Commentary

THE LAW AND YOUR POSITION ON PROFESSIONAL COMMITTEES

The following letter from the Law Offices of Webster, Chamberlain & Bean highlight an antitrust case in which the professional obligations of a committee member conflicted with the interests of a specific engineering industry. The last paragraph of this letter points out, "that the standards process can be manipulated by an economically self-interested party." The body of the letter, dated 18 February 1992, is reproduced below, because it provides a reminder of how the industry stands on the shoulders of appropriate standards and specifications.

The purpose of this letter is to alert you to a recent antitrust case that arose out of standards setting activities:

Very simply, this case, Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc., Trade cases 69,688 (DC Cal. 12/11/91) (copy enclosed) involved a successful effort by a member of a technical subcommittee of a professional society to compel that subcommittee to adopt a standard that effectively prohibited the use of the services of a competitor of that member. The following excerpt from the case summarizes the conduct of the principal wrongdoer:

> Robbins (the President of the defendant) took advantage of his position as a subcommittee member and his knowledge of the subcommittee's procedures to secure the inclusion of §79.601(d) (the offending standard) in the subcommittee draft. First, aware that he was considered the most technically competent person on the subcommittee and that his colleagues relied on his advice on engineering issues, Robbins presented a partisan portrait of tank lining. He articulated all of the potential dangers associated with lining, but neglected to discuss the availability of tests to ensure that lining would be perfectly safe. Second, Robbins made knowingly false statements to the subcommittee, telling them that the lining process would "void" the UL label. Third, Robbins drafted the language of §79.601(d) and moved the subcommittee to approve it. Fourth, Robbins prevented proponents of tank lining from fully and effectively articulating their contentions regarding the lining process to the subcommittee. He did not make his arguments known to the proponents of tank lining who were scheduled to speak to the subcommittee on 17 Mar 1981. The proponents were not provided with a copy of the Robbins' letter, which set forth specific arguments against the tank lining process. They did not know what arguments he had made, so they obviously had no chance to rebut them. Moreover, Robbins waited until the conclusion of the final subcommittee meeting and until after the proponents of tank lining departed to propose §79.601(d); as a result, the provision was not really debated at all in the subcommittee. Finally, Robbins made the motion despite the fact that neither the subcommittee members nor the tank lining proponents had been notified that a vote on the issue would be taken.

Although neither the society involved, the Western Fire Chiefs Association, nor the individual members of the relevant subcommittee were sued, in my opinion they certainly could have been. The court made the following statement in this regard:

> ...members of the...subcommittee who voted for §79.601(d) clearly could be held liable under the Sherman Act. These subcommittee members knew that Robbins was economically interested in restricting tank lining and knew that the subcommittee had not followed procedures to ensure that tank lining would be addressed in a objective manner. Nevertheless, they voted to ban tank lining.

As I interpret this case, it appears that the subcommittee members committed two errors. First, they adopted a standard prohibiting use of a certain procedure based solely on the statements of a single, economically interested person. They accepted the representations of this person without question. Second, they acted in a procedurally improper manner by adopting a standard without any advance notice to interested parties that a vote was to be taken and without affording such parties an opportunity for comment.

The opinion of the court does not reveal what happened during the period between adoption of the standard by the subcommittee and the filing of the lawsuit. One would assume that the injured company, Sessions, would have contacted the Association about this situation, and the Association would have attempted to correct it. Typically, there should be an opportunity for a standards setting organization to address these types of problems prior to the filing of a suit. It is simply not known what occurred here.

There are two other aspects of this case that are worth noting. First, the suit was filed in 1984, yet not decided until late 1991. This length of time is not usual for antitrust cases. Second, the plaintiff was awarded over $1 million in damages, which was automatically tripled to almost $3.5 million and also was awarded attorney's fees of almost $900,000. In sum, antitrust cases can be lengthy and expensive.

The fact that the standards process can be manipulated by an economically self-interested party and the importance of standards procedures are not new ideas. Nevertheless, people still need to be reminded of them, as this case demonstrates. I recommend that this case be required reading for all relevant staff members.

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