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Kittelle & Lamb: Trade Association Law and Practice

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RECENT BOOKS

TRADE ASSOCIATION LAW AND PRACTICE.[1] By *George P. Lamb* and *Sumner S. Kittelle,* assisted by *Carrington Shields.* Boston: Little, Brown & Company, 1956. Pp. xxiii, 284. $10.

Trade associations unfortunately continue to be suspect in the eyes of antitrust enforcement officials; and, one must realistically add, to those reviewing courts that make obeisance to the *expertise* of the Federal Trade Commission in ferreting out what one tribunal recently called "concerted conscious action."[2] In social life the irrepressible gregariousness of most Americans is considered a commendable norm. In religious and charitable activities it is usually channeled into useful good works. Yet whenever those competitively engaged in the same line of business venture to indulge it, they encounter a chilly fog of suspicion and potential legal trouble.

Why those who labor at like tasks in the business world, have the same orientation, and often are drawn together by the touchstone of their common interests, cannot organize for social or trade purposes without inviting scrutiny or requiring the ministrations of legal talent, has constantly attracted comment. The oft-quoted diatribe of Adam Smith—"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"—has been matched, uniquely by a government lawyer, with the couplet of John Gay that

"In ev'ry age and clime we see
Two of a trade can never agree"[3]

Yet whatever may be the genesis or warrant for this seemingly inescapable penumbra of suspicion about a trade association, Messrs. Lamb and Kittelle and Miss Shields have dedicated themselves to its dissipation. Indeed, they start with the conviction that the American trade association is an important, if not essential, instrument in maintaining freedom in both the economic and political spheres.[4] In their view, "if businessmen's rights

[1] This book is the first in "The Trade Regulation Series," edited by Professor S. Chesterfield Oppenheim, University of Michigan Law School.

[2] See Chain Institute, Inc. v. FTC, (8th Cir. 1957) 246 F. (2d) 231. The commission decision in this case is cited at pp. 73, 88 and 226 of the book being reviewed, and is offered in the final reference as an illustration that to convince the commission and the courts that there is no real evidence of price-fixing is often a "Herculean" and "hopelessly impossible" task. P. 226.

[3] Jacobs, "Statistical, Standardization, and Research Activities," ABA, Proceedings of the Section of Antitrust Law, "Trade Associations," April 1955, p. 80.

[4] That the social and prestige values of trade association membership still ought not to be neglected is suggested in REISMAN, et al., THE LONELY CROWD (1953): "The frontiers for the other-directed man are people; he is people-minded. Hence both work and pleasure are felt as activities involving people." P. 151. Companies may join trade associations, these sociologists suggest, for prestige: "*Fortune* is put on the table, a trade association is joined, and the aim becomes not so much dollars as the possession of those appurtenances which an up-to-date company is supposed to have." P. 159. This might ground a novel defense in an antitrust case.

to meet together to discuss common problems and present different points of view, to assist one another through an exchange of ideas *within the limits of the antitrust laws* are denied" then "democratic processes will have suffered almost irreparable loss in a large and important segment of our life." (p. ix).

Of course, the caveat is the main text. The authors premise most of their book on the belief that the more common antitrust violations are unintentional. Only because they are "untutored in the meaning of antitrust and confused by vagueness in the law" do businessmen act in what is to them "a rational fashion to achieve stability and economic security." As the authors put it, "Too often and sometimes too late they are brought to realize that 'rational' behavior may not always be lawful." It is to this task of guiding the well-meaning businessmen through the bramblebush of legal uncertainty—to afford them the opportunity (golf and restrained libation aside) to deal with their common problems *within the limits of the antitrust laws*—that the authors have principally devoted themselves.

In doing so they have produced a remarkably good book that abundantly fills a long-felt need in the trade association field. One may be forgiven a degree of initial skepticism as to the triple and disparate goals which Professor Oppenheim set for them.[5] He wanted a volume that would interest and be equally palatable for the trade association executive, the fairly limited number of trade association counsel, and the very wide group of general practitioners who inevitably have clients participating in trade association activities.[6]

This reviewer was sufficiently skeptical and, being somewhat lazily inclined to let others do his job, decided to conduct an experiment. He had the volume read by a trade association executive, by several students in a seminar on business regulation, and by the general counsel of a corporation. Delicate probing revealed that the book had been willingly gone through. Moreover, what was retained testifies to this volume's readability (despite the synoptic format and decimally-numbered paragraphing) as well as to its broad utility. Trade association executive, student, and general practitioner alike perceived that antitrust attitude and effect are the central core of trade association legality. More importantly, they got from this book both a working knowledge of the controlling cases and a pragmatic insight into their application.

[5] In his preface he demanded of each author "a text designed to present the law with the greatest possible clarification, as a guide for the general practitioner who has little experience in this field, for the economist or business executive who wants to be quickly oriented in one of the areas covered, and for the specialist who desires a ready reference tool." (P. viii).

[6] "[I]t is safe to say that almost every lawyer in private practice represents at least one client who is a member of such an organization. . . . The chances are that the average client will not ask you whether or not he should join a trade association. He will probably have been a member when he became your client or he will simply join the trade association in the ordinary course of business, as he does so many other things." Levy, "The Trade Association and Its Members," ABA, Proceedings of the Section of Antitrust Law (April 1955) at 89-90.

Contributing largely to this achievement is the well-thought-out organization of the book. Part I is essentially a primer of antitrust principles as they bear upon the types of collective activity inherent in the modern trade association. Short of reaching treatise proportions (and many tomes are far less cogent), this had to stick to essentials. The stress is properly on having some legitimate purposes for the trade association, in having them well-defined and articulated, and in relating whatever is done to these central and legally proper objectives.[7]

Against this background, the authors in Part II traverse the full ambit of almost all trade association activities. The technique is excellent. Each type of association program is described; its fate in administrative and judicial proceedings is detailed; and the limiting rules well developed. Documentation in terms of both general background materials, such as law review articles, and specific cases is comprehensive. Particularly good are the collected tables of cases, statutes, regulations, and secondary authorities at the back of the volume.

In subject matter, the coverage is broad, and no conventional trade association activity is neglected: Statistical Reporting; Price Activities (including a sensitive awareness of the problem of delivered prices and the use of freight books); Cost Accounting; Product Standardization and Simplification; Credit Activities; Joint Research, Invention, and Patenting; and the so-called elimination of trade abuses are each thoroughly delineated. In addition, there is a useful chapter on the Webb-Pomerene Act, and a discerning discussion of relations between industry and the Federal Government including the specifics of "lobbying" and of industry advisory committees.

A further word on organization and presentation is warranted. Each chapter culminates in a "Summary" section. Each of these is succinct, conservative, and pragmatically lucid. Moreover, it is here perhaps that the balance of joint authorship proves its worth. One cannot help detecting in the discussion of particular court decisions an occasional affection for or marked disagreement with the decision. But when the chips are down and the detailed case analysis concluded, the chapter summaries reflect a desirably conservative approach to what is likely to be held to be the outer limits of permissible conduct.[8]

[7] The authors correctly observe that "Antitrust prosecutors will hardly be persuaded that important business executives will foregather from great distances, at great expense, to play golf or otherwise relax with competitors unless benefits are to be derived therefrom." (P. 15). Yet even recognizing that legally to justify a substantial association budget by fun and frolic alone is a difficult task, there are many instances in which no other discernible purposes, lawful or unlawful, could be found in trade association periodic outings.

[8] This dichotomy is evident particularly in chapter 3 on statistical reporting; in chapter 4 on price activities where enthusiasm for the Tag Manufacturers Institute decision, (1st Cir. 1949) 174 F. (2d) 452, is not permitted to qualify the basic caution that price reporting should be limited to past transactions; and in chapter 5 on cost accounting where the authors do not go overboard on the Vitrified China Assn. Proceeding [49 F.T.C. 1571 (1953)] in which the complaint was dismissed.

Particularly valuable is the penetrating and recurrent awareness throughout this volume of two pitfalls that have so often trapped trade association advisers: first, that some trade association activities, such as price reporting and the use of freight books, are far more sensitive than are other activities, such as the operation of a credit service; and second, and far more important, that no single activity of any trade association may be isolated and selectively considered apart from the totality of all of its activities.[9]

Empirical reader testing indicates that the final portion of the book, dealing with the organization and operation of a trade association, is largely of interest to the professional trade association executive and to association counsel rather than to the general practitioner. (This is less true of Chapter 16 on membership meetings which is in part a reprise of the earlier detailed discussions of potential antitrust difficulties.) But this inherent limitation does not lessen its value to those who are thus directly concerned. Indeed, there is much that is provocative and illuminating to those intimately concerned (and often smugly content) with any long-established and well-organized trade association. Only lawyers as experienced as the authors of this volume could write so penetratingly on the necessary qualifications, requisite strength of character, abiding good humor, and the hazards of not having enough to do, that reside in the job of being a professional trade association executive.[10]

No one can survey this panorama of trade association activity and of the legal hazards that surround it without being left with a disquieting restiveness. Is guilt by association, in its broadest sense, to become an all-pervasive legal principle? These authors approach, but perhaps do not fully penetrate, the basic issue in their much too brief section on "Guilt by membership."[11] They are critical of the Second Circuit concept that any member of a trade association can be held to be a participant in unlawful conduct by some of its constituent companies "once he is *chargeable with knowledge* that his fellows are acting unlawfully" and that thereafter "his

[9] The second point might be put in many ways: A single illegal activity will often taint everything else; otherwise lawful activities may not be employed for lawful ends; antitrust decisions dealing with trade associations must be examined in the light of all of the facts of record and when this is done they frequently fade in value as precedents; and, cardinally, that the facts as to what a particular trade association is doing or has done have controlling weight.

[10] Possibly the only area which the authors of this volume do not thoroughly cultivate is the relation between the general practitioner and the trade association general counsel. Of course, any lawyer who becomes familiar with the book will readily discern the danger areas for his client in trade association activities. As to how to handle the resulting problems, see Levy, "Trade Association and Its Members" ABA Proceedings of the Section of Antitrust Law (April 1955) at 89.

[11] Pp. 27-29. This may derive from their specific interest in the commission use of "class suits" in trade association cases. As to this unfortunate trend, see Advertising Specialty National Assn. v. FTC, (1st Cir. 1956) 238 F. (2d) 108 at 119-120.

failure to dissociate himself from them is a ratification of what they are doing."[12]

Messrs. Lamb and Kittelle and Miss Shields point out that "chargeable with knowledge" is an elastic phrase. They ask whether in effect it is not equivalent to saying that mere proof of an unlawful conspiracy by some is enough to support a finding that the non-participants *should* have known of it. If it is—and this reviewer agrees with them that it seems often to be so considered—the authors are concerned that there is no escape for the innocent. For to prove the negative, to establish that one had no knowledge, is a difficult and usually insurmountable task. Hence they fear that application of this variant of "guilt by membership alone" will seriously affect many trade associations. With that observation few would disagree.

Yet does not the issue bite more deeply? The parallels in the protection of personal liberty and the protection of freedom of economic enterprise are seldom publicly drawn by businessmen, and perhaps are not often enough even recognized. Few trade associations have been vocal in criticizing the application of "guilt by association" in other areas, not directly connected with business life, and usually unpopular. It may well be that the preferable and sounder way to protect the innocent in this important enclave of trade association activity would be to identify, to examine, and to condemn what these authors warrantedly call an "alien doctrine," in its application in the broader and far more important areas of individual freedom.

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[12] See Phelps Dodge Refining Corp. v. FTC, (2d Cir. 1943) 139 F. (2d) 393 at 396. This decision was recently followed by the Eighth Circuit, on rather tenuous facts, in Chain Institute, Inc. v. FTC, (8th Cir. 1957) 246 F. (2d) 231.