Vanderbilt Law Review

Volume 11
Issue 2 *Issue 2 - A Symposium on Trade Regulation and Practices*

Article 5

3-1958

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Recommended Citation
Harry Kemker, The Legality of Trade Association Statistical Reporting Under the Antitrust Laws, 11 *Vanderbilt Law Review* 361 (1958)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol11/iss2/5

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THE LEGALITY OF TRADE ASSOCIATION STATISTICAL REPORTING UNDER THE ANTITRUST LAWS

HARRY KEMKER*

Of the myriad economic functions performed by trade associations, the practice of gathering, compiling, and disseminating trade statistics is doubtless one of the most important.[1] Although the numerous statistical reporting programs vary markedly in size and scope, it seems safe to say that at least two-thirds of all trade associations indulge in some form of statistical activity.[2]

The beginning of this trade association statistical reporting is usually attributed to the theories contained in a book called *The New Competition,* written by A. J. Eddy and published in 1912. The concept championed by this work was "open competition," and an important part of this plan was that if there were free exchange of trade information among competitors, the resulting enlightenment would work a benefit to the members of the industry and to the public.[3] If competitors had full information as to each other's prices, costs, and production, they could assay accurately their competitive positions and avoid wasteful and uneconomic practices, which followed from the secrecy of pricing and the lack of market awareness. This notion re-

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1. This specific subject has been considered in excellent fashion by a book on the general topic, dealing with both the legal and the practical aspects of trade associations. LAMB & KITTELLE, TRADE ASSOCIATION LAW AND PRACTICE, cc. 3, 4, 5, at 31-83 (1956). It has been considered several times in law review articles: Donovan, *The Effect of the Decision in the Sugar Institute Case upon Trade Association Activities,* 84 U. PA. L. REV. 929 (1936); Fly, *Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions: I,* 45 YALE L. J. 1339 (1936); Fly, *The Sugar Institute Decisions and the Anti-Trust Laws :2,* 46 Yale L.J. 228 (1936); Stocking, *The Rule of Reason, Workable Competition, and the Legality of Trade Association Activities,* 21 U. CHI. L. REV. 527 (1954); Notes, *Trade Association Statistics and the Anti-Trust Laws,* 18 U. CHI. L. REV. 380 (1951); *Trade Associations—Permissible Scope in Reporting Trade Statistics,* 28 TEXAS L. REV. 281 (1949). See also Kern, *Price Reporting by Trade Associations,* AMERICAN BAR ASSOCIATION, *Section on Anti-Trust Law, Spring Meeting* 22 (1955). Also important is the economic study by Pearce, *Trade Association Survey* (TNEC Monograph No. 18, 1941).

2. An estimate of 75% has been made by one writer. Jacobs, *Statistical, Standardization, and Research Activities,* AMERICAN BAR ASSOCIATION, *Section on Anti-Trust Law, Spring Meeting* 80-81 (1955). A survey arrived at the figure of 72%. Kern, *Price Reporting by Trade Associations, supra* note 1, at 63. See also LAMB & KITTELLE, *op. cit. supra* note 1, § 3 at 31, citing a range of survey percentages from 40% to 75%.

3. Mr. Eddy's thesis should not, however, be considered as one of fostering competition in the usual sense. Quite the contrary, he would supplant competition with cooperation. Of competition he said, "So far from promoting progress, competition stays and hinders. . . . Rightfully viewed, there is not a single good result accomplished by man in . . . economics . . . that should not be attained by intelligent and far-sighted cooperation." EDDY, THE NEW COMPETITION 26 (1912).

ceived judicial approval in the case of *Maple Flooring Manufacturers Ass'n v. United States*,[4] where the Court stated

> It is the consensus of opinion of economists and of many of the most important agencies of government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, costs and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.[5]

The usual plan for statistical reporting requires that members periodically report various economic data to the trade association, which will compile it in a meaningful fashion and disseminate it, periodically, to the members of the association. Varied legal results flow when these plans are particularized and placed in the context of the given industry, but even generally considered, the antitrust danger in collective activity by competitors, which relates to prices, costs and production, is clear.[6]

The problem is one of striking a balance in the conduct of a statistical program which will afford members of the industry the benefits of clear knowledge of the market and, at the same time, avoid in this concerted activity pursuing some purpose which is illegal under the antitrust laws. Perhaps the best statement of the general problem is the economic standard postulated by Professor Stocking, who, in inquiring whether or not a given program of statistical interchange is in keeping with free enterprise, asks

> Is it designed to promote informed but *independent* decisions by trade rivals and by their customers in order that they may adjust their operations more intelligently to the vagaries of the market, or is it designed to achieve a common judgment among business rivals about their business policies and a common pattern of behavior which will bring security to all of them?[7]

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4. 268 U.S. 563 (1925).
5. *Id.* at 582.
6. Trade association statistical reporting as price-fixing will be considered in part II of this paper. Trade associations are somewhat vulnerable, antitrust-wise, in that they are, by definition, combinations of competitors whose activities frequently tend to produce uniformity of action among supposed competitors.
7. Stocking, *supra* note 1, at 543.

It is proposed to consider first the authorities dealing with statistical programs, regardless of whether or not the program is primarily a price reporting, cost reporting, or general statistical program, and then to attempt to formulate certain rules for the safe conduct of a statistical reporting plan under the antitrust laws. Finally, some comment on the problem of statistical reporting as being a price-fixing device and, therefore, a per se violation of the antitrust laws, will be attempted.

SUPREME COURT CASES

Statistical reporting by trade associations came under judicial scrutiny in the 1921 Supreme Court decision of *American Column & Lumber Co. v. United States.*[8] The association in this so-called *Hardwood* case had adopted a plan of "open competition," which involved extensive statistical activity. The association's "manager of statistics" would receive from each member the most detailed information on sales, shipments, inventories, production and price lists, some of which were reported daily, and other information, on a monthly basis.[9] Measures for checking and verifying the reports were employed.[10] The manager would then correlate the information and compile reports which would be sent to association members, in the form of a weekly sales report and a monthly production report.[11] In addition, there was sent to members a monthly market letter, in which the manager interpreted these reports, in terms of their market significance.[12] These reports were individuated as to each member's market activities.

At association meetings, market conditions would be discussed in terms of the statistics embodied in certain reports.[13] Repeated warnings as to the dangers of overproduction were made, and the association constantly exhorted members to decrease production in order to raise prices.[14]

All of this could not be accepted by the Supreme Court as without the interdiction of the Sherman Act, on the theory that it constituted the new form of competition called "open competition."

To the Court there existed a clear violation of section 1 of the Sherman Act, in that the association was a "combination" and its activities a "conspiracy" which had the "purpose and effect . . . to restrict competition and thereby restrain interstate commerce . . . by con-

8. 257 U.S. 377 (1921).
9. *Id.* at 394-95.
10. *Id.* at 395.
11. *Id.* at 396.
12. *Id.* at 396.
13. *Id.* at 396-97.
14. *Id.* at 402-07.

certed action in curtailing production and increasing prices. . . ."[15] In the Court's opinion:

> Genuine competitors do not make daily, weekly, and monthly reports of the minutest details of their business to their rivals, as the defendants did; they do not contract, as was done here, to submit their books to the discretionary audit and their stocks to the discretionary inspection of their rivals for the purpose of successfully competing with them; and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a "harmonized" estimate of the market as it is and as, in his specially and confidentially informed judgment, it promises to be. This is not the conduct of competitors, but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a combination to restrict production and increase prices in interstate commerce, and as, therefore, a direct restraint upon that commerce, as we have seem that it is, that conclusion must inevitably have been inferred from the facts which were proved. To pronounce such abnormal conduct on the part of 365 natural competitors, controlling one-third of the trade of the country in an article of prime necessity, a "new form of competition," and not an old form of combination in restraint of trade, as it so plainly is, would be for this court to confess itself blinded by words and forms to realities which men in general very plainly see and understand and condemn as an old evil in a new dress and with a new name.[16]

It is important to note that this early case finds no fault with statistical reporting as such, the illegality being that such activity was carried on by a combination of members of the association to secure concerted action in the curtailment of production and increasing of prices.[17] The focus is on the illegal concert of action and not the specific practices.

Certain features of the "plan" were influential in determining its illegality. The Court was struck by the intricacy and the highly-detailed character of the information reported. The legitimate objectives of statistical reporting did not call for such detail. They said:

> This elaborate plan for the interchange of reports does not simply supply to each member the amount of stock held, the sales made and the prices received, by every other member of the group, thereby furnishing the data for judging the market, on the basis of supply and demand and current prices. It goes much farther.[18]

15. *Id.* at 410.
16. *Ibid.*
17. The activities of the defendants were found by the Court to have, in fact, caused an increase in market price. *Id.* at 409.
18. This language, perhaps, furnishes a vague standard for determining the legality of a statistical reporting plan, in terms of the allowable degree of detail. *Id.* at 398.

Of considerable significance was the fact that the association could audit a member at will, as were the unarticulated "sanctions" of "financial interest, intimate personal contact, and business honor" which would subject a deviating member to certain odium, if not "trade punishment."[19] It was clear to the Court that agreement or "harmony" of action would invariably result from this program because of the "disposition of men 'to follow their most intelligent competitors. . . .' "[20] Also important was the practice of rendering an expert analysis in the association's reports which furnished a guide to determining market policy; important, too, was the fact that these reports were unavailable to buyers.[21]

Just two years later, the Court was faced with the question of the legality of a similar statistical reporting plan. The plan involved in the *Linseed*[22] case was highly intricate and detailed. The "plan" called for members to furnish the "Bureau," an independent association, daily reports as to sales, including "quantity and kind, price and terms, and whether (the shipment was) for immediate or future delivery. . . ."[23] Weekly reports as to sales to consumers in various designated "zones" were required, as well as monthly reports on gross sales.[24] In addition to these usual features, the members were obligated to furnish price lists and adhere to same unless they notified the Bureau immediately.[25] There was a provision that the members should deposit Liberty Bonds with the Bureau to be forfeited in case of a violation by the member.[26] Monthly meetings were to be held to discuss industry problems, and those not attending were subject to fine.[27] Further, each member agreed to keep all information from the Bureau "confidential."[28]

The Court was again unconcerned with the legality of each element of the plan. It said, "We are not called upon to say just when or how far competitors may reveal to each other the details of their affairs."[29] Observing only that "the ordinary practice of reporting statistics to

19. *Id.* at 411.
20. *Id.* at 399.
21. *Id.* at 398. The *Hardwood* majority opinion was followed by strong dissenting opinions of Justices Holmes, *id.* at 412, and Brandeis, joined by McKenna, *id.* at 413. To Justice Holmes the "ideal of commerce was an intelligent interchange made with full knowledge of the facts as a basis for a forecast of the future on both sides." *Id.* at 412. Mr. Justice Brandeis disagreed with the majority of the Court that the effect of the defendants' activities was to curtail production and raise prices. In discussing statistical reporting generally he said, "The Sherman Law . . . does not command that competition shall be pursued blindly, that business rivals shall remain ignorant of trade facts or be denied aid in weighing their significance." *Id.* at 415.
22. United States v. American Linseed Oil Co., 262 U.S. 371 (1923).
23. *Id* at 383. The "Bureau" was the Armstrong Bureau of Related Industries.
24. *Ibid.*
25. *Id.* at 382-83.
26. *Id.* at 382.
27. *Id.* at 384-85.
28. *Id.* at 384.
29. *Id.* at 390.

collectors stops far short of the practice which defendants adopted,"[30] it proceeded to find, as in the *Hardwood* case that there existed a violation of section 1 of the Sherman Act in that "concerted action through combination . . . is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection."[31]

In portraying the restrictive effect upon competition of the price reporting plan, the Court felt that the advantage obtained by the enlightened sellers in dealing with the unorganized and uninformed buyers prevented the members from claiming that they were bona fide competitors.[32] Again the element of submission to the authoritarian control of the central agency was important in determining illegality.[33]

The significance of the *Hardwood* and *Linseed* cases soon was brought into sharp focus. In 1925, the Supreme Court decided the *Maple Flooring*[34] case, and this time the trade association fared better. The program adopted here embraced average cost data, freight rate information, statistical information relative to sales and production, and a provision for regular meetings.

The specific statistical data furnished the association were weekly reports of sales, including price, quantity, grade, thickness and face, freight, kind of wood, and average freight rate; monthly reports on stock type and quantity and amount of unfilled orders; and monthly reports on production and new orders for each type of flooring.[35]

The association compiled and returned to the members monthly reports which showed the exact and percentage changes from the month immediately preceding and from the same month in the previous year.[36] Weekly reports were furnished,[37] showing the exact details of each sale by every member. These reports were particularized by members so that each member could see the position of the others;[38] however, the association ceased to identify the members in these weekly reports after the prosecution had been initiated.[39] The reports of sales and prices dealt only with past and closed transactions, and wide dissemination was given to the reports by sending them to many government and nonmember private groups.[40]

30. *Ibid.*
31. *Ibid.*
32. *Id.* at 389.
33. *Ibid.*
34. Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563 (1925).
35. *Id.* at 573.
36. *Ibid.*
37. *Ibid.*
38. *Ibid.*
39. *Ibid.*
40. *Id.* at 573-74.

What is more significant about the facts in *Maple Flooring* than the statistical activities carried on is the Court's interest with what they did not do in their reporting plan. The Court observed:

> It is to be noted that the statistics gathered and disseminated do not include current price quotations; information as to employment conditions; geographical distribution of shipments; the names of customers or distribution by classes of purchasers; the details with respect to new orders booked, such as names of customers, geographical origin of orders; or details with respect to unfilled orders, such as names of customers, their geographical location; the names of members having surplus stocks on hand; the amount of rough lumber on hand; or information as to cancellation of orders. Nor do they differ in any essential respect from trade or business statistics which are freely gathered and publicly disseminated in numerous branches of industry producing a standardized product such as grain, cotton, coal oil, and involving interstate commerce, whose statistics disclose volume and material elements affecting costs of production, sales price, and stock on hand.[41]

The bureau also compiled data on industry "costs," and careful and intricate statistical practices were employed to ascertain "average costs."[42] There was no charge that the determinations made were not accurate nor that any specific cost accounting principles were used. The Government's complaint was that the figures were necessarily arbitrary and that they could become a basis of price fixing.[43] In addition, there was compiled a booklet which set up the freight rates from Cadillac, Michigan,[44] to the principal consumption areas in the United States.[45] This enabled the members to give quick and accurate delivered prices to consumers. The Government's position was that this freight information, when coupled with the cost data furnished by the Bureau, constituted a re-creation of the "minimum price plan," a price-fixing program that the association had discarded.[46] The Court, however, found no evidence that this freight rate and cost data had been used for price-fixing purposes.[47]

At the association meetings, which were held monthly, the statistical information was discussed, as were the general manufacturing and market conditions and certain market prices.[48]

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41. *Id.* at 574.
42. *Id.* at 568-69.
43. *Id.* at 570.
44. This point was used because of its central location among the defendant producers. The freight rates from Cadillac would be, substantially, the same as those from any other point in the area occupied by the defendant producers to the usual markets.
45. 268 U.S. at 570-72.
46. *Id.* at 571-72.
47. *Id.* at 572.
48. *Id.* at 574-75. The Association received specific advice from counsel that future prices were not a proper topic of discussion. Evidence showed that several members did discuss the trends of prices and future prices outside the

The task of the Court here was simplified by the fact that there was no evidence to support a finding of a conspiracy to produce a specific restrictive effect on commerce, such as curtailing production arbitrarily or artificially raising prices.[49] It was possible then to narrow the scope of inquiry so that

> the sole question presented by this record for our consideration is whether the combination of the defendants in their existing Association as actually conducted by them, has a *necessary* tendency to cause direct and undue restraint of competition in commerce falling within the condemnation of the Act.[50]

The activities of the Maple Flooring Association were held not to have a "necessary tendency" to restrain commerce.[51] The Court gave new life to trade association price reporting in the following language:

> We decide only that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, as did these defendants, and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.[52]

One can only square this decision with the *Hardwood* and *Linseed* cases by saying that the Court found differing "necessary tendencies" in the respective cases. The fact distinctions between the Maple Flooring Association "plan" and those involved in the *Hardwood* and *Linseed* cases are clear: Though certainly a question of degree and of specific context, the price reporting plan of the Maple Flooring Association lacks the restrictive characteristics of coercion, exclusiveness, price currency, and, perhaps, the level of detail which condemned those in *Linseed* and *Hardwood.*

For future purposes, a final observation on this case must be made. In extolling the beneficial effects of trade association price reporting, the Court admitted one intrinsic problem:

> But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals en-

meetings, but the Government did not charge or contend that there existed any agreement with respect to prices.

49. *Id.* at 577-78.
50. *Id.* at 578.
51. *Id.* at 586.
52. *Ibid.*

> gaged in commerce, and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce or if so it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful.[53]

This "stabilizing" effect may have now grown into something more serious than the Court then thought.

The companion case to *Maple Flooring* was the so-called "old" *Cement* case.[54] Here is found a mature development of the notion that certain industries have unique problems which must be solved, even though the remedial means may restrict competition significantly.

Although most cement of the producers here involved was sold for immediate delivery, some forty per cent was sold on "specific-job contracts." These contracts were, in effect, options to purchase, by which contractors or other buyers could obligate cement producers to deliver cement at a future time at a set price, for a named construction job. This practice developed from a need on the part of the contractors to be able to bid on construction work, with certainty of material cost. The contractor was not obligated to accept delivery, and he would, therefore, enter several such contracts for an amount in excess of the job needs, in anticipation of an advance in market prices. If there were an advance, he would accept delivery and enjoy a competitive cost advantage, while in the event of a recession in price, he would accept only what was needed. The effect of this program was to act as a brake on price rises.[55]

As a corrective measure, the association would receive highly detailed daily reports on job contracts, and would compile these reports and mail the members their aggregate report.[56] These reports identified the parties to the contract, the construction job, the amount of cement, and the price. The association also collected statistical information on production, inventory and shipments and returned monthly compilations of this information to members of the association.[57] In addition, the association reported quarterly on the amount of cement bags returned and the re-usable percentage of same.[58]

Traditionally, cement has been sold on a delivered price basis so that the association's development of a freight-rate book, quoting

53. *Id.* at 582.
54. Cement Manufacturers Protective Ass'n v. United States, 268 U.S. 588 (1925).
55. See full explanation of these industry practices in the opinion. *Id.* at 594-97.
56. *Id.* at 600-01.
57. *Id.* at 600.
58. *Ibid.* The Association also provided a credit information service, which gave each member detailed information on all delinquent accounts and some general statistics on total delinquent accounts, as compared with the previous year. There was no charge or showing that this information was the basis of any illegal agreement. *Id.* at 599-600.

rates as per various basing points, was consonant with extant industry practices.[59] A member would add the proper quoted rate to a base price and determine the delivered price, or the differential he would have to offset to compete in a certain territory. Although the manifest purpose of this freight-rate book was the ascertainment of the delivered price, the Court was impressed by the fact that the system evolved as a "natural result" of the nature of the business, rather than from agreement.[60]

The association meetings were conducted astutely from the antitrust viewpoint: No discussion on the issues of current or future prices, or prospects of the market or production, was indulged.[61] The Government could not adduce cogent proof as to any agreement or "uniformity of trade practice" which followed from these meetings.[62]

The Government's case against Cement Manufacturer's Protective Association, under section 1 of the Sherman Act, failed for lack of proof of concerted action which would have a restrictive effect on competition, found illegal by the Court. It held

> that uniformity of price may be the result of agreement or understanding, and that an artificial price level not related to the supply and demand of a given commodity may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred. But here the Government does not rely upon agreement or understanding, and this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred; and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action.[63]

The Court lauded the curative practices of the association, which averted the perpetration of "frauds" on members by those with whom they dealt.[64] The collection and dissemination of this information, including price, was lawful unless a specific agreement "for price maintenance" was shown,[65] even though the natural effect of the statistical reporting program might be to facilitate the accomplishment of price uniformity.[66] Of importance here also was the fact that the members

59. *Id.* at 597-99.
60. *Ibid.*
61. *Id.* at 601-02.
62. *Ibid.*
63. *Id.* at 606.
64. *Id.* at 604.
65. *Id.* at 604-05.
66. See quoted language, text to note 10 *supra*. There was considerable price uniformity in the industry. This uniformity existed in part in the larger market in which cement was sold via dealers and in which the asso-

were free to use the information they received in any manner they desired.[67]

The effect of the *Maple Flooring* and "old" *Cement* cases was to legitimize statistical reporting as such. If no agreement to achieve an illegal arrangement were present, then the reporting plan would, undoubtedly, be legal. The elements of illegality pointed up in the *Hardwood* and *Linseed* cases were somewhat softened by these later cases, but the criteria of these earlier cases still have importance in determining whether or not the reporting plan is to achieve an illegal concert of action.

The most significant aspect of the statistical reporting plan adopted by the trade association in the *Sugar Institute* case[68] was the fact that it incorporated certain existing industry price practices. For several years sugar had been sold on what was known as a "move." A move occurred when one or more refineries announced to the trade that, as of a given future date, the selling price would advance. The future price would either be higher than the current selling price or be higher than a reduced price that the announcements offered before the named date for advancing prices. A grace period was allowed during which sugar could be bought at the pre-advance price. The trade would invariably make its contracts for a month's requirements prior to the advance. A move was effective, of course, only if all refiners joined in, as sugar is a completely standardized product.[69]

The Institute modified this scheme somewhat in its so-called "basic agreement": The moves would be made known in the usual manner by a member's independent announcement, which would be relayed to the trade by the institute. Confusion had arisen as to the "period of grace" to be allowed after notice of an advance.[70] An arbitrary "interpretation" was made, deeming three o'clock p. m. as the time after which a move could not be announced.[71]

Although the Institute deal with other aspects of the existing price pattern,[72] the most important element was that of coercion. Members

ciation did not report price bids. It was also argued that price uniformity was attributed to high competition and product standardization. 268 U.S. at 605-06.

67. *Id.* at 603.

68. Sugar Institute v. United States, 297 U.S. 553 (1936).

69. See discussion of these industry practices in the opinion, *id.* at 579-82.

70. *Ibid.*

71. *Ibid.*

72. Most notably the practice of "repricing." If a price "move," in the nature of a decline, were announced late in the business day, those purchases earlier in the day would be "repriced" so as to give the purchaser the benefit of the new lower price. The institute attempted to prevent this practice, but eventually ruled it could be permitted, as to sales on the same business day. The defendant's evidence showed some repricing beyond the same business day. *Id.* at 581-82. The trial court had enjoined this practice of restraining repricing, United States v. Sugar Institute, 15 F. Supp. 817, 908 (S.D.N.Y. 1934). This provision stood on appeal.

were required to adhere to the announced price moves, and the Institute policed the program carefully.[73] The trial court felt that the objective of eliminating secret concessions could be achieved by the independent, open price announcements, as they were formerly made.[74] The Supreme Court, however, permitted most of the concerted action on the part of the institute relating to price moves to persist. The only evil feature to the Court was the requirement that all members abide by the move, there being no restraint of trade in the industry evolved practice as such. Convinced of the need to preserve the extant practices as far as possible, the Court said:

> That practice which had grown out of the special character of the industry did not restrain competition. The trial court did not hold that practice to be illegal and we see no reason for condemning it. The unreasonable restraints which defendants imposed lay not in advance announcements, but in the steps taken to secure adherence, without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition however fair and appropriate they might be. But, in ending that restraint, the beneficial and curative agency of publicity should not be unnecessarily hampered. The trial court left defendants free to provide for immediate publicity as to prices and terms in all closed transactions. We think that a limitation to that sort of publicity fails to take proper account of the practice of the trade in selling on "moves," as already described, a practice in accordance with which the court found that "the great bulk of sugar always was and is purchased." That custom involves advance announcements, and it does not appear that arrangements merely to circulate or relay such announcements threaten competitive opportunities. On the other hand, such provision for publicity may be helpful in promoting fair competition. If the requirement that there must be adherence to prices and terms openly announced in advance is abrogated and the restraints which followed that requirement are removed, the just interests of competition will be safeguarded and the trade will still be left with whatever advantage may be incidental to its established practice.[75]

Of considerable aid to the Court was the earlier Supreme Court decision of *Appalachian Coals, Inc. v. United States.*[76] Simply stated, this case supplied the notion that cooperative action, fairly designed to eliminate ills within an industry, will not be struck down, even if its effect will be to stabilize or otherwise affect price. The Court, in speaking of the interest of the antitrust laws in the *Sugar Institute* case, said

> they do not prevent the adoption of reasonable means to protect interstate

73. 297 U.S. at 582.
74. See trial court opinion, United States v. Sugar Institute, 15 F. Supp. 817, 897, 908 (S.D.N.Y. 1934).
75. 297 U.S. at 601-02.
76. 288 U.S. 344 (1933).

> commerce from destructive or injurious practices and to promote competition upon a sound basis. Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law. Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade. Accordingly, we have held that a cooperative enterprise otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. *Appalachian Coals v. United States,* 288 U. S. 344, 373, 374, 53 S. Ct., 471, L. Ed. 825.[77]

The Sugar Institute program also embraced a statistical reporting plan of a more general character. This information was divided into two classes: The first group of statistics embraced weekly figures, as to production and deliveries, and monthly reports on deliveries, that were broken down into the specific types of sugar.[78] Wide public circulation was given this group.[79] A second group, called "vital data," yielded more precise trade information, such as production and deliveries by specific refineries, deliveries by states designating important "differential routes," and stocks both consigned and in transit.[80] This information which, it was felt, would enlighten many concerned with the market, was withheld from purchasers.

The Court was impressed by the trial court's argument, that the withholding of information worked a decided disadvantage to purchasers and required open disclosure of the vital data group.[81] The decree of the trial court had required the Institute to make available, generally, "any other statistical information of a similar character"[82] but the Supreme Court deleted this part of the decree, feeling that the trade generally does not have a legitimate interest in all information, and that injury or unfairness might result if this catch-all forced the disclosure of any "confidential" information the Institute might possess.[83]

77. 297 U.S. at 598, The *Sugar Institute* case cannot be construed to be authority for the proposition that *any* curative practice is permissible. The Court clearly deleted the remedial requirement that members adhere to future prices.
78. 297 U.S. at 596.
79. *Ibid.*
80. *Ibid.*
81. *Ibid.*
82. United States v. Sugar Institute, 15 F. Supp. 817, 908, at ¶ 7 (S.D.N.Y. 1934).
83. 297 U.S. at 604.

This case supplies two fairly clear views, with regard to statistical reporting, as such. Mandatory adherence to price lists by trade association members will not be permitted under the Sherman Act. In the second place, it is clear that some inroad was made on the requirement that full disclosure be made to the public. The trade association can keep some information secret. The validity of reporting prices as such is not in question, but the determination of whether or not current or future prices can be reported is not clear.[84] With no requirement to adhere to the announced prices, the case could be argued to permit the dissemination of current and future prices. However, an equally forceful argument exists for limiting the case to its facts. The emphasis on peculiar problems of the industry and the significance of the fact that the price reporting plan conformed to existing industry price practices lend weight to this latter argument.

Certain aspects of statistical reporting were considered in the 1945 Supreme Court decision of *Hartford-Empire Co. v. United States.*[85] Though, primarily, a case involving pooling and cross-licensing of patents, the defendants' trade association did perform some statistical type activity.

For a number of years the association had developed forecasts of its members' production. At association meetings these forecasts were communicated from one member to another so that there existed among the defendants a general knowledge of the production forecasted for each member. These forecasts were, in fact, production quotas, and it was generally agreed that these quotas would be adhered to; deviation from quotas was discouraged.[86]

The Court dissolved the defendant trade association and enjoined the corporate defendants from forming any such similar organization for a period of time. They would not, however, prohibit all trade association activity because, aside from the unlawful objectives pursued, the association could be a valuable economic institution.[87]

The Court struck the requirement that all trade information be given to the public. To require such publication would be to "render the assembly of it for the information of members useless and indeed detrimental to competition."[88]

84. Various interpretations have been made, as to the significance of this decision on the issue of price reporting. See Fly, *Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions: I*, 45 YALE L.J. 1339 (1936); Handler, *Construction and Enforcement of the Federal Anti-Trust Laws* 22 (TNEC Monograph No. 38, 1941); Donovan, *supra* note 1.
85. 323 U.S. 386 (1945).
86. *Id.* at 427.
87. *Id.* at 427-28.
88. *Id.* at 429.

FEDERAL TRADE COMMISSION CASES

The Federal Trade Commission has had occasion to consider trade association statistical reporting on several occasions. The primary statutory mandate enforced by the Commission, in determining illegal trade practices, is section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition in commerce."[89] This general language has been interpreted as including all violations of the Sherman Act and certain types of conduct not illegal under the Sherman Act.[90]

By far the most important case for present purposes is that of the *Tag Manufacturers Institute v. FTC*,[91] but several cases considered by the Commission prior to the *Tag* case should also be mentioned. In the *Salt Producers Ass'n*,[92] *Phelps-Dodge Refining Co.*,[93] *Maltsters Ass'n*,[94] *Milk and Ice Cream Can Institute*,[95] and *Fort Howard Paper*

89. 38 STAT. 719 (1914), as amended, 15 U.S.C. § 45 (a) (1952).
90. This was made clear by the Court in Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941), wherein the Court said, *id.* at 466: "[I]t was the object of the Federal Trade Commission Act to reach not merely in their fruition but also in their incipiency combinations which could lead to these and other trade restraints and practices deemed undesirable." In addition, see, generally, FTC v. Raladam Co., 283 U.S. 643 (1931), and FTC v. Cement Institute, 333 U.S. 683, (1948).
91. 174 F.2d 452 (1st Cir. 1949).
92. Salt Producers Ass'n v. FTC, 134 F.2d 354 (7th Cir. 1943). The Commission charged the defendant salt producers and their association with a combination to monopolize and suppress competition in the salt industry, by fixing prices, establishing price zones in order to fix prices, curtailing production, and exchanging price lists and information relative to conditions of sales, via the defendant association. The Commission's cease and desist order prohibited the dissemination of this information if done so "pursuant" to the conspiracy. The Seventh Circuit was more lenient. It felt that this statistical activity was illegal only when it was a part of an "integral scheme to restrict competition . . ." and that, as the other activities of the association relating to price-fixing had been enjoined, the statistical activity, otherwise legal, should not be enjoined, unless it formed a part of the conspiracy or became a conspiracy itself.
93. In Phelps-Dodge Refining Corp. v. FTC, 139 F.2d 393 (2d Cir. 1943), the Commission found the defendants, manufacturers of insecticides, their trade association and its officers, and others to have combined to suppress competition, in violation of § 5 of the Federal Trade Commission Act. The Second Circuit said:
"The stipulation of facts states that the Association, organized in 1934, has acted as a clearing house for the exchange of information submitted by its members, including reports as to the sales of various types of insecticides, fungicides, and related items, together with the prices, terms, and discounts at which said items are sold, or offered to be sold and in some instances including advance notice of future prices. Thus it admits of no doubt that the association and some of its members were engaged in price-fixing which violated the Act." 139 F.2d at 396.
94. United States Maltsters Ass'n v. FTC, 152 F.2d 161 (7th Cir. 1945). In this case the Commission determined that the defendants and their association were guilty of a conspiracy to fix prices. There existed among these supposed competitors complete uniformity of price and conditions of sale. This was so in the face of varied costs among the defendants. The association's statistical reporting plan was quite comprehensive, calling upon members to furnish both weekly and monthly reports, as to stocks, shipments, orders, price lists, deviations from price. The court brushed aside the respondents' arguments that the *Maple Flooring* and *Cement* cases had legit-

Co.[96] cases, the statistical reporting plan involved was a part of a more general scheme to fix prices. The price-setting was achieved in most of these cases by the developing of delivered price systems, used concurrently by the defendants.[97]

The *Tag Institute* case is the latest important judicial pronouncement as to the legality of trade association statistical programs. In 1941, the Commission filed its complaint, charging the defendants with having "entered into and having carried out an understanding, agreement, combination and conspiracy to restrict, restrain, suppress and eliminate price competition in the sale and distribution of said tag products" and that pursuant to said agreement, the defendants "have fixed and maintained, and still fix and maintain, uniform prices, terms and conditions of sale for said tag products. . . ."[98] The activities of the defendants, which were the basis of these allegations, were the carrying on of their statistical reporting plan, evolved from the plan

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imized this statistical activity. It was clear that when the reporting plan was part of a price-fixing scheme, it was illegal.

95. Milk and Ice Cream Can Institute v. FTC, 152 F.2d 478 (7th Cir. 1946). Here the Commission charged the defendants with having maintained an unlawful combination to restrain competition in interstate commerce, within the meaning of the Federal Trade Commission Act. The gist of the charges was price-fixing. The defendants employed a freight equalization plan, a uniform discount plan, a product standardization plan, and a statistical reporting program, with the effect that for a four-year period prior to the filing of the complaint by the Commission the prices charged customers by the defendants had been identical for buyers at a given point, regardless of the seller's location.

The statistical program required members to report daily detailed information on every sale and to report monthly detailed information on shipments into each state and for export, monthly sales volume, average daily production, percentage of capacity utilized, and orders outstanding. The institute would send to members daily a consolidated sales report, which did not identify sellers or buyers.

The Commission's finding that the overall plan was a concerted effort to fix prices was affirmed by the court, as being amply supported by the evidence.

96. In Fort Howard Paper Co. v. FTC. 156 F.2d 899 (7th Cir. 1946), the Commission charged a violation of § 5 of the Act by members of the crepe paper industry and their trade association. Again the charge was price-fixing, this time by a setting up of delivered price "zones," within which all prices quoted would be the same, regardless of the distance of a given purchaser from various sellers. In the setting up and maintaining of this zone system, the association was the chief instrumentality. The association would keep and dispense "price lists, zone maps, trade practice information, volume of business statistics, etc. . . ." The Commission finding of a conspiracy to set price was upheld.

97. These cases followed the action instituted by the Commission against the Cement Institute, in FTC v. Cement Institute, 333 U.S. 683 (1948) the first case in which the FTC attacked the problem of delivered pricing on a theory of conspiracy. In these cases, as in the *Cement Institute* case, the evidence of price uniformity was used to demonstrate the conspiracy. Here was the beginning of the notion of "conscious parallelism of action," or implied conspiracy. (This subject will be considered in the discussion of price-fixing, *infra* page .....) See the discussion of "common course of action," as found in the cease and desist order of the Commission in the *Salt Producers Ass'n* case, 134 F.2d at 356-57. The conspiracy found in these cases was, however, more than the simple showing of uniform conduct.

98. 174 F.2d at 452.

for the industry, developed under the NRA.

Under the agreement involved in the *Tag Institute* case, the members of the industry were required to furnish to the Associates[99] daily reports of every sale, not later than the close of the business day following the day of the sale. These reports were to contain a complete description of each sale, and the Associates could freely request further details on any aspect of prices, terms or conditions of sale.[100] Next, each member was obliged to furnish the Associates his entire price list and all details, as to sales policies, terms, discounts, rebates or concessions of every kind.[101] He must also provide complete specifications of his products.[102] If a member changed his price list or his terms or conditions of sale, he had to report this information to the Associates by the close of the business day following the date of publication of the new sales information.[103] Each member furnished the Associates with a duplicate copy of every sales invoice and relative credit memoranda which were required to reflect a high degree of detail. This information had to be sent to the Associates by the close of the business day following the sale.[104]

The Associates were permitted, under the agreement, to disseminate the information received, as they thought would be most advantageous to the trade. In practice, the policies were rather uniform. The price lists were disseminated, supplemented from time to time with letters and bulletins.[105] The Associates would ascertain the exact transactions in which price lists were not adhered to and make up a report of these so-called "off-list" transactions. These reports were sent daily to members and disclosed all of the details of each specific transaction, except the identity of the buyer.[106] The Associates also furnished periodical reports, as to aggregate sales of the industry which did not identify producers or purchasers.[107]

Carefully laid out in the agreement were certain rules for the statistical program, rules clearly designed to avert antitrust dangers. It was stated that each member was free to establish independently his prices and terms and conditions of sale and that nothing furnished the Associates by the members would be construed as a representation

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99. The Tag Manufacturers Institute, an unincorporated association, was under the active management of Frank H. Baxter. An agreement was entered into between the defendants, manufacturers, and distributors, and Frank H. Baxter Associates for the carrying on of the statistical program by the latter.
100. 174 F.2d at 456.
101. *Ibid.*
102. *Ibid.*
103. *Ibid.*
104. *Ibid.*
105. *Id.* at 457.
106. *Id.* at 456.
107. *Id.* at 457.

of current or future prices.[108] Unless it were embodied in a published price list or closed sale, price information was not to be disseminated by the Associates, and the information was to be compiled in such a manner as to prevent anyone from identifying any statistics relative to any specific member or purchaser.[109]

The only objective sanction imposed by the agreement was one to insure that each member furnished the required information correctly and promptly: Each member deposited a small sum of money with the Associates every year, from which a certain predetermined amount would be deducted for failure to furnish properly the required information.[110]

The court took issue with the Commission on several of its findings, concluding that the evidence presented would not support the findings to the effect that the statistical program had caused members to adhere to list prices and had produced price uniformity in the trade.[111]

In a sense, the dissemination of a price list was an "announcement of future prices," but the seller remained free to change his list price or sell "off-list." The prices currently being charged by one's competi-

108. *Id.* at 456.
109. *Ibid.*
110. *Id.* at 455. The Commission found that Baxter had made audits and checks of members' books periodically, and it interpreted this as a check by him to see whether or not members were adhering to published prices. The court found that no agreement existed, as to prices. *Id.* at 461.
111. The First Circuit had considerable quarrel with the findings of the Commission: The finding that a price list, when filed with the Associates, became and remained the manufacturer's price until he filed a new price list was inaccurate. This was so because of the widespread practice of "off-list" selling and because of the fact that, in depending on a given price list, there was always the possibility that a new list had just been issued, of which another manufacturer would not be aware until several days after its issuance.

The court admitted that there was every likelihood that a given price list would still be in effect and would, when examined along with the reports on "off-list" sales, afford any member an accurate picture of current prices within the industry and yield some information, as to price trends. The freedom to change price lists without prior notice, the freedom to sell "off-list" negate the existence of any concerted plan to adhere to list prices.

The Commission found that the reporting of "off-list" sales had the effect of causing members to adhere to price lists in selling, generally, since the "off-list" reporting served only to single out the "unusual act" of selling "off-list." The evidence clearly showed, however, that twenty-five per cent of sales were "off-list" and that the statistical program of the Tag Institute had not produced any increase in the percentage of sales in which list price was followed. The Commission's argument that the requirement of reporting "off-list" sales had the effect of causing members to sell at list, or be subject to certain opprobrium in the trade, was adequately met by the observation that everyone in the trade would be guilty.

The Commission found that this reporting plan had the effect of uniformizing prices. Again the court disagreed. The Commission's evidence of uniformity was weak and highly vulnerable to analysis. It was clear that substantial price uniformity did exist, but this could not be attributed to the Tag Institute's statistical program; for no increase in list price selling was shown and "off-list" selling was clearly a significant and substantial factor. There was strong evidence that when purchasers shopped the trade, they received varied price offerings.

tors was information readily available if it were desired. Aside from list prices, the reporting of "off-list" sales and the furnishing of invoices, constituted reporting of past transactions. These facts would not permit a finding of a price-fixing agreement.

The information furnished by the Associates to the trade was available to any interested person, and the court could see no reason to require any other duty than that of making it available to the trade.[112] Efforts to employ the rule set forth in the *Sugar Institute* case, which prohibited the coercing of members to adhere to announced prices, were thwarted by the court. The element of coercion of members was clearly eliminated in the Tag Institute agreement.[113]

The court entered a judgment setting aside the order of the Commission.

The *Tag* case is highly important for several reasons: It is, first, the most recent significant treatment of the general question. Secondly, it seems to cut away somewhat at the supposed illegality of certain aspects of statistical reporting. From *Tag* we learn that some minimum sanctions are permissible to insure the proper running of a statistical program. Also the prohibitions against keeping data secret do not require the trade association to distribute the information actively. Availability at the source is sufficient. Perhaps, the most important is the view expressed toward filing and disseminating price lists. Although it did not admit that the Associates were reporting future prices as such, the court did say that the price reported would be the future price, subject to its volitional change by any member. *Sans* coercion to adhere to any given price list, it can, perhaps, be argued from the *Tag* case, then, that the reporting of existing prices, which are likely to continue unchanged, is permissible. And last of all, *Tag* is significant because, in discussing the sufficiency of the evidence to support a charge of price-fixing, the test of the *Socony-Vacuum*[114] case, apparently, was not employed by the First Circuit.

SUGGESTED RULES FOR CONDUCT OF TRADE ASSOCIATION STATISTICAL PROGRAMS

From the sequence of cases just presented, it is proposed now to attempt to abstract rules defining the area of legal trade association statistical reporting. The usual caveat must be injected here, to the effect that the development of general rules from cases decided by the determination of the existence of an illegal purpose, or on the weight of economic evidence, is a hazardous game. The rules set

112. 174 F.2d at 463.
113. *Id.* at 465.
114. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, (1940).

forth are conservatively drawn and may seem to limit unduly the practice of statistical reporting. However, the confidence of other writers[115] that statistical reporting plans are relatively safe from the thrust of the price-fixing cases, notably the *Socony-Vacuum* case,[116] is not shared by this writer. Some attempt has been made in the footnotes to these rules to indicate instances in which they can be relaxed with a measure of safety. These rules are as follows:

1. The statistical data must not be limited in distribution to the association members.[117]

2. The reports disseminated by the trade association should not identify the data relative to any trade association member or his customer.[118]

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115. Stocking, *supra* note 1, at 613. LAMB & KITTELLE, *op. cit. supra* note 1, § 4.4 at 57. (These authors seem considerably more concerned than Professor Stocking, but feel that statistical reporting can "probably" be conducted with safety. They postulate rules for guidance in avoiding anti-trust risks.)

116. See note 114 *supra*.

117. If there can be said to be any categorical rule in the field of the legality of trade association statistical reporting, it is the requirement that the compilation of statistics be made available to interested persons, other than association members. American Column and Lumber Co. v. United States, see note 21 *supra;* United States v. American Linseed Oil Co., see note 32 *supra;* Maple Flooring Manufacturers Ass'n v. United States, see note 40 *supra;* Sugar Institute v. United States, see notes 31-33 *supra;* Tag Manufacturers Institute v. FTC, see note 112 *supra*. It is essential that it be made available to customers. United States v. American Linseed Oil Co., see note 32 *supra*.

The courts, in at least two instances, have said that all information possessed by the trade association need not be made available for public dissemination. Sugar Institute v. United States, *supra*, at 604-05 (Here the Court permitted the withholding of information which was "confidential"); Hartford-Empire Co. v. United States, 323 U.S. at 429. There is a considerable problem, however, in determining which data can be withheld from general dissemination. In the *Sugar Institute* case, *supra*, there was a classification employed entitled "vital data," but it is of dubious value outside its context.

The amount of publicity which must be given to the information disseminated is not clear. The Court, in the *Maple Flooring* case, approved the wide publication given the information there. (The information was published in trade journals which went to consumers; it was sent to government agencies and banks, and was available for general distribution.)

In the *Tag Institute* case, a practical standard was adopted, that if the reports were readily available to buyers at the association headquarters, there was sufficient publicity.

In the following consent decrees, the trade associations were required to make available, generally, the statistical information which they compiled: United States v. Outdoor Advertising Ass'n of America, Inc., 1952-53 Trade Cas. ¶ 67341 (N.D. Ill. 1952); United States v. Wallpaper Institute, 1950-51 Trade Cas. ¶ 62642 (E.D. Pa. 1950); United States v. National Retail Lumber Dealers Ass'n, 1940-43 Trade Cas. ¶ 56181 (D. Colo. 1942); United States v. E. L. Bruce Co., 1940-43 Trade Cas. ¶ 56121 (N.D. Cal. 1941); United States v. Southern Pine Ass'n, 1940-43 Trade Cas. ¶ 56097 (E.D. La. 1940).

118. The Supreme Court has said, on two occasions, that the practice of identifying the statistics relative to each competitor and naming of customers was not in keeping with natural competitive activity. American Column & Lumber Co. v. United States, 257 U.S. at 394-96 and United States v. American Linseed Oil Co., 262 U.S. at 389. Later the Court approved the plan in the *Maple Flooring* case, in part at least, because the identity of each member and the purchasers was not revealed. See notes 37-39 *supra*.

3. Every form of supervision, coercion, and penalty designed to insure that members of a trade association join in the statistical reporting, or adhere to any of its requirements, should be avoided.[119]

4. The trade association should not place any interpretation on the information disseminated, either in the form of a prediction or in the form of an analysis of existing economic facts.[120]

5. The trade association reports disseminated to the association members should not be made with greater frequency, or in more detail, than is necessary to afford members a basis of forming an independent judgment as to general market trends, production efficiency, and like matters valuable in assaying their general competitive position.[121]

In the old *Cement* case, the Court approved a plan permitting the disclosure of the details of specific contracts and the naming of the parties thereto, but the case must be limited to its facts, as regards the degree of identification of parties permissible in trade association statistical reports. See note 63 *supra*. The information reported should be accurate and not calculated to produce an unnatural market result. See consent decrees: United States v. National Retail Lumber Dealers Ass'n, 1940-43 Trade Cas. ¶ 56181 (D. Colo. 1942); United States v. W. C. Bell Services, Inc., 1940-43 Trade Cas. ¶ 56171 (D. Colo. 1941).

119. The Supreme Court, in the *Hardwood* case, viewed the requirement that association members submit their books to audit to determine whether or not they reported correctly as an element of illegality, see note 10 *supra*. In the *Linseed* case, the provision for depositing bonds to secure compliance with the statistical plan was considered too much coercion to be compatible with the supposed independence of action of competitors. See note 33 *supra*. The court in the *Tag* case permitted a token fine in the form of "liquidated damages" to secure compliance with the statistical reporting plan. See note 110 *supra*.

There exists one consent decree which is of some note on this point: In 1940 the decree in the case of United States v. Stevenson, Jordan and Harrison, Inc., 1940-43 Trade Cas. ¶ 56061 (S.D.N.Y. 1940), was entered. The conduct of the statistical program clearly violated the existing rules. The association audited members' books to ascertain whether or not they had deviated from assigned quotas. In spite of this extreme program, the consent decree found the activity illegal only if used to limit production or to fix prices. The value of this decree is that it serves as a basis for argument, that if no production-limiting or price-fixing agreement is involved, then there are no real limitations on statistical reporting. This argument should be cautiously accepted. Other consent decrees have enjoined the auditing of records: United States v. West Coast Lumbermen's Ass'n, 1940-43 Trade Cas. ¶ 56122 (S.D. Cal. 1941); United States v. Western Pine Ass'n, 1940-43 Trade Cas. ¶ 56107 (S.D. Cal. 1941).

120. There is little forceful authority to support this rule, but the antitrust dangers of a central authoritative board making market predictions is clear. Little evidence of adherence to such predictions would be required to support a charge of price-fixing. The mandatory adherence to forecasted "quotas" in the *Hartford-Empire* case was clearly violative of § 1 of the Sherman Act. See note 87 *supra*. The consent decree in United States v. Southern Pine Ass'n, 1940-43 Trade Cas. ¶ 56007 (E.D. La. 1940) prohibited market forecasts. The analysis of existing data has received backhanded approval in the *Maple Flooring* case, in which the Court did not comment on discussions at trade association meeting of general industry conditions "as reflected by the statistical information disseminated among members." Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. at 574-575.

121. This rule is admittedly vague, and its prohibition, of less importance than some of the other limitations set forth. The Court, in the *Hardwood*, (see note 16 *supra*) and *Linseed* (262 U.S. at 383) cases, was convinced that true

6. The discussions at trade association meetings should be limited to general statistics compiled by the trade association, with no discussion of the affairs of any individual member, and considerations of future trends should be conducted in such a way as to negate any idea of agreement or plan to adhere to any conclusions arising from the discussions.[122]

7. A trade association price reporting program should deal only with closed transactions.[123]

8. Trade association members must not be required to adhere to any price, terms of sale, or other index directly related to price.[124]

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competitors do not make frequent complete disclosures of the most minute aspects of their businesses. The danger involved here is the suspicion created by such disclosures that there exists concerted action to accomplish some illegal objective, and not just a simple desire to be informed as to business conditions. The particular facts facing each association must govern the determination of how frequent and how detailed the reports should be.

122. The problem here, of course, is that a court may find, in these discussions, some concert of action to adhere to the predictions arising from the discussions of future trends. In the *Maple Flooring* case, discussion of future price trends was found permissible, in the absence of some agreement, "with respect to price." 268 U.S. at 575. The Court, in the *Hardwood* (see note 13 *supra*) and *Linseed* (see note 27 *supra*) cases, found that the trade association meeting discussions had been an ingredient of an illegal agreement.

123. This rule is conservatively drawn. In the *Maple Flooring* case, the Court approved a plan which reported only closed transactions. See note 40 *supra*. Later the Supreme Court, in the *Sugar Institute* case (see note 75 *supra*) permitted the reporting of future prices to stand, when the requirement that members adhere to announced prices was deleted. As indicated, the *Sugar Institute* case is not too strong authority, as it may well be limited to specific industry practices.

It must be admitted, however, that from the *Tag* case, with some augmentation from the *Sugar Institute* case, there can be made a plausible argument that the reporting of *current* prices is valid, even if there is some likelihood that the current price will, in fact, be the future price for some indeterminate period of time. See note 111 *supra*.

The recent consent decree, in the case of United States v. Gold Filled Manufacturers Ass'n, Inc., CCH TRADE REG. REP. (1957 Trade Cas.) ¶ 68760 (D. Mass. 1957), prohibited the circulation of price lists or quotations to members of the trade association, prior to communication of such price information to customers. Other consent decrees have required price information distribution to be limited to past sales: United States v. National Retail Lumber Dealers Ass'n, 1940-43 Trade Cas. ¶ 56181 (D. Colo. 1942); United States v. W. C. Bell Services, Inc., 1940-43 Trade Cas. ¶ 56171 (D. Colo. 1941); United States v. West Coast Lumbermen's Ass'n, 1940-43 Trade Cas. ¶ 56122 (E.D. Cal. 1941); United States v. Western Pine Ass'n, 1940-43 Trade Cas. ¶ 56107 (S.D. Cal. 1941); United States v. Electrical Solderless Service Connector Institute, 1940-43 Trade Cas. ¶ 56081 (S.D.N.Y. 1941).

Two recent consent decrees enjoined the dissemination of price lists: United States v. Machine Chain Manufacturers Ass'n, 1955 Trade Cas. ¶ 68099 (D.R.I. 1955); United States v. Tobacco and Candy Jobbers Ass'n, 1954 Trade Cas. ¶ 67798 (N.D. Ohio 1954). The dissemination of data, concerning the monetary trade-in value of specific pieces of equipment, has been enjoined by a recent consent decree: United States v. National Audio-Visual Ass'n, Inc., CCH TRADE REG. REP. (1957 Trade Cas.) ¶ 68833 (D. Va.)

124. The Supreme Court, in the *Linseed, Sugar Institute,* and *Hartford-Empire* cases, made it quite clear that there can be no requirement to adhere to prices, terms, or conditions of sale or to production quotas. In addition, there probably should be no provision for reporting specific transactions, in which there has been a deviation from list prices. United States v. American Linseed Oil Co., 262 U.S. at 282-83. See also the following consent decrees: United

9. The trade association price reporting program must be both created and operated for a lawful purpose, and it must conform, as nearly as possible, to the pricing practices as they exist in the industry.[125]

10. The trade association should not undertake the ascertaining and reporting of any type of cost data, unless it has a legal purpose in doing so, and the association members should have no agreement, with regard to the use of said cost data; nor should the association make any recommendations as to its use.[126]

THE PROBLEM OF PER SE ILLEGALITY

Although most conduct which is alleged to be a violation of section I of the Sherman Act is viewed through a glass of reasonableness,[127] there exist certain arrangements that the courts have determined

States v. Association of Knitted Glove & Mitten Manufacturers, 1954 Trade Cas. ¶ 67638 (N.D.N.Y. 1953); United States v. Electrical Solderless Service Connector Institute, 1940-43 Trade Cas. ¶ 56081 (S.D.N.Y. 1941). In the *Tag* case, the reporting of "off-list" sales, which was not done for the purpose of fixing prices, was permitted. The practice stood in the *Tag* case, because of its universal indulgence by the members of the trade; but this case probably does not have much strength on this issue, as it should be limited to its facts. Here it was part of the pattern of price activity within the industry. The reporting of price deviations in another situation could well be a strong coercive to adhere to list prices. The argument, in part, justifies rule 9.

125. It is manifest that the price reporting plan must not be a part of an agreement to influence price or suppress competition; it is legitimate only as a device to enlighten competitors so that they can make intelligent independent determinations concerning business conditions. The notion of conforming price reporting plans to existing patterns of pricing activity within the industry was clearly influential in determining that the price reporting plans in the *Sugar Institute,* 297 U.S. at 601-02, and *Tag* cases, 174 F.2d at 306-07, were valid.

126. Cost data, whether average cost data or uniform cost accounting information, can easily become an index for price-fixing. In the *Maple Flooring* case, the Court approved the collection, compilation, and dissemination of average-cost data, because there was no proof that the information had been used for price-fixing purposes. See notes 42 and 43 *supra.*

The Federal Trade Commission has enjoined the dissemination of both types of cost information in the case of United Typothetae of America, 6 F.T.C. 345 (1923), when these data were used in furtherance of a conspiracy to fix price. Recently, in the Vitrified China Ass'n, 49 F.T.C. 1571 (1953), use of average cost data was not made in furtherance of a price-fixing conspiracy. Several consent decrees have prohibited the compilation and dissemination of cost information. See United States v. Battery Separator Manufacturers Ass'n, 1940-43 Trade Cas. ¶ 56154 (N.D. Cal. 1941); United States v. National Ass'n of Leather Glove Manufacturers Inc., 1952-53 Trade Cas. ¶ 67623 (N.D. N.Y. 1953); United States v. Association of Knitted Glove & Mitten Manufacturers, 1954 Trade Cas. ¶ 67638 (N.D.N.Y. 1953). The dissemination of cost data was permitted in these consent decrees: United States v. National Container Ass'n, 1940-43 Trade Cas. ¶ 56028 (S.D.N.Y. 1940); United States v. National Lumber Manufacturers Ass'n, 1940-43 Trade Cas. ¶ 56123 (D.D.C. 1941) (must be made available to all interested persons and must not identify any particular concern).

127. The so-called "rule of reason," developed in construing and applying the Sherman Act, was established in 1911 by two Supreme Court opinions: Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) and United States v. American Tobacco Co., 221 U.S. 106 (1911). The Court, in the *Standard Oil* case, said that the Sherman Act was

"expressly designed not to unduly limit the application of the act by precise definition, but while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be

are, by their nature, in restraint of trade. Of these so-called per se violations, price-fixing is, perhaps, the best known.[128] The notion that the private setting of prices was an act in restraint of trade dates almost from the passage of the Sherman Act.[129]

Price-fixing has undergone a rather steady evolution. Early in its career there existed the requirement that, in order to prove a case of price-fixing, the party charging illegality had to demonstrate that the defendant had the purpose to fix price, had the power to fix price in terms of market control, and that his conduct had the effect of fixing price.[130] It is against the framework of these three requisites that the *Hardwood, Linseed, Maple Flooring,* and "old" *Cement* cases were decided.[131] The importance of these cases, as authorities for price-fixing, is diminished considerably by the changing character of the wrong.

In 1927, the *Trenton Potteries* decision furnished a clear definition of price-fixing.[132] This case placed sharp emphasis on the requisite of power to control the market, but the Court, at the same time,

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determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute." 221 U.S. at 63-64.

128. Other types of activity constituting per se violations of the antitrust laws are limiting production, allotting markets, and collective boycotting. See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS 11-29 (1955).

129. The most important of these early cases were the following: Swift and Co. v. United States, 196 U.S. 375 (1905); Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

130. In the case of Board of Trade v. United States, 246 U.S. 231, (1918), the Supreme Court upheld a grain exchange rule which fixed the price between daily sessions of the exchange of grain "to arrive" to the closing bid of the previous day. In addition to requiring a purpose or intent to fix prices and power to set prices, it also looked to ". . . its effect, actual or probable." *Id.* at 238.

131. The position of the "power" requisite in the early trade association statistical reporting cases is somewhat vague. In the *Hardwood* case, the association claimed only about one-third of the industry as members, but the Court accepted as sufficient proof that ". . . the united action of this large and influential membership of dealers contributed greatly to this extraordinary price increase." 257 U.S. at 409.

In the *Linseed* case, the trade association members controlled "a very large part" of the market. 262 U.S. at 380. The "necessary tendency" of this statistical reporting was to "suppress competition." *Id.* at 389. These cases were distinguished by the Court in the *Maple Flooring* case, by the fact that in each of them, the Court inferred from each set of facts a necessary tendency to "lessen production or increase price." 268 U.S. at 585. What is the significance of "necessary tendency"? This is, undoubtedly, the requirement of showing that the group has the power to affect industry price, by virtue of the fact that its collective activity, necessarily, tends to set industry prices. It is also arguable that the Court only used these words, in lieu of proof of a specific agreement. The later cases bear out the validity of the former argument.

132. United States v. Trenton Potteries Co., 273 U.S. 392 (1927). Certain manfacturers of vitreous pottery bathroom fixtures were charged with having combined to set prices and limit sales to certain specific outlets. These defendants, representing 82% of the nation's production of these fixtures, were mem-

virtually eliminated the requisite of market effect.[133] The depression case of *Appalachian Coals, Inc. v. United States*[134] made it clear that an agreement to fix prices, without the power to effect same, was not per se illegal. The dual requisites of purpose and power to affect prices continued to describe price-fixing, until 1940. In that year the *Socony-Vacuum*[135] case was decided, and the requisite of power to effect the market also disappeared. In the now famous footnote 59, Justice Douglas said, "But that does not mean that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act . . . ."[136] This footnote is admittedly dictum, but later cases have borne out its force.[137]

Most significant for our purposes is the fact that the *Socony-Vacuum* case expanded the definition of price-fixing. Prior to this case, the type of activity which would constitute price-fixing was rather clear,[138] but now the definition encompassed new forms. If the activity con-

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bers of the Sanitary Potters Association, through which the agreement was achieved. The circuit court of appeals had reversed the trial court for refusing to grant a jury instruction that price-selling was illegal only if unreasonably in restraint of trade. In upholding the trial court, the Supreme Court established, with candor, that an agreement to set prices would be conclusively presumed unreasonable and in restraint of trade. The oft-quoted passage of the Court is:

"The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." 273 U.S. at 397-98.

133. See quoted language, note 132 *supra*.

134. 288 U.S. 344 (1933). Here a group of coal producers organized a common selling agency, with the power to fix prices of the coal it sold. The Court found that there existed sufficient competition both within and without the usual trade area of the defendants and that the selling agency was without the power ". . . to fix the price of coal in the consuming markets. . . ." *Id.* at 373. The intent to fix prices, without the power to accomplish this end, was not illegal.

135. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

136. *Id.* at 225 n. 59.

137. See, *e.g.*, United States v. National Ass'n of Real Estate Boards, 339 U.S. 485 (1950); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951). In neither of these cases could the defendants be said to have market control.

138. It was clear that a specific agreement setting prices was illegal (see cases cited note 129 *supra*), as was an agreement limiting production in order to raise prices. *Hardwood* case, see note 16 supra. The *Sugar Institute* case supplied the ruling that an agreement to adhere to published prices was

ducted has the effect of "stabilizing" prices, then it is price-fixing.[139] In addition, the Court approved a notion which might be called indirect price-fixing. Activity carried on by any ". . . combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se* . . . ."[140]

The examination of trade association statistical programs as price-fixing devices must be made anew with the *Socony-Vacuum* test of price-fixing as the critical frame of reference.[141] There is little case authority upon which to base an analysis of the problem.[142] It is clear that it is no longer of controlling importance that the members of the trade association, in aggregate, possess a sufficient percentage of market control to be said to have the *power* to affect market price. Small regional trade associations, without industry control, may now, if guilty of an intent to fix prices in conducting their statistical reporting programs, come under the proscription of the antitrust laws.

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illegal. See note 75 *supra*. All of these types of price-fixing involve rather direct action.

139. The Court stated:

"Hence, prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to market prices. They are fixed because they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial. For purchases at or under the market are one species of price-fixing. In this case, the result was to place a floor under the market—a floor which served the function of increasing the stability and firmness of market prices. That was repeatedly characterized in this case as stabilization. But in terms of market operations stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone." 310 U.S. at 222-23.

140. A previous statement in the opinion reads, as follows: "Any combination which tampers with price structures is engaged in an unlawful activity." *Id.* at 221. This statement has been explained as not being a definition of price-fixing, by a close analysis of its context. It is suggested that it is merely a "rhetorical substitute" for price-fixing, used in an argument by the Court, that the reasonableness of the price set is no defense. See LAMB & KITTELLE, *op. cit. supra* note 1, at 59 n. 6. This argument is forceful, but the statement is troublesome, as it is followed by a considerable enumeration of acts which may be price-fixing, but which enumeration does not purport to be exhaustive. See *Socony-Vacuum*, 310 U.S. at 222-23.

141. The earlier trade association statistical reporting cases: *Hardwood, Linseed, Maple Flooring,* and old *Cement Institute* were decided prior to the *Trenton Potteries* decision. At this time the three requisites of purpose, power, and effect were necessary to establish illegal price-setting. In addition, the factors of indirect price-setting and price-setting by stabilizing prices were new with the *Socony-Vacuum* case. The *Sugar Institute* case was decided, in part, on the authority of the *Appalachian Coals* decision, see note 76 *supra*, which has been greatly weakened, if not overruled. Also, the notion of "conscious parallelism" did not exist when these cases were decided.

142. In the *Tag Institute* case, the First Circuit did not mention the *Socony-Vacuum* case, but there the proof failed, as to the reporting plan having any effect on prices. On the specific issue of price-fixing, the rife practice of "off-list" selling was highly influential in negativing the Commission's insistence that the practices produced uniform price levels. See note 111 *supra*.

Consider next the element of indirectness injected into the per se wrong of price-fixing, by the *Socony-Vacuum* case: This notion should create some concern over the basic legality of statistical reporting. When the trade association furnishes members with price and cost information, this alone could be said to indirectly affect price.[143] Assuming the statistical reporting plan to be legal in every other respect, the natural propensity of weaker industry members to follow the price leaders of the industry may possibly serve as the agreement to fix prices.[144]

Perhaps the most disturbing aspect of the *Socony-Vacuum* opinion, in considering the legality of statistical reporting, is the holding that the "stabilization" of price constitutes illegal price-fixing. It had been observed by the Supreme Court, in the *Maple Flooring* case, that statistical reporting had the "natural effect" of stabilizing prices.[145] However, it was the development of the doctrine of "conscious parallelism of action" which aggravated the problem, by supplying an easy route to the requisite legal agreement to set prices.[146] Under this rule, a conspiracy can be inferred by showing that supposed competitors have, knowingly, followed uniform practices.[147] Employing these authorities, a trade association statistical reporting plan could well be held an illegal price-fixing arrangement, if it operates

143. The general, simultaneous possession of the same economic data, relating to the same market, by supposed competitors could well work as a price-setting device. It would be overly credulous to believe that the information possessed by these competitors would be used by each of them only in an attempt to ascertain the competitive character of the individual position.

144. It did so in the *Hardwood* case, where the Court said:

"It is plain that the only element lacking in this scheme to make it a familiar type of competition-suppressing organization is a definite agreement as to production and prices. But this is supplied: by the disposition of men to follow their most intelligent competitors, especially when powerful; by the inherent disposition to make all the money possible; joined with the steady cultivation of the value of 'harmony' of action; and by the system of reports, which makes the discovery of price reductions inevitable and immediate. The sanctions of the plan obviously are, financial interest, intimate personal contact, and business honor, all operating under the restraint of exposure of what would be deemed bad faith, and of trade punishment by powerful rivals." 257 U.S. at 399.

145. See quoted language in text to note 53 *supra*.

146. This concept was mentioned previously, see note 97 *supra*. The first significant statement of this rule was found in the case of Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939). In speaking of the proof necessary to show a conspiracy, the Court said that:

"It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

147. In two Circuit Court of Appeals cases decided in 1945, proof of knowing uniformity of conduct on the part of competitors was equated with conspiracy under the doctrine of "conscious parallelism." See William Goldman Theatres, Inc., v. Loew's, Inc., 150 F.2d 738 (3rd Cir. 1945), *cert. denied*, 334 U.S. 811 (1948), and Bigelow v. RKO Radio Pictures, Inc., 150 F.2d 877 (7th Cir. 1945), *rev'd on other grounds*, 327 U.S. 251 (1946).

to produce some price uniformity in the industry.[148]

The *Socony-Vacuum* opinion has created a serious pitfall with which all trade association executives must cope. The most careful effort to engineer a safe statistical reporting plan may go awry, because of the result, rather than the form of the statistical program. A self-governing principle is suggested here. The trade association should analyse the effect of its own activity as carefully as it determines industry statistics. If, in doing so, it finds that its activity is significant in producing price uniformity, or any other effect on price patterns, it should take steps to alter or eliminate the responsible features of its reporting plans. Generally, the trade association should be aware constantly of its impact on the industry it serves and should curtail any conduct on its part, if illegal restrictive results appear or seem likely.

In the final analysis, the conduct of members of the association will determine the validity of the association's activities.[149] Therefore, the trade association should encourage, actively, independent action by its members and should create an awareness among them of the dangers of concerted action.

Post Note

The trade association is one of the most valuable of our economic institutions, and its statistical activity, perhaps, is one of the most necessary services rendered members. The present state of the antitrust law clearly does not permit the freedom many would desire,[150] but there is certainly an area in which trade associations can still engage in beneficial, legitimate statistical activity. Each trade association should reassess constantly its statistical program, in light of its effect on the industry and of the continuing evolution of the antitrust laws. By a pragmatic approach and an adoption of principles of self-discipline, the trade association can persist in benefiting industry and public.

The thrust of these cases was blunted by the later Supreme Court decision in Theatre Enterprises, Inc. v. Paramount Film Distribution Corp., 346 U.S. 537 (1954). Here the Court emphasized the need for a finding of a conspiracy, saying that mere proof of uniform conduct would not suffice. There must now be a finding of an agreement of some kind.

148. If there exists a history of price uniformity prior to any trade association activity, care should be taken to establish the independence of this condition from any trade association activity.

149. The problem of whether or not trade association membership alone furnishes sufficient evidence to bring any member within a conspiracy carried out by the trade association has not been answered adequately. In the case of Phelps-Dodge Refining Corp. v. FTC, 139 F.2d 393, 396-97 (2d Cir. 1947), the Court considered this question, as follows:

"Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise . . . ."

Just what will make a trade association member "chargeable with knowledge" is not clear.

150. See Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 Mich. L. Rev. 1139, 1171-75 (1952).