETON HALL L. REV. 354 (1983); 17 SUFFOLK U.L. REV. 147 (1983).

104. For further research into the problems of antitrust for professional associations, see II E. KINTNER, *supra* note 22, § 10.5; 16E BUSINESS ORGANIZATIONS, *supra* note 58, § 49; *Antitrust and the Professions—Conflict or Accommodation?*, 52 ANTITRUST L.J. 161 (1983).

105. *See generally* Coleman, *The Learned Professions*, 33 ANTITRUST L.J. 48 (1967).

106. The theory was built by courts from dicta in a long line of cases. United States v. Oregon State Medical Soc'y, 343 U.S. 326, 336 (1952); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 436 (1932); FTC v. Raladam Co., 283 U.S. 643, 653 (1931); Federal Baseball Club v. National League, 259 U.S. 200, 209 (1922); The Nymph, 18 F. Cas. 506, 507 (C.C.D. Me. 1834) (No. 10,388). The only court to ever make the theory a holding was the lower court in *Goldfarb*. Goldfarb v. Virginia State Bar, 497 F.2d 1, 14–15 (4th Cir. 1974), *rev'd*, 421 U.S. 773 (1975).

cal behavior and competent practice and that this need was better served by self-regulation than by application of the antitrust laws.[107] Recently, however, professional associations have come to be faced with the same antitrust problems with which trade associations contend, including the expanded liability signaled by cases such as *Hydrolevel.*

The Supreme Court skirted the resolution of whether professional associations were included within the sweep of section 1[108] until the landmark case *Goldfarb v. Virginia State Bar.*[109] In *Goldfarb*, the Court held that a minimum-fee schedule for lawyers set by a local bar association was price-fixing and a *per se* violation of section 1.[110] The Court rejected any antitrust exemption for the professions when it stated: "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce."[111]

The strong language of *Goldfarb* could have led to the demise of any distinction between professional associations and traditional business activities. A footnote, however, tempered the *Goldfarb* Court's unanimous rejection of a professional exemption:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions other antitrust concepts which originated in other areas. The *public service* aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in

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107. *See generally* II E. KINTNER, *supra* note 22, at 94; 16E BUSINESS ORGANIZATIONS, *supra* note 58, at 49-8, 49-15–49-17.

108. United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 490–91 (1950); American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943).

109. 421 U.S. 773 (1975).

110. *Id.* at 781–83, 793. The petitioners needed a title examination when they contracted to buy a new home. Such a service could be done legally only by a member of the state bar. The local county bar published a recommended listing of minimum prices for common legal fees. The recommended fee for a title search was 1% of the value of the property. The petitioners could not find a lawyer who would charge less than the local bar association's 1% recommended minimum fee. The petitioners paid the fee to a lawyer to have the title search completed and subsequently sued the state and local bar associations for a violation of § 1 of the Sherman Act.

111. *Id.* at 788.

> It is no disparagement of the practice of law as a profession to acknowledge that it has [a] business aspect, and § 1 of the Sherman Act "[o]n its face . . . shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states."

Id. (footnote & citation omitted) (quoting United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944)).

another context, be treated differently.[112]

Since *Goldfarb*, various professional organizations have sought shelter from liability under this "public service" language. As two subsequent cases—*National Society of Professional Engineers (NSPE) v. United States*[113] and *Arizona v. Maricopa County Medical Society*[114]—have demonstrated, however, the footnote may in fact provide little real protection from antitrust liability.

In *NSPE*, a society of engineers adopted an ethical canon absolutely prohibiting competitive bidding by its members.[115] Faced with a section 1 lawsuit,[116] the NSPE argued that its ethical canon was necessary to promote the public interest and safety since competition between engineers could produce shoddy work by engineering firms trying to cut costs and obtain a bid.[117] The Supreme Court found the argument unconvincing. Rather, the Court characterized this argument as an attack on the purposes of the Sherman Act itself, rather than a true attempt to fit within the meaning of a "public service."[118] The Court had no difficulty in discerning an antitrust violation, reasoning that the NSPE ban on competitive bidding denied consumers the chance to compare prices or bargain for services.[119]

Yet the dicta in footnote seventeen of *Goldfarb* had a life of its own. Even if the *NSPE* litigants could not fit under the footnote's "public service" aegis, the Court stated that later litigants still might be able to do so:

> We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. *Ethical norms* may serve to regulate and promote this competition, and thus fall within the Rule of Reason.[120]

However, even the *NSPE* reformulation of the dicta in *Goldfarb* failed to help later professional association defendants. In *Arizona v.*

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112. *Id.* at 788 n.17 (emphasis added).

113. 435 U.S. 679 (1978).

114. 457 U.S. 332 (1982).

115. *NSPE*, 435 U.S. at 682–84.

116. *Id.* at 681.

117. *Id.* at 684–85.

118. *Id.* at 695. The Court stated: "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services . . . . [T]he statutory policy precludes inquiry into the question whether competition is good or bad." *Id.*

119. *Id.* at 692–93.

120. *Id.* at 696 (footnote omitted & emphasis added). *NSPE* has been analyzed by many commentators. Posner, *Information and Antitrust: Reflections on the* Gypsum *and* Engineers *Decisions*, 67 GEO. L.J. 1187 (1979); 20 B.C.L. REV. 716 (1979); 62 MARQ. L. REV. 260 (1978).

Maricopa County Medical Society,[121] the Supreme Court struck down a maximum-fee plan by doctors for claiming payment under medical insurance plans.[122] The Court again saw no valid justification in the medical society's "public service" and "ethical norms" arguments rationalizing the price-fixing arrangement.[123]

Professional associations are now almost indistinguishable from trade associations for purposes of determining section 1 liability.[124] "Doctors, nurses, hospitals, pharmacists, engineers, architects and a variety of related service-providers have felt the sting of antitrust."[125] One suspects that the only distinction a professional defendant may make is grounded in some elusive valid public-service aspect or ethical norm rationale yet to be discovered. Thus far, however, these characterizations have been of little help to professional defendants.[126] One final defense a professional association may be able to raise is the state

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121. 457 U.S. 332 (1982).

122. The case involved two medical societies which together contained 70% of the doctors in Maricopa County, Arizona. By majority vote of the members they "establish[ed] the schedule of maximum fees that participating doctors agree[d] to accept as payment in full for services performed from patients insured under [insurance] plans approved by the foundation." *Id.* at 339. The state of Arizona alleged that "the maximum fee-schedule [had] the effect of stabilizing and enhancing the level of actual charges by physicians, and that the increasing level of their fees in turn increase[d] insurance premiums." *Id.* at 341–42. In other words, the maximum fees of the schedule became the minimum or only fees charged.

123. The Court stated: "The price-fixing agreements in this case . . . are not premised on public service or ethical norms. The respondents do not argue, as did the defendants in *Goldfarb* and *Professional Engineers*, that the quality of the professional service that their members provide is enhanced by the price restraint." *Id.* at 349. The *Maricopa* case has been analyzed by many commentators. Harrison, *Price Fixing, the Professions, and Ancillary Restraints: Coping with* Maricopa County, 1982 U. ILL. L. REV. 925; Heitler, *Health Care and Antitrust*, 14 U. TOL. L. REV. 577 (1983); Lipner, *Antitrust's Per Se Rule: Reports of Its Death Are Greatly Exaggerated*, 60 DEN. L.J. 593 (1983); 24 B.C.L. REV. 1087 (1983); 31 EMORY L.J. 913 (1982); 56 TEMP. L.Q. 162 (1983); 57 TUL. L. REV. 994 (1983); 12 U. BALT. L. REV. 541 (1983); 52 U. CIN. L. REV. 253 (1983); 61 WASH. U.L.Q. 307 (1983).

A previous attempt to use "ethics" as an antitrust shield was struck down in American Medical Ass'n v. FTC, 638 F.2d 443 (2d Cir.), *aff'd per curiam by an equally divided court*, 452 U.S. 960 (1980). For a discussion of the case, see Barnes, *The Federal Trade Commission's American Medical Association Case and Other Health-Related Activities*, 37 FOOD DRUG COSM. L.J. 237 (1982).

124. *See supra* text accompanying notes 62–103.

125. Kauper, *Antitrust and the Professions: An Overview*, 52 ANTITRUST L.J. 163, 168 (1983).

126. The Court in *Goldfarb* first espoused this distinction. 421 U.S. at 788 n.17. The Court developed it in *Maricopa*, 453 U.S. 337 (1982). The distinction can be characterized as the last remnant of the dead and buried professional exemption.

It must be remembered that even if a valid distinction be established for a professional association because of a public service or ethical norm characterization, the matter does not end there. It would simply convert an otherwise *per se* violation into a rule-of-reason inquiry so that the actual anticompetitive or procompetitive aspects of the challenged rule could be properly evaluated. For a discussion of the rule of reason, see *supra* text accompanying notes 44–46.

action or authorization exemption.[127] In any event, professional associations should become accustomed to the threat of Sherman Act prosecutions for anticompetitive activity, even when the most firmly entrenched aspects of their respective professions are challenged.[128]

V. PRACTICAL ADVICE TO ASSOCIATIONS

With care, innocent businesses and members of trade associations may avoid liability for section 1 offenses now germinating in the minds of potential plaintiffs.[129] In general, one should first avoid even the appearance of wrongdoing.[130] This means that a business should be independent and wary in dealings or meetings with its competitors.[131] The use of clever phrases, code words,[132] or sweeping overgeneralizations

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127. There is a judicially recognized exemption from § 1 of the Sherman Act for actions by the state to restrain competition because of a valid state interest. Parker v. Brown, 317 U.S. 341 (1943) (state restricted competition in raisin growing and packing business). *See also* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

Therefore, if the professional association's conduct is regulated, mandated, or enforced by the state, such conduct is exempted from antitrust liability by reason of the state's authorization and action in the activity. Bates v. State Bar, 433 U.S. 350 (1977) (prohibition on attorney advertising was exempt from Sherman Act scrutiny but violated 1st and 14th amendments); *cf. Goldfarb*, 421 U.S. 773 (1975) (state action exemption held not to apply).

128. Certain state bar examinations may violate the antitrust laws. Ronwin v. State Bar, 686 F.2d 692 (9th Cir. 1981), *cert. granted sub nom.* Hoover v. Ronwin, 103 S. Ct. 2084 (1983) (No. 82-1474). For details of the case and the arguments before the Supreme Court, see 52 U.S.L.W. 3559 (1984); Browning, *Fail the Bar, Sue the Examiners*, 69 A.B.A. J. 1656 (1983). The plaintiff in this case alleged that the grading practices for the Arizona bar exam violated § 1 of the Sherman Act because the examiners—before grading began—predetermined the number of attorneys they desired to grant bar admission. This quota was then translated into admission results when the exams were graded.

The Ninth Circuit ruled for the plaintiff. 686 F.2d 692 (1981). The bar examiners used the *Noerr-Pennington* doctrine, *see supra* note 66, and the state action exemption, *see supra* note 127, as defenses to liability. The Supreme Court reversed. 104 S. Ct. 1989 (1984).

129. This subject is covered in greater detail in numerous articles including Anderson, *Antitrust Compliance in Action*, 20 ANTITRUST BULL. 731 (1975); Birdzel, *What Can Be Done to Minimize Danger of Antitrust Litigation*, 38 A.B.A. ANTITRUST SEC. 126 (1968); Loughlin, *The Naughty Words of Antitrust*, 54 A.B.A. J. 246 (1968); Monroe, *Practical Antitrust Considerations for Trade Associations*, 1969 UTAH L. REV. 622; Monroe, *Prophylactic Antitrust*, 9 N. KY. L. REV. 405 (1982); Withrow, *Making Compliance Programs Work*, 7 ANTITRUST BULL. 607 (1962).

130. Dealings with competitors should be in the open and the fruits thereof probably made available to others. *See* Tag Mfrs. Inst. v. FTC, 174 F.2d 452 (1st Cir. 1949); Fishman v. Wirtz, 1981-2 Trade Cas. (CCH) ¶ 64,378 (N.D. Ill. 1981) (by not allowing a group wanting to purchase an NBA franchise the use of the only feasible stadium, defendants excluded plaintiff from competition in restraint of trade).

131. Only join trade associations if you are satisfied that the benefits outweigh the disadvantages and then periodically reexamine the reason for membership in and the activities of the association.

132. The use of code words and plain envelopes for mailing communications to competitors from homes of executives are to be avoided. *See generally* J. FULLER, THE GENTLEMAN CONSPIRATORS 74 (1962); Watkins, *Electrical Equipment Antitrust Cases—Their Implication for Gov-*

should be especially avoided.[133]

Trade and professional association members should also institute procedures to document their actions. Consider adopting a file retention policy and a formal compliance program. Since price-fixing is anathema, document any pricing decisions, especially when it seems as if a member is following another's prices.[134] Lastly, limit or screen through counsel any interviews by investigators.

Additional suggestions are particularly applicable in regard to professional associations. Avoid any conduct that appears to fix prices or establish recommended fees. Even if this conduct is traditional practice for professions, it is no longer defensible. Consider having an attorney, familiar with antitrust law, present at association meetings. Reexamine ethical codes with a critical eye for antitrust problems. Do they have a procompetitive or an anticompetitive effect? Is there a valid justification for the canon or only some vague notion of the public interest? Tradition alone will not carry the day in antitrust litigation.[135]

The above suggestions are not overly burdensome, and indeed any burden they present pales in comparison to the potential burden and expense of a section 1 case. Strict adherence to the suggestions above will not guarantee immunity from an antitrust suit, but it will greatly diminish the probability of such a suit being brought, and of being prosecuted successfully.

VI. CONCLUSION

A definite trend has been established in recent antitrust cases involving trade and professional associations. Quite simply, the risk of antitrust liability is increasing. Trade associations now must worry about the apparent authority of their officers and members. Professional associations, once thought exempt from its reach, have been rudely introduced to the Sherman Act. Some of the most basic and sacred canons of professional organizations have been challenged.

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ernment and for Business, 29 U. CHI. L. REV. 97, 101–03 (1961). *See also* United States v. Portsmouth Paving Corp., 694 F.2d 312, 321 (4th Cir. 1982) ("the skies are clear in Chesapeake" as code signal that competitive bidders "cleared" off the job).

133. *See, e.g.*, Dimmitt Agri Indus., Inc. v. CPC Int'l Inc., 679 F.2d 516, 522–23 (5th Cir. 1982) (referring to "price leadership" and "stabilization"), *cert. denied*, 103 S. Ct. 1770 (1983); Esco Corp. v. United States, 340 F.2d 1000, 1010 (9th Cir. 1965) ("destroy" after reading); Volosco Prods. Co. v. Lloyd Fry Roofing Prods. Co., 308 F.2d 383, 388 (6th Cir. 1962) (stabilize the industry); Bray v. Safeway Stores, Inc., 392 F. Supp. 851, 857 (N.D. Cal.) ("confidential" label on meeting minutes), *vacated and remanded for dismissal*, 1975-2 Trade Cas. (CCH) ¶ 60,533 (9th Cir. 1975).

134. If following another's prices, first obtain written evidence of the leader's prices from the field.

135. *See generally* Sims, Maricopa: *Are the Professions Different?*, 52 ANTITRUST L.J. 177, 184–85 (1983).

Because of the present trend, the need for creative and competent lawyering in defending trade and professional associations is stronger than ever. Perhaps the most crucial need is for more "preventive" lawyering to stave off potential antitrust problems. This article is intended to provide a starting point for those who attempt to fill that need. Trade and professional associations need never feel the "sting" of antitrust if defended and counseled by wary and critical lawyers.