

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

Remarks of

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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

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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,

ensures that one firm's product or technology gains monopoly power.² Although most of

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 Asweeps.⁶ 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

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 Aethical 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>.

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