What price price-fixing?

BY LAWRENCE R. LEVIN

It all started with a federal grand jury investigating criminal violations of antitrust laws in another industry. A witness was asked whether he was aware of any violations, and he explained that a former employer (General Cinema) and others were regularly involved in fixing prices.

This simple answer prompted numerous grand juries across the country to investigate the beverage industry in the 1980s. The result: scores of indictments and the conviction of about 45 individuals and 40 companies. Only three people were acquitted after trial, and only one company was able to force the dismissal of the charges after indictment.

Grim realities

Today, with many new young people in our industry, memories have begun to fade. But antitrust laws are nothing to take lightly. An individual can spend up to three years in jail and pay enormous fines, and companies can face tremendous criminal penalties and civil damages.

Individuals who were caught in the antitrust web of the 1980s were personally devastated. Marriages were ruined, rights lost, jobs terminated; and they were bankrupted by litigation costs. But a few simple concepts can avoid such heartache.

Most beverage companies now enforce corporate policies prohibiting any conduct that violates antitrust laws. These policies require that extreme care be exercised to avoid any conduct which might appear to an outsider as an agreement or understanding with a competitor about: 1) prices or other terms and conditions of sale; 2) the allocation of customers or markets; or 3) any issue which might inhibit aggressive competition.

In plain English, it is a big mistake to communicate with a competitor about any matter involving competition. That means competitors should never discuss past, present or future prices. Nor should competitors discuss the level, terms, availability, timing and duration of discounts or other promotions; or methods of distribution; or cooler-placement policies—to name just a few.

Before the grand juries of the 1980s, the stories were legend of two friendly competitors having a drink during a convention, and one exclaiming to the other, "Don't you guys know how to sell? All you do is give the stuff away. Your last promo was so low, I'd bet you made no profit on those cans. Look, that customer never pays on time. I'll cut his credit if you do."

As innocent as these conversations sound, they were a sure ticket to testify before the grand jury and jail. In those days bottlers thought they could just forget those conversations when they appeared before the grand jury or shade the truth a little and skate by without consequence.

"Good old Joe" won't mention that talk we had down by the lake. Of course, faced with three years in jail, whether it be friend "Joe," other competitors or colleagues within your company, they were lined up trying to trade testimony for immunity—and all you got for not being absolutely truthful was an extra several years in jail for "obstruction of justice."

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Just say no

If a competitor attempts to discuss or ask questions about prices, you should decline to participate. Make it very clear that you never talk about pricing, promotions or other terms of sale. The law on price discussions is so strict that you can go to jail for even being in the same room where two other competitors talk about prices.

If you hear two other competitors talking about prices, you should not only make sure that they know you won't participate, but you should immediately leave the room in which such discussions are taking place. Any possible violation of antitrust laws should be reported immediately to your employer's appropriate officer so the company can take the necessary steps to protect itself.

If they believe an employee may have been exposed to a possible price-fixing conversation, most companies will immediately send the potential violators a written communication, putting them on notice that the company does not participate in that type of conduct. Those who followed this procedure saved millions of dollars and a lot of trouble for themselves and their employees when the Justice Department launched its investigation in the 1980s.

Recent studies show that the average cost of an effective antitrust defense is over $2 million. Today, many companies regularly conduct interactive seminars on antitrust compliance because they know this is the best way to educate and refresh employees on what to avoid in order to comply with the antitrust laws.

Whatever the circumstances, it is critical not to talk about subjects that might create an antitrust problem. What simpler way can you think of to save your company $2 million?

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