SAN DIEGO COUNTY VETERINARY MEDICAL ASSOCIATION

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U.S. v. SDCVMA

Reflections on Antitrust and Veterinary Medicine

By Robert C. Wright

Antitrust law is inherently difficult to understand. One of the most important implementing statutes, the federal Sherman Act of 1890 banning contracts, combinations and conspiracies in restraint of trade or commerce among the states is so generally worded that literal application is impossible. Instead, using a concept of reasonableness, courts have had to decide on a case-by-case basis what conduct is prohibited. After over 100 years of jurisprudence, one thing is clear: With few exceptions, agreements between competitors to fix or stabilize the prices of their products or services are illegal.

Before 1975, minimum fee schedules were common among professionals — including doctors and lawyers — across the country. Relying on federal decisions dating back to the 1800's, many antitrust lawyers and judges concluded that the "learned professions" were not engaged in "trade or commerce" and, like baseball, were not subject to the Sherman Act.

In November 1975, the Antitrust Division of the U.S. Department of Justice brought a civil action against San Diego County Veterinary Medical Association (SDCVMA). The charge was price-fixing in violation of section 1 of the Sherman Act. The wrongful acts alleged included conducting and publishing the results of fee surveys, adopting minimum fee schedules, and prohibiting SDCVMA members from accepting referrals from animal welfare agencies for reduced-fee spay and neuter operations. The relief sought was a determination that SDMVA and various unnamed co-conspirators, who were members and officers of SDCVMA, had violated the Sherman Act, and an injunction preventing similar conduct in the future.

Early in the case, the government offered to enter into a consent judgment in which SDCVMA would be ordered to refrain from this type of conduct and take certain compliance steps in the future. SDCVMA refused. There followed an intense period of formal discovery, in which numerous veterinarians — members of SDCVMA's board and the local chapters — were examined under oath by government prosecutors. In July 1976, SDCVMA moved for summary judgment on the ground that it had ceased the conduct referred to in the complaint, and there was no likelihood of recurrence. Therefore, the claim was moot.

Over strenuous government opposition, U.S. District Judge Leland Nielsen granted the motion, finding in part that: "The fact that all of the past activities complained of by the Government have ceased, coupled with defendant's announced intent to refrain from any future violations, indicates that further violations cannot reasonably be expected to occur. This court has no reason to doubt the bona fides of SDCVMA or its members in promising to obey the antitrust laws in the future."

The Court's findings on the motion provide some insight into the way local veterinarians determined fees in the 1950s and 1960s: "Since 1958, 23 meetings of veterinarians have occurred in San Diego County where fees were discussed, many of which were Chapter meetings of SDCVMA. Fee surveys or fee schedules have been prepared after some of the meetings, at which fees were discussed, and mailed to veterinarians in the immediate area."

When the government sued SDCVMA, it was undoubtedly aware of a landmark decision rendered earlier that year in Goldfarb v. Virginia State Bar. There, the U.S. Supreme Court held that although the public service aspect of the professions may require that antitrust concepts be applied differently to them than other businesses, professions are not exempt from the Sherman Act. The Court held that a county bar association's minimum fee schedule, the habitual violation of which was enforced as misconduct by the Virginia State Bar, constituted a violation of section 1 of the Sherman Act.

Since Goldfarb, there has been a proliferation of cases applying antitrust laws to the professions.

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The ethical rule of an engineering association prohibiting competitive bidding among its members; the American Medical Association's group boycott of chiropractors; and the limitation of competition in certain medical specialties through unreasonable certification standards, are but a few examples of practices challenged under the Sherman Act.

Membership in a professional association can satisfy the element of combination or conspiracy needed to prove a violation. And, some antitrust prosecutors view trade associations to be ongoing anti-competitive conspiracies.

Although 27 years have elapsed since U.S. v. SDCVMA, there are important points to be remembered from the case:

- Assume that federal prosecutors will pursue all antitrust violations, regardless of the size of the industry or profession involved. You do not have to be Microsoft to get sued.

- In antitrust cases, the appearance of propriety is almost as important as compliance with the law. Most antitrust violations are proven by circumstantial evidence. For example, competitors have dinner or attend an association meeting, and each raises prices by the same amount the next day.

- Discussion or exchange of current fee information between competitors is extremely dangerous, even if no agreement is reached to fix prices.

- Individual members, as well as professional associations, need to be concerned about compliance with the antitrust laws.

- If joint action is planned by two or more veterinarians or by SDCVMA that has economic consequences for the participants or their customers, the actions should be reviewed by counsel before they are taken.

U.S. v. SDCVMA was a rarity among antitrust cases, which are seldom dismissed on the ground of mootness. As Judge Nielsen observed in his order: "The test of mootness in cases like this one is very strict. . . . The protection of the public interest requires that abandonment of alleged past violations not be lightly inferred, particularly from mere protestations timed to anticipate suit." Although successful, the mootness defense should never be considered a substitute for knowing and complying with the law. Because of the severe civil and criminal penalties for antitrust violations, compliance education is a sound investment for companies, trade and professional associations.

Before memories dim, several things should be mentioned about SDCVMA's officers and members. When confronted with a serious legal challenge, Roger Beck, Robert Jackman, and the other members of the Board in 1975 and 1976 made hard, right decisions about the litigation. The so-called "unnamed co-conspirators," many of whom gave depositions, were completely unknowing "conspirators." (One of them questioned his lawyer about the legality of minimum fee schedules before the suit was filed and was told they were legal: "The bar association has them too.") They were also some of the finest veterinarians in the county. Their willingness to be well prepared for depositions in the case was essential to the outcome.

The government's complaint in U.S. v. SDCVMA was part of a new wave of antitrust enforcement against professionals which continues to the present. Although SDCVMA won, the need for antitrust compliance remains. As only veterinarians can fully appreciate, defense of a case like this one involved many unusual, poignant moments before the final hearing. The common law began in 1066. Since then, how many lawyers have had a Doberman Pinscher sitting in their lap while writing on a yellow pad?

Robert C. Wright is a member of the San Diego law firm of Wright & L'Estrange, where he specializes in business litigation. In 1975, he was one of the lawyers who defended SDCVMA in a suit brought by the Antitrust Division of the U.S. Department of Justice in federal district court in San Diego. Mr. Wright has represented SDCVMA on various matters since 1975. He graciously agreed to provide this article at our request.

RULES for DOGS — #1: When I say move, it means go someplace else — not switch positions with each other so that there are still two dogs in the way!