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CLIENT BULLETIN

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Antitrust Applies To Me?

Yes. The antitrust laws don't apply only to huge companies – they apply to all businesses. There are federal and state antitrust laws. There are also federal and state antitrust enforcement agencies. Each busies itself with investigating and, in some cases, filing lawsuits over alleged antitrust violations. Further, private parties may bring cases based on the antitrust laws. In addition to large legal fees, the costs of experts, and the time an antitrust case will take away from your business, the federal antitrust laws allow for a successful plaintiff to recover three times the amount of its damages. In certain circumstances, there can even be criminal penalties.

Antitrust is truly an area of the law where an ounce of prevention is worth a pound of cure. Being able to spot potential antitrust issues, adopting risk management measures, and knowing when to call knowledgeable counsel are key.

Antitrust Generally

Antitrust laws are founded on the notion that competition creates the largest choice of products and services and the greatest breadth of quality and prices. The antitrust laws are designed to foster competition and deter anticompetitive conduct. They are also designed to punish anticompetitive conduct when it occurs.

Stated generally, there are three types of conduct addressed by the antitrust laws – monopolization, agreements to restrain trade, and price discrimination.

Monopolization is unilateral conduct by one firm that unduly restricts competition. Monopolization can include predatory pricing, improper refusals to deal, and "tying," which is forcing a customer to buy two products when the customer wants only one. The size of the alleged monopolizer matters, but can be a tricky thing to define. Even businesses that think of themselves as "small" can monopolize a market, depending on how relevant product and geographic markets are defined. For example, if your product is unique and customers can practicably turn to only a relatively small geographic area for substitutes for your product, a monopolization claim could be asserted even if you don't think of yourself as Behemoth, Inc.

Agreements that restrain trade include price fixing, bid rigging, allocating customers or markets, and boycotting competitors or suppliers. When an agreement to restrain trade is at issue, it doesn't always matter how big or small your business is. In fact, certain agreements are illegal regardless of how big your business is or the agreement's purported justification. Agreements restraining trade may include agreeing with competitors to hold the line on price reductions or to buy from a supplier only if the price stays at a certain level; having a "gentleman's agreement" that one builder will build only on the east side of town and another will build only on the west side of town; and an agreement between competitive bidders to rotate bids or to put in a high bid one time and a low bid the next. Even exchanging competitively sensitive information, such as price or cost data, can lead to allegations of an antitrust violation.

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Price discrimination is almost an area of antitrust law all to itself. Contemporaneously selling goods of like grade and quality at different prices may invite allegations of price discrimination. Providing discriminatory promotional payments, services, or facilities may also invite those same allegations. If such allegations are made, there are a variety of defenses, all of which involve detailed, fact-specific matters that require careful consideration. For example, you may sell widgets to Acme, Inc. for $4.00 per unit and, at about the same time, the same type of widgets to XYZ Corp. for $3.00 per unit. "Yeah, but XYZ Corp. bought 1,000 widgets, and Acme, Inc. bought only 100." You may have a defense, but you certainly run the risk of being accused of price discrimination.

Risk Management

Because the antitrust laws are fraught with grey areas, often the best that can be done is minimizing your risk of antitrust problems. A first step is to have knowledgeable employees. Training managers – especially those in sales, marketing, strategizing, deal making, and procurement – is important.

Making sure that your website and sensitive documents, such as strategy papers, marketing plans, and agendas for trade association events, are carefully considered before being put in final form is also a good idea. Not infrequently, words used in marketing material and material to "rally the troops" can have unintended consequences. Because the antitrust laws have a jargon unto themselves, with words having specific meanings and ramifications, something on your website saying that "We're the largest distributor in the Central Ohio market!" may come back to bite you.

Another thing to consider is a document retention plan. There can be benefit to having files that are current. Needless to say, if such a plan is implemented, employees should be encouraged to follow it.

Picking Up The Phone

Most often, the best risk management tool is picking up the phone and calling knowledgeable antitrust counsel. This bulletin only states (and can only state) in the most general terms some aspects and considerations under the antitrust laws. But it is important to remember that antitrust damages, if proven, are multiplied by three. It is also important to remember that some antitrust violations carry with them criminal penalties. If you have something that looks like it may have antitrust ramifications, it is well worth it to pick up the phone and call competent antitrust counsel.

Bill Michael has over a decade of experience counseling clients across industries on antitrust matters. Please feel free to call him if you have any questions.

NOTICE

This bulletin provides general information and is not legal advice. Please contact us if you need legal advice.