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Although pressure for pollution control is oftentimes directed at single companies it is directed more frequently at single industries. In the context of antitrust regulation, whether a joint response to such pressure by the several companies comprising the industry is permissible, and the nature of such a response, gives rise to highly provocative questions. The reader will find the authors' analysis and conclusion in this regard very interesting.

## AIR POLLUTION, WATER POLLUTION, INDUSTRIAL COOPERATION AND THE ANITITRUST LAWS

*Philip K. Verleger\**

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**C**ONCERN with air and water pollution is national and intense. Demands for the rigorous cleanliness of stream, ocean and atmosphere, indeed of the environment in its entirety, are heard daily. One need be no prophet to foretell that present regulation in this field is mild as compared to that to be anticipated in the future.

Pressure for control of pollution is many times directed to single companies. More commonly, it is directed to "industry" in the abstract, or, at a slightly more specific level, at single industries. How are such industries to respond? An example may help.

Picture a dozen tin soldier mills peacefully producing martial miniatures along the banks of the Grenadier River. Collectively, the owners agree that tin is scarce and expensive: no more tin soldiers shall be made. All soldiers will be made of lead. Doubtless these manufacturers would have problems with the FTC or the Antitrust Division.

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Picture the same dozen mills quietly making lead soldiers. The State Inspector General comes to them and says: lead is toxic. The shavings from your lead soldiers pollute the Grenadier River. Please (or you must) make your soldiers of something else. So the twelve mills (a) agree to use no more lead. Or (b) the twelve mills agree that the Inspector General is wrong and do nothing. In either event, have they broken the antitrust laws?

What are the analogies? Some are to be found in more familiar areas. There are countless cases dealing with somewhat related activities of trade associations. These are something of a guide: again, some help is to be found in cases on joint research efforts—for joint response to a pollution problem may well involve joint research. Cases involving joint ventures may need a look. Ultimately, the answer to these questions is in the Constitution, not the antitrust laws. But we will look at the analogies first.

First, then, the Trade Association analogy.

Among the analogies activities of trade associations are product standardization or certification, cooperative research and exchange of information, and the adoption of codes of ethical standards.

“... Standardization programs in and of themselves are not to be condemned by the [Antitrust] Department. It is the wrongful use to which such programs have been put that has been questioned.”<sup>1</sup> This statement was made by the Assistant Attorney General for Antitrust, Thurman Arnold, many years ago when he commented on the consent decrees filed in *United States v. Southern Pine Association*. The consent decrees required that the Southern Pine Lumber Association separate its lumber grading activities from its other functions, thus recognizing the validity of standardization, but enjoined the exchange of information and other concerted action which would accomplish a price fixing scheme.<sup>2</sup>

Standardization involves “joint action” in the formulation of the standards and once a standardization program has

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1. Letter from Thurman Arnold to the Journal of Commerce, March 26, 1960.  
2. CCH TRADE REG. REP. ¶ 56,007 Trade Cas. (E.D. La. 1940).

been effected, there will automatically be a restraint of trade—but a lawful restraint of trade unless there is some added improper objective.

Standardization programs initiated because of safety and accident prevention requirements have been upheld by the courts. In *United States v. National Malleable & Steel Castings Co.*,<sup>3</sup> an association of competitors developed a universal railroad car coupler. They prevailed. And in *United States v. Nationwide Trailer Rental System*,<sup>4</sup> the court approved an association's safety standards for rental trailers which were rented by the members to customers.

Conflicting results were reached in cases involving uniform prices as well as standardized products. In *Peverly Dairy*,<sup>5</sup> the court discounted evidence of uniformity of prices on milk where a St. Louis ordinance required standardization of raw milk. But in *Milk and Ice Cream Cone Institutes v. FTC*, the court concluded that the efforts of the association resulted in the standardization of milk and ice cream cone, a fact which is a "strong circumstance in support of the Commission's findings that their activities (price uniformity) were the result of agreement."<sup>6</sup> The court's view was that the product had been standardized primarily to facilitate the maintenance of price uniformity. The manufacturers were guilty of a price-fixing conspiracy and standardization was used as evidence of the conspiracy.

In *Bond Crown & Cork Co. v. FTC*, the court, in finding a violation of the antitrust laws states, "The standardization of product, for example, would be innocent enough in itself, but not when taken in connection with standardization of discounts and differentials, publication of prices with agreement not to charge less than a minimum under patent license agreements affecting practically the entire industry, the freight equalization which we have described and such uni-

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3. CCH TRADE REG. REP. ¶ 68,890 Trade Cas. at pp. 73,587, 73,589, 73,595 (N.D. Ohio 1957), *aff'd per curiam* 358 U.S. 38 (1958).

4. 156 F.Supp. 800 (D. Kan. 1957), *aff'd* 355 U.S. 10 (1957).

5. *Peverly Dairy Co. v. United States*, 178 F.2d 363 (8th Cir. 1958), *cert. denied* 339 U.S. 942 (1950).

6. *Millard Ice Cream Can Institute v. FTC*, 152 F.2d 478, 482 (7th Cir. 1946); *see also C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489 (9th Cir. 1952).

formity of prices throughout the industry as to leave no price competition of any sort anywhere.”<sup>7</sup>

In 1961, the Supreme Court struck down a regulation adopted by a trade association, whereby gas suppliers refused to supply gas to burners whose devices did not comply with the safety standards formulated by the association. The court found that the testing by the association and failure to grant a seal of approval to plaintiff’s burner constituted an arbitrary exclusion.<sup>8</sup>

The recent trend of the courts has been to adopt a progressive attitude toward private cooperative efforts to standardize. This trend is demonstrated in companion cases, *American Society for Testing and Materials*<sup>9</sup> and *United States v. Johns-Manville Corporation*.<sup>10</sup> In the latter case, charges that the defendants had conspired to have American Society for Testing and Materials adopt certain chemicals tests for predatory reasons were dismissed, but the question of determining whether the defendants’ intent in promoting the adoption by the American Society for Testing and Materials of a requirement that all asbestos-covered pipe installed in the United States be tested in the United States was left for the jury. The court found that defendants’ conduct in attempting to influence officials to adopt restrictive specifications, whether predatory or not, was constitutionally protected. The authorities compelling that result will be discussed below. The court also rejected the government’s argument that such lawful activities could be used as evidence of anticompetitive intent.

Consistently, in *Structural Laminates, Inc. v. Douglas Fir Plywood Association*,<sup>11</sup> the court found that even though some members of an organization cooperated in the development of standards with the Department of Commerce because

7. *Bond Crown & Cork Co. v. FTC*, 176 F.2d 974, 979 (4th Cir. 1949). For a discussion of this case and others see Verleger, *Trade Association Participation and Simplification Programs*, 27 ABA ANTITRUST SECTION 129, 135 (1964).

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

9. *Application of American Society for Testing and Materials*, 231 F.Supp. 686, 690 (E.D. Pa. 1964).

10. *United States v. Johns-Manville Corp.*, 259 F.Supp. 400, 454 (E.D. Pa. 1966).

11. *Structural Laminates, Inc. v. Douglas Fir Plywood Assn.*, 261 F.Supp. 154 (D. Ore. 1966), *aff’d* 399 F.2d 155 (9th Cir. 1968).

of an ulterior motive to exclude competitors' products, this would not violate the antitrust laws or make the joint effort illegal. The court said that it was a "congressionally sanctioned scheme."

So much for the standardization cases. In general, they seem to suggest that our tin soldier mills have not violated the antitrust laws. What of the cases on exchange of data and on cooperative research?

Presently there is no case in which a court has based a decision solely on cooperative research and exchange of information. The decided cases involving exchange of technical information and cooperative information are most often combined with cross-licensing and patent arrangements.<sup>12</sup>

In this day of rising costs and technical developments research becomes costly when carried on by an individual company. As research continually becomes more elaborate, cooperation with other competing companies becomes economically attractive, as well as avoiding needless duplication of effort.

By its very nature, control of pollution is totally dependent upon research. As is true in virtually all cases of scientific research, frequently the research does not result in commercial reward. Theory, which is the preliminary to the end result, is frequently not patentable. Trial and error, which is the bulwark of scientific research, may result in financial loss without any comparable step forward or solution to the problem. This is compounded when it is considered

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12. William E. Currie, *Co-Operative Research and The Antitrust Laws*, 36 J. PAT. OFF. SOC'Y. 690-712 (1954); *United States v. National Lead Co.*, 63 F.Supp. 513 (S.D. N.Y. 1945), *aff'd* 332 U.S. 319 (1947). *United States v. Minnesota Mining & Manufacturing Co.*, 92 F.Supp. 947, 963, 964, 96 F.Supp. 356, in which Judge Wyzanski found a Section 1 Sherman Act violation where the companies exchanged industrial know-how as well as cross licensed patents.

The Court stated:

The intimate association of the principal American producers in day-to-day manufacturing operations, their exchange of patent licenses and industrial know-how, and their common experience in marketing and fixing prices may inevitably reduce their zeal for competition *inter se*. . . . And the good or evil nature of the immediate manifestations of the producers' joint action is a superficial consideration.

Their close alliance in these unexempted undertakings would inevitably bring them so close as reasonably to restrain competition between themselves. . . .

that the experience of one industry may have no value to a solution to other industries' problems in emitting pollutants.

Beyond that, the benefits which flow from research in the pollution area are public benefits: the costs are private costs. Competition is no adequate motive. The industries presently contributing to the pollution problem are engaged in profitable commercial enterprises: a tin soldier will not sell for a nickel more because the Grenadier River is lead-free. In this area, collaboration is a quick route to results.

Joint research by competitors involves problems comparable to those faced by competitors who engage in standardization and certification programs through trade associations. A joint research program alone, or indeed, a cross-patent or pooling arrangement alone would not contravene the antitrust laws. "If the available advantages are open on reasonable terms to all manufacturers desiring to participate, such interchange may promote rather than restrain competition."<sup>13</sup>

It is only fair to say, in passing, that there is a contrary theory. A former head of the Antitrust Division has expressed the theory that pooling of invention is bad.<sup>14</sup> If that theory were applied to the pollution problem, surely it would offer one of the most remarkable applications of the theology of antitrust. For a real patent advantage would produce but *one* survivor in a competitive industry: the first auto company to solve the auto smog problem would be the only one allowed to manufacture cars: similarly for airplanes and the like. Monopoly in the name of the antitrust laws—a fascinating idea.

There remain the cases dealing with joint ventures. What do they offer? Not much.

A joint venture (in research) has been described as "the creation by two or more partners of either a joint research corporation or an informal research relationship similar to a partnership."<sup>15</sup> Until recently, the only true joint venture

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13. *Standard Oil Co. (Ind.) v. United States*, 283 U.S. 163, 171 (1931).

14. Donald F. Turner, *Patents, Antitrust Innovation*, November 4, 1966.

15. Marquis, *Compatibility of Industrial Joint Research Ventures and Antitrust Policy*, 38 *TEMP. L.Q.* 2 (1964).

cases were *United States v. Terminal Railroad Assn.*,<sup>16</sup> and *Associated Press v. United States*.<sup>17</sup>

Both *Terminal* and *Associated Press* involved conduct found illegal under the Sherman Act as combinations in restraint of trade. In *Terminal* a number of railroad organizations joined together and acquired certain essential terminals which were made available to non-participating railroad companies at higher fees or not at all. In *Associated Press*, competing newspapers formed the Associated Press as a vehicle for gathering news and disseminating it to its members. The bylaws forbade the giving of news to non-members and gave existing members a veto power to refuse applicants for membership who were competitors.

The *Terminal* decree required that outsiders be allowed to invest in the company or obtain its services on non-discriminatory terms. *Associated Press* was enjoined from discriminating against applicants on the ground that they were competitors of members.

Those decisions would indicate that joint ventures among competitors in rational areas of common interest are not illegal if equally available to all competitors in the industry. This is not contradicted by *United States v. Penn-Olin Chem. Co.*, in which the court first considered the application of Section 7 of the Clayton Act<sup>18</sup> to joint ventures.<sup>19</sup>

Pennsalt Chemicals Corporation and Olin Mathieson Chemical Corporation, competitors, jointly formed Penn-Olin Chemical Company to produce and sell sodium chlorate in southeastern United States. Each acquired 50% of the newly formed corporation. Although neither of them had previously been involved in the production or sale of sodium chlorate, it was a natural expansion of their business. The formation of the joint venture was held unlawful. This, however, is a joint commercial venture. It is not a venture in research: it is not a common response to a common governmental demand.

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16. 224 U.S. 383 (1912).

17. 326 U.S. 1 (1945).

18. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958) *amending* 38 Stat. 731 (1941).  
See note 11 for text.

19. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).



None of the decided cases deal exclusively with the creation of a joint venture for the exclusive purpose of engaging in joint research. Dictum in an early case lends support to the theory that a joint venture created for joint research would not violate the antitrust laws.

In considering the legality of a patent agreement among various patentees, the Court in the *Line Materials* case found that the arrangement violated the antitrust laws when the various patents were used to fix the prices of their several products. But the Court indicated that the mere joining together for the purpose of research and development of the patents would not have been illegal. The Court stated:

The development of patents by separate corporations or by cooperating units of an industry through organized research group is a well known phenomenon. However far advanced over the lone inventor's experimentation those method of seeking improvement in the practices of the arts and sciences may be, there can be no objection, on the score of illegality, either to the mere size of such a group or the thoroughness of its research. . . .<sup>20</sup>

Again, the tendency is to suggest that our "joint activity" is lawful.

Let us suppose that our Grenadier Guards adopt a voluntary "code" for the Grenadier River fixing the amount of lead each can put in the Grenadier River. What then?

"Codes" or self-regulatory agreements have been adopted which would control standards or quality, information to be supplied, advertising, and various other activities, all to "improve" the industry. Various reasons are given for such industry practices.<sup>21</sup> The success of such agreements in complying with the antitrust laws is significant for purposes of this discussion.

Recently, the Federal Trade Commission approved trade association voluntary standards of advertising for industry members. Included was a program for obtaining advertising media cooperation in screening the advertising for conform-

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20. *United States v. Line Material Co.*, 333 U.S. 287, 310 (1947).

21. *See Levin, The Limits of Self Regulation*, 67 COLUM. L. REV. 603-04 (1967).

ance to the standards. But, there was no enforcement procedure or no method of coercing the members of the industry to conform.<sup>22</sup>

The FTC approved an association's proposed certification program, provided that "The association will affirmatively offer and accord to non-members an equal opportunity for certification at a cost no greater than, and on conditions no more onerous than, those imposed upon comparably situated members for whom comparable services are rendered."<sup>23</sup>

Recently spokesmen for the Antitrust Division of the Department of Justice spoke regarding a program initiated by the Department of Commerce pursuant to the Fair Packaging and Labeling Act<sup>24</sup> to "faster voluntary industry agreements designed to reduce undue proliferation of the quantities in which consumer products are sold."<sup>25</sup> Zimmerman (then head of the Antitrust Division) expressed his approval of Commerce's desire to curb "unnecessary proliferation of product variety" which does not serve the consumer interest, but disapproved Commerce's procedure of utilizing informal private action rather than the formal procedure contemplated by the act.

The Antitrust Division adopted the position that it would be inappropriate to fix "limits upon maximum or minimum product quantities"; or to adopt "any private standard which would significantly disadvantage a particular segment of the industry. . . ."<sup>26</sup>

Where the courts have found industry attempts at self-regulation to be invalid, they have been able to point to excessive restrictive methods, or coercive enforcement or the like.<sup>27</sup> Again, then, the "code" cases are not discouraging.

22. *Advisory Opinion #287*, CCH TRADE REG. REP. 379, [¶ 18,499 (Sept. 17, 1968)].

23. *Federal Trade Commission Advisory Opinion Digest No. 96*, CCH TRADE REG. REP. ¶ 17,723 (1967).

24. Section 5(d), 15 U.S.C. § 1454(d) (1964).

25. Letter of Assistant Attorney General Zimmerman to Commerce Department, November 27, 1968. ATRR, No. 387, December 10, 1968.

26. *Id.*

27. *Radiant Burner, Inc. v. Peoples Gas Lights & Coke Co.*, 364 U.S. 656, 659-660 (1961)—refusal to grant real approval to non-members' gas burner equated with collective refusal to deal; *Fashion Organizers Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); policing and punishment of members who dealt with designers whom industry found to be copying design of members.

Thus one finds that one has at least three lines of decisions, which our lead soldier manufacturers may look to. Yet all these would worry their lawyer. For in them one finds a mixture of cases won and cases lost, frequently in circumstances not easily distinguished. This is characteristic of the antitrust area. These cases, by themselves, would make for nervous meetings, as the group discussed the State's demands on the pollution of the local stream. There are, however, more fundamental criteria involved.

Cooperation among competitors in industry over pollution is brought about by State<sup>28</sup> and Federal legislation,<sup>29</sup> as well as by suggestions and requests for cooperation by individual legislators; in a word, by the demands of government. Whether an industry, concerned with a pollution problem, meets to agree to solve that problem, or to resist governmental demands, its response is a part of the relation between the regulator and the regulated. There is thus involved a matter of basic constitutional right; for those regulated are entitled collectively to discuss the demands of government; collectively to agree (if they will) to those demands. And they also have the right, severally or collectively, to refuse those demands. The leading case, of course, is *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*<sup>30</sup>

In this case the Supreme Court has declared unequivocally that competitors are not prohibited from associating together to persuade the legislature or executive to take action with respect to enacting a law which would produce a restraint or a monopoly. It involved a private treble damage suit under Section 4 of the Clayton Act, filed by approximately 41 truckers against the railroads and its association for alleged violations of the antitrust laws (Sections 1 and 2 of the Sherman Act) in conducting a cooperative publicity campaign to veto legislation (Fair Truck Bill) by the Pennsylvania Governor.

28. CAL. STAT. 1947, Ch. 632, § 1, p. 1640 as amended CAL. HEALTH AND SAFETY CODE §§ 24198-323 (1964).

29. Water Quality Act of 1965, 79 Stat. 903-10 (1965); Federal Water Pollution Control Act, 33 U.S.C. §§ 466-466ka (1964); Federal Clean Air Act, 42 U.S.C. § 1857 (1968).

30. *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 126, 136 (1961), *rehearing denied*, 365 U.S. 675 (1961).

The railroad admitted that it conducted a campaign to influence passage of State laws relating to truck weights, limits on taxes, etc., and in addition counterclaimed on the basis of the fact that the trucker's publicity campaign was also a violation of the antitrust laws. The Supreme Court accepted the basic premise "that no violation of the Act [Sherman 2] can be predicated upon mere attempts to influence the passage or enforcement of laws. . . . accordingly it has been held that where a restraint upon *trade or monopolization is the result of valid governmental action*, as opposed to private action, no violation of the Act can be made out."<sup>31</sup>

And in 1965, the Supreme Court enlarged upon *Noerr* by concluding that even concerted efforts to induce public officials to take anti-competitive action, "does not violate the antitrust laws, either standing alone or as part of a broader scheme itself violative of the Sherman Act."<sup>32</sup> The court concluded that concerted attempts to influence the Secretary of Labor were within the *Noerr* decision. But the court went further than *Noerr* in concluding that the jury should not have been given instructions that they could find such conduct to be one of the means of affecting a conspiracy.

Justice White observed that ". . . *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent of purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."<sup>33</sup> Implicit is the same principle in the cases which exclude from the law of libel, comment on governmental officials. And one may also rely on the cases which hold that unless there is a "clear and present danger" of success, a conspiracy to overthrow the government is not actionable.

To sum up, then, when the State makes demand on industry, whether to control pollution or otherwise, a joint response is lawful. And whether that response assists, or delays a

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31. *Id.*

32. *United Mine Workers of America v. Pennington*, 381 U.S. 657-70 (1956).

33. *Id.*

solution to the problem is not germane, for we are concerned with the constitutional right of citizens to collaborate in dealing with their government.<sup>34</sup>

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34. Since this text was prepared, the Antitrust Division has filed an action against the Automobile Industry, seemingly based on a position differing from that expressed here. *United States of America v. Automobile Manufacturers Assn.*, Civil No. 69-75-JWC, Central District of California. Because one of the authors is of counsel for the defense, comment thereon would be inappropriate here.