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When Associations Attack: Beware Standing and Other Pitfalls When Suing on Behalf of Members

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If you are an in-house lawyer for a trade or professional association, you probably spend a good amount of your time counseling the association and its members on the importance of complying with government regulations, industry-specific laws, and laws of general applicability, such as the antitrust laws. On occasion, however, the circumstances may flip, with members pushing your association to file a lawsuit on behalf of members – perhaps to challenge a government regulation or to protect members from a perceived competitive threat. How should you counsel your association in these situations? On the one hand, you are sensitive to member needs and pressure. On the other, pursuing litigation is costly and time consuming, and may expose your association and its members to potential counterattacks. Balancing these interests is often a complex task.

For those associations looking for an excuse not to pursue litigation, a recent federal district court case, *Association of Independent Gas Station Owners v. Quiktrip Corp.*, No. 4:11CV2083 (E.D. Mo. July 20, 2012), reaffirms the high jurisdictional bar that associations face when bringing suit on behalf of members. This article provides a brief overview of the case along with practical guidance for associations considering (or trying to avoid) litigation on behalf of their members.

High Bar for Representational Standing

As with all litigants, an association may bring a lawsuit in court only if it has standing – meaning the association must demonstrate to the court that it has suffered injury in fact, that the injury is fairly traceable to the defendant, and that the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-472 (1982). An association may sue on its own behalf if it has suffered an injury, or the association may, under certain circumstances, sue in a representational capacity on behalf of its members.

The U.S. Supreme Court has held that an association has standing to sue on behalf of its members only if the following conditions are met: (1) the association's members would otherwise have standing in their own right, (2) the interest the association is seeking to protect is germane to the association's purpose, and (3) neither the claim asserted, nor the relief requested, requires participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977). As demonstrated in *Association of Independent Gas Owners*, meeting this standard is often a challenge for associations.

In the case, the plaintiff trade association, which represented independent retail gas stations, filed suit on behalf of its members against QuikTrip, a retail gas station operator that allegedly violated the antitrust laws in its effort to dominate the St. Louis market for the distribution of gasoline. The court dismissed the association's complaint for lack of either individual or representational standing.

First, the association lacked individual standing because it did not operate retail gas stations and therefore was not injured by the defendant's alleged predatory pricing. Second, the court held that the association could not satisfy the second and third *Hunt* factors for representational standing. According to the court, the association failed to present evidence showing that the lawsuit was germane to the association's purpose. Finally, with respect to the third *Hunt* factor, the court found that the association's claim required the participation of individual members because the complaint alleged that members suffered varying degrees of injury. *Compare to Nat'l Office Mach. Dealers Ass'n v. Monroe, the Calculator Co.*, 484 F. Supp. 1306 (N.D. Ill. 1980) (finding the challenged conduct to be "equally applicable and equally detrimental" to all of the association's members).

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Lessons Learned (or How to Avoid Unnecessary Headaches)

For in-house counsel looking to caution members on the wisdom of pursuing litigation, *Association of Independent Gas Owners* reaffirms the high bar that associations face to establish representational standing. From the association's perspective, this is not always such a bad thing. Litigation is costly, time consuming, and redirects association resources that would otherwise be used in furtherance of the association's purposes.

To the extent that your association decides to move forward with litigation, you should keep the following points in mind as you put together the complaint and craft a litigation strategy. First, confer with association management to confirm that the litigation is in the best interests of the association, notwithstanding member pressure. As part of this analysis, you should explore whether there are less aggressive ways to resolve the proposed litigation. Maybe you could lobby federal or state legislators or regulators to reconsider a troubling law or regulation. Or, for example, if you are contemplating an antitrust complaint, maybe you could interest a federal or state antitrust enforcement agency to do the heavy lifting by opening an investigation. (Under the *Noerr-Pennington* doctrine, joint efforts to influence public officials do not violate the antitrust laws, even if intended to eliminate competition. *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965)). You also should review the association's articles of incorporation, bylaws, internal policies and procedures, federal tax exemption recognition application and annual IRS forms 990, and other organizational documents to determine whether the litigation falls within the organization's mission and purposes. The association should document, whether through meeting minutes or otherwise, any decision to pursue litigation, including how such pursuit will further the association's mission and purposes.

Second, once the decision is made to file a complaint, work with management and outside counsel to develop an organized litigation strategy and budget. In addition to addressing litigation tactics, the plan should provide for a media strategy, address document preservation requirements, and ensure that the association informs relevant employees of the nature of the litigation, their potential roles, and what to expect moving forward.

Third, following *Association of Independent Gas Owners*, make sure to draft your complaint carefully to tie the association's mission and purposes to the lawsuit. In *Association of Independent Gas Owners*, the association very well may have filed suit to protect members from a legitimate competitive threat. The association's complaint, however, did not provide the court with sufficient factual information regarding the association or its members to establish standing, *i.e.*, "the number of members it has, the location of these members, the types of gas stations owned by its members, or what general interests its organization seeks to serve." It also might help to explain that the alleged injury applies equally to all members.

Finally, before pulling the trigger, make sure that your association's house is in order and that filing the complaint will not expose your association and/or its members to counterclaims, such as product disparagement, defamation, trade libel, or other unfair trade and antitrust allegations. In this regard, make sure to counsel your association that offense is not always the best defense.

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This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.

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