

1968

Self-Regulation-Panacea or Pitfall?

William D. Dixon

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Administrative Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

William D. Dixon, *Self-Regulation-Panacea or Pitfall?*, 3 U. Rich. L. Rev. 29 (1968).

Available at: <http://scholarship.richmond.edu/lawreview/vol3/iss1/4>

This Article is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

SELF-REGULATION—PANACEA OR PITFALL?

*William D. Dixon**

SEVERAL recently announced Federal Trade Commission advisory opinions have revived anew the controversy surrounding what a businessman can and cannot do in the area of self-regulation. The reasons for the existence of the controversy can be readily understood, for on the one hand businessmen are being constantly urged by those within the federal government to clean their own houses before the Government is forced to do the job for them,¹ and yet on the other they are faced with the specter of an antitrust prosecution if they do anything toward that end which they feel will be in any way effective.² It is small wonder that the perplexed businessman, caught between these two apparent extremes, is beginning to wonder if he is suffering from an acute case of schizophrenia. Upon reaching out for what he thought was a panacea for his troubles, he finds instead only a pitfall leading to still more troubles.

Yet upon closer analysis it does not appear that the businessman has been deliberately deceived. Sometimes the advice given has been well-intentioned, but accompanied by an apparent total lack of comprehension of the anti-trust implications involved.³ At other times, he has been advised that it is a field which the antitrust laws absolutely prohibit him from entering.⁴ Still other writers suggest that there is possibly a middle ground between these extremes in which the businessman can operate with relative safety and at

*Attorney, Division of Advisory Opinions, Federal Trade Commission. The views expressed herein are those of the author and do not necessarily reflect those of the Commission.

¹ See ADVERTISING ADVISORY COMMITTEE TO THE SECRETARY OF COMMERCE, SELF-REGULATION IN ADVERTISING (1964).

² *Sugar Institute v. United States*, 297 U.S. 553 (1936).

³ See *The Washington Post*, Sept. 21, 1966, for editorial reproduced in 112 CONG. REC. 22796-97 (daily ed. Sept. 22, 1966), commenting on the adoption of the Motion Picture Association of America's revised Code of Self-Regulation: "The movie-makers have sought to preserve their freedom by embracing a measure of self-regulation—a traditional American approach."

⁴ See LAMB & KITTELLE, *TRADE ASSOCIATION LAW AND PRACTICE* 151 (1956): "[I]t is axiomatic that a trade association and its members cannot act as arbiters of the law, to decide and enforce its terms If association members suspect that a legal rule is being violated they can use persuasion to remedy the matter, but enforcement must be left to official agencies."

least de facto immunity.⁵ If he goes behind these writings to the cases themselves, he will find decisions which can be construed as lending support to any one of these three positions and possibly others as well.⁶ It is only natural then that this subject should be one of the most controversial topics for debate in the field of antitrust law today, and if it is the cause for disagreement among lawyers and judges, it is even more understandable that it is the cause for a concern bordering on dismay to the businessman to whom it is not a subject for academic discussion, but a real, live question which he must answer at his peril or resolve by leaving it strictly alone. It is our purpose here to examine some of these precedents and to analyze some of the interpretations which have been given them in an effort to shed some light on the perplexing question of what a businessman can and cannot do, both alone and in concert with his competitors, to regulate practices within his industry.

To place this subject in perspective, we must first define our terms, for self-regulation can and often does mean different things to different people. In its broadest sense, the subject can be construed as including any regulation of business practices by other than a government agency. But within this broad category, there are several fairly well-defined subdivisions which often overlap each other. The Advertising Advisory Committee to the Secretary of Commerce has broken the subject down into four main types of self-regulation:⁷ (1) self-regulation by individual advertisers, companies, and corporations; (2) self-regulation by individual industries and industry groups; (3) self-regulation by advertising trade associations, clubs, bureaus, and related organizations; (4) self-regulation by advertising media, by publishers, and by broadcasters acting both independently and through their own medium associations.

As noted, these classifications often overlap, for individual companies will often link their efforts to control the activities of their own personnel with a program adopted by the industry trade association; advertising trade

⁵ See Van Cise, *Regulation—By Business or Government?*, 44 HARV. BUS. REV., March-April 1966, at 53, 62, where it is concluded that while industry may not set itself up as a self-contained private government whereby competitors pass judgment and apply sanctions on other competitors, "Any theoretical proceedings by our enforcement agencies charging . . . alleged technical violations of the antitrust laws would result in a storm of well-deserved protests from both Congress and the public. Necessity here knows no antitrust law."

⁶ See Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966), for an excellent compilation of the precedents in this area, the rationale of which will be discussed more fully herein.

⁷ *Supra* note 1, at 10.

associations, clubs, and bureaus frequently solicit and obtain the cooperation of advertising media to enforce their own programs of regulation.⁸ Be that as it may, this division of the subject will serve as well as any as a basis for discussion of the problems incident to self-regulation.

SELF-REGULATION BY INDIVIDUAL COMPANIES

Self-regulation by individual companies of their own activities, which has been described by the Advertising Advisory Committee to the Secretary of Commerce as the most meaningful of all,⁹ involves few if any antitrust implications in the sense with which we are here concerned with antitrust law, since it represents simply an effort by an individual company or corporation to clean its own house by its own efforts. It is most effective, of course, since management has complete control of the activities of its own personnel if it will but take the trouble to set up operating machinery to make that control effective. The establishment of some sort of machinery or operating procedure is particularly important in today's modern corporation which is often too large and too diversified for management to know firsthand what each department or division is doing unless some reporting and reviewing procedure is created whereby the legal department can pass upon the legality of proposed practices before and not after the operating departments have embroiled the company in legal difficulties not of management's own choosing. This is an unusually attractive alternative today, when the Government, through its advisory procedures, is offering more assistance than ever before to the individual company which is seeking to stay within the law.¹⁰

However, as observed, these internal efforts by an individual company to regulate its own affairs do not in and of themselves involve antitrust questions although they are usually directed at least in part at the prevention of antitrust and trade regulation law violations by company personnel. Thus the company's review and clearance procedures may be and should be designed to prevent the operating departments from engaging in false advertising, price discrimination, illegal conspiracies with competitors, and like practices which raise questions under the antitrust laws; the procedures themselves raise no questions under those laws so long as they remain

⁸ See Baum, *Self Regulation and Antitrust: Suppression of Deceptive Advertising by the Publishing Media*, 12 SYRACUSE L. REV. 289 (1961).

⁹ See *supra* note 1, at 10.

¹⁰ See 16 C.F.R. § 1.51 (1967).

internal with the company and do not involve any form of cooperation with the company's competitors.

It is precisely at this point that the most troublesome problems arise, for it requires no great exercise of imagination to visualize a mythical corporation which has through great individual effort succeeded in weeding out all illegal practices from its own operations only to discover that its competitors are enjoying the often profitable fruits of the same practices it has eliminated. It cannot be denied that this sort of situation, whether it exists in this perfect form or not, constitutes the greatest barrier to self-regulation by individual companies, for no profit-making enterprise cares to voluntarily refrain from practices which its competitors are pursuing to its disadvantage and to their profit. Not only is the law-abiding company victimized by the uncontrolled activities of its competitors, but the specter of further Government regulation is ever present against such a background in an era when Congress and the administration are perhaps more consumer-conscious than at any time since the passage of the Federal Trade Commission Act.¹¹ Obviously, most companies and individual businessmen would prefer to correct such a deplorable situation themselves rather than to have the Government do the job for them either in the form of regulatory agency prosecutions or additional legislation. Further, many if not most businessmen probably feel that they can do a more effective job themselves if the law would only grant them the right to exercise the power.¹²

The businessman so situated has in reality only three alternatives. First, he can abandon his own efforts at self-regulation and fight fire with fire on the competitive level. Second, he can invoke the assistance of the Government to correct the illegal practices. Third, he can inaugurate some sort of industry self-regulation, which is usually accomplished by turning to the industry trade association. Assuming the latter, we come then to the second and in many ways most perplexing area of self-regulation, self-regulation by industries and industry groups, which will far more often than not be trade associations.

SELF-REGULATION BY INDIVIDUAL INDUSTRIES AND INDUSTRY GROUPS

I.

An industry trade association is most certainly a proper place for the

¹¹ See Wall Street Journal, Jan. 17, 1968, at 1, col. 1.

¹² See Van Cise, *supra* note 5. See also Self-Regulation or Stricter Government Control—Which Will Advertising Choose?, a statement by former FTC Chairman Earl Kinter before Advertising Federation of America, Washington, D. C., Feb. 5, 1960.

worried businessman to turn, for the legality of the practices of industry members and the ethical standards they have attained are matters of legitimate concern to any association which is trying to be of service to its members.¹³ In fact, one reason trade associations are formed is to upgrade the performance level of the industry members not only to avoid trouble with government, but also to improve the image of the industry in the eyes of the general public, where without some central direction competition could and sometimes does give the public a tarnished picture which is detrimental to all. Further, the trade association may be the only medium through which an industry's ethical as opposed to purely legal standards can be improved, and it was apparently with this in mind that the Supreme Court in *Sugar Institute v. United States*,¹⁴ one of the landmark cases dealing with self-regulation, made the following statement:

Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And coöperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law.¹⁵

The trade association which decides to embark upon some form of industry self-regulation has several choices to make as to how far it wishes to go. Modern trade associations have close at hand the many court decisions dating back over several decades in which one association after another has had to learn the bitter lesson that whenever a trade association acts, it acts not as an individual entity but rather as a combination of competitors, which is exactly what a trade association is—a combination of competitors joined together for some specific purpose or purposes. Hence present-day trade association executives and their counsel are acutely aware of the laws dealing with concerted activities by competitors and the cases which have given those laws painful application to concrete situations.

Primarily, the legislation which has application here is embodied in two statutes, although others on occasion may come into play as well. Section 1 of the Sherman Act¹⁶ provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be

¹³ See LAMB & KITTLE, *supra* note 4, at 14; OPPENHEIM & WESTON, *FEDERAL ANTI-TRUST LAWS, CASES AND COMMENTS* 175 (3d ed. 1968).

¹⁴ 297 U.S. 553 (1936).

¹⁵ *Id.* at 598.

¹⁶ 26 Stat. 209 (1890), 15 U.S.C. § 1 (1964).

illegal. . . ." Section 5 of the Federal Trade Commission Act¹⁷ provides that "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." This statute, which is one of the broadest grants of authority Congress has ever given an administrative agency, is one of several statutes which Congress has enacted subsequent to the passage of the Sherman Act in 1890 to supplement that Act and make it more effective. It is now well-settled that anything which would violate the Sherman Act would also violate the Federal Trade Commission Act, but that the latter statute is designed to and does reach many, many practices which have not yet resulted in full-blown Sherman Act violations, but which are likely to if continued unabated.¹⁸

Evidence that trade associations have run afoul of these two statutes over and over again can be easily located in the decisions of the agencies and the courts dealing with their activities. It is not our purpose here to deal with the many cases in which trade association activities have been challenged under the antitrust laws. It is only that regulatory activities of trade associations should be viewed for their potentiality for involving the association in similar difficulties.

II.

At the outset of our analysis, it should be noted that no court has ever held that a trade association's efforts at self-regulation are per se illegal, although the objectives that regulation is designed to accomplish may well be. Apart from the objectives, the mere fact that an association engages in some attempts to improve the standards of conduct within an industry has never been held to fall within that category of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."¹⁹

Over the years, only a limited number of practices have been held to fall within this somewhat arbitrary category.²⁰ Generally included within this category are: agreements not to compete which are not ancillary to a legitimate contract;²¹ collusive price fixing;²² agreements among competitors

¹⁷ 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(1) (1964).

¹⁸ See *FTC v. Raladam Co.*, 283 U.S. 643 (1931); *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934).

¹⁹ *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

²⁰ See *Loevinger, The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23 (1964).

²¹ See, e.g., *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

²² See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

to divide markets;²³ group boycotts;²⁴ tie-in agreements which foreclose competitors from any substantial market;²⁵ and pooling of profits and losses by competitors.²⁶ To this list might now be added, in view of the Supreme Court's decision in *United States v. Arnold Schwinn & Co.*,²⁷ sales to distributors or retailers upon any condition, agreement, or understanding limiting their freedom as to where and to whom they will resell the products. Beyond this list, however, it would be well to note a tendency of the courts against lightly enlarging the per se category to include new practices not theretofore considered to be of that nature.²⁸

Clearly then, the subject of our inquiry here is not included within any such grouping; hence we are free to inquire into the reasonableness of regulatory activities which an association might undertake, unless the objective of the regulation itself falls within the per se category, as, for instance, where the regulatory activity results in a group boycott.²⁹ Much more will be said as to this aspect of the problem as the subject develops.

At the very least then it may be stated that an industry group such as a trade association may engage in reasonable regulation of its members. But this, of course, takes us exactly nowhere until we determine what is and is not reasonable. Trade associations are fond of describing the documents they draft in connection with these endeavors as "Codes of Ethics." Perhaps it is because this euphemism gives the whole undertaking a greater aura of reasonableness and, hence, a greater chance of surviving any possible legal challenge; but whatever the reason, it may be noted in passing that many if not most codes have to do more with legal responsibilities than ethical questions.

As mentioned above, once having decided to embark upon a program of self-regulation, the association still must reach a decision as to how far it will attempt to go. Any industry code must, in essence, consist of two principal features. First are the sections dealing with the substantive practices to be prohibited. While these may be concerned with almost any area

²³ See, e.g., *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

²⁴ See, e.g., *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

²⁵ See, e.g., *International Salt Co. v. United States*, 332 U.S. 392 (1947).

²⁶ See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

²⁷ 388 U.S. 365 (1967).

²⁸ See, e.g., *White Motor Co. v. United States*, 372 U.S. 253 (1963).

²⁹ See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

of trade regulation law, they are most often designed to eliminate a variety of deceptive practices which plague the industry and tarnish its image. Second, the association must decide what sort of enforcement proceedings it wishes to incorporate. Here also it has a number of different routes it can travel. It may publish the code solely for its educational effect in the hope that the individual members will abide by the consensus of the industry as to what is legal as well as ethical. It may provide simply that questions of compliance will be referred to the appropriate government agency for consideration as a possible violation of law. Or it may decide to set up its own enforcement machinery to secure compliance with the substantive provisions of the code. The first two alternatives involve few if any antitrust implications, assuming the substantive provisions themselves are correctly drawn. It is the third alternative which creates the distinct antitrust problems with which we are here concerned.

It may be observed that most modern trade associations are sufficiently knowledgeable and sophisticated and well-enough advised by expert counsel not to draft codes containing provisions which are in and of themselves violative of the antitrust laws. Certainly, there can be little sympathy for an association which today drafts a code designed to limit price competition among its members. Further, the Government itself now makes available all sorts of assistance for groups which desire to draft a code which accurately restates the substantive law in any area which the group desires to cover. Thus, for instance, the association can have its code reviewed by the Federal Trade Commission itself under that agency's advisory opinion procedure if it or its counsel has any doubts as to the accuracy of its coverage of the law.³⁰ The most difficult problems simply do not exist in this area; but it should by no means be minimized, for the implications of drafting a code which in terms prohibits a perfectly legal practice simply because some members of the industry do not like it should be obvious. Even without express means of enforcement, such provisions could raise an implication of concerted pressure on the individual members in a manner which is designed to eliminate competition in the industry.³¹

Thus in a recent advisory opinion,³² the Federal Trade Commission advised a trade association that the use of a standard rate and service pricing manual by competing electronics servicemen could not be approved despite an asserted problem of complaints from the public about service charges and

³⁰ 16 C.F.R. § 1.51 (1967). See generally W. D. Dixon, *Federal Trade Commission Advisory Opinions*, 18 AD. L. REV. 65 (1965).

³¹ See FTC Advisory Opinion No. 80, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,637 (1966).

³² FTC Advisory Opinion No. 158, 3 TRADE REG. REP. ¶ 18,148 (Jan. 4, 1968).

fraudulent operations by unethical repairmen, all stemming from a lack of guides by which the public can determine whether prices are fair and equitable. The Commission felt that a manual, as proposed, went further than necessary and contained the implicit danger that it would serve as a device through which service rates and fees would become uniform and stable throughout the country. The convenience of association members was held to be far outweighed by the benefits to the public of the intense competition between competing servicemen. One is mindful here of a further comment in the *Sugar Institute* opinion:

The freedom of concerted action to improve conditions has an obvious limitation. The end does not justify illegal means. The endeavor to put a stop to illicit practices must not itself become illicit. As the statute draws the line at unreasonable restraints, a coöperative endeavor which transgresses that line cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them.³³

In an advisory opinion³⁴ involving somewhat the same general principle, the Commission informed a trade association that it could not give its approval to a proposed amendment to the association's by-laws which would prohibit a member from advertising that its service is faster and better in other towns than that of members who actually are in business in those towns. The Commission said in its opinion that the adoption of the proposal would be highly questionable under the antitrust laws for the reason that advertising is an element or form of competition and any agreement among competitors to refrain from legitimate and truthful advertising restricts competition. If an industry member wishing to compete in another city is denied the right to advertise that despite his geographical disadvantage he can furnish faster and better service than his local competitors, assuming the representation to be truthful, he is to that extent denied the right to compete effectively. Local industry members would thus, in the Commission's view, be insulated from outside competition, for, as the opinion stated, "If competition in an industry is to survive, the members must be left free to exploit in a lawful manner such advantages as they actually possess."³⁵

One does not need to know why the association wanted to attack this practice or what loss of public confidence the industry may have suffered through false advertising in this area, for the point is that once again an

³³ 297 U.S. 553, 599 (1936).

³⁴ FTC Advisory Opinion No. 80, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,637 (1966).

³⁵ *Id.* at 22,906.

association was not permitted to justify an unreasonable restraint by "pointing to evils afflicting the industry or to a laudable purpose to remove them."³⁶ If one might be allowed to generalize from such matters, it would be to the extent of stating the rule to be that no matter what else it may properly do, an industry association cannot correct practices that beset the industry by the incisive tactic of eliminating the practices whether legal or not. Such summary remedies may be effective and in accord with the consensus of the industry, but if the practice in question is a legal one which is simply being abused, its excision by agreement among the members would work to eliminate competition and will not be permitted even though dressed in the garb of a code of ethics.

III.

With the exception, then, of situations such as these, we may assume that the association knows how to avoid such obvious pitfalls and pass on to a code containing provisions designed to allow the association, or an "ethics" committee of the association, to enforce its legal provisions. Generally, this involves the establishment of a procedure for reporting violations, hearing the evidence and arguments, making findings, and assessing penalties. In short, the industry group which would enforce its own code or conduct self-regulation must establish its own private judicial machinery for that purpose. This brings us then right down to the crux of the matter, for if an association can go this far in enforcing industry codes, it can go about as far as any association could ever wish.

While an association's weapons for discipline or the penalties it can enforce against those who violate the code are few, they can be effective enough to accomplish the purpose and certainly to raise the antitrust questions with which we are concerned. Generally speaking, the code can provide for the imposition of fines, denial of membership to those nonmembers who do not comply, and expulsion of members who violate the code. Publicity may or may not be given such disciplinary actions; if it is, it only serves to make the penalty more severe. If the association has a seal which is an aid in the sale of the industry's products, it may deny its use to those who fail to comply.³⁷

As one writer has stated, in speaking of the ways in which a trade association is limited by the antitrust laws in establishing and applying its membership qualifications, "There is no simple, pat answer to this question, but perhaps the best and safest general rule is that the greater the business

³⁶ *Sugar Institute v. United States*, 297 U.S. 553, 599 (1936).

³⁷ *See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

advantage of membership in an association, the less control the association may exercise over its membership policies.”³⁸ So, while in a technical sense the antitrust laws do not become operative unless membership is necessary in order to engage in effective competition, if denial of membership places one at a competitive disadvantage, the association’s activities in this regard will become particularly suspect.³⁹ The imposition of fines, particularly if the payment of such is a condition to the retention of membership, and any attendant publicity given to disciplinary actions, as well as denial of the use of a seal, would come under the same close scrutiny.

Thus it can be seen that an association is not without an adequate arsenal of weapons to make its regulations effective. Of course, if an association is so weak and ineffective that membership is of no consequence to the members of the industry, the same antitrust principles might not come into play.⁴⁰ But under those circumstances, the association’s attempt at regulating industry practices would then be a futile act, and so we can safely dismiss such situations from further consideration.

From what has been said so far, it might be assumed that the contrary is true and so long as the regulatory efforts of the association are designed to eliminate actual trade abuses those efforts would automatically be held legal. Any association inclined to rest its future on this premise would be likely to find that it had indeed leaned upon a slender reed if it would but read the Supreme Court’s opinion in *Fashion Originators’ Guild of America v. FTC*.⁴¹ There a group of textile and garment manufacturers adopted a scheme whereby textiles were to be sold to garment manufacturers only upon the condition that such buyers would not use or deal in textiles which had been copied from designs of members of the combination. In short, the members had organized a boycott of customers who practiced “style piracy.” After making the obvious point that the combination constituted an illegal boycott and so “the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination,”⁴² the Court concluded by stating:

In the second place, even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in com-

³⁸ Bodner, *Antitrust Restrictions on Trade Association Membership and Participation*, 54 A.B.A.J. 27, 28 (1968).

³⁹ See *Associated Press v. United States*, 326 U.S. 1 (1945).

⁴⁰ See FTC Advisory Opinion No. 119, 3 TRADE REG. REP. ¶ 17,907 (1967).

⁴¹ 312 U.S. 457 (1941).

⁴² *Id.* at 468.

binning together to regulate and restrain interstate commerce in violation of federal law.⁴³

On this same point, the Court of Appeals had already observed, when the case was being decided at that level, that

[c]ertainly it is not true that the lawfulness of every combination depends upon whether it "reasonably" corrects trade "abuses"; there are some combinations that nothing will excuse. The accepted rubric for this is that when the means are unlawful per se, the purposes of the confederates will not justify them.⁴⁴

Thus, in this field the ends will not justify the means, and we may thereby derive a corollary rule that a private group may not employ illegal methods even to rid the industry of admittedly illegal practices. It is not enough that the practices to be eliminated must fall within the broad and somewhat vague category of "trade abuses." The methods employed to correct them must also be legal. *Fashion Originators' Guild* settles the point that a group boycott, which is itself a per se illegal practice, may not be used no matter how reprehensible the abuses may be. One might almost formulate a rule from this that self-regulation is permissible only where legal methods are employed to eradicate illegal practices. Absent either element, the endeavor may well be subject to antitrust challenge.

However, in a sense this merely states the problem, for we must still continue our search for the answer to the question as to which methods are illegal and which, if any, are legal before we can arrive at any sort of conclusion as to what an association can do in the way of effective self-regulation. As usual with such matters, it is easier to determine what the association may not do, which is an area charted by the cases, than it is to ascertain what it may do, which is an area where few judicial guidelines exist.

Thus, still on the negative side, we may look at the result reached in *Union Circulation Co. v. FTC*.⁴⁵ There the court upheld a Commission order banning an agreement among magazine subscription selling agencies that each would not hire any solicitors who had been employed by other agencies during a certain period, usually the preceding year. While the court did not conclude that this "no-switching" agreement was a per se illegal boycott in the conventional sense, it did find that the reasonably

⁴³ *Ibid.*

⁴⁴ *Fashion Originators Guild of Am. v. FTC*, 114 F.2d 80, 84 (2d Cir. 1940).

⁴⁵ 241 F.2d 652 (2d Cir. 1957).

foreseeable effect of the agreement would be to impair or diminish competition between existing agencies and to prevent would-be competitors from engaging in similar activity. Hence the court found the agreement to be harmful to competition and therefore an unreasonable restraint of trade. It is also interesting to note that the court disposed of the claim that the agreements were intended to affect only those crew members who have a record of deceptive selling practices by stating that "[t]he petitioners cannot be left to police the magazine-selling industry by a method as ripe for abuse as that offered by such agreements."⁴⁶

It is interesting to note, in connection with the future development of this article, that the court also refused to permit application of the agreement to such solicitors and stated that "[t]he Commission properly refused this request, pointing out that the application and effects of an agreement so restricted had not been explored by it, and thus there was no evidence in the record by which the reasonableness of such a hypothetical agreement could be tested."⁴⁷ Obviously, the crucial unknown fact bearing on the reasonableness of this proposal was how and by whom a decision was to be reached as to when a salesman was guilty of deceptive selling practices.

It would also be well to note that the method employed for enforcing the association's efforts does not have to be expressly stated in illegal terms, for its illegality can be presumed from the nature of things. Thus in *Eastern States Retail Lumber Dealers' Association v. United States*,⁴⁸ the retailers were confronted with wholesalers who sold direct to consumers. They compiled and circulated names of those wholesalers engaged in the practice. While finding that there was no agreement among the retailers to refrain from dealing with listed wholesalers, the Court added that

the circulation of such information among the hundreds of retailers as to the alleged delinquency of a wholesaler with one of their number had and was intended to have the natural effect of causing such retailers to withhold their patronage from the concern listed.⁴⁹

Along the same lines is a Commission advisory opinion in response to a request by a trade association of wholesalers of rebuilt products for comment as to the legality of a proposed resolution suggesting certain conduct to the trade association of rebuilders who supply the wholesalers.⁵⁰ The reso-

⁴⁶ *Id.* at 658.

⁴⁷ *Ibid.*

⁴⁸ 234 U.S. 600 (1914).

⁴⁹ *Id.* at 609.

⁵⁰ FTC Advisory Opinion No. 15, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17, 456 (1966).

lution would have provided that rebuilders should give wholesalers 120 days' notice in writing of any change in the allowance to be granted for used products to be turned in for rebuilding purposes; that during this period the wholesalers should receive credit at the old rate on such returned products; and that the rebuilders should incorporate a 30% gross profit for the wholesalers when establishing prices for the used products in view of the fact that the wholesalers give an allowance to the retailers who turn in the used product for rebuilding purposes. The association added that there was no agreement not to do business with those rebuilders who declined to follow the practices contained in the resolution.

The Commission took the position that it could not give approval to the adoption of the resolution, which, though it may be motivated by the desire to remove evils affecting the industry, appeared to go further than was reasonably necessary to accomplish such result. Even if accompanied by disclaimers, there was implicit in the resolution too grave a danger that it would serve as a device whereby the concerted power of the members of the association would be brought to bear to coerce the members of the rebuilders trade association to conform their pricing policies to the restrictive standards of the resolution, or at the very least as an invitation to enter into agreements among themselves to do so.

IV.

So far we have been concerned primarily with the legality of the objectives of attempted self-regulation and with the legality of the methods employed to make that attempt effective. If the methods used do not fall within one of the categories which have been determined to be per se illegal under the antitrust laws, such as group boycotts, we have concluded that legality will be determined under the rule of reason. In applying this rule down through the years, one cardinal principle has been enunciated several times by the courts which, despite its overriding importance, is being more and more ignored in current writings on the subject, as though the writers knew it existed but preferred to pretend it was not there or at least that it would go away.

In brief, our courts and agencies have been concerned for years that private groups which assume regulatory functions backed by coercive powers are in reality taking unto themselves the power of the sovereign in a manner never contemplated under our system of law. While the groups may claim that they are filling a vacuum created by the Government's failure to regulate to the extent necessary, nonetheless this view would hold that the

group is usurping the silent power of the people by attempting to do that which only the people themselves can do. The Court, in *Fashion Originators' Guild*, stated the principle in this manner:

In addition to all this, the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extrajudicial tribunals for determination and punishment of violations, and thus "trenches upon the power of the national legislature and violates the statute."⁵¹

Further, we might look at the language of the court in *Northern California Pharmaceutical Association v. United States*,⁵² for another eloquent statement of the same principle:

And far from suggesting that public regulation be instituted, appellants suggest that they should be permitted to carry on that regulation with no public overseer. It is precisely such use of uncontrolled private economic and quasi-political power in the market place which the Sherman Act condemns. Such regulatory power, if it is to exist at all, resides under our system in democratically controlled legislatures. The Sherman Act forbids appellants to appropriate a segment of that sovereign power to their private association.⁵³

Responsible government officials are also greatly troubled by this basic and fundamental question during the current popularity wave which industry codes are enjoying. Thus the Chairman of the Federal Trade Commission had occasion to pose certain key questions as recently as 1966 when he stated:

The question then arises as to whether an industry is privileged to crack the whip on the illegal few within it. What kind of discipline is acceptable? Who is to be the judge and jury? What assurance is there that the assessment of the facts will be impartial? And will the accused have a fair chance to defend himself? These are serious questions. . . . Thus, should any industry interpret self-policing as conveying the privilege to mete out justice to offenders without due process of law, far more would be lost than gained. That is why I say that self-policing must be reinforced by governmental authority. For the advertising industry to set up high ethical standards . . . is all to the good, and to

⁵¹ 312 U.S. at 465.

⁵² 306 F.2d 379 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962).

⁵³ *Id.* at 385-86. *See also* FTC v. Wallace, 75 F.2d 733 (8th Cir. 1935).

adhere to the standards is even better. Indeed, such self-restraint serves to focus attention on those few who are out of step. They may even become so uncomfortably conspicuous that they will mind their ways. But if they don't and persuasion fails, it is not your privilege to discipline them. Such is the sole responsibility of governmental authority—local, state or national.⁵⁴

Further, the head of the other government agency directly concerned with these matters, the Assistant Attorney General, Antitrust Division, also recently felt constrained to write along the same lines:

In discussing collaboration among competitors which regulates or limits their competition in particular ways, I have been considering only *voluntary* adherence by the competitors themselves to agreements of one sort or another. I have not been discussing the question of sanctions that might be imposed within the group for failure to comply with the agreement; the more so, I have not been discussing sanctions effected through pressure on outside parties with whom the group deals. For good reasons, the law has always been suspicious of the potential abuse in private government of economic activity enforced by sanctions. Therefore, the use of sanctions within and without the group raises quite separate questions. . . . In short, the imposition of sanctions is indeed an assumption of legislative power by a private group which is likely to be intolerable under all but the most extreme circumstances.⁵⁵

One might well ask during this era of good feeling towards the concept of self-regulation, when to oppose an industry code now appears to be the equivalent of being in favor of sin and against the American way of life,⁵⁶ why these key government officials are so troubled, as have been the courts before them, by what on the surface at least appears to be such an eminently reasonable and typically American approach to a difficult problem. It is here submitted that at least part of the reason lies in the fact that in their zeal to correct real or imaginary abuses through the medium of codes, industry groups often see fit to incorporate enforcement provisions which, if

⁵⁴ See The Precious Ounce of Prevention, Address by Paul R. Dixon, FTC Chairman, before the Advertising Association of the West, Spokane, Wash., June 28, 1966.

⁵⁵ Turner, *Cooperation Among Competitors*, 61 Nw. U. L. REV. 865, 870-71 (1967). See also *Community Blood Bank, Inc.*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,728, at 23,041 (FTC Dkt. No. 8519, 1966) (Elman, Comm'r, dissenting):

For, it is felt, the application of sanctions to unethical and even unlawful business conduct should be left to the orderly processes of the law, not to vigilante action—however justifiable such action may seem in the circumstances—by private individuals or firms who, acting concertedly, enjoy great power.

⁵⁶ See The Washington Post, *supra* note 3.

not clearly illegal, fall squarely upon the borderline between permissible and illegal conduct. This stems from a very natural desire on the part of the members to put an effective code into operation and from a belief that no one knows better than themselves what the abuses in the industry are or how to correct them.

Experience has taught that private enforcement agencies, no matter how well intentioned, frequently enforce their own conception of what is desirable rather than adhering closely to the requirements of law, as a government agency or a court would be required to do. This is inherent in their very nature, for the only restraint to which they are subject is that which their own good sense, reason, and prudence require them to impose upon themselves; and, it is submitted, no American citizen should be forced to submit his business future to such a panel. The growth of missionary zeal seems to frequently accompany the uncontrolled exercise of power to the extent that the one possessing it begins to confuse power with right and takes actions the law would not otherwise permit. Benefits to the public in the form of improved practices may result, but these benefits are hardly worthwhile when obtained at the price of the individual freedom of those who are powerless to resist.

This becomes particularly true when the group is administering and enforcing a code usually drafted in broad, general language. General rules give general guidance, but the real test of any rule is the manner in which it is given specific application to concrete situations. To say that members must avoid misrepresentation of products states the general rule, but the rule has no real life until one says what constitutes misrepresentation under a given set of facts. This involves a process of interpretation which must be performed with great care and in accord with legal processes, since individual rights are drastically affected thereby. As the Commission itself was compelled to observe in another advisory opinion:⁵⁷

Were a private group to assert this power for itself it would mean that the judicial process of interpretation and enforcement would be carried on without the carefully developed safeguards which the law normally imposes upon the process. Unlike the government agency and the courts, the only restrictions private bodies are subject to are those restrictions they see fit to impose upon themselves.⁵⁸

Perhaps what troubles responsible officials the most about the private

⁵⁷ FTC Advisory Opinion No. 59, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,573 (1966).

⁵⁸ *Id.* at 22,845.

approach to law enforcement is the lack of a right of appeal to duly constituted courts of law. A compulsory code deprives one of the right to test administrative interpretations which are incorrect. When an administrative agency acts, it acts subject to review by the courts, and if its action is demonstrably wrong, arbitrary, or unsupported by adequate evidence, the appellate courts are there to correct the error and protect the victim. Nor would this defect appear to be corrected by a theoretical right of the individual to bring suit in the courts to enjoin the illegal action. If the joint action constitutes a restraint of trade, the individual would be entitled to the protection of the antitrust laws before and not after he has been victimized by an illegal procedure. No matter how reprehensible the conduct of the individual may be as a matter of provable fact, he has a right to have his actions initially judged according to law and not by vigilante action.

V.

Lest this point should appear so obvious that the reader is led to wonder why it is being treated at such length, an examination of contrary positions is now in order. Certainly, writers in the field have not been of one mind on the subject, particularly of late when self-regulation has come more in vogue than ever before. Thus one recent article has authoritatively taken the position that exclusionary measures designed to enforce schemes of self-regulation are permitted when justified by public policy or when essential for efficient operation of an entire industry.⁵⁹ According to this writer, a trade group has not wrongfully assumed the role of a private government if a strong public policy encourages the disciplinary measures it seeks to impose and if collective action is inherent in the basic nature of the industry.⁶⁰ Another writer argues that courts have specifically approved the right of an association to establish discipline and enforce disciplinary provisions even when they result in the elimination of competition.⁶¹

Subscribers to this point of view rely upon a number of precedents, the first of which is the cases that have arisen in the field of professional sports. Under their league constitutions, the administrators who run the various professional sports undeniably possess great power which they have from time to time used to expel players from participating. Generally, these disciplinary actions, which have had the obvious effect of denying to the player the means of making a living in his chosen profession, have been

⁵⁹ Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966).

⁶⁰ *Ibid.*

⁶¹ See Bodner, *supra* note 38.

upheld by the courts. Thus in *Molinas v. National Basketball Association*,⁶² a decision much cited to this end, a professional basketball player was suspended from playing because he admitted betting on games in which he was participating. The suspension was under a clause in his contract and a league rule prohibiting gambling. The court held the suspension was not unreasonable, as the rule was necessary for the survival of the league, adding that while such rules may be a restraint they do not necessarily run afoul of the antitrust laws.

Despite surface similarities, it would seem upon closer analysis that these cases furnish scant support to advocates of uncontrolled self-regulation. In the first place, the Supreme Court long ago ruled, in *Toolson v. New York Yankees*,⁶³ that Congress has not seen fit to bring the business of baseball under the antitrust laws and the business had been left free for thirty years to develop on the understanding that it was not subject to existing antitrust laws. In the Court's view, if there are evils in this field which warrant the application to it of the antitrust laws, it should be done by legislation. While the courts have subsequently ruled that other sports such as football,⁶⁴ basketball,⁶⁵ and boxing⁶⁶ do not enjoy the same immunity, it would appear from the subsequent holdings that the lower courts are reluctant to apply a different rule when to do so would as a practical matter leave baseball in an inexplicable favored position.

It is submitted here that it is exceedingly unwise to generalize from cases dealing with professional sports, particularly where gambling is involved, for in such instances courts will go the extra mile to uphold the action of the league. Generalizations here are even more unwarranted when one considers the disparity between sports and an ordinary commercial enterprise operated for a profit. The two simply cannot be equated to a point where the precedents in one area can be said to apply with anything like equal force in the other. Groups that wield economic power or exist solely for economic purposes have almost uniformly been held to a higher standard than non-economic organizations.⁶⁷

It is not so easy to explain the case of *Hughes Tool Co. v. Motion Picture Association of America, Inc.*,⁶⁸ except that it was an unappealed District

⁶² 190 F. Supp. 241 (S.D.N.Y. 1961).

⁶³ 346 U.S. 356 (1953).

⁶⁴ See, e.g., *Radovich v. National Football League*, 352 U.S. 445 (1957).

⁶⁵ See, e.g., *Washington Professional Basketball Corp. v. National Basketball Ass'n*, 147 F. Supp. 154 (S.D.N.Y. 1956).

⁶⁶ See, e.g., *United States v. International Boxing Club*, 348 U.S. 236 (1955).

⁶⁷ See *States Marine Lines, Inc. v. FMC*, 376 F.2d 230 (D.C. Cir. 1967).

⁶⁸ 66 F. Supp. 1006 (S.D.N.Y. 1946).

Court opinion and represents a highly unusual treatment of the problem. There an independent movie producer was denied an injunction against revocation by the association of its seal of approval which had previously been granted to plaintiff's motion picture *The Outlaw*. The motion picture code represents self-regulation carried to the ultimate, for the association's seal was vital. Without it a producer at that time could not show his film in 90% of the country's theaters. The association had absolute control of its use and also controlled all advertising of films bearing the seal. The court, which cited no applicable law, seemed to feel it was a fine thing for community morals. But the court also hedged its opinion by saying that Hughes had signed the contract with the association and it was not inherently illegal. That being so, it was enforceable even though one of the parties might be violating the Sherman Act. Also the court added that if the seal contract can be said to be illegal because of the conspiracy, Hughes could not both enforce it and attack it as he was attempting to do. Both parties to it seemed to the court to be *in pari delicto* and in such a case the court would not lend its aid to either. Thus the court employed a technical escape and avoided the real issue.

In *Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co.*,⁶⁹ the plaintiff claimed a fire loss and was paid by his insurance company. After investigation by the National Board of Fire Underwriters and a report to the member companies, none would insure the plaintiff, who was a bad risk. The court held this was not per se illegal and that it was reasonable, as the companies could employ some method to protect themselves against bad insurance risks. But even in this relatively clear-cut situation the court hedged a bit by finding that the effect upon commerce of this one controversy was so trifling it could not be characterized as unreasonable.

A significant recent decision was handed down in the case of *Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Association*.⁷⁰ FTD was a voluntary association of leading florists in each city which exchanged orders between cities. FNTDN membership was limited to one member of FTD in each city and did not exchange orders. It was a central purchasing agent and published a directory of its members who were represented to be the best in each city. FTD adopted rules providing (1) no member could allow his name to be used in a directory if the purpose was to influence other members on the list to exchange orders between themselves to the exclusion of other FTD members and (2) no member could advertise that he offered an exclusive service when other

⁶⁹ 195 F.2d 86 (7th Cir. 1952).

⁷⁰ 371 F.2d 263 (7th Cir. 1967).

FTD members in the area offered the same service. FNTDN suffered a decline in membership and sued for damages and an injunction. The jury awarded damages but the District Judge refused to issue the injunction.

The Court of Appeals affirmed the District Judge and reversed the award of damages, holding that if an association could establish its rules were reasonable methods of self-protection against activities of another association, the second association was barred from recovery and injunction. If FTD could establish FNTDN misused FTD's clearing house so as to boycott FTD members who were not members of FNTDN, such a defense would bar recovery, for there can be no recovery by the original offender in a case in which his illegal acts were merely sought to be offset under the rule of *Union Leader Corp. v. Newspapers of New England, Inc.*⁷¹ Then the court added that under the rule of *Board of Trade v. United States*,⁷² an association has the right to enact reasonable regulations governing the trade practices of its members.⁷³

Advocates for the view that industry groups now have greater freedom than ever to engage in compulsory self-regulation unquestionably received their greatest encouragement from the interpretations which have been placed upon the decision of the Supreme Court in *Silver v. New York Stock Exchange*.⁷⁴ The Securities Exchange Act placed a duty upon stock exchanges of self-policing, which included the obligation to formulate rules governing the conduct of exchange members and to expel, suspend, or discipline members for conduct "inconsistent with just and equitable principles of trade." Pursuant to this authority, the Exchange terminated the wire services of two over-the-counter brokers without explanation and without a hearing. The Court found that the absence of a hearing rendered the action illegal, but it did not question the right of the Exchange to regulate the brokers.

Along the way, the Court had much to say about self-regulation which, as noted above, seems to form the chief foundation for the conclusion reached by many that compulsory self-regulation is permissible under the present state of the law. It would then be well worth our time to see if *Silver* actually furnishes enough support to hold up all of those who are now leaning on it. After demonstrating how vital the wire services were to such brokers, the Court observed that these important business advantages were taken away

⁷¹ 284 F.2d 582 (1st Cir. 1960).

⁷² 246 U.S. 231 (1918).

⁷³ See also *United States v. Allied Florists Ass'n*, 1952-53 Trade Cas. ¶ 67,433 (N.D. Ill. 1953); *United States v. Florists' Tel. Delivery Ass'n*, 1956 Trade Cas. ¶ 68,367 (E.D. Mich. 1956).

⁷⁴ 373 U.S. 341 (1963).

by the group action of the Exchange and its members and "[h]ence, absent any justification derived from the policy of another statute or otherwise, the Exchange acted in violation of the Sherman Act."⁷⁵ The difficult problem here arises from the need to reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating self-regulation which may well have anticompetitive effects in general and in specific applications, the Court stated.

The Court found the Securities Exchange Act contains no express exemption from the antitrust laws and that repeal is to be regarded as implied only if necessary to make the Act work and even then only to the minimum extent necessary. While the Act empowers the Securities and Exchange Commission to compel changes in the rules of the Exchange, it does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules. This, the Court found, means that the question of antitrust exemption does not involve any problem of conflict of coverage with the agency's regulatory power. There is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends. Enforcement of exchange rules may well, in given cases, result in competitive injury when the imposition of such injury is not within the scope of the Act, and "[s]ince the antitrust laws serve, among other things, to protect competitive freedom, *i.e.*, the freedom of individual business units to compete unhindered by the group action of others, it follows that the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable."⁷⁶ Then the Court again observed that

[t]he entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act.⁷⁷

It is difficult, if not impossible, to find here support for a general public policy in favor of compulsory self-regulation, particularly where the phrase "or otherwise," contained in one of the quotations set forth above, is employed for that purpose.⁷⁸ To lift this phrase out of the context in which

⁷⁵ *Id.* at 348.

⁷⁶ *Id.* at 359.

⁷⁷ *Id.* at 360.

⁷⁸ See Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966).

it was uttered will not supply us with a vehicle capable of carrying us that far. The proper process to employ in interpreting judicial opinions is not to dissect each word or phrase in order to arrive at a construction which supports a given result. Instead, one should make a fair effort to grasp the meaning of the opinion taken as a whole and then apply it to the problem at hand.

Applying this principle to the *Silver* decision, one can fairly deduce several points. First, Congress may in its own discretion express a policy in favor of self-regulation in a given industry and implement that policy with appropriate legislation. Second, in the absence of some other form of review being established, the antitrust laws will serve as an effective check on abuse of the power of regulation so granted. Third, such regulation must be accompanied by procedural safeguards, including notice and an opportunity for hearing. Fourth, and most important for our purposes here, absent some such express authorization such activities on the part of an industry group may well constitute a violation of the antitrust laws. One is constrained to say to any group which would rely upon this decision as authority for its regulatory activities that it had best get itself a law passed first else it will find its activities adjudged under less predictable circumstances.

Even less understandable are the efforts to convert the landmark opinion in *Associated Press v. United States*⁷⁹ into at least an implied endorsement of compulsory self-regulation. Stripped to its essentials, the *Associated Press* case involved the adoption of By-Laws which effectively excluded nonmembers from access to AP news and which made it virtually impossible for newspapers which competed with members to gain membership in AP. All members had to consent to be bound by the By-Laws and severe disciplinary action could be taken by AP for violations, including a fine of \$1,000 and expulsion. Such actions were to be final and no member had the right to question the same. The Government's case was directed against the exclusionary nature of these By-Laws and their stifling effect on competition and tendency towards monopoly. No charge was made against the disciplinary provisions as being themselves a violation of law. They were treated as a part of the whole.

The Court upheld the District Court's holding that the By-Laws in and of themselves were contracts in restraint of commerce, quoting *Fashion Originators' Guild*⁸⁰ for the proposition that "the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals

⁷⁹ 326 U.S. 1 (1945).

⁸⁰ *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941).

for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'"⁸¹ Further, the Court found that the publishers had surrendered themselves completely to the control of the association. Therefore the restraint could not be found to be within the Sherman Act. In short, the whole operation was held to suppress competition. No mention was made of the individual by-laws standing alone for the simple reason that they did not stand alone.

More substantial support can be found by the proponents of compulsory self-regulation in the opinion of the Court of Appeals in *Cowen v. New York Stock Exchange*.⁸² There the court found, in another case involving the Exchange's rules, that the Exchange did not need to give the plaintiff a hearing, since he had admitted the violation and that this did not do violence to the *Silver* holding. The court then saw fit to add the statement that "[i]ndeed, even absent a statutory duty of self-regulation such as that under the Securities Exchange Act, similar self-regulatory activities involving refusals to deal have been held not to violate the antitrust laws,"⁸³ citing *Deesen v. Professional Golfers' Association*⁸⁴ and the Columbia Law Review Note.⁸⁵ We have previously had occasion to examine the dangers of generalizing from cases involving professional sports, and the theories advanced in various other law review articles have also been discussed above. However, it can be said with some justification that there is a recent tendency on the part of some courts to look with sympathy upon efforts by various industries to regulate themselves, although most of the statements evidencing that sympathy are pure dictum, as in *Cowen* and the *Nationwide Telephone Delivery* case involving a plaintiff which could not approach the court with clean hands.

VI.

Of great significance to the development of the law here is a recent Federal Trade Commission advisory opinion dealing with a code proposed by a group of producers of products sold by door-to-door salesmen employed by independent sales agencies to govern the practices of the agencies and the salesmen.⁸⁶ The code provided for the appointment of an Administrator who would be empowered to impose fines against any of the agencies if he found that they had authorized, condoned, or in any way supported decep-

⁸¹ 326 U.S. at 19.

⁸² 371 F.2d 661 (2d Cir. 1967).

⁸³ *Id.* at 664.

⁸⁴ 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966).

⁸⁵ *Supra* note 78.

⁸⁶ FTC Advisory Opinion No. 128, 3 TRADE REG. REP. ¶ 17,950 (May 23, 1967).

tive practices by their sales and collection representatives. The maximum amount of fines had been limited to an amount which in the Commission's judgment would not operate anticompetitively or in a confiscatory manner but would be sufficient to constitute a deterrent.

Further, in the code, as modified following an earlier submittal, the agreement between signatory agencies not to employ a person found to be a willful violator in a sales capacity for a period not to exceed one year was eliminated. In its place the code provided that the Administrator, upon finding that a person had willfully violated the code, should recommend that he not be employed in a sales capacity for a period not to exceed one year. However, it was further provided that an agency should use its own discretion in deciding whether to follow the recommendation of the Administrator.

In order to find a person to be a willful violator it must have been determined that on three separate occasions he violated the code with knowledge that his representations were in violation of the code. Moreover, if an agency repeatedly condoned or authorized violations by its salesmen, it could be subject to expulsion from participation in the code.

Finally, in order to insure greater participation in the administration of the code by the agencies than was the case in connection with the original submittal, the code provided that the Administrator would be responsible to a Board of Directors composed of six agencies and one producer. Of the six agencies, at least two could not be affiliated with any agency. Appeals from actions of the Administrator could be taken as a matter of right to a committee composed of representatives of at least three participating agencies, at least one of which was not to be affiliated with a producer. A new committee was to be appointed each month and its members were to be rotated from among signatory agencies.

The Commission advised that it had given this code very careful consideration in view of the magnitude of the problems which confronted the industry and the obvious sincerity of the industry in attempting to devise ways to cope with those problems. Even taking all these factors into consideration, however, the Commission was unable to give its approval to those sections of the code which applied to the salesmen because it believed the probable result of the Administrator's recommendation would be to substantially interfere with those individuals' right of employment and their right to have their fate decided by their individual employers uninfluenced by virtually mandatory recommendations from the Administrator.

However, the Commission did not believe that this called for outright rejection of the code if the provision was eliminated, and in its place the

Commission would not object to the maintenance by the Administrator of a public record of the names and circumstances respecting a finding of a willful violation. The Commission further expressed the view that since greater participation of the agencies had been assured, it was possible to apply the code to the producers and agencies in such a manner as not to do violence to the antitrust laws, particularly if the element of coercion could be truly eliminated insofar as the agencies were concerned when they were arriving at their decision as to whether to join or whether to remain under the code after having joined. The Commission emphasized that this conclusion was a tentative one, since there was little recorded experience upon which to predicate such a judgment. Therefore, the opinion was based on

the understanding that there will be no coercion of any agency to subscribe to the plan, no coercion of any agency to remain in it after it has subscribed and no retaliation of any kind against any agency which does not choose to join or which subsequently elects to leave after having joined.⁸⁷

The opinion concluded by advising the industry that approval was extended for a three-year period, following which the industry should resubmit its request; and, in the meantime, the Administrator must submit reports to the Commission of each complaint which was received, considered, or investigated and of each action taken. Further, the opinion was rendered with instructions to the staff of the Commission to initiate periodic inquiries after the plan had been put into effect to determine and report to the Commission as to how it was actually working.

To place this matter in its proper relation to the scheme of things, one must take a close look at what the Commission actually did in its opinion. First, such approval as was given was tentative in nature and for a limited period of time and subject to intervening supervision by the agency. In a sense, the Commission authorized a laboratory experiment in self-regulation, but with the important reservation that the government would act as the public's overseer to see that the great purposes of the antitrust laws were not neglected during this test of the industry's efforts to itself correct acknowledged abuses in a lawful manner. It may well be that the Supreme Court itself had something of this nature in mind in its *Silver* decision when it stated, after observing how easy it was for groups with such power to bring about competitive injury, that

⁸⁷ *Id.* at 20,329.

[s]ome form of [judicial] review of exchange self-policing, whether by administrative agency or by the courts, is therefore not at all incompatible with the fulfillment of the aims of the Securities Exchange Act. Only this year S. E. C. Chairman Cary observed that "some government oversight is warranted, indeed necessary, to insure that action in the name of self-regulation is neither discriminatory nor capricious."⁸⁸

The applicability of this language to the present problem is somewhat diminished by the fact that the self-regulation there was specifically authorized by statute. But it would seem to apply where an administrative agency determines that it will permit some measure of self-regulation on an experimental basis. Certainly the industry's regulators should not be turned loose on the members without some form of government supervision.

Second, careful notice should be taken of the emphasis which the Commission placed on the need for eliminating the element of coercion in persuading the agencies to join or to stay in after having joined. In short, the agencies' participation in and submittal to the code must be completely voluntary as a condition for Commission approval. This step alone would seem to have taken much of the sting from this code from an antitrust point of view. While prior cases may not have so articulated the governing principle, there runs all through those opinions the basic objection that businessmen were being compelled to submit to regulatory measures being adopted by their competitors which they were powerless to resist.

The antitrust laws are by their very nature opposed to nongovernmental forces which compel a businessman to act against his will.⁸⁹ This is particularly true if the coercive forces have the effect of eliminating any form of competition. The point here is not that the absence of coercion can render an otherwise illegal agreement legal, which it cannot. The point is that the presence of coercion can render an otherwise legal agreement illegal. Thus if we apply the rule of reason to self-regulation, the presence or absence of coercion of those subject to the regulation can become very material, if not crucial, to the judgment of the legality of the regulation.

The materiality of this element can also be clearly deduced from the Commission's action in permitting the provision for fines to stand after finding they were not large enough to operate in a confiscatory manner. Assuming the objectives of the code are lawful and that no member is

⁸⁸ *Silver v. New York Stock Exchange*, 373 U.S. 341, 359 (1963).

⁸⁹ See *The Atlantic Co.*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,488 (FTC Dkt. No. 8677, 1966) where the consent order prohibited coercion in any manner to compel others to engage in any acts or practices relating to the conduct of the latter's business. Cf. *Goldlawr, Inc. v. Shubert*, 268 F. Supp. 965 (E.D. Pa. 1967).

compelled to participate, the fact that fines were to be imposed did not operate to prevent the experiment. As the Court of Appeals had observed some years before in its opinion in *Tag Manufacturers Institute v. FTC*,⁹⁰ in speaking of a similar provision in a statistical reporting agreement:

If the reporting commitments they are designed to buttress are otherwise lawful, the agreement does not become a violation of the anti-trust laws or the Federal Trade Commission Act merely because the reporting plan is accompanied by a penalty provision which would not be legally enforceable.⁹¹

Taking all of these factors into consideration, we are faced with the interesting question which has been posed and to some extent answered by this opinion whether, assuming proper government supervision, a group of competitors can voluntarily submit themselves to this sort of regulatory mechanism.

SELF-REGULATION BY ADVERTISING ASSOCIATIONS, CLUBS, AND BUREAUS AND BY ADVERTISING MEDIA

It has seemed most logical to treat the Advertising Advisory Committee's categories three and four together in this discussion, for it is when they come together in actual practice that very grave antitrust questions arise as a result of the union. Little time need be spent in establishing that the various advertising media, whether they be newspapers, magazines, broadcasters, etc., can control the content of their publications and reject advertising on a nondiscriminatory basis which is considered illegal or objectionable if the media do not possess monopoly power and if they are acting according to the dictates of their own independent judgment.⁹² Joint action of one kind or another is our concern here, not the exercise by a single newspaper or other medium of its undeniable right to refuse to accept advertising considered objectionable.

The legal principles applicable to self-regulation by advertising associations, clubs, bureaus, and related organizations are much the same as those discussed above in connection with industry groups such as trade associations. The same is true with respect to media when acting in concert with

⁹⁰ 174 F.2d 452 (1st Cir. 1949).

⁹¹ *Id.* at 461. We need not be diverted here by the question of whether the fines would or would not be collectable at law. It is for certain the antitrust agencies would not undertake to collect them.

⁹² See FTC Advisory Opinion No. 93, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,717 (1966). See also Baum, *Self-Regulation and Antitrust: Suppression of Deceptive Advertising by the Publishing Media*, 12 SYRACUSE L. REV. 289 (1961).

other media or with other associations, clubs, or bureaus, for then the media would not be acting according to the exercise of their own independent discretion as to the advertising which they will accept, but would instead be part of a collective action affecting the rights of others with all the coercive powers which such a combination is capable of bringing to bear.⁹³ The primary distinction is undoubtedly a practical one, for such combinations as this are peculiarly effective in making their regulatory power felt. In short, those subject to the regulations either comply or they do not advertise.

Again a Federal Trade Commission advisory opinion has gone right to the heart of the problem in response to a request for a ruling as to the legality of a proposed private group advertising review board to control advertising practices in a particular locality.⁹⁴ The review board was to consist of representatives of business and trade groups in the area, and its function was to consider complaints of violations of advertising standards established by the organization representing such business and trade groups. Hearings were to be conducted by a panel of seven or more members of the board, none of whom were to be in direct competition with the advertiser. This procedure was to be invoked only after other efforts to correct the practice had been exhausted. Decisions on the merits of each case were to be made by the panel and were to be considered as setting precedents for succeeding panels. Where an advertiser had been cited by a panel for violating the standards and failed to comply within a specified time, a letter was to be sent to local media requesting them to require the advertiser to comply with the decisions of the panel.

Although expressing sympathy with the laudable motives of the group, "the Commission advised that 'approval cannot be given the proposed Advertising Review Board in its present form. Long ago the courts recognized that voluntary action to end abuses and to foster fair competitive opportunities were in the public interest and could be even more effective than legal processes. However, the law has also long recognized that this right of businessmen to police themselves is not without limitations and is certainly not a license for private groups to employ illegal methods in the pursuit of desirable objectives.'" ⁹⁵ The Commission then added this significant comment:

⁹³ See *Chamber of Commerce v. FTC*, 13 F.2d 673, 686 (8th Cir. 1926): "[P]ublications might be restrained where they were instruments in carrying out a boycott or a conspiracy."

⁹⁴ FTC Advisory Opinion No. 59, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,573 (1966).

⁹⁵ *Id.* at 22,845.

"[A]bsolute regulation of all advertising practices down to and including the determination of individual rights and the imposition of a penalty in the form of interference with the individual's right to advertise . . . is the ultimate authority which can only be exercised pursuant to legislative grant and subject to proper judicial review.

"Were a private group to assert this power for itself would mean that the judicial process of interpretation and enforcement would be carried on without the carefully developed safeguards which the law normally imposes upon the process. Unlike the government agency and the courts, the only restrictions private bodies are subject to are those restrictions they see fit to impose upon themselves."⁹⁶

Here then is a form of self-regulation approaching the absolute in power. We have only to assume that the media will honor the finding of the panel to make it total in nature.⁹⁷ Then a would-be advertiser is simply denied access to the advertising media until such time as he accedes to the wishes of the group. This again is the real crux of the matter. We have previously had occasion to refer to the missionary zeal with which the untrained can approach the attainment of their objectives once they become convinced the objective is worthwhile. If this can create real problems in the case of a trade association, membership in which may or may not be vital to the member's business future, it is even more true in the case of a group having the power to cut off the businessman's access to advertising media which is essential to the operation of almost any business.

Our whole judicial system is, of course, predicated upon the rather elementary assumption that judges can be wrong. Hence the right of appeal to higher courts is provided for in every jurisdiction. Thus, we do not need to assume that these groups will be actuated by bad motives or that they will be arbitrary or capricious. Sometimes they are.⁹⁸ Far more often, they are not. But they do not have to go so far. They only have to be wrong in their interpretation of the law to effectively prohibit advertising which the advertiser has a legal right to publish. If the Federal Trade Commission is wrong or arbitrary in its assessment of advertising, the aggrieved individual can seek redress in the courts. If a private enforcement group is wrong or arbitrary, the individual has virtually no recourse, except to the extent that he may be able to obtain injunctive relief. Hence, regulatory power should ultimately repose only in those legally constituted agencies

⁹⁶ *Ibid.*

⁹⁷ See ADVERTISING ADVISORY COMMITTEE TO THE SECRETARY OF COMMERCE, SELF-REGULATION IN ADVERTISING at 48 (1964) for description of so-called "Cleveland Plan."

⁹⁸ See *New Home Appliance Center, Inc. v. Thompson*, 250 F.2d 881 (10th Cir. 1957).

which can be made answerable for their actions. This is particularly true where, as here, the remedy to be employed by the private group is even more drastic than that invoked by the public agency. There is no more drastic remedy to a business dependent upon advertising than the denial of the right to advertise. Its devastating effect upon a discount retailer who, for instance, depends upon advertising lower prices in order to draw business away from old line department stores, should be readily apparent.⁹⁹

If what has been said above with respect to absence of some form of government supervision and the presence of coercion has any validity when applied to trade associations, it would seem to have as much if not more applicability to combinations of such agencies and the advertising media because of the relatively greater coercive power which those combinations can exert. Indeed, unless the victim is rescued by a difficult-to-obtain court injunction, the power which can be brought to bear is virtually irresistible. When viewed in this light, the central issue then comes more sharply into focus. Is it our wish that such a high degree of unregulated regulatory power should reside in nongovernmental private combinations?

To those who suffer from its effects, hard competition will often seem to be illegal competition and thus fairly subject to prohibition. Hence the fallacy of subjecting one to the judgment of his competitors. But to the objective judge guided only by the law, hard competition will appear only for what it is—hard competition. The system used must eliminate illegal competition and only illegal competition. The question of which system can do this best would seem to answer itself.

CONCLUSIONS

Mention was made at the beginning of this article of the fact that self-regulation is sometimes referred to as "a traditional American approach."¹⁰⁰ Another editorial¹⁰¹ conceded that there are aspects of self-regulation which could be construed as, in some sense, collusive and involving restraint, but went on to add:

In all probability the "public interest" involved here is so broad it is beyond the competence of the anti-trusters. Perhaps the time has come for some other public agency, capable of viewing the situation from a

⁹⁹ See *ibid.* Compare Laurent, *Regulating Commercials Is Difficult*, The Washington Post, Dec. 29, 1967, § A, at 15, col. 5, 8: "Usually if the Code Authority rules that a commercial is 'unacceptable,' it will not be carried by Code subscribing stations."

¹⁰⁰ See note 3, *supra*.

¹⁰¹ *Self-Regulation and Anti-Trust*, ADVERTISING AGE, July 11, 1966, at 20.

less restricted standpoint, to consider the role of self-regulation in modern society. If such a review shows that the anti-trust laws do not permit reasonable self-regulation, then perhaps some new laws are needed which give specific endorsement to self-regulation, and define the rights and responsibilities of those who engage in it.¹⁰²

There is some truth in all of these comments. Self-regulation is traditional with a people who pride themselves on their ability to manage their own affairs under a government which governs as little as possible. Further, the purpose of all that has been written to this point is that "reasonable" self-regulation is not forbidden by the antitrust laws. But it is essential that we avoid flights of rhetorical fancy and define our terms, for neither of the quotations above means anything until the writers state clearly what they mean by such terms as "self-regulation," "reasonable," and "rights and responsibilities," all of which have a nice, round, American sound, but which can turn out to be a trap for the unwary.

If by these terms they mean that private citizens should be armed with all the powers of our judiciary, coupled with the investigatory and prosecution powers of a state's attorney, to use in determining the rights and liabilities of other citizens, who just happen to be their competitors in the business world, then a very serious question could and would be raised as to whether they are indeed describing a traditional American approach or even reasonable self-regulation. In a society grown accustomed to living and functioning under the rule of law, it is doubtful that the American approach would settle for anything less than that each citizen, and none can deny that businessmen are citizens, should have his substantive rights and business futures determined by the rule of law and established judicial procedures.

One cannot help but wonder if the proponents of virtually unrestricted compulsory self-regulation have ever stopped to think about these basic questions, or whether they have instead been so blinded by the allure of this seeming panacea for all business evils that the thought never dawned that this approach may not be as American as they had first dreamed. Instead, it has about it a slight aura of well-intentioned but misguided vigilante justice, in which judgments are swift and certain, but not by any means always fair and from which there is no appeal. Vigilante justice always did strike terror into the hearts of wrongdoers—and into the hearts of the innocent as well. Thus we must consider if the results of this sort of self-regulation are worth the price which must be paid.

On the other hand, this does not mean that effective self-regulation cannot

¹⁰² *Ibid.*

be conducted above the level of individual action if the group will abandon hopes of wielding the coercive powers of the state itself. Once the effort at reaching out to usurp the powers of the people is ended, the group can then set about, in the traditional American way, to educate, persuade, and participate in some of the tests now underway of an industry's ability to govern itself without coercion and under proper and necessary government supervision. The prospect is not so bleak as either of the extremes set forth at the beginning would lead one to believe. Nor does the group need to gamble as to whether it is or is not immune from government action no matter what it does. Business needs to abandon an attitude of despair on the one hand and overreaching ambition on the other. Once persuaded to move away from these extreme positions, businessmen can just possibly then enter a period of effective yet still legal self-regulation.