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THE LEGALITY UNDER THE ANTITRUST LAWS OF WAGE STATISTICS COMPILED BY PROFESSIONAL ASSOCIATIONS

*Lawrence R. Velvel**

As a service to their members, many professional associations compile and distribute information on the salaries and fringe benefits paid to the members' employees. Although these compilations of information can be used for potentially anticompetitive purposes, they have been largely ignored in the law and literature of antitrust. This lack of interest most likely has stemmed from the very fact that the compilations were gathered for professional institutions and individuals who were thought to be immune from the antitrust laws under the alleged "learned professions" exemption—an exemption based on the rationale that professional activities did not constitute trade or commerce within the meaning of the antitrust laws.[1] However, now that the learned profession exemption has been eviscerated by the Supreme Court's opinion in *Goldfarb v. Virginia State Bar*,[2] an un-

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1. *See, e.g.*, United States v. Oregon Medical Soc'y, 343 U.S. 326, 336 (1952); Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 436 (1932).

2. 421 U.S. 773 (1975). In *Goldfarb*, the minimum fee schedule of a county bar association set a fixed and rigid price floor for legal services. The Supreme Court held that such a price fixing arrangement was not immune from the antitrust laws under *any* exemption and that bar associations may be held liable for activities which restrain competition. Of the "learned profession" exemption, the Court stated:

> In arguing that learned professions are not "trade or commerce" the County Bar seeks a total exclusion from antitrust regulation. . . . We cannot find support for the proposition that Congress intended any such sweeping exclusion. The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions. Congress intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose.
>
> The language of § 1 of the Sherman Act, of course, contains no exception. . . . And our cases have repeatedly established that there is a heavy presumption against implicit exemptions. Indeed, our cases have specifically included the sale of services within § 1. Whatever else it may be, the examination of a land title is a

dercurrent of deep concern is emerging as to whether these salary compilations are consonant with the Sherman Act.[3]

The salary and fringe benefit compilations in question can vary in degree of specificity. They may contain certain statistical averages or ratios relating to wages and benefits paid by some or all of the members of an association. Medium, high, and low salaries may be charted. Gross and net income attributable to classes of professional persons within each organization may be tabulated. Although efforts often made to withhold the identification of particular members of an association, in some instances members *are* identified, and in others they may be identifiable by inference.

Professional associations generally do not attempt to compel their members to submit data for inclusion in the statistical compilations. They also do not try to compel their members to adhere to averages, ratios or other figures shown in the statistical compilations. Nevertheless, because of the breadth of the antitrust laws and the fact that this is an uncharted area, scrutiny of the compilations is beginning to occur, albeit quietly. The bulk of this article will, therefore, examine the factors which are likely to be critical in determining the legality of the compilations. Before turning to these factors, however, the article will discuss the relevant economic ramifications of these compilations.

I. THE PARADOX OF KNOWLEDGE

In assessing the legality of the distribution of salary and fringe benefit information, it is noteworthy that this information suffers from the para-

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> service; the exchange of such a service for money is "commerce" in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect. . . .

Id. at 787-88 (citations omitted).

Nevertheless, the Court appeared to limit the scope of this ruling in certain instances, stating in a footnote that:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any situation other than the one with which we are confronted today.

Id. at 788-89 n.17.

3. The breadth of coverage of the Sherman Act is evident from § 1 of the Act: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1 (1976).

dox which often attaches to the dissemination of information by trade associations.[4] On one side of the paradox, in order for the competitive process to work effectively, competitors must have access to vital economic data, including the level of wages paid by other producers. Access to wage data is particularly important when, as is true of organizations which produce professional services, wages are the most significant cost which must be covered in computing the price of the ultimate product. Comparative wage information helps a producer to know whether he is paying higher salaries than necessary or, if he also receives other relevant data, to calculate whether his total wage bill is too great in relation to the value of his total output. Conversely, access to comparative wage information can enable a producer to recognize that he is paying insufficient wages and fringe benefits to attract the quality of personnel necessary for a first rate performance. Accordingly, compilations of wage information may serve to foster competition in the marketplace by helping producers increase the efficiency and quality of production.

On the other side of the paradox, the dissemination of comparative cost data can have anticompetitive effects. Such effects are especially possible when, as is true of statistics concerning the compensation paid to employees of professional organizations, the cost data concerns a factor of production which is a major component of the total cost structure. Knowledge of the prices which competitors pay for labor may cause general acceptance of standardized wage rates, and acceptance of standardized prices for labor will lessen natural competitive efforts to bid up or hold down the wage level in accordance with forces of supply and demand. Such a situation will, in turn, artificially inflate or reduce the price of the ultimate product in relation to natural supply and demand. This result is even more likely when, as often occurs in connection with professional services, the price of the ultimate product is calculated by adding a standardized mark-up to the costs of production.

For purposes of the antitrust laws, the paradox attaching to the compilation and distribution of wage statistics is easily solved if members of a professional association actually agree that they will continue to pay nonunion employees the wage rates shown in the statistics. In such a case, the members of the association have entered an agreement to fix the price of labor, and the law is likely to regard their agreement as illegal per se regardless of any advantages to the competitive system which assertedly flow

4. *See, e.g.*, Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 582-85 (1925). *Compare* the majority opinion *with* the dissenting opinions in American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). For a discussion of these cases, see note 6 *infra*.

from the spread of economic information.[5] The problem, however, is that an explicit agreement to fix wage rates occurs in only the rare case. More often, the existence of such an agreement must be inferred through an examination of the factors which are normally considered in assessing the legality of programs under which trade associations disseminate economic information. Throughout this examination, it will, of course, be necessary to focus upon the overall purpose and effect of the compilations of wage statistics.[6]

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5. There is one factual context in which employers can all agree to pay the same wages. Under the labor exemption to the antitrust laws, employers who belong to a single multimember bargaining unit can all sign a collective bargaining agreement requiring that each of them pay identical salaries. *See* UMW v. Pennington, 381 U.S. 657, 664-67 (1965). Thus, if wage statistics are necessary to the process of negotiating such a collective bargaining agreement, they could conceivably be immune from the antitrust laws under the labor exemption. However, in connection with wage statistics of professional organizations, I am presently aware of no actual situation which involves a collective bargaining agreement signed by members of a multimember bargaining unit. Moreover, it appears that the labor exemption would not realistically apply outside of this factual context. *Id.* at 661-67. *See* American Fed'n of Musicians v. Carroll, 391 U.S. 99 (1968); Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., Inc., 381 U.S. 676 (1965); L. SULLIVAN, ANTITRUST 724-31 (1977).

6. In American Column & Lumber Co. v. United States, 257 U.S. 377 (1921), a trade association claimed benign purposes for its "Open Competition Plan," under which it gathered and disseminated elaborate information regarding prices, production, and sales. The Supreme Court disagreed, noting the elaborate nature of the information, the interpretations and advice disseminated by an employee of the association, and the conduct of competitors in raising prices. The Court inferred from these factors that the fundamental purpose of the plan was to "procure 'harmonious' individual action among a large number of naturally competing dealers with respect to the volume of production and prices. . . ." *Id.* at 410-12.

In United States v. Container Corp. of America, 393 U.S. 333 (1969), the absence of a trade association did not impede a finding of Sherman Act violation when competitors exchanged information on current prices charged on specific sales to identified customers. Each competitor furnished this data to others on request, expecting to be provided with reciprocal information when it is so desired. Because sales were very dependent upon price, the industry was dominated by relatively few sellers, and knowledge of a competitor's price usually caused a seller to match rather than beat the competitor's price, the price exchange agreements were found to stabilize prices, thereby violating the Sherman Act. *Id.* at 336-38.

In Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), the Chicago Board of Trade adopted a "call" rule which, during particular times of the day, prohibited members from purchasing or offering to purchase certain grain at any price other than the one prevailing at the close of the "call" period. The Supreme Court held that this arrangement did not violate the antitrust law. The Court stated that, in determining whether a particular restraint merely regulated and lawfully promoted competition or unlawfully suppressed or destroyed it, several factors should be considered, including: the peculiar nature of the business, its condition before and after the imposition of the restraint, the nature and effect of the restraint, the history of the restraint, the reasons for adopting it, and its purposes or the results sought to be obtained. *Id.* at 238. These factors are relevant "not because a good intention will save an otherwise objectionable regulation . . . but because knowledge of intent may help the court to interpret facts and predict consequences." *Id.* In view of the

II. Factors Affecting Legality

A. History and Use of the Compilations

The reasons a professional organization undertook the compilations and the use which members have made of them can have an important bearing on their legality.[7] In many instances, their genesis stemmed from one or both of two purposes which, although beneficent, are somewhat contradictory. First, members of a professional association may have wanted to know whether their costs of producing services were reasonable in comparison with the costs of competitors. Second, members may have wanted reliable data which would enable them to make independent judgments on whether they must pay higher salaries in order to attract and keep high quality personnel. The more benign and pro-competitive the actual purposes, the greater the chances the compilations will be held legal.

If the subsequent use and competitive effects of the compilations also conform to beneficent purposes, this, too, will augur for legality. In this regard, it appears that in our consistently inflationary economy, the statistics have often been used in the past as a basis for increasing the salaries of employees. In this connection, the statistics have been particularly useful because professional organizations usually contain certain administrators or partners who perforce resist salary increases for employees. Other administrators or partners, who favor salary increases, have been able to cite the statistics as grounds for increases in the compensation of their employees. To the extent that the statistics have served as grounds for salary in-

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nature, scope, and effect of the "call" rule, the rule generally tended to foster competition and was legal. *Id.* 239-41.

In Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925), an elaborate information exchange arrangement existed under which information was gathered and disseminated regarding product costs, actual sales prices in past transactions, stocks of merchandise on hand, and transportation costs from a base point to points throughout the United States. The competitors belonging to the flooring association also met and discussed this information. The Supreme Court ruled that the government had failed to prove an agreement or concerted action regarding prices, production, or attempts to restrain competition. *Id.* at 586. The Court felt that the mere collection of the information by an association and its use by members was not necessarily anticompetitive. The decision is obviously subject to criticism. *See, e.g.*, A. Phillips, Market Organization and Performance 138-60 (1962) (criticizing the "uncritical, nonanalytical performance tests" used by the Court). For more detailed discussion of the antitrust implications of the data dissemination practices used by trade associations, see G. Lamb & C. Shields, Trade Association Law and Practice 54-73 (1971); Bodner, *Antitrust Restrictions on Trade Association Membership and Participation*, 54 A.B.A.J. 27 (1968).

7. *See, e.g.*, Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925) (exchange of specific price information concerning specific customers approved, despite possible effects on prices when purpose of dissemination scheme was to prevent buyers from defrauding sellers). *See also* United States v. United States Gypsum Co., 550 F.2d 115, 120-27 (3d Cir.), *affirmed*, 98 S.Ct. 2864 (1978).

creases, it becomes more difficult to infer that they are part of a price fixing agreement designed to hold down wages. The only "agreement" of which they inferentially could be a part is one to raise wages. Not surprisingly, however, nobody has yet accused professional organizations of illegally conspiring to *raise* the wages of their employees.

Nevertheless, even though the statistics have been used as a basis for raising salaries in an inflationary economy in the past, it is possible that existing conditions may cause the statistics to be used as a basis for keeping down salaries in the future. Such use of the statistics would increase the likelihood that an unlawful agreement to hold down wages could be inferred.

In the last few years, a number of professional organizations have been beset by financial difficulties or limitations, which threaten to continue. Moreover, in certain professional fields there has been a glut of job applicants, which also may continue. It cannot be expected that professional organizations which are faced with a need for financial stringency or which have an oversupply of qualified job applicants will be eager to pay ever higher salaries indefinitely. Rather, at some point these organizations are likely to seek to keep down their costs by holding the line on salaries. Wage statistics will be useful in this quest, since the statistics will better enable an organization to know whether it can obtain suitable personnel even though it restrains the amount of salary which it pays. To the extent that the statistics are utilized to restrain salaries, it is more possible to infer that the purpose and use of the statistics is to facilitate an unlawful agreement among competitors to limit the amount of wages they pay employees.

B. Discussions of the Statistics

On certain occasions, wage rates, including those revealed in the compilations, may have been discussed by persons who hire or set the salaries of workers employed by organizations which belong to a professional association. As is true of the compilations themselves, the purpose of these discussions may be to obtain information which enables employers to make better independent judgments on wage rates rather than to facilitate wage fixing agreements among competitors. Yet, because discussions of price are almost always viewed with suspicion, discussions of wages are probably as dangerous to legality as are discussions of other kinds of prices. Moreover, it is highly probable that the discussions of wages often occur in the specific context of a mutual desire to hold down the level of salaries. For instance, when faced with the need to hire an employee, an administrator in one organization may phone a counterpart elsewhere to swap information on the amount each is paying particular kinds of employees. The goal

of the phone call is to ascertain that the caller does not pay more than is being paid elsewhere, a goal of which the party called is fully aware and which he is only too happy to aid in order to decrease the possibility that wage rates will rise. In these circumstances, there is a serious threat that the exchange of information on wages, including the exchange accomplished by the compilations, is part of an illegal agreement to fix the price of labor.[8]

C. Structure of the Industry

An exchange of information in a highly oligopolized industry is more suspect than a similar exchange in a competitive industry.[9] Professional associations are usually involved in the production of services rather than products, and service industries are almost never highly concentrated. Because of this atomistic structure, there usually is competition in bidding for the services of their employees. Indeed, the competitive bidding is sometimes increased because members of other industries may also be bidding for the same kind of employees. Thus, the competitive nature of professional service industries would argue for the legality of wage compilations.

There may, however, be a complication to this analysis. Though each professional service industry contains numerous competitors, as a practical matter, it is often true that the competitors in such an industry can be roughly divided into two groups, one composed of highly prestigious or large organizations which pay high levels of compensation, and the other composed of smaller or less prestigious organizations which pay lesser amounts of compensation. To the extent that the first of these groups is relatively small and can realistically be regarded as a submarket, this submarket may be somewhat oligopolistic, whereas the submarket represented by the second and larger group of organizations remains unconcentrated and competitive. The partially oligopolistic nature of the first group of organizations would argue against the legality of wage statistics, while the atomistic nature of the second group would argue *for* their legality. Ironically, however, the *behavior* displayed by each group may lead to the opposite result because the relatively small number of large and prestigious

8. If discussions of wages take place at meetings of professional associations, and the discussions later lead to a determination that the law was violated, then not only the members of the association but the association itself may be held liable. Moreover, if there are no discussions of wages at trade association meetings, but wage statistics are found illegal for some other reason, the association may still be found to have acted illegally if its purpose in sponsoring or compiling the statistics was to facilitate the violation or if it was aware that the violation was a likely consequence of the statistics.

9. *See, e.g.*, United States v. Container Corp. of America, 393 U.S. 333, 342-43 (1969) (Marshall, J., dissenting).

organizations often lead the way to higher salary levels—which argues *for* the legality of the statistics. On the other hand, the submarket composed of the large number of smaller and less prestigious organizations may have a particularly strong interest in using the statistics to hold down wage levels—which argues *against* the validity of the statistics.

D. Consonance with Supply and Demand

If the trend of wages has conformed to expectations derived from the natural forces of supply and demand, the legality of the compilations is strengthened.[10] To assess the correspondence between the trend of wages and the forces of supply and demand, it can be useful to compare the wage rates paid by members of a professional organization with the rates paid by nonmembers who are part of the same industry. If the wages paid by nonmembers have risen to a far greater extent than those paid by members, a strong inference is created that the members have used the wage compilations as a device for implementing an agreement to hold down salaries.

Even if the wages paid by members of an association have risen to a considerable extent, it is still possible that they might have risen faster or further if wage information had not been exchanged.[11] However, because members of professional associations usually belong to service industries which are atomistic and competitive, this argument possesses less strength here than it might have in the context of some concentrated industries.

E. Form of the Statistics

It is generally believed that economic data circulated by trade associations should be in the form of aggregate or average statistics rather than precise figures concerning individually identifiable companies or transactions.[12] Moreover, when the economic data consists of prices, it should relate to the price level of prior transactions, not current or future prices.[13] To the extent that wage statistics conform to these norms, the legality of the statistics is aided.

10. *See* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 567-68, 582-85 (1925).

11. See discussion of United States v. Container Corp. of America, *supra* note 6.

12. *See* M. McArthur, Associations and the Antitrust Laws 28, 39-41 (1976); Address by J. Wallace before the American Institute of Industrial Engineers, Management Division Conference, Greensboro, North Carolina (March 5, 1976); Competitive Interchanges of Price, Cost, Production and Technological Information—How To Do It Without Violating The Antitrust Laws; Association of Legal Administrators, Antitrust Guide for Members of the Association of Legal Administrators (April 1977) (available from ALA). *See also* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

13. *See generally* note 12 *supra* and authorities cited therein.

In certain respects, however, wage statistics compiled by professional associations may not conform to these standards. At times, the names of specific member organizations are appended to statistics concerning the wages and fringe benefits paid by those particular groups. This breaches the norm against revealing the statistics of identifiable organizations.[14] Also, by their very nature, organizations which belong to professional associations have certain jobs which are filled by only one or two persons. When wage compilations contain statistics about these jobs, and the name of each member organization is appended to its own statistics, one is no longer dealing in average price figures for unidentified transactions. In this situation, both the specific wages paid as well as the persons to whom they are paid can be identified. Finally, professional associations often attempt to produce statistics for the current economic or calendar year rather than prior years. Since wage levels are set for a year at a time, statistics for the current year inevitably reveal not merely the salaries which have been paid earlier in the year, but also the salaries which will be paid during the remainder of the year. This, of course, violates the rule against revealing future prices.

Since the wage statistics may depart from the usual norms, the question arises as to whether these departures are justifiable. Justification may exist if the statistics have been used procompetitively.[15] The identification of particular member organizations and the identification of the compensation paid to particular individuals can indeed have procompetitive effects if the member organizations use these statistics to emulate competitors with whom they feel a strong rivalry or competitors who have achieved a high level of status or quality. In such cases, identification of specific organizations and individuals gives others a competitive target.

It is possible, however, to argue that even though the statistics can be used in a procompetitive manner, departures from the norms should not be allowed since the statistics could have been drawn up without such departures. For instance, the identification of specific organizations could be eliminated, the statistics could be confined to prior years so that there would be no identification of the salary levels which will be paid during the future part of the current year, and the statistics concerning identifiable individuals could be omitted. These methods of compilation may constitute a less restrictive alternative because arguably they reduce the likelihood that competitors will reach implicit agreement or uniformity on wages.

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14. *But see* note 7 *supra* and cases cited therein.
15. *See* discussion of Chicago Bd. of Trade v. United States, *supra* note 6.

On the other hand, unless wage compilations are first shown to have some actual anticompetitive purpose or effect, it is questionable whether professional associations should be forced to alter their present statistical techniques. For not only does the current statistical format provide a basis for procompetitive emulation of successful rivals, but, in accordance with economic and business precepts, the present format enables professional organizations to plan for the future on the basis of the most recent and reasonably detailed economic information.[16]

F. Use of an Independent Third Party to Compile the Statistics

It is often thought that the legality of a statistical program will be enhanced if the statistics are compiled by an independent third party rather than the trade association itself.[17] For this reason, statistics on the wages paid by members of professional associations are sometimes compiled by independent accounting firms. Nevertheless, many professional associations continue to compile their own statistics.

Because the use of an independent third party to compile statistics might prove helpful in persuading a court that wage compilations are legal, it may be wise to utilize a third person even though this may not be strictly necessary under a purely objective analysis of antitrust law. Whether it *is* necessary under a purely objective analysis depends upon how much of the raw data received by the person who compiles the wage statistics consists of information which should not be distributed to association members, lest an unlawful pricing agreement be facilitated, and which must, therefore, be converted into a more innocuous form, such as average figures, before the statistics are transmitted to members. When raw data of this type is received, an independent third person is desirable to decrease the possibility that the raw information will fall into the wrong hands, either inadvertently or by design.

In this regard, however, there may be less need to use an independent third party to compile wage statistics than to compile other kinds of price statistics. As stated previously, it may be permissible for wage statistics to give more detail than is allowed for other kinds of price figures as long as the effects are procompetitive. It is possible, therefore, that wage statistics can breach ordinary norms by showing wages paid by particular member organizations, wages paid to identifiable individuals, and wages to be paid

16. If the current statistical format is one of several factors which lead to a violation of the law, the violation may be curable by eliminating the other factors, without altering the statistical methods. If so, and if the present statistical methods have some competitive benefits, the existing methods should be permitted to continue.

17. *See* M. MCARTHUR, *supra* note 12, at 43.

during the future part of the year. This being so, there is less need for secrecy of the underlying raw data, since the raw data consists of the kind of details which can be included in the statistics. And the less the need for secrecy of the raw data, the less the need for an independent third party to compile the statistics.[18]

Nevertheless, it is also quite possible that the party who compiles the statistics will receive at least some raw wage data which should not be transferred among competitors, such as the salaries of individuals whose identities need not be ascertainable from wage statistics. When this occurs—and it often will—an objective analysis may require the use of an independent third party.

Another factor mitigating against the need for using a third party is the high cost involved. If a professional association is sufficiently penurious that it cannot afford this cost, it is arguable that the association itself should be permitted to compile the statistics, since the competitive marketplace may function better with wage statistics compiled by the association than with no statistics at all. There is, however, one obstacle to acceptance of this argument: if the statistics are truly helpful to the members of an association, the members, if they are sufficiently affluent, could simply pay more money to the association in order to cover the cost of having an independent person compile the statistics.

G. Availability of the Statistics to Employees

In many instances, statistics on wages and fringe benefits are not revealed to the employees whose levels of compensation are the subject of the figures. On the contrary, the statistics often are scrupulously, even religiously, withheld from the employees. This secrecy poses a major stumbling block to legality.

In order to work effectively, the competitive process requires that economic information be available to those who are engaged in the given economic activity. Clearly, this need for information is not limited only to those on one side of a market, but applies to those on both sides. For instance, for the competitive process to function with maximum efficiency, statistical information on the price of a product cannot be revealed to sellers and withheld from buyers or vice versa. Rather, it must be given to buyers and sellers alike.[19] This precept is no less true when the price in-

18. Of course, although secrecy of the raw data may not be required by the antitrust laws, secrecy may still be desired by the association's members because they may regard the raw data as confidential business information.

19. In Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936), the Supreme Court indicated that the dissemination of information to both sides of the market normally aids

volved is the price of labor rather than the price of a product.

In keeping wage compilations secret from employees, professional associations and their members may be gaining a significant anticompetitive advantage which serves their own ends rather than the ends of a competitive marketplace. Each member organization will learn from the statistics the level of salaries which its employees might command elsewhere, but the employees themselves will not have the same access to that information. The employees' lack of information can—and often does—result in their acceptance of salaries which are beneath the true value of their services in the marketplace. This situation certainly benefits the employer, but distorts the allocation of labor resources and is unfair to employees who could earn more by going elsewhere. These results are especially disturbing when nonmonetary considerations play a relatively small role in an employee's decision to remain with an employer, such as the common situation in which the price paid to labor is the vital factor in an employee's decision.

It must be recognized, of course, that the failure to reveal the statistics to employees does not mean that the employees' side of the market is wholly bereft of relevant information. There may be an informal grapevine through which employees obtain some information on salaries paid elsewhere. But information from the grapevine, which is equally available to employers, is usually incomplete and vague. It does not begin to equal or give the same advantage as formal wage statistics.

In cases in which employment agencies are active in the marketplace, the agencies provide another source of wage information for the employees' side of the market. The agencies keep abreast of the generally prevailing levels of wages and also of the specific wage rates being paid by individual employers. Indeed, the amount of market knowledge possessed by the agencies can greatly exceed the amount known to individual employers; and to some extent, compilations of wage statistics may represent an effort to equalize this imbalance so that an employer will not be at a serious disadvantage when negotiating with agencies over the salary which the employer should be offering for particular jobs.

Even when they are active, however, the existence of employment agencies is not a satisfactory answer to a failure to make wage statistics available to employees. Because the agencies are seeking to further their own

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commerce, whereas the restriction of the information to one side of the market is undesirable. *Id.* at 598-99. The Court thus enjoined sugar refiners from gathering and disseminating, to themselves alone, certain statistical information which was not readily, fully, and fairly available to the purchasing trade. *Id.* at 602-05. *See also* discussion of Maple Flooring Mfrs. Ass'n v. United States, *supra* note 6.

financial interests, they do not necessarily make full and complete information available to prospective employees who use their services. Moreover, some prospective workers do not wish to use their services, and should not be forced to do so in order to obtain marketplace information.

Thus, the existence of the grapevine and employment agencies will not validate the practice of withholding wage statistics from employees and will not eliminate the possibility of a violation of the antitrust laws. To eliminate this possibility, it would clearly be advantageous to professional associations to make the wage compilations available to their employees to equalize the knowledge possessed by the other side of the market. Moreover, while the thought may be somewhat boggling at first glance, it would also be advantageous for the associations to make the statistics available not just to existing employees, but also to potential employees. No less than existing employees, applicants, too, are part of the other side of the employment market. They also need access to wage information in order to fully assess their value in the marketplace and to make employment decisions. Such an open availability of wage statistics would generally tend to foster competition for professional services.

H. Voluntary Participation by Members and by Nonmember Competitors

Members of a professional association should—and normally do—have a free choice as to whether they wish to cooperate with a statistical program by submitting wage and fringe benefit data. If members are forced to submit such data upon pain of suffering punishment, such as a fine or expulsion from the association, the case for the legality of the wage compilations is harmed. On the other hand, it appears reasonable to argue that a member organization can be denied access to the wage compilations if it freely chooses not to submit the essential data. If members could obtain the compilations without submitting their own wage data, there would likely be a significant decrease in the number of members who provide information and in the value of the compilations.

Competitors who are not members of a professional association should also be permitted to participate in the association's wage compilations, although the nonmembers who choose to participate can be required to pay their fair share of the costs.[20] Allowing nonmembers to participate by submitting data and receiving the compilations will serve the effective working of the competitive process, since nonmember competitors have as much need as members for vital economic information. Conversely, a re-

20. *See* M. McArthur, *supra* note 12, at 41.

fusal to permit participation by nonmembers will serve only the business ends of the members and not the efficient working of the marketplace.

III. Conclusion

Wage statistics compiled by professional associations are often regarded as an invaluable competitive tool by members of these associations. However, the legality of the statistics is presently an uncharted area of antitrust law and, except for unusual situations in which competitors may have explicitly agreed to use the statistics as a tool for stablizing wages, it is not possible to draw any bright line as to when the statistics will or will not be lawful. Rather, their legality will depend upon the particular facts of each given situation, with heavy emphasis being placed upon the typical antitrust considerations relating to purpose and effect. Thus, the reasons that wage compilations were initiated, whether they have been used in a procompetitive or anticompetitive way, whether the methods of drawing them up are defensible, whether they have contributed to results which are in harmony with natural marketplace forces, and whether participation in a wage statistics program is voluntary and open to all competitors, will be relevant questions in any given factual situation.