AntitrustConnect Blog

Rabbinical Cartel Ought to Face Antitrust Scrutiny

Christopher Sagers (Cleveland-Marshall College of Law) · Tuesday, September 4th, 2012

During this past couple of years, my friend and colleague Barak Richman of the Duke law school has made a small cottage industry of pissing off organized Judaism. Himself newly the president of a synagogue in North Carolina, he turned his frustrating experience in hiring a new rabbi into a study of the antitrust treatment of collusive or exclusionary practices that happen to involve religious officials. His much discussed paper on the topic is forthcoming in the *Pepperdine Law Review*, and it has lately gotten some pretty high-profile attention.

Well, the rabbis have noticed. Personally, I think they ought to face antitrust scrutiny. Based on their protestations so far, I think they misunderstand antitrust and its application to non-profit sectors, and I happen to think that even the First Amendment instincts on which many people find sympathy for them should not bar antitrust scrutiny. So I thought I would take a moment to reply to a recent posting they made.

"Professor Richman," they say, "incorrectly attempts to apply antitrust concepts intended for the business marketplace to a religious movement." (Go figure. As if in 120 years there has ever been an antitrust defendant that didn't have an argument that antitrust didn't apply to it.)

To their credit, the rabbis discovered a choice quote from John Sherman. To them, it shows that "churches are not covered under this nation's antitrust laws." In Senate floor debate, in the course of responding to a long series of proffered amendments, Sherman said this [21 Cong.Rec. 2658-59 (1890)]:

> I do not see any reason for [exempting] temperance societies any more than churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce.

Admittedly, this was a good catch, showing presumably that the rabbis have got an antitrust lawyer of their own.

Perhaps not an especially good one, though.

Using the quote is like selectively relying on Old Testament moral protocols; some of them seem to have modern relevance, until you notice that some others say things like when and how to

execute adulterers and rebellious children. Sherman states his prediction that "churches . . . school-houses or any other kind of moral or educational associations" would be excluded from the Sherman Act. But "school-houses" and "educational associations" emphatically are not excluded from the Sherman Act, as the U.S. Supreme Court has held in a widely respected opinion, *NCAA v. Board of Regents of the University of Oklahoma* [468 US 85, (CCH) 1984-2 Trade Cases ¶66,139]. (See also the celebrated *United States v. Brown University,* 5 F.3d 658, (CCH) 1993-2 Trade Cases ¶70,358 (3d Cir. 1993)).

But put aside that half of Sherman's prediction of how the law would be applied has already proven wrong. His reason for thinking that temperance societies, churches and school-houses would be exempt from antitrust was not their identities or status; it was the kind of conduct he thought they ordinarily engaged in, as of 1890. As he said, "[s]uch an association is not in any sense *a combination or arrangement made to interfere with interstate commerce* . . . ." But what if a temperance society or a school or some such thing *did* interfere in commerce—for example, what if a religious order established a publishing company? Is the sale of books exempt when undertaken by a church? Pat Wald, who was one of the country's most distinguished judges, and both the spouse and parent of eminent antitrust lawyers, didn't think so. *Costello Pub. Co. v. Rotelle,* 670 F.2d 1035, (CCH) 1981-2 Trade Cases ¶64,352 (D.C. Cir. 1981). What about the many religious universities that exchange education for tuition, and therefore are no more exempt from antitrust than Brown University or the University of Oklahoma (see cases cited above)? What about certifications of restaurants or food manufacturers as kosher or halal? And, at least in a non-hierarchical organization like Judaism, in which clerics are not employees of a central church hierarchy, what about restraints on hiring and salary?

Finally, observe this. Sherman here was reacting to an amendment that would have specifically exempted temperance societies from his bill. The one issue he actually acutely considered was the status of temperance societies, which boycotted businesses and restrained trade in alcohol, but did so for moral reasons. Those entities would in fact be exempt from modern antitrust, but not because they resemble churches. It would be because boycotts and other anticompetitive group activity can be exempt under the First Amendment freedom of expression when they are genuinely "political" and not motivated by financial gain. The leading case is *NAACP v. Claiborne Hardware,* 458 U.S. 886 (1982), as elaborated in *Allied Tube* and *Superior Court Trial Lawyers.*

There also is the fact, incidentally, that the rabbis' effort here is like one that the newspapers have been losing for about 100 years. The rabbis say very generally, as have the newspapers, that because they are a peculiarly First Amendment-protected enterprise, they are wholly exempt from antitrust. That has broadly failed in the case of the press. *See, e.g., Cohen v. Cowles Media Co.,* 501 U.S. 663, 670 (1991) ([t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."). I know, I know, I know, religion and the press are different, the press is a for-profit enterprise, yada, yada, yada. I still expect the same desirable balancing of values that led to that result as to the press will lead courts to reject the kind of blanket antitrust immunity the rabbis seem to invoke.

In that light, consider the specific restraints Prof. Richman has criticized. The organized rabbinate constrains the freedom of individual rabbis to interview for specific jobs, and the freedom of congregations to hire whom they like. Barak collects evidence in his paper suggesting that restraints of this kind keep clerical salaries high, as if that weren't already obvious. With respect, I think rabbinical organizations need to deal more realistically with the law and their likely relation

to it. They definitely should give up 120-year-old quotes and other random bits and pieces like the one above.

This entry was posted on Tuesday, September 4th, 2012 at 7:39 pm and is filed under Antitrust Exemptions & Immunity
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.