



Anti-trust Issues for Certification Organizations

NFRC Member Meeting
July 28 - 31, 2008

Presented by
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NFRC IS AN EFFECTIVE STANDARDS SETTING ORGANIZATION

- For anti-trust purposes, NFRC is a standards setting organization; we promulgate procedures for rating and labeling energy performance attributes of fenestration products.
- NFRC's rating and labeling program has had a positive effect on the fenestration industry and the consumer public.
 - Allowed new technologies to demonstrate improved energy performance
 - Allowed consumers to compare energy performance of different products
 - Facilitated adoption and enforcement of energy codes
 - Saved energy!

Generally, the Federal Trade Commission and the Courts believe standards setting is good/pro-competitive, because:

- Can increase price competition because standard technologies can be compared and contrasted;
- Can spur technological development by creating common standards to measure performance; and
- Can open new markets to new products and services.

Examples of the improper or anti-competitive use of standard setting include the following:

- A group of competitors join together to exclude a rival company's products from the standard setting process.
- Standards and related procedures are not properly enforced or are manipulated to benefit or disadvantage one group of competitors.
- Standards are developed without a sound scientific or objective basis. (This has risk of negligence liability too.)

ALLIED TUBE, U.S. SUPREME COURT:

“When private associations promulgate standards based on merits of objective expert judgments and through procedures that prevent the standard setting process from being biased by members with economic interests in stifling competition, those standards can have significant pro competitive effect.”

SO, WHAT CAN A NOT-FOR-PROFIT STANDARD SETTING ORGANIZATION DO TO AVOID THIS RESULT?

- First and foremost, in setting standards and applying them, the process must be open and fair and allow for due process. For example:
 - Allow all competitors, the general public and other interested parties to have input into development of the standards.
 - Allow for reasonable due process in the standard setting process to help assure that all points of view can be heard and considered.
 - Adopt standards based on reasonable, objective analysis.
 - Apply the standards in a consistent and even handed way.

Don't Get Caught in a "Naked Boycott"

- Federal Trade Commission (FTC) sued two chiropractic trade associations and their attorney for violating FTC Act, committing an illegal "group boycott."
- Defendants agreed to consent judgment with the FTC that included an order to
 - cease and desist from illegal conduct
 - submit to regular reviews of their conduct
 - potential severe financial penalties for future misconduct

FACTS

- A new company promoted a chiropractic services for health plans that offered lower fees to chiropractors, more control over them.
- Trade associations opposed new company because it could hurt its members financially by reducing the compensation they would receive.
- To fight the new company, the trade associations and their lawyer took the following actions;
 - called meetings of chiropractors to encourage them to “band together” to oppose new company;
 - at meetings, chiropractors incited each other to oppose new company by not agreeing to participate in its network of chiropractors;

FACTS (continued)

- defendants distributed information about which chiropractors were signing up with new company;
- the attorney distributed forms that could be used for chiropractors to “opt out” of doing business with new company;
- the chiropractors and trade associations sent bad emails to each other: “a great victory”; “need more resignations”; “more effort and we could be there” .

CONCLUSION

- This was the worst kind of boycott; i.e. competitors blatantly getting together/conspiring to prevent another company from competing.
- Defendants had no valid goal/objective that would counteract anti-competitive effects.
- So, this was the worst kind of boycott: a “naked boycott” and therefore a per se violation of antitrust laws.
- Moral of story: “where competitors come together, be careful” .

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