



MINTZ



Antitrust Best Practices and Updates for Nonprofits

Presentation by:

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Joe is a seasoned antitrust attorney and Co-chair of the firm's Antitrust Practice. He has 30 years of experience that spans roles in private practice, as a general counsel, and with federal antitrust enforcement agencies. He focuses his practice on providing strategic transactional advice and representing clients in government investigations and merger reviews. Joe primarily works with clients in the health care industry.



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Mondie leads government relations and government affairs for the Consortium of Universities of the Washington Metropolitan Area. The Consortium represents over 20 higher education institutions and over 400,000 students in the District of Columbia, Maryland and Virginia. She received a “Top Lobbyist 2022” award from the National Institute for Lobbying & Ethics in November 2022. In addition, Mondie is an adjunct professor and teaches courses on “Law, Politics & Educational Policy” and “Civil Rights”.

Overview

- Antitrust Law Primer
- Status Update on State of Antitrust Enforcement under the Biden Administration
- Guardrails and Practical Considerations for Non-Profits and Trade Associations
- Information Sharing Post-Withdrawal of DOJ Enforcement Policy Statements
- Exemption from Antitrust Law—Noerr-Pennington Doctrine
- Agreements with Competitors to Influence Policy
- *When should I call outside antitrust counsel?*
- Potential Penalties for Antitrust Violations
- Key Takeaways

Federal Antitrust Laws - Primer

- Section 1 of the Sherman Act
 - Prohibits contracts, combinations, and conspiracies in restraint of trade.
- Section 2 of the Sherman Act
 - Covers actual and attempted monopolization.
- Section 5 of the Federal Trade Commission (“FTC”) Act
 - Gives the FTC authority to bring antitrust actions against “unfair methods of competition,” which the current FTC has interpreted broadly to cover a range of conduct in a recent policy statement issued in November 2022.
 - The current FTC has committed itself to stopping unfair methods of competition in their “**incipiency** based on their tendency to harm competitive conditions.”
 - Current FTC Chair Lina Khan has vowed to actively use the FTC’s Section 5 authority.

State of Enforcement under the Biden Administration

- The Biden Administration has taken an aggressive antitrust enforcement approach, using a “Whole of Government” strategy that involves multiple federal agencies outside of the FTC and the Department of Justice Antitrust Division.
- The administration has pointed to several merger abandonments as a sign of successful deterrence from this enforcement approach, though many of the novel antitrust theories it has been bringing have largely been unsuccessful.
- Major Highlights include:
 - New Merger Guidelines (expected June 2023)
 - Increased focus on labor markets (including no-poach agreements and labor market allocation)
 - Increased utilization of the FTC’s competition rulemaking authority under Section 5 of the FTC Act, including the introduction of a proposed rule banning Employee Non-Compete Agreements
 - Vertical theories of competitive harm in merger cases
 - DOJ Withdrawal of Information Sharing Guidance

Practical Considerations for Non-Profits and Trade Associations

- *Per se* illegal activities between competitors include price fixing, bid rigging, customer or market allocation, and group boycott agreements.
- Such agreements always run afoul of the antitrust laws and are likely to result in an enforcement action being brought by the DOJ or FTC, the agencies that enforce the antitrust laws.
- Though these “hardcore” violations seem pretty straight forward, sometimes collaborations amongst competitors and sharing of competitively sensitive information can result in firms accidentally treading into troubled waters.
- When facilitating conversations amongst competitors, stop the conversation and avoid discussion of the following topics:
 - Specifics of pricing policies and pricing mechanisms
 - Customer-specific information regarding current or anticipated prices, discounts, or terms
 - Coordination on pricing, allocation of customers, or agreements on sales or bidding strategies

Practical Tips for Counsel in Competitor/Trade Association Meetings

- Have a written agenda and stick to it
- Have counsel present and read the antitrust policy statement
- Know the high danger areas for competitor discussions:
 - Pricing information and plans
 - Forward-looking business plans (including marketing and strategic plans)
 - Contracting terms by and between a firm and its vendors or business partners.
 - Boycotting the government as political protest
- If it gets close to the line:
 - Ask questions about what they are about to say with a reminder of that we can't discuss individual plans or strategies
- If it goes over the line – halt the meeting, noisy exit

Limited Exemption—Noerr-Pennington Doctrine

- Certain activities are deemed protected from antitrust laws under the First Amendment’s right to petition the government.
- The Noerr-Pennington immunity includes a limited exemption from antitrust liability for certain actions by individuals or groups, if they intend for their action to influence government decision making on the legislative, executive, or judicial levels
- The Noerr-Pennington Doctrine protects ethical and proper actions or discussions designed to influence:
 - 1) legislation at the national, state, or local level;
 - 2) regulatory or policy-making activities (as opposed to commercial activities) of a governmental body; or
 - 3) decisions of judicial bodies.

Planning for Competitor Collaboration: Information Sharing

- Information necessary to the collaboration may be shared (sometimes through the use of clean teams or with other protections). However, the collaboration **should not** be used as a conduit to exchange competitively sensitive information not relevant to the collaboration.
- Principal Antitrust Risk
 - One or both parties adjust their competitive behavior as a result of the information learned through the information sharing.
- You can minimize the antitrust risk of collaborations by:
 - Creating a detailed agenda which is reviewed by counsel prior to the meeting and strictly adhering to that agenda.
 - Having counsel present at the meeting and stopping the conversation if it veers into discussion of the key risk areas discussed.
 - Using outside counsel when conducting competitor surveys and making sure any competitively sensitive information is handled by outside counsel.

Withdrawal of Information Sharing Guidance

- In February, the DOJ withdrew several policy statements related to enforcement in healthcare markets, which included guidance that many industries relied on when engaging in information exchanges in the collaboration context.
 - Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area (1993)
 - Statements of Antitrust Enforcement Policy in Health Care (1996)
 - Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (2011)
- Does this present a greater risk for information sharing?
 - DOJ likely did this with an ongoing investigation in mind.
 - The guardrails discussed today are still baked into other antitrust guidance documents from the enforcement agencies.
 - Collaborations should still follow the same rules of the road discussed in this presentation.
 - *It is unlikely that the antitrust agencies will start bringing actions against conduct that has been in the “safety zone” since 1996*

Case Example: ESG Initiatives

- ESG stands for Environmental, Social, and Governance.
 - ESG is a set of standards for a company’s behavior and refers to the three key factors when measuring the sustainability and ethical impact of an investment in a business or company.
 - Antitrust scrutiny of ESG collaborations are now a partisan political issue
 - House Judiciary Chairman Jim Jordan sent letters threatening antitrust enforcement against ESG collaborations and companies “collectively adopting and imposing progressive [ESG]-related goals.”
 - Several state AGs are in on the action, claiming ESG collaborations alleging that such collaborations “intentionally restrain and harm the competitiveness” of certain markets.
 - What’s the problem? Isn’t ESG goal setting good?
 - Political/policy advocacy is legal even if the resulting regulatory/legislative action harms competition
 - Agreeing with your competitors on what decisions your business will make on ESG issues can be illegal
 - Nat’l Society of Prof’l Engineers v. United States, 435 US 679 (1978)
 - Group boycotts of firms that do not adopt certain ESG standards can violate the law

Potential Penalties for Antitrust Violations

- Antitrust violations may have serious consequences including lengthy, costly, complex and disruptive antitrust investigations and litigation.
- For example, individuals and businesses that violate antitrust laws may be prosecuted by the Department of Justice. Criminal prosecutions are typically limited to intentional and clear violations such as when competitors fix prices or rig bids. A violation of the Sherman Act (a criminal statute) could result in penalties that are punishable by exorbitant fines of up to \$100 million for a corporation and \$1 million for an individual along with up to 10 years in prison.
- In addition, the Justice Department, state attorneys general and any person or company impacted by a violation of the antitrust laws may bring an action for treble damages, plus attorney's fees.

Key Takeaways

- Utilize outside counsel when engaging in exchanges of competitively sensitive information.
- Have an agenda (and stick to it) in collaboration meetings.
- Have counsel present and stop the conversation if it veers into key risk areas.
- The antitrust enforcement landscape is shifting under the Biden Administration, and both the FTC and DOJ are pursuing novel theories of harm and taking a more aggressive approach.
- Outside antitrust counsel can help put guardrails in place to ensure compliance with the current state of the law and avoid potential liability.

Management Liability Policies – Where Insurance Coverage for Antitrust Claims Can Be Found

- Common approach for nonprofits is a ML package policy which includes D&O, employment practices liability, and fiduciary
- D&O is the insuring agreement that can provide coverage for AT claims
- Limits can be shared or dedicated
- Defense costs are within the limit
- Claims made policies

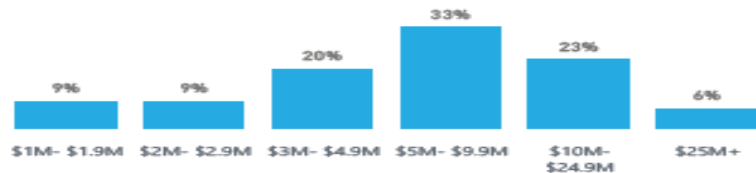
D&O Insurance Structure

- ¹ Side A
 - Pays on behalf of the insured person loss that is not indemnified resulting from a claim against the insured person
 - Who is insured? Individual officer
 - What is at risk? His/her personal assets
- Side B
 - Pays on behalf of the company loss that is indemnified resulting from a claim against the insured person
 - Who is the insured? The organization
 - What is at risk? Corporate assets
- Side C
 - Pays on behalf of the company loss that is incurred resulting from a claim against the organization
 - Who is the insured? The organization
 - What is at risk? Corporate assets
- Who is covered?
 - Past, present and future directors and officers
- What is covered?
 - Allegation of wrongful act
 - Defense costs
 - Financial losses where insured is held liable
- Who can claim?
 - Creditors, banks
 - Regulators, government authorities
 - Customers
 - Suppliers



D&O Limits and Pricing

TOTAL LIMITS PURCHASED

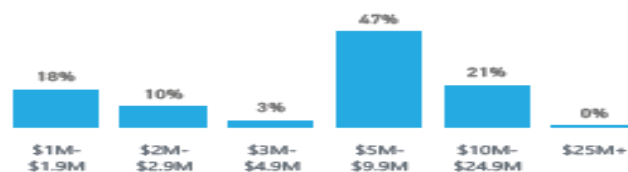


16% of clients purchase Side A Limits

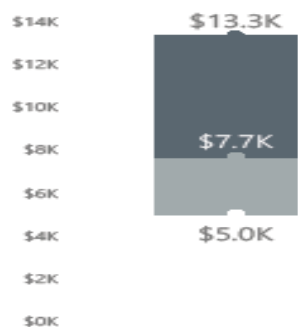
TRADITIONAL A/B/C LIMITS PURCHASED



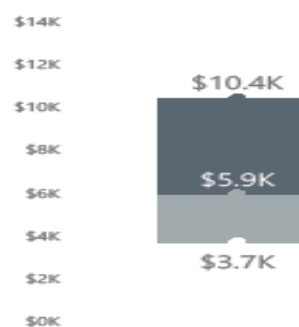
SIDE A LIMITS PURCHASED



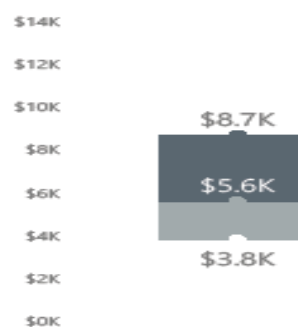
PRIMARY PPM



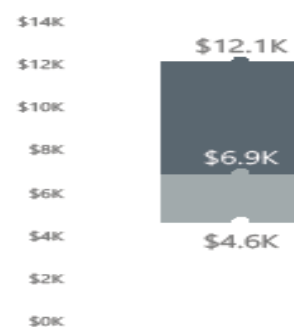
TRADITIONAL A/B/C PPM



SIDE A PPM



TOTAL PPM



Legend: 25th-50th Percentile (light grey), 50th-75th Percentile (dark grey). Values displayed represent the 25th, 50th, and 75th percentiles.

Total limit includes both traditional A/B/C and Side A. Limit charts represent 2,133 clients. Price change is calculated using price per million of capacity, and PPM charts include the 985 clients where premium was allocated. Client counts and premium amounts for this report are limited to clients who met reporting criteria. This report does not represent Lockton's full book of business.

Underwriters View of AT Risk

- Generally wary of this risk and organizations with more pronounced risk will find coverage more restrictive
- Certification programs and standard-setting
- Coverage can be restricted through:
 - Sublimit
 - Specific Retention
 - Coninsurance

Insurance Carriers Who are Offering Coverage

- Chubb
- Hartford
- C.N.A.
- Berkshire Hathaway
- Everest
- Starr

Telling Your Story

- Talk with your underwriters
- They will want to see:
 - AT Policy Statement
 - Periodic training
 - Leadership commitment to compliance
 - AT statements distributed in advance of meetings

Buyer Beware

- Not all coverage is created equal
- Importance of understanding endorsements
- Side A Only Coverage for Antitrust claims

Considerations When Constructing the Policy

- Duty to defend vs. duty to indemnify
- Choice of counsel



Lockton Nonprofit Practice



- Deep and experienced team focused on the nonprofit sector
- Significant experience with social service, associations, religious
- Specialized brokerage teams for management liability, cyber, media, property & casualty, international, and travel risk/duty of care
- Large claims advocacy group including in-house claim counsel for large and/or complex claims

Keith Mulvihill

Vice President – Nonprofit Organizations

Lockton Companies

Independence changes everything.

