

Trade Association Law and Practice

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BOOK REVIEWS

Trade Association Law and Practice. GEORGE P. LAMB AND CARRINGTON SHIELDS. Boston: Little, Brown and Company. 1971. Pp. xxi, 287.

The revised edition of *Lamb and Kittelle*¹ is a first-rate practical treatise that should be of significant value to the trade association practitioner. It will be of little value to anyone else because its focus is limited to "nuts and bolts." However, the value of *Trade Association Law and Practice* as a reference tool for the practitioner is a product of its narrow focus. We live in a period of enormous trade regulation, and as the body of substantive regulation has exploded, scope has become a major problem for commentators. The sheer quantity of regulation renders almost inconceivable the appearance of a Wigmore in the field. The commentator's editorial judgment becomes extremely important if, rather than choosing to deal with a finite area of regulation or a particular statute, he chooses, as have Mr. Lamb and Miss Shields, to survey the regulatory problems faced by a particular class of entities. Trade associations are potentially subject to the Sherman Act,² the Clayton Act as amended by the Robinson-Patman Act,³ the Webb-Pomerene Act,⁴ the Federal Trade Commission Act,⁵ the Federal Regulation of Lobbying Act,⁶ the Patent Code,⁷ the Internal Revenue Code,⁸ state antitrust statutes, state tax codes, state corporation and non-profit corporation statutes, state lobbying statutes, and so on and so forth into the night. Mr. Lamb and Miss Shields do a creditable job in so many of these areas that it may be unfair to criticize them for overlooking issues of social policy. But, unimpressed by fairness, we will do so anyway—gently.

As a reference book, *Trade Association Law and Practice* is intelligently structured. Key doctrines are repeated wherever relevant, so the risk of missing an issue when using a part of the book for a quick reference is minimized. There is a good index, so quick references are easily made. The coverage of case law is superb, and there is a complete table of cases.

1 G. LAMB & S. KITTELLE, *TRADE ASSOCIATION LAW AND PRACTICE* (1956).

2 15 U.S.C. §§ 1-7 (1970).

3 *Id.* § 13.

4 *Id.* §§ 61-65.

5 *Id.* §§ 41-58.

6 2 *id.* §§ 261-70.

7 35 *Id.* §§ 1-293.

8 26 *id.* §§ 1-8073.

The book begins with a brief treatment of the evolution of trade associations and the history of their regulation by government. This material is more than window dressing; it should be of great value to the practitioner. To be effective in a changing area of the law, a lawyer has to develop a "feel" for its ebb and flow so that he can anticipate developments and counsel his clients accordingly. Knowledge of today's law is not a sufficient basis for anticipating future developments. In the antitrust area, where change comes largely from the courts, an understanding of how we got where we are is essential to an appreciation of where we are likely to go. Curiously, the law's most static proposition, *stare decisis*, is at the root of this kind of anticipation of the dynamics of the law. Judges try to make changes without directly confronting precedent—chipping away here, adding there, modifying rather than writing on a clean slate. The lawyer who understands what kind of chipping and adding led to the present state of the law is acquainted with the process of such change. If he is also sensitive to current public policy he can develop a "feel." Essentially, a "feel" is the ability to identify the areas where change is deemed desirable by those in a position to force the issue and where change can be made through modification rather than direct confrontation of precedent.

A sense of history is especially important with regard to trade associations because their status is the product of a variety of conflicting forces. Interfirm and interindustry pressures have provided the basic thrust of the trade association movement, but the government has had a significant role in both restricting and encouraging its growth. The intermittent tug-of-war between the antitrust enforcers (the Federal Trade Commission and the Justice Department) and the economic stabilizers (the Department of Commerce and, for a while, the National Recovery Administration) is responsible for many of the contradictions surrounding today's trade association.⁹

The authors provide a competent, concise analysis of section 1 of the Sherman Act¹⁰ and section 5 of the Federal Trade Commission Act¹¹ in an early chapter devoted to antitrust principles. The balance of the first half of the book analyzes specific trade association activities in terms of section 1.¹² It is a mistake, however, to ignore section 2 of

⁹ This continuing internecine struggle is also a fascinating chapter in the history of the executive branch, but Mr. Lamb and Miss Shields do not venture beyond its effects on trade associations.

¹⁰ 15 U.S.C. § 1 (1970).

¹¹ *Id.* § 45(a)(1).

¹² The activities analyzed include statistical reporting, price activities, product standards, cooperative research, credit reporting, and industry self-regulation. Section 1 analysis includes some examination of Federal Trade Commission Act section 5 because

the Sherman Act¹³ as the authors do.

Section 2 of the Sherman Act may be invoked in complaints filed against trade associations, but it is seldom mentioned in court opinions discussing an association's activities. The principal antitrust statutes with which trade associations must accommodate their activities are, therefore, Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act.¹⁴

The authors take a largely prophylactic view of antitrust practice; they do not bother to analyze the litigation posture of a trade association. They are more concerned with what not to do than with what to do if someone alleges the association did something it should not have done.¹⁵ Their perspective leads them to ignore section 2, and in doing so they may mislead their readers. A suit brought under section 1 can be significantly different from one brought under section 2 or sections 1 and 2. When a violation of section 2 is alleged, discovery may properly include defendants' cost and profit data as indicia of market power.¹⁶ This material would be neither admissible nor discoverable in a section 1 case. Disclosure of such figures might be very embarrassing for individual member firms who are joined as co-defendants with their trade association; association counsel as well as the members themselves ought to be aware of such potential litigation problems.

Trade Association Law and Practice also provides the practitioner with an introduction to the corporate and tax problems faced by trade associations. The corporate materials¹⁷ are helpful in that they provide a practical complement to antitrust principles. For example, the authors point out that bylaws may be held to be contracts in restraint of trade.¹⁸ However, the practitioner cannot rely on the authors' specific suggestions, because the corporate materials contain the only truly inadequate scholarship in the book. New York's Membership Corporation Law is used by the authors as a model statute without noting that it was repealed by the enactment of the Not-For-Profit Corporation Law.¹⁹

The tax materials are straightforward and well organized. Their

the Commission enforces the section 1 prohibitions through section 5.

¹³ 15 U.S.C. § 2 (1970).

¹⁴ Pp. 20-21.

¹⁵ For example, their treatment of class actions (pp. 29-30) is one of their least satisfactory efforts.

¹⁶ *Banana Distribs., Inc. v. United Fruit Co.*, 162 F. Supp. 32 (S.D.N.Y. 1958), *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959).

¹⁷ Pp. 184-260.

¹⁸ Pp. 195.

¹⁹ N.Y. NOT-FOR-PROFIT CORP. LAW (McKinney 1970).

coverage includes qualification for tax exemptions under Internal Revenue Code section 501(c)(6), problems raised by unrelated business income, and the development by associations of prototype qualified employee benefit plans. Any attempt to solve tax problems on the basis of these materials (or any other treatise, for that matter) would be ill-advised, but they are indeed a helpful introduction.

While public policy may be fairly beyond the scope of a book like *Trade Association Law and Practice*, trade associations are a significant factor in our community, and it is unfortunate that the authors chose not to explore some of the crucial social questions raised by association activities. For example, the lobbying activities of trade associations raise significant political and constitutional questions. The authors do not discuss the implications of the imbalance of power between organized industry and disorganized consumers, and their analysis of the first amendment ramifications of lobbying²⁰ leaves much to be desired. In addition, although the authors discuss the antitrust problems presented by cooperative innovation programs, they do not analyze the potential benefits of such activities in any meaningful way.²¹

On balance, however, *Trade Association Law and Practice* is a valuable addition to the literature in its field. Any trade association lawyer ought to be able to find a place for it in his library.

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²⁰ Pp. 170-73.

²¹ For example, their discussion of the automobile industry's cooperation with respect to air pollution control devices (pp. 83-84) is skeletal. This kind of activity has significant social impact as well as significant potential for anticompetitive abuse.

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