

The Good, the Bad and the Ugly: Trade Associations and Antitrust

Remarks of

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**American Bar Association
Antitrust Spring Meeting**

Washington, DC

March 30, 2005

I have been wondering why you wanted me here to discuss trade and professional associations – maybe it’s because I worked at a trade association myself, the Motion Picture Association of America. In that spirit, I am going to try to combine my past and present lives and talk for a few minutes about “The Good, the Bad and the Ugly in Trade Associations and Antitrust.”

Now, believe it or not, that phrase – “the Good, the Bad and the Ugly” – is actually pretty common in legal scholarship. We did a Westlaw search on the topic and found over 50 articles that used the phrase in the title. Usually, authors use that phrase when they want to say three things about their topic: one nice thing, one not-so-nice thing, and then usually one kind of vague thing. In this talk, I also plan on using the phrase in two ways. On the one hand, I am going to use it in exactly the same way most people do – with a particular focus, though, on the state action doctrine and whether groups of competitors on state regulatory boards should be supervised. On the other hand, I’ll really be using the phrase as cover – I am going to pretend to talk about antitrust law and policy, but really talk about “Spaghetti Westerns.”

But before I do any of that I want to repeat the required disclaimer that nothing I say represents the conclusions of the Commission or of any Commissioner other than me. After all, to the best of my knowledge there are few other spaghetti western fans on the Commission.

For those of you who have no idea what I am talking about when I refer to “Spaghetti Westerns,” “The Good, the Bad and the Ugly” is the title of a 1966 movie directed by the great Sergio Leone starring Clint Eastwood (representing the “Good” from the title), Lee Van Cleef (representing the “Bad” from the title) and Eli Wallach (representing the “Ugly” from the title). At the beginning of the movie, Eastwood and Wallach played a pair of conmen. Taking advantage of Wallach’s character’s long and illustrious career as a criminal and the large reward for capturing him, the pair work a scam whereby Eastwood turns Wallach in to a town sheriff for the reward, then rescues Wallach from the noose at the last minute, and finally they split the reward. The two of them then repeat the scam in other towns across the West. This conduct actually reminds me of some of the consumer protection cases I have been seeing lately. But I don’t want to go too far afield here; you invited me here to talk about antitrust.

The first area of trade and professional associations I want to discuss is standard-setting. This would be the “good” trade association topic. What I mean by that is that standard-setting is generally pro-competitive. Every day, often beneath the radar screen, standard setting organizations do good things for consumers and competition.

The benefits of standard-setting in some industries can be seen by looking at what happens when standard-setting fails to occur. Sometimes when no standard is formed, that prevents the industry from developing. One example of where effective standard

setting could do some good is email authentication, which was the topic of a recent summit sponsored by the Commission and the National Institute of Standards and Technology.¹ Email authentication is a set of technologies that would allow Internet service providers (among others) to ensure that email is coming from where it says it is coming from. Simply put, without some method of email authentication, we may never be able to completely get our arms around the spam problem.

It isn't that there are no technologies that would allow for such email authentication – the problem is that more than one technology can do this, and each possible authentication standard has its own champion. The fact that more than one possible technology can solve this problem, coupled with the fact that there has yet been no successful standard-setting in this area, means no standard or set of standards has been adopted by industry. And that means many of us have lots more spam in our in-boxes than we otherwise would. Hopefully, the email summit, along with hard work by those companies involved, will eventually lead to an effective authentication approach that will allow the industry to reduce the torrent of spam that fills our in-boxes every day.

But let's get back to the movie – which, as I said, is the real topic of this talk. If you remember, the “good” character, Clint Eastwood's character, was not always so good. Similarly, standard-setting will not always be pro-competitive. There are times when a standard can confer market power on one product or technology. And we have seen a number of schemes where the standard-setting organization is subverted in a way that

¹ See generally Federal Trade Commission, E-mail Authentication Summit, *available at* <http://www.ftc.gov/bcp/workshops/e-authentication/index.htm> (Agenda, proposals and presentations from Summit).

ensures that one firm's product or technology gains monopoly power.² Although most of these schemes are not as creative as the one in the movie, they often harm consumers.

Should a standard-setting organization be liable when that happens? That question can take up an entire talk all by itself. But my own sense is only rarely: my own comfort level with a particular standard-setting organization depends to a great extent on the care with which that organization avoids such subversion. We need to know that consumers were not harmed as a result of complacency by the standard-setting organization and its members.

So much for the good part of trade associations, the bad part of trade associations is cartels. Unlike the good and the ugly aspects of trade associations, there really is nothing legally ambiguous about cartels. They are always bad. You can see the effects of a very successful cartel on your lives every time you spend about \$2.30 per gallon to fill your tank with gas.

But sometimes it is hard to get the message out. For example, the Commission has brought more than a dozen physician price fixing cases over the past few years, including two cases that have ended up in Part III.³ But at times we seem to have almost a new physician price fixing case each month.

Since the Commission, using the standard Bureau of Competition methods of communication, has not been as successful as we'd like to be in getting the word out

² See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (standard-setting organization meeting packed by incumbent in order to influence vote to exclude rival firm's technology from standard); *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (standard-setting organization letterhead used to label a rival's product unsafe).

³ Timothy J. Muris, *State Intervention/State Action – A U.S. Perspective*, n.2 (Oct. 24 2003), available at <http://www.ftc.gov/speeches/muris/fordham031024.pdf>.

about just what doctors can (or can't) do in negotiating with insurers perhaps we should start using some of the lessons learned by the Bureau of Consumer Protection to get our point across. When BCP uncovers an unfair or deceptive trade practice, they issue pamphlets, they make posters and they develop "sweeps." It's a time-tested approach that has helped us with deterrence – maybe it can help us stop physician price fixing cases as well.

This may also be an area where additional authority, such as the ability to get civil fines, may be useful to reinforce our message.

Finally, in the movie, the ugly character is sometimes good and sometimes bad, which is sort of like some aspects of trade association self-regulation. Self-regulation can be beneficial and I support it, as has the Commission historically. Indeed, a casual search of the FTC website will reveal thoughtful speeches about self-regulation by a number of commissioners and staff, including former Chairman Pitofsky⁴ and Commissioner Leary.⁵ We have found self-regulation useful in a number of areas, especially ensuring that advertisements are accurate and in pointing consumers to reliable e-commerce sites. Simply put, self-regulation allows those who know the industry best to help set the rules of the game. And it can make everyone better off by improving the information available to consumers, increasing their willingness to buy those products or services.

⁴ See, e.g., Robert Pitofsky, Self Regulation and Antitrust, Prepared Remarks before the D.C. Bar Association Symposium (Feb. 18, 1998), *available at* <http://www.ftc.gov/speeches/pitofsky/self4.htm>.

⁵ See, e.g., Thomas B. Leary, Self Regulation and the Interface between Consumer Protection and Antitrust (Jan. 28, 2004), *available at* <http://www.ftc.gov/speeches/leary/040128deweyballantine.pdf>.

But self-regulation can also be ugly because the same state board or association of competitors that creates a pro-competitive rule with one breath can create a rule that hinders competition with another. Like Eli Wallach's "ugly" character in the movie, self-regulation sometimes has a dark side because industry members can develop rules and so-called "ethical" provisions that restrict price competition or that keep out new competitors that threaten the established firms. Over the past few years the Commission has initiated a number of investigations of state boards and trade associations where the board or the association has pushed rules to benefit industry at the expense of consumers – for example, where the state board or the association has prohibited advertising of prices or discounts.⁶

One thing that can make self-regulation particularly ugly is abuse of the state action doctrine. The idea behind the state action doctrine is to ensure that if the federal policy in favor of competition is sidestepped, it is only because of a specific policy of the state government.⁷ There is nothing wrong with this doctrine in theory, but because it protects anticompetitive conduct from liability on a basis other than consumer welfare, in practice it should be narrowly applied. Too often, it hasn't been, and one of the great contributions to the Commission by Tim Muris had been his focus on using all of the tools of the agency to repair state action.

⁶ See, e.g., *In the Matter of Virginia Board of Funeral Directors and Embalmers* (Oct. 5, 2004), available at <http://www.ftc.gov/os/caselist/0410014/0410014.htm> (advertising restriction imposed by state board); see generally Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, n. 83 (Dec. 10, 2002), available at <http://www.ftc.gov/speeches/muris/handler.htm>.

⁷ See generally, Federal Trade Commission, Office of Policy Planning, *Report of the State Action Task Force* (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

One issue that really has not been considered at the Commission level, though, is where state boards themselves fit into this approach. In other words, do they need to be supervised to qualify for the state action defense? The question is important because boards set the rules for so many industries and professions. But it is not an easy question. Depending on how you look at them, boards are either agencies of the state that require no supervision, or combinations of competitors who do. On one hand, you don't need to look beyond the letterhead on a board's correspondence to know that you are dealing with a state-related entity. On the other hand, when they are not wearing their state board tee-shirts, the same board members making and enforcing the rules often work in the very industry they are regulating.

To my mind, the fact that the rules are set in the context of a state's regulatory regime is important, but it should not by itself eliminate the need for active supervision. In fact, the regulatory context itself establishes the participants' ability to restrict output through the power of the state. That the rules occur in the context of a state's regulatory regime, however, means that there may be ways short of active supervision to ensure that the rules are not simply the result of a private agreement to restrict competition.

We should look closely at factors that give us confidence that any anticompetitive rules or enforcement actions are not simply a private agreement to restrict competition. Clearly, the most important factor is the composition of the board. If a board is more than simply a group of competitors, but includes others who would be harmed by an anticompetitive agreement then that makes it less likely that a particular rule is a result of a private agreement to restrict competition. Now, I don't think that board full of industry competitors becomes diverse with the addition of a single stray "public" member who

may, or may not, be engaged in the board's rulemaking; but it is hard to say in the abstract when the composition of a state board is sufficiently diverse that the board does not have to be supervised to have recourse to the state action defense.

We should also look at the procedures the board uses. A board is acting more like a government agency than simply a group of competitors when it works in the open. At least then, the public can establish whether that work is pro-competitive and, if it isn't, whether it is pursuant to some affirmatively expressed policy of the state. When the board restricts competition behind closed doors, however, that board is more likely indistinguishable from any other group of competitors. In that case the board's actions should probably require supervision before it can receive state action protection.

Hopefully, we'll have an opportunity to opine on this aspect of the state action doctrine at some point in the future.

In any event, there it is. Perhaps it is wrong to assume that all of antitrust law relating to trade associations can be discussed in the context of a mid-1960s spaghetti western. On the other hand, if I've encouraged even a few of you to go to your local Blockbuster's or Hollywood Video to rent "The Good, the Bad, and the Ugly," or even better "Once Upon a Time in the West" then I've accomplished something.