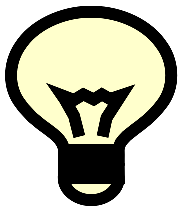

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The Antitrust Counselor

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Reevaluating Individual Arbitration of Antitrust Claims After *AT&T Mobility v. Concepcion*

By Joel M. Cohen and Rosanna G. Lipscomb

The Supreme Court rendered two decisions in 2011 that may impact the ability of plaintiffs and their counsel to assert claims—including antitrust claims—on behalf of a class. The case that received the most attention, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct 2541 (2011), clarified and sharpened the application of traditional Rule 23 standards. While *Wal-Mart* may impact class certification decisions in antitrust cases under Rule 23, the Court's decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2001), has the potential to impact whether certain kinds of antitrust cases may no longer be heard by the federal courts altogether.[1]

Concepcion confirmed the enforceability of arbitration provisions in standard-form consumer contracts that require individual arbitration of all disputes, precluding both class action litigation and class action arbitration. *Concepcion* suggests a potentially significant role for arbitration provisions—in lieu of traditional Rule 23 concepts—to determine the size, scope, and location of disputes that might otherwise have been brought as class actions in federal court.

Concepcion has led at least one court—the Second Circuit—to request briefing on whether it should reconsider a prior decision nullifying an arbitration provision in an antitrust class action. Other courts will likely be asked to consider the issue in similar cases. These matters should be watched closely by companies that include arbitration provisions in their customer agreements or who may seek to include them in the wake of *Concepcion*.

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[1] A third class action-related decision, *Erica P. John Fund, Inc. v. Halliburton Co.,* No. 09-1403, slip op (June 6, 2011), involved questions regarding the certification of a class in the context of a securities fraud action.

It is worth noting, however, that individual antitrust arbitrations can, in certain circumstances, create risks and complications. Recent attempts by plaintiff lawyers to initiate multiple arbitration-based challenges to the proposed AT&T/T-Mobile transaction illustrate this point.[2]

Background

In *Concepcion*, the plaintiffs alleged that their cell phone service provider, AT&T, engaged in false advertising and fraud by charging sales tax on phones that were advertised as free. The plaintiffs' claims were later consolidated in a putative class action.

AT&T moved to compel arbitration of the claims because the plaintiffs' contracts with AT&T mandated arbitration of all disputes and further required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[3] The district court[4] and the Ninth Circuit Court of Appeals,[5] denied AT&T's motion and held that the class action waiver provision in AT&T's arbitration clause was "unconscionable," and therefore unenforceable, under the California Supreme Court's decision in *Discover Bank v. Sup. Court*, 36 Cal. 4th 148 (2005). *Discover Bank* held that class action waiver provisions are unconscionable when "[the] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money . . . ."[6]

The Supreme Court reversed. The Court held that the California state law rule was preempted by the Federal Arbitration Act.[7] In so holding, the Court noted that the "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms" and emphasized that "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."[8]

The Court also held that requiring class arbitration where the parties have not agreed to it "interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[9] Moreover, from the Court's perspective "class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[10] At the same time, class arbitration "greatly increases risks to defendants" because the "absence of multilayered review makes it more likely that errors will go uncorrected."[11]

The Court also held that requiring class arbitration where the parties have not agreed to it "interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

In responding to the dissent's assertion "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," the Court explained that, even if it is desirable for unrelated reasons, "States cannot require a procedure that is inconsistent with the FAA . . . ."[12] Finally, the majority noted that where a litigant fares better in individual arbitration than they would as a member of a class in court, the "[arbitration] scheme [is likely] sufficient to provide incentive for the individual prosecution of meritorious claims."[13]

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[2] *Law Firm Strikes Back at AT&T Over Merger*, Reuters (July 27, 2011), http://www.reuters.com/article/2011/07/27/us-att-merger-arbitration-idUSTRE76Q7F320110727.
[3] *Concepcion*, 131 S.Ct. at 1743 (internal quotations and citation omitted).
[4] *Laster v. T-Mobile USA, Inc.*, 2008 U.S. Dist. LEXIS 103712 (S.D. Cal., Aug. 11, 2008).
[5] *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009).
[6] 36 Cal. 4th at 162-63.
[7] *Concepcion*, 131 S. Ct. at 1743.
[8] *Id.* at 1749.
[9] *Id.* at 1748.
[10] *Id.* at 1751.
[11] *Id.* at 1752.
[12] *Id.* at 1753.
[13] *Id.*

Potential Application of *Concepcion* in Antitrust Litigation

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636–37 (1985), the Supreme Court concluded that antitrust claims arising from international transactions are suitable for arbitration. The Court expressed the view that federal statutory claims may be arbitrated if "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."[14] The rationale of *Mitsubishi* has been extended to domestic antitrust disputes.[15]

Prior to *Concepcion*, several courts had considered the enforceability of arbitration provisions that prohibited class action litigation or arbitration in the context of federal antitrust claims. In *In re American Express Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009), *vacated and remanded*, 130 S. Ct. 2401 (2010), *on remand*, 634 F.3d 187 (2d Cir. 2011), American Express moved to compel individual arbitration of plaintiffs' Section 1 tying claims, pursuant to an arbitration agreement which contained a class action waiver.[16] The Second Circuit held that the class action waiver was unenforceable because it effectively would have precluded the plaintiffs in that case from vindicating their statutory rights under the Sherman Act.[17] The First Circuit reached a similar conclusion in *Kristian v. Comcast*, 446 F.3d 25 (1st Cir. 2006).

On the other hand, the Fourth Circuit in *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274 (4th Cir. 2007), declined to invalidate an arbitration provision which effectively prohibited multiple plaintiffs from combining their antitrust claims in a single proceeding. The court recognized that "requiring each plaintiff to proceed separately against each defendant will entail additional expense," but concluded that this "does not necessarily mean that the party cannot effectively vindicate its statutory rights through arbitration."[18] The court held that there was insufficient evidence in the record to conclude that enforcing the individual arbitration provision would prevent plaintiffs from effectively vindicating their statutory rights.

Although *Concepcion* was not an antitrust case, it raises the question of whether the analysis applied in the foregoing decisions—that is, a case-by-case assessment of whether a contractual prohibition against class-wide prosecution of claims effectively prevents plaintiffs from vindicating their statutory rights—is consistent with the Federal Arbitration Act. To the extent the issue involves a balancing of federal policies, *Concepcion* certainly adds weight to the arbitration side of the scale. Moreover, the Court expounded at length regarding the potential benefits of class action waiver provisions in promoting the core benefits of arbitration that the Federal Arbitration Act were intended to foster, and dismissed the concern that class proceedings may be "necessary to prosecute small-dollar claims that might otherwise slip through the legal system." In the end, the Court concluded that the Act "prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures." Defendants will argue that the same result should apply when the underlying substantive claims arise under federal law.

Given the importance of the issue in the many industries in which consumer arbitration clauses are or could be in use, it is likely that other courts—and perhaps ultimately the Supreme Court—will be asked to address these questions as well.

On the other side, antitrust plaintiffs presumably will seek to distinguish *Concepcion* on the ground that it did not involve the enforcement of federal statutory rights, and argue that the reasoning of cases such as *American Express* remains valid to the extent plaintiffs can establish that they will be unable to vindicate their statutory rights through individual arbitrations.

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[14] *Id.* at 637.

[15] *See, e.g., Kotam Elecs. v. JBL Consumer Prods.*, 93 F.3d 724 (11th Cir. 1996) ("Today we hold that antitrust disputes in the domestic context are arbitrable as well.").

[16] The court's initial decision in 2009 was vacated and remanded for reconsideration in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), which held that an arbitration panel could not impose a class arbitration procedure on parties that had not agreed to such a procedure in their arbitration agreement. The Second Circuit found that *Stolt-Nielsen* did not affect its conclusion that the class action waiver provisions were unenforceable.

[17] *See In re American Express Merchants' Litig.*, 634 F.3d at 197-98

[18] *In re Cotton Yard Antitrust Litig.*, 505 F.3d at 285.

On May 9, 2011, the Second Circuit issued an order requiring the parties in *American Express* to submit letter briefs limited to the issue of how *Concepcion* applies to the case.[19] The parties submitted briefs in early June, and on August 1, 2011, the Second Circuit indicated that it would consider rehearing the case.[20] Given the importance of the issue in the many industries in which consumer arbitration clauses are or could be in use, it is likely that other courts—and perhaps ultimately the Supreme Court—will be asked to address these questions as well.

Conclusion

Concepcion does not spell the end of antitrust class actions. It may, however, suggest a potential avenue for diverting certain kinds of antitrust claims for resolution in individual arbitrations. Companies that have or could have arbitration provisions in their customer agreements should keep a close watch on how *Concepcion* is interpreted and applied in antitrust matters, as the law in this area continues to evolve.

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[19] Order at 1, *In re American Express Merchants' Litig.*, No. 06.1871-cv (2d Cir. May 9, 2011).

[20] Order at 1, *In re American Express Merchants' Litig.*, No. 06.1871-cv (2d Cir. Aug. 1, 2011).

Did Premerger Notification Just Get Easier? *It Depends on Your Perspective*

By S. Lynn Diamond

If you are responsible for your company's antitrust premerger compliance, you know that the Federal Trade Commission (FTC) has issued new rules for preparation of Hart-Scott-Rodino (HSR) filings that took effect in August.[1] While the new rules do not change the substantive antitrust analysis of mergers and acquisitions, they do change the way the HSR Form is to be completed, and the information and documents that must be submitted.

The new rules have eliminated a number of burdensome requirements, but have added a few significant new ones. Most of the changes are in three areas: revenue reporting, document production, and reporting of financial and corporate information. More broadly, where in the past some information required of corporations did not need to be provided with respect to LLCs and partnerships, treatment of such non-corporate entities has now been brought in line with that of corporations.

Many HSR practitioners have been concerned that the new rules will impose greater burdens on filers. The FTC Premerger Notification Office staff, in meeting with groups of HSR practitioners and conducting seminars on the new rules, has maintained that the rules will reduce the burden for most filers. However, whether the new rules are more or less burdensome depends to a great extent on whether you represent the acquiring or the acquired party, how your organization is structured, and whether your company includes foreign manufacturing operations that derive revenues from sales into the United States.

For many filers, compliance will be simpler. In the most extreme situations – e.g., where the acquiring person is an equity fund with many holdings across different funds, some in overlapping product categories with the acquired entity, and the acquired entity is a company with many different products manufactured abroad – filing just got a whole lot more complicated. Most filers will probably find some things to like and some things to dislike in the new rules.

However, whether the new rules are more or less burdensome depends to a great extent on whether you represent the acquiring or the acquired party, how your organization is structured, and whether your company includes foreign manufacturing operations that derive revenues from sales into the United States.

For Some, It's Easier: Outdated Information Requirements Have Been Eliminated

Outdated revenue information: Practitioners enthusiastically welcome the elimination of the dreaded "base-year" revenues. In addition to reporting revenues for the most recent fiscal year classified by NAICS industry codes,[2] the FTC previously required the provision of revenue information from 2002, the most recently published census data year, and adjustments for acquisitions or divestitures made since then. Many first-time filers found it difficult to access such outdated information and, for companies that had made acquisitions since 2002, previous revenue information sometimes was not available at all. The earlier data was meant to provide the agencies with a historical context for current revenues, but the FTC ultimately decided that older data is of minimal value. The requirement was eliminated, and now, revenues from only the most recent year are required. In addition, revenue from products manufactured by the company and then transferred to a related entity for sale by that entity are to be reported only once. This eliminates the previous counter-intuitive double-counting, which many filers found burdensome because it was not in conformity with internal record-keeping.

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[1] The FTC published a Notice of Final Rulemaking in the Federal Register on July 19, 2011, and the revisions became effective on August 18, 2011.

[2] North American Industrial Classification System ("NAICS") codes for manufactured products and wholesale products or services are available at http://www.census.gov/cgi-bin/sssd/naics/naicsrch?chart=2007.

Financials: The FTC concluded that balance sheets provide no useful information beyond the sufficiency of the filer's assets under the HSR "size of person" test, and so it eliminated the requirement to submit balance sheets. For companies with complex structures, and especially for equity funds whose holdings typically are unconsolidated, these changes represent a welcome reduction in searching, finding and updating financial documents. Further, companies that make SEC filings no longer need to supply paper documents. Filers need only supply the names and Central Index Key numbers of entities that file annual reports on Form 10-K or Form 20-F; the FTC will use the SEC's Edgar database to access the filings directly.

Corporate holdings: The FTC now requires considerably less information about corporate holdings with an HSR filing. Previously, every controlled[3] entity within the company filing, together with each entity's headquarters address, had to be listed. For some international corporations, this ran to pages of listings, often including dozens, if not hundreds, of foreign entities controlled by the filing party even if totally unrelated to the transaction. Some companies with widely flung foreign holdings found it difficult to maintain local address information. Now, only U.S. entities and those foreign entities that derive revenues from sales in or into the United States must be disclosed in answer to this question, and street address information is not required.

Similarly, the FTC significantly cut back the requirement to list outside minority holders of controlled entities. Previously, substantial minority shareholders of all controlled corporate entities of the acquiring party and the acquired entity had to be reported, one of the requirements that led many business people to grumble, "What do they need that for; these entities have nothing to do with the transaction!" Now, acquiring parties need only list the outside minority holders of the parent entity and the entity making the acquisition (if different); and sellers need only list minority holders of the entity being acquired (and any entities it controls). This change should reduce the burden of gathering this information for many filers, only slightly offset by the new requirement to include relevant non-corporate interests within the entities to be reported.

The agency also reduced the required disclosure of minority interests of the filing parties. Formerly, all substantial minority interests (five percent or greater) had to be detailed. The FTC now only wants to see information about companies that derive revenues in the same NAICS industry codes as the other party. While this change does reduce the amount of information to be supplied, it also creates a number of complications. For one, any likelihood of overlap will require inquiry into the relevant NAICS codes for the filing party's minority interests. This information may not be readily accessible. Except in strategic acquisitions, in-house counsel for the seller will generally have to rely on outside counsel to advise them whether there are NAICS code overlaps with the buyer at all, or else supply the information for all minority interests and let outside counsel pare down the list. Fortunately, the rules allow filers to rely on information and belief about the overlapping NAICS codes and, if necessary, to supply information about all minority holdings, as before. Parties that take this route, however, should make note of that fact in their HSR Form. Inadvertent inclusions of holdings here, or listing all holdings without an explanation, could create the implication of a NAICS overlap where none actually exists.

For Others, It's More Difficult: New Categories of Information are Required

Foreign revenues: Elimination of the base-year revenue requirement makes filing easier for all parties; but for companies that manufacture outside the United States, the process just got a little more complicated. Previously, foreign-manufactured products did not have to be reported if they were sold directly to third parties in the United States, and if they were sold to an entity in the United States under common control, that U.S. entity reported the revenue using the broader wholesale, or six-digit, NAICS codes. Now, revenues from all foreign products sold into the United States must be reported, broken out by NAICS industry codes. Manufactured products sold directly

Elimination of the base-year revenue requirement makes filing easier for all parties; but for companies that manufacture outside the United States, the process just got a little more complicated.

[3] An entity controls a corporation if it holds 50% or more of the voting securities of that corporation or has the contractual right presently to designate 50% or more of its board of directors. An entity controls a partnership or limited liability company ("LLC") if it has the right to 50% or more of the profits of the partnership or LLC or 50% or more of the assets upon dissolution. An entity may have more than one ultimate parent entity.

to third-party customers must be reported using the more detailed manufacturing, or 10-digit, NAICS codes. Products manufactured abroad and then transferred to a related U.S. entity for sale by that entity are to be reported as foreign revenues, as noted above, at the internal transfer price.

Companies with extensive foreign manufacturing operations may have difficulty locating the necessary information. The CFO may not have revenue information categorized by NAICS codes. If the information is gathered at all, it may be done by someone much lower on the organization chart than the CFO. Some manufacturing companies gather the NAICS information at the plant and send it directly to the government, rather than collect it centrally. In other cases, NAICS reporting may have to be reconstructed from scratch, at least the first time, from SKU data.

Documents: The new rules add three new categories of documents that must be submitted with the HSR Notification. As elsewhere, the increased burden will depend to a great extent on the transaction.

Confidential Information Memoranda – not really new: Documents containing content related to competition, markets, and potential for sales growth or expansion, drafted for the purpose of analyzing the proposed acquisition and found in the files of officers or directors of the filing party, have always been required as "4(c)" material.[4] The Confidential Information Memorandum – a document created in-house or by a third party that lays out the details of a company, or assets of a company, that is for sale – almost always contains such competition-related content. But, on occasion, when a Confidential Information Memorandum had no such content, or was not drafted to analyze the specific transaction being reported, parties sometimes took the position that these documents were not responsive. In response, the FTC has added Confidential Information Memoranda as a separate category – now these documents must be submitted even if they contain no competition-related content.

If no Confidential Information Memorandum was prepared in connection with the sale, a document given to the buyer *specifically intended by the seller to serve the purpose of a Confidential Information Memorandum* must be submitted in its place. The agencies are not looking for documentation of a day-long series of presentations to potential buyers, or other documents that contain Confidential Information Memorandum-like content. Nor are they looking for Confidential Information Memoranda concerning prior offers for sale of the same entities or asset but which were abandoned before the current transaction. And the FTC specifically states that "ordinary course" documents and financial data shared during the due diligence process do not "serve the function" of a Confidential Information Memorandum unless they were shared with the buyer "specifically to serve the purpose of a Confidential Information Memorandum when no Confidential Information Memorandum was prepared."

But the FTC now also requires third party materials even where they were unsolicited and unrelated to any specific transaction.

Third-Party Documents – sort of new: When third-party advisors such as investment bankers and consultants are involved in the reported transaction, any materials they create that include competition-related content have always been routinely included in 4(c) submissions. But the FTC now also requires third party materials even where they were unsolicited and unrelated to any specific transaction. For example, where an investment bank prepares materials seeking an engagement ("pitch books") or where the seller engages advisors to create materials analyzing a range of strategic options, those documents now must be submitted as long as they contain competition-related content and were created within a year of the filing, even if no acquisition was contemplated when the documents were prepared. The FTC does not, however, expect documents like corporate subscriptions to market studies or periodicals; industry reference materials and databases; routine market research; information received by financial investors; unsolicited financial and market analyses from investment bankers and consultants; or reports prepared in the course of patent, securities, antitrust or other types of litigation.

[4] Specifically, "all studies, surveys, analyses and reports, that were prepared by or for any officer(s) or director(s) of the company, for the purpose of evaluating or analyzing the proposed acquisition, with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets (or similar topics)."

Efficiencies Documents – these really are new: The FTC has created a new category of documents, those dealing with synergies or efficiencies. These are the first to be required regardless of competition-related content. The FTC finds these documents very useful in evaluating transactions, and believes their value outweighs the burden to parties in producing them. However, such documents need only be produced if they were seen by directors or officers of the company; for instance, the files of HR and IT executives need not be searched for such material if those custodians are not in the ordinary scope of a 4(c) search. The FTC has said that synergies-related documents submitted with an HSR filing may carry greater weight than materials claiming synergies created and submitted at a later time during an investigation, even though the parties may not be able to anticipate savings as accurately in the beginning stages of the merger process as well as they will later. This will likely increase the advocacy burden in transactions under investigation.

The new category of "Associates": Investment company acquirers, such as equity funds and master limited partnerships, will find the rules and reporting requirements just got a whole lot more complex when they are on the buying side of a transaction. Because of the structure of such firms, which often have funds under common management but not under common control (as defined by the HSR), the FTC decided it was not getting all the information it needed to evaluate the potential antitrust ramifications of an acquisition. Rather than completely change the definition of control, it created a new "Associates" category. An associate of an acquiring person is an entity that is not under common HSR control with the acquiring person but (a) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a "Managing Entity"); (b) has its operations or investment decisions, directly or indirectly, managed by the acquiring person; (c) directly or indirectly controls, is controlled by, or is under common control with a Managing Entity; or (d) directly or indirectly manages, is managed by, or is under common operational or investment management with a Managing Entity.

Acquiring persons now have to report associates' minority holdings in entities that operate in the same six-digit NAICS categories as the acquired entity or assets, and also provide geographic sales information about controlled entities of those associates that derive revenues in the same NAICS codes as the acquired entity or assets. Note, however, that the seller does not have to provide such sales information about its entities whose activities overlap with those of the buyer's associates (only those that overlap with the buyer's controlled entities). Acquiring persons with such management structures will therefore have a greater compliance burden. In some cases, the effort of determining which entities are associates and whether they derive revenues in the relevant NAICS codes will take considerable effort itself. This will rarely be a concern for a buyer that is a typically organized corporation, however; such a company is highly unlikely to have "associates" as the FTC has defined them. The prudent course requires confirmation of any less-than-clear relationships.

Acquiring persons now have to report associates' minority holdings in entities that operate in the same six-digit NAICS categories as the acquired entity or assets, and also provide geographic sales information about controlled entities of those associates that derive revenues in the same NAICS codes as the acquired entity or assets.

LLCs and Partnerships: As noted in the discussion of certain requirements, the new rules reflect changes to a number of provisions and definitions intended to bring the treatment of non-corporate entities in line with the treatment of corporations. This change is unlikely to create a great burden; but frequent filers who are used to omitting partnerships and LLCs from responses to the questions on corporate holdings and financials will have to remember to include them.

* * *

This discussion is necessarily only a broad overview of the key changes to the HSR rules. The rules are very detailed, and in some cases, for instance, with regard to how foreign manufacturing revenue is to be reported, the FTC is still evolving its view on situations it did not anticipate when drafting the rules.

Below are some steps that counsel should consider taking now if there is a likelihood of HSR filings in the foreseeable future.

A Few Things You Can Do to Prepare

Manufacturing – If you file HSRs often, you probably already have a system for tracking your revenues by NAICS code. You can throw away your 2002 data; but start now to gather revenue data from your foreign operations. It could take a significant amount of time even to determine who has the data you need, and record keeping protocols could vary around the globe. Identify the responsible parties, set up a NAICS code tracking system, and set up a system for gathering the data on an annual basis.

Third-Party Documents – The unsolicited competition-related documents discussed above could contain information unhelpful to your position. You may end up spending a lot of time explaining away certain information. If such documents are less than a year old and in the files of officers or directors, they must be produced. Set up appropriate retention policies now.

Efficiencies Documents – The preparation of documents discussing efficiencies and synergies is even more important now that the FTC has indicated that documents prepared before the advocacy stage may be accorded greater weight. Use care when creating documents that discuss efficiencies and synergies and recognize that these are likely be reviewed in the first instance by the antitrust agencies.

Use care when creating documents that discuss efficiencies and synergies and recognize that these are likely be reviewed in the first instance by the antitrust agencies.

Associates – For entities with "associates" (as defined by the new rules, discussed above), immediately gather relevant NAICS code information. Having a database of the applicable NAICS codes for every entity that the organization controls and in which it has minority interests will be helpful to fund managers working on HSR submissions, and avoid disrupting the operating units for requests for information with every filing (or disclosing confidential business information).

Company websites – The new HSR form asks for the company's website URL. Do you know what is on your corporate site? Are the business sectors in which the company participates described correctly? Are entities still listed that are no longer part of the organization? Best practices for websites' legal compliance should include HSR sensitivity, especially if the company is a frequent filer.

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Profit Sharing Agreements and the Non-Statutory Labor Exemption in *State of California v. Safeway*

By Howard M. Ullman

Profit sharing agreements among competing firms have long been thought to be anti-competitive because they tend to reduce firms' incentives to advertise, discount, and provide quality service. In *State of California, ex rel. Kamala D. Harris v. Safeway, Inc.*, ___ F.3d ___, 2011 WL 2684942 (9th Cir. July 12, 2011) (*en banc*), the Ninth Circuit advanced the law in this area, ruling that certain profit sharing agreements are neither *per se* illegal nor subject to a "quick look" analysis, but rather must be analyzed under the Rule of Reason. Although the court decided the issue in the context of a labor dispute, it also determined that such agreements, although potentially lawful, are not immunized by the non-statutory labor exemption to the antitrust laws. The decision also raises some interesting questions about the lawfulness of limited profit sharing agreements in the case of other emergencies or industry crises or difficulties.

***Safeway*'s Facts**

In 2003, the collective-bargaining agreement between several chapters of the United Food and Commercial Workers union and three large supermarket chains in Southern California (Albertsons, Ralphs, and Vons (a subsidiary of Safeway, Inc.) expired.[1] Before the contracts expired and with the consent of the union, the three grocery chains formed a multi-employer bargaining unit to negotiate a new contract.

The three chains and Food 4 Less then entered into a Mutual Strike Assistance Agreement ("MSAA"). The grocers anticipated that the union would use "whipsaw" tactics, *i.e.*, would exert pressure on one grocer through strikes and picketing. The MSAA provided that if one grocer was struck by the union, the other grocers (except for Food 4 Less) would lock out union employees within 48 hours. The MSAA also included a revenue-sharing provision ("RSP"). The RSP provided that in the event of a strike or lockout, any grocer that earned revenues above its historical share relative to the other chains during the strike period would pay 15% of those excess revenues as reimbursement to the other grocers to restore their pre-strike shares.[2] The MSAA specified that the strike/lockout period would begin at the start of the week in which the strike/lockout commenced and continue for two weeks following the end of the strike/lockout. The 15% figure was designed to estimate the incremental profit the grocers earned on each additional dollar of revenue.

> The revenue sharing provision provided that in the event of a strike or lockout, any grocer that earned revenues above its historical share relative to the other chains during the strike period would pay 15% of those excess revenues as reimbursement to the other grocers to restore their pre-strike shares.

The union began a strike against Vons. Albertsons and Ralphs then locked out union employees pursuant to the MSAA. The union then began striking all three chains, but soon elected to focus on Albertsons and Vons only. About four-and-a-half months later, the parties reached an agreement and the strike/lockout ended. In accordance with the RSP, Ralphs paid about $83.5 million to Vons, and $62.5 million to Albertsons.

California's Claims and the Procedural History

While the strike was in progress, the State of California challenged the RSP as a violation of Sherman Act Section 1. The district court denied the grocers' motion for summary judgment on the ground that the RSP was immune from antitrust scrutiny under the non-statutory labor

[1] Another grocery store chain, Food 4 Less, had a separate contract with the union that was set to expire several months later. Food 4 Less is an unincorporated operating division of Ralphs.

[2] The data collection and calculation functions were performed by an independent certified public accountant.

exemption. The district court also denied California's motion for summary judgment on the ground that the RSP was a *per se* violation of Section 1, or at the very least was unlawful under a quick look analysis. The parties then stipulated to a final judgment that preserved their appellate rights but that precluded California from pursuing the theory that the RSP violated Section 1 under a full Rule of Reason analysis. In return, the grocers agreed not to pursue various affirmative defenses, with the exception of the non-statutory labor exemption.

On appeal, a panel of the Ninth Circuit affirmed in part, reversed in part, and remanded the case.[3] The court then decided to rehear the case *en banc*.

The Ninth Circuit's *En* Banc Decision

The Ninth Circuit (Gould, J.) first considered the non-statutory labor exemption, and then turned to the question of how to analyze the grocers' profit-sharing agreement.

The non-statutory labor exemption

The statutory labor exemption (not at issue in *Safeway*) establishes that labor unions are not combinations or conspiracies in restraint of trade.[4] The non-statutory labor exemption is inferred from federal labor statutes. These set forth a national labor policy favoring free and private collective bargaining, require good faith bargaining over wages, hours, and working conditions, and delegate related rulemaking and interpretive authority to the National Labor Relations Board.[5]

The *Safeway* court observed that the Supreme Court has never delineated the precise boundaries of the non-statutory labor exemption, and then proceeded to examine prior Supreme Court decisions. Those that found the exemption did not apply tended to involve agreements between an employer and a labor union that were alleged to have injured or eliminated a competitor in the employer's business or product market.[6]

The Safeway court observed that the Supreme Court has never delineated the precise boundaries of the non-statutory labor exemption, and then proceeded to examine prior Supreme Court decisions.

The Ninth Circuit then turned to examine the *Brown* decision, the Supreme Court's first extension of the non-statutory labor exemption to an agreement that was solely among employers. In *Brown*, after expiration of a collective-bargaining agreement, the football teams had proposed terms for a developmental squad of rookies. After about two months, the bargaining reached an impasse, and the NFL unilaterally implemented the developmental squad program under its proposed terms. *Brown* found the arrangement exempt under the non-statutory exemption. The Brown court rejected the argument that the exemption should be limited to existing labor-management agreements.[7] It also rejected the suggestion that the exemption should terminate when collective-bargaining negotiations reach impasse or a reasonable time thereafter, as well as the suggestion that the exemption be limited to post-impasse agreements about bargaining tactics but not terms of policies directed at employees.[8] Nor did the Supreme Court accept the proposition that professional sports should be treated differently than other industries with respect to the exemption. Because the conduct took place during and immediately after a collective-bargaining negotiation, grew out of and was related to the lawful operation of the bargaining process, involved a matter that the parties were required to negotiate collectively, and concerned only the parties to the collective-bargaining relationship, the *Brown* court applied the exemption.

The *Safeway* court, relying upon *Brown*, rejected application of the exemption for three reasons. First, "[t]he agreement to share revenues during and shortly after a labor dispute

[3] *See* 615 F.3d 1171 (9th Cir. 2010).
[4] *See Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-22 (1975).
[5] See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996).
[6] *See id.* at *3.
[7] *See id.* at 243-44.
[8] *See id.* at 244-48.

does not play a significant role in collective bargaining, nor is it necessary to permit meaningful collective bargaining to take place. The RSP does not relate to any core subject matter of bargaining, namely wages, hours, and working conditions, but rather relates principally to the relative revenues of the grocers in the market and the temporary, artificial maintenance of those revenues."[9] Reasoning that employers could not fix prices in response to a strike, the court wrote that "anything goes" is not the rule in the labor context. Second, the RSP concerned the "business" or "product" market rather than the labor market. "While we stop short of endorsing the concept that as a strict rule the non-statutory labor exemption can only arise in a case involving restraint of terms directly relating to labor, that the restraint here is primarily a product market restraint does not encourage application of the non-statutory labor exemption."[10] Third, the inclusion of a non-member of the collective bargaining unit, Food 4 Less, in the agreement to share revenue counseled against application of the exemption, despite the fact that Food 4 Less's inclusion in the RSP was helpful to the grocers because Food 4 Less was an unincorporated division of Ralphs.

Appropriate level of antitrust scrutiny for profit-sharing agreements

The court then determined that the RSP was subject to a full Rule of Reason analysis, rejecting California's arguments that it was a profit-pooling agreement or a market-allocation agreement subject to the *per se* rule or quick look analysis. As to profit-pooling, the court distinguished older profit-pooling cases such as *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), on two grounds. First, in that and other older cases, the profit-pooling between competitors was to last many years. Also, in *Citizen Publishing*, the agreement could only be terminated by mutual consent of the parties. In contrast, the RSP could end at any time – as soon as the labor dispute was resolved. As it turned out, the RSP lasted only five months.

The court then determined that the revenue sharing provision was subject to a full Rule of Reason analysis, rejecting California's arguments that it was a profit-pooling agreement or a market-allocation agreement subject to the *per se* rule or quick look analysis.

In the court's view, this "temporary and short-term feature" of the RSP was sufficient to distinguish it from *Citizen Publishing*. "Unlike the *Citizen Publishing* arrangement, which insulated the newspapers from competition by pooling profits for decades and left no reason to compete for customers, the unknown duration of the RSP, the strike-induced nature of the agreement, and the fact that it could end at any moment suggests that the grocers had a continued interest in maintaining and growing their customer bases. Temporary revenue sharing likely did not blunt the grocers' incentives to advertise, discount, and provide quality service."[11] Grocers retained incentives to prevent the loss of customers during the strike, who might not return after switching to a competitor, and they also had incentive to win new customers that might return as regular customers after the strike ended. Because the RSP was of a limited duration, the grocers' interest in preserving customer loyalty and maintaining or expanding market share likely persisted during the revenue-sharing period.

Second, the RSP was an agreement among some, but not all, of the competitors in the relevant market. (Their market shares accounted for between 54.4% and 76.0% of the market.) In contrast, the agreement in *Citizen Publishing* was between the only two daily newspapers in Tucson. "Given the presence of [other] competitors in the market, there is a significant probability that the grocers retained incentives to continue – or even to increase – discounting and advertising of grocery products to prevent the loss of customers and profits during the strike period, to gain new customers if possible, and to maximize profitability and market share after the strike."[12]

The court quickly rejected California's argument that the RSP was a *per se* illegal market sharing agreement. California conceded that the RSP did not "prevent any Defendant from actually making sales" to consumers. California did not assert that the RSP restricted customers from patronizing certain grocers. Moreover, the agreement "did not prevent the

9 *Safeway* at *8.
10 *Id.* at *9.
11 *Safeway* at *13.
12 *Safeway* at *13.

grocers from selling any particular products, or limit the grocers to a particular set of customers or geographic regions." Therefore, the RSP could not be characterized as a *per se* illegal market-allocation agreement.

Finally, the court also rejected a "quick look" analysis of the RSP, for many of the same reasons that *per se* treatment was unwarranted. The RSP had unique features, including its limited duration and the existence of other significant external competitors in the market. "To reach a confident conclusion on the anticompetitive effects of the RSP, further development of the record is required."[13] The features of the RSP strongly suggested that the agreement might plausibly be thought to have a net pro-competitive effect, or possibly no effect at all on competition.[14] In light of the novel circumstances and uncertain economic effects of the RSP, the Ninth Circuit held that the district court correctly determined that it should follow the presumptive Rule of Reason.

In light of the novel circumstances and uncertain economic effects of the RSP, the Ninth Circuit held that the district court correctly determined that it should follow the presumptive Rule of Reason.

The Dissents

Chief Judge Kozinski dissented in part, contending that the court's ruling on the non-statutory labor exemption was unnecessary and likely an advisory opinion at odds with Article III jurisdiction. The Chief Judge also wrote that the majority erred in denying application of the non-statutory labor exemption.

Judge Reinhardt dissented from the majority's application of the Rule of Reason to the RSP, and would have applied a "quick look" analysis. In his view, the limited duration of the RSP, as well as the fact that it did not include all of the firms in the relevant market, counseled against application of the *per se* rule.[15] Judge Reinhardt then reached a "confident conclusion" that the RSP creates a "great likelihood of anti-competitive effects," and that such effects are not outweighed by any plausible pro-competitive benefits.[16] "Although it is plausible that the two differences [between the RSP and the historic profit-pooling cases] will serve to reduce the competitive pressures to a lesser extent than would a long-term agreement among competitors who control 100% of the market, it is evident that the lessening of the reduction in competitive pressure will be one of degree only, and that there is no likelihood whatsoever that the anticompetitive effects of a profit sharing agreement will be eliminated."[17] A quick look analysis would therefore be appropriate.

Discussion

Prior to *Safeway*, competitors could safely assume that profit-sharing arrangements would likely be condemned as per se unlawful. That is no longer true. But what, exactly, is the permissible zone of conduct? Given the nature of the *Safeway* decision, the answer is unclear.

Because *Safeway* arose in the labor relations context, one might be tempted to dismiss it as merely a labor exemption case. That conclusion, however, would be unwarranted. After all, the Ninth Circuit went out of its way to find that the labor exemption did not apply to the RSP at issue. In light of that decision, there is little reason to confine *Safeway* to the labor relations field.

One can imagine many situations in which some competitors may want to pool profits, at least for a limited period of time. There may be a temporary market crisis or emergency. For example, a local market may be devastated by a natural disaster – a tornado, a hurricane, an earthquake, even a crop disease. *Safeway* suggests that in those cases, where some or all suppliers are having difficulty supplying the market, profit-sharing is theoretically permissible. These situations feel somewhat analogous to the crisis of a labor strike. But what about other situations that may tempt competitors to pool profits? For example, could the *Safeway* decision permit profit-pooling

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13 *Id.* at *15.
14 *See id.*, citing *California Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999).
15 *See id.* at *26 (Reinhardt, J., dissenting).
16 *See id.* at *28.
17 *Id.* at *29.

for certain R&D efforts of limited scope and duration? Nothing in the opinion expressly rules out such arrangements.

The remaining questions about the level of antitrust scrutiny for such arrangements, however, become more difficult. Rule of Reason treatment for a profit-sharing arrangement, *Safeway* indicates, turns on two factors: (i) whether the arrangement is long-term or short-term, and (ii) whether the arrangement includes all competitors in a relevant market. The first threshold question is whether both factors are required to obtain favorable Rule of Reason scrutiny. It would certainly be safer to assume that both factors are prerequisites, but that is not entirely clear from the decision.

Safeway also leaves open the question of how many competitors can join an arrangement before it no longer is subject to Rule of Reason treatment. Apparently, a 54% to 76% combined market share is permissible, at least in a retail grocery market. But would a larger share be? Would the answer turn on the duration of the agreement? Put another way, is there an inverse relationship between the permissible maximum collective share and the agreement's duration? And would the figures be different for a wholesale market, or a technology market?

Prior to Safeway, competitors could safely assume that profit-sharing arrangements would likely be condemned as per se unlawful. That is no longer true.

As to duration, five months is apparently consistent with Rule of Reason treatment, but a decades-long agreement would not be. Is there a dividing line, and if so, where is it? Does it depend upon the type of industry, or other market factors? These questions were also not answered by the *Safeway* court.

The *Safeway* decision opens up a possible new vista for certain types of competitor collaborations. However, it leaves the lines between Rule of Reason treatment and quick look or *per se* treatment rather blurry.

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How to Ask Congress For a Favor

By Anant Raut

Introduction

Used effectively, legislative advocacy (aka, lobbying) can be a powerful tool in the arsenal of any company looking to enhance its competitive advantage. The *Noerr-Pennington* line of cases has outlined an antitrust immunity for companies seeking favors (typically, legislation) from Congress (as well as the executive, judicial, and administrative branches, to varying degrees) even if such favors expressly benefit the companies at the expense of their competitors.

Noerr-Pennington doctrine referees the boundary between the antitrust laws and the freedom of petitioning protected by the First Amendment.[1] The doctrine safeguards the right of private actors to petition the government, regardless of the harm to competition or competitors that might ensue. *Noerr-Pennington* immunity even protects outright misrepresentation when petitioning a legislative body.

Yet there are limits to how far companies can take *Noerr-Pennington*. There is a consensus that companies must be advocating out of a genuine desire to obtain the relief sought, not simply as a means of impeding a competitor's business or draining a competitor's resources. In addition, while companies are afforded considerable protection when lobbying Congress and state legislatures, that protection diminishes when seeking potentially anticompetitive actions from courts, administrative agencies, and private organizations.

Still, with careful forethought, legislative advocacy can be an effective prong of a company's overall business strategy. It can be undertaken with relatively low levels of investment yet can yield extraordinary benefits.

Why Your Company Should Care

There's an apocryphal story among tour guides in Washington, D.C., that during the Grant administration, members of Congress favored the historic Willard Hotel as their preferred watering hole. Persuasion artists, seeking a favor of some sort for a client or an industry, would loiter in the lobby, taking the elected Representatives by the arm as they came in and walking them to the bar, whispering blandishments in their ear and oh by the way, would you see fit to support a bill that did the following? Their lair of choice led President Grant to purportedly decry them as "damned lobbyists," coining a new term in the process.

Over a century later, lobbying has become a sophisticated industry in Washington, D.C. As of 2010, there were nearly 13,000 registered federal lobbyists, accounting for $3.51 billion spent on lobbying activities.[2]

An increasing number of companies are realizing that having a presence on Capitol Hill pays for itself in the long run, both as an offensive as well as a defensive strategy. Retaining an outside firm, versus maintaining dedicated personnel within the company, have their respective pros and cons. In either event, having "boots on the ground," gauging political winds, provides companies with opportunities to ask elected representatives to:

- introduce legislation;
- oppose legislation that has been introduced;

An increasing number of companies are realizing that having a presence on Capitol Hill pays for itself in the long run, both as an offensive as well as a defensive strategy.

[1] U.S. Const. amend. I ("Congress shall make no law…prohibiting…the right of the people…to petition the Government…").

[2] http://www.opensecrets.org/lobby/

- propose a carveout from legislation that would otherwise adversely impact that company's industry/sector; or
- propose an earmark benefiting that company in legislation that would otherwise not affect the industry/sector as a whole.

Legislative advocacy, once sequestered to "smoke-filled rooms," has become a legitimate part of companies' business strategy. And with good reason – legislation, once passed, becomes markedly difficult to overturn. Witness the antitrust exemption contained within the McCarran-Ferguson Act of 1945[3] for health insurance companies.

The McCarran-Ferguson exemption was originally intended as a 3-year bridge to allow insurance companies to adjust to a world in which the antitrust laws now applied to their industry, following a 1944 Supreme Court decision overturning decades of de facto immunity.[4] Insurance companies lobbied Congress at the time, arguing that federal antitrust enforcement would disrupt the longstanding state-based regulatory system in place. The termination date for the exemption was removed entirely when the House- and Senate-passed versions of the bill were negotiated into a final bill in conference.[5] As a result, what was originally intended as a -2-3-year phase-in period was signed into law as a permanent exemption.[6] Since then, various Congresses have tried to curb or eliminate the exemption over the years, with zero success.

In 2010, a series of ill-timed pricing decisions by insurance companies fomented public resentment[7], facilitating the passage of the most comprehensive health care reform bill in decades.[8] Yet the McCarran-Ferguson exemption survived intact – it was included, then removed from the bill that finally passed. The McCarran-Ferguson immunity repeal clause was reintroduced as a standalone bill[9] that swept through the House of Representatives 406-19, but went nowhere in the Senate, despite the fact that both chambers were controlled by the same party. Thus, the exemption, lobbied for more than sixty-five years ago, continues to benefit the industry to this day.

What *Noerr-Pennington* Allows Your Company to Do

The *Noerr-Pennington* line of cases allows your company to ask Congress for legislation (or any other Congressional action, such as a hearing, a study, a letter to an agency, a declaration, or opposition to any of the above) that specifically helps your company and hurts your competitors. You can even make outright misrepresentations in making your argument (although, as the next section explains, you really don't *want* to). That type of activity is your biggest zone of protection from the antitrust laws.

The further you move away from asking Congress (or state legislatures) for legislation, the less protection you have. *Noerr-Pennington* protection diminishes when the petitioning activity is before a private association, before an administrative body performing ministerial functions, or in an adjudicatory setting.

The seminal case, *Eastern Railroad Presidents Conference, et al. v. Noerr Motor Freight, Inc., et al.*[10], involved a lawsuit brought by trucking companies alleging that a group of railroads had violated the antitrust laws by engaging in a campaign disparaging truck hauling and seeking state legislation that would have restricted trucking companies' ability to compete for freight business with the railroads. In its decision, the Supreme Court upheld the right of companies to lobby the legislature in their own interest, even if doing so necessarily resulted in harm to competition.

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3 15 U.S.C. §§ 1011 et seq. (1945).

4 United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

5 H.R. REP. No. 111-322, at 3-4.

6 *Id.*

7 Emily Berry, *Anthem Rate Hike Reignites Health Reform Push,* AMERICAN MEDICAL NEWS, *Mar. 1, 2010, available at* http://www.ama-assn.org/amednews/2010/03/01/bil20301.htm.

8 PATIENT PROTECTION AND AFFORDABLE CARE ACT, H.R. 3590, 111th Cong. (2009) (enacted).

9 Health Insurance Industry Fair Competition Act, H.R. 4626, 111th Congress (2nd Sess. 2010), passed House 406-19.

10 365 U.S. 127 (1960).

The *Noerr* Court held that the Sherman Act did not prohibit individuals or groups from petitioning the legislature and "[attempting] to influence the passage or enforcement of laws,"[11] even if their goal was to impose an anticompetitive restraint upon a competitor. The Supreme Court drew its rationale both from the petition clause of the First Amendment and *Parker*[12] state action doctrine, rationalizing that if states were immune from the antitrust laws when passing legislation that reduced competition, then it made little sense for antitrust law to prevent their constituents from being able to express their preferences.[13] The Court held that "to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[14]

The Noerr Court held that the Sherman Act did not prohibit individuals or groups from petitioning the legislature and "[attempting] to influence the passage or enforcement of laws," even if their goal was to impose an anticompetitive restraint upon a competitor.

Two other areas of note in the *Noerr* decision: first, the *Noerr* Court essentially gave a green light to outright lying when petitioning the legislature. "It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors."[15] Despite the fact that "each group [had] deliberately deceived the public and public officials….[,]that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned."[16]

Second, the *Noerr* Court validated what we refer to today as "astroturf campaigns" (i.e., ostensibly grassroots third-party campaigns that are actually organized and operated by a party in interest). The negative publicity campaign at issue in Noerr was perpetrated through third-party organizations secretly backed by the railroad companies. However, the Court didn't care ("…[T]he…use of the third-party technique was, so far as the Sherman Act is concerned, legally irrelevant."[17]).

Four years later in *United Mine Workers of America v. Pennington*[18], the Supreme Court extended Noerr protection to lobbying the executive branch. The activity at issue involved a coal miners union and several large coal companies lobbying the Secretary of Labor and the Tennessee Valley Authority to undertake a series of actions that harmed smaller coal companies. The Court reiterated that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."[19]

In the *California Motor Transport Co. v. Trucking Unlimited*[20], the Supreme Court extended Noerr-Pennington protection to administrative and judicial proceedings, while providing some guidance as to where *Noerr* protection would not apply, the "sham" exception.[21] The Court also drew a distinction between misrepresentations made to a legislature versus misrepresentations made to an adjudicatory body, noting that while unethical conduct in the legislative arena is protected, "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."[22] The rationale is that legislation is a deliberative process, and legislators expect to hear one-sided arguments from all interested parties, whereas the adjudicatory environment has fewer inputs for information and is thus more susceptible to making harmful anticompetitive decisions in reliance upon deceptive petitioning.[23]

Allied Tube & Conduit Corp. v. Indian Head, Inc.[24] further articulated the limits of *Noerr-Pennington* immunity, holding that a company could not claim *Noerr-Pennington* protection for lobbying a private standard-setting association. At issue in the case were the actions of a consortium of metal conduit manufacturers in packing a voting session of their standard setting association with supporters with the result that the metal conduits they manufactured were selected as a standard

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11 *Noerr* at 135.
12 Parker v. Brown, 317 U.S. 341 (1943).
13 *Noerr* at 137.
14 *Noerr* at 137.
15 *Noerr* at 139.
16 *Noerr* at 145.
17 *Noerr* at 142.
18 381 U.S. 657 (1965).
19 *Pennington* at 670.
20 404 U.S. 508 (1972).
21 *California Motor Transport* at 611-612.
22 *California Motor Transport* at 513.
23 Clipper Express v. Rocky Mt. Tariff Bureau, Inc., 690 F.2d 1240, 1261 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983).
24 486 U.S. 492 (1988).

for internal home wiring, and competing plastic PVC conduits were not. The PVC manufacturers alleged an antitrust violation, but the metal pipe manufacturers claimed that the association was a "quasi-legislative body," in that its standards were routinely adopted by state legislatures, and thus their petitioning activity was protected under *Noerr-Pennington* doctrine.

In denying their assertion of immunity, the Court rejected "an absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action,"[25] injecting a subjective analysis of "the context and nature of the activity"[26] in determining the validity "and thus the applicability of *Noerr* immunity."[27] Conduct that is essentially political in nature should expect traditional protections under the First Amendment, while conduct traditionally subject to antitrust scrutiny, such as agreements among horizontal competitors in a trade association setting, should not. The Court also rejected the "quasi-legislature" argument, drawing a distinction between direct versus indirect efforts to influence government action.

Caution: There are Limits to Noerr-Pennington Immunity, Even When Lobbying Congress

The *Allied Tube* Court so muddled the limits of *Noerr-Pennington* immunity that it acknowledged as much in the course of the majority opinion ("It is admittedly difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact…"[28]). Scholars such as Einer Elhauge has masterfully pointed out internal inconsistencies throughout the line of *Noerr-Pennington* caselaw.[29] One thing that is clear is that the broadest freedom is accorded to petitioning the legislature, but even that it not absolute. Noerr-Pennington doctrine creates an exception to the immunity from the antitrust laws when the petitioning activity is a sham, and the goal is not the relief sought from the entity being petitioned, but to use the process to thwart and tax their competition. In 1991, the Court provided some clarification to what constituted a sham, stating that "the purpose of delaying a competitor's entry into the market does not render lobbying activity a 'sham,' unless…the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks."[30] Lobbying activities have been found to fall within the "sham exception" of the antitrust laws when they disguise what is nothing more than an attempt to directly injure a competitor and the political actor has no real interest in the outcome.[31]

Noerr-Pennington doctrine creates an exception to the immunity from the antitrust laws when the petitioning activity is a sham, and the goal is not the relief sought from the entity being petitioned, but to use the process to thwart and tax their competition.

In short, no petitioning activity is without antitrust risk. Your greatest zone of protection lies in petitioning Congress for legislation that helps your company. However, even lobbying Congress can be challenged as sham petitioning, so it is critical to weigh the antitrust consequences before engaging in lobbying.

There's the Good Way, and There's the Better Way

As outlined above, a company is well within its First Amendment rights to ask federal and state legislatures to pass legislation that will give it a business advantage over its competitors. They can even lie while making their case. But if the goal is to actually see such legislation passed into law (which it should be, to avoid any possible "sham" challenge), a business should take into account optics factors that go beyond the *legality* of such legislation and address the *likelihood* of its coming to pass.

One designation every politician fears is being labeled "in the pocket of [insert business name here]." No politician wants to be seen as beholden to a particular company. There are also practical considerations. Even if a member of Congress wants to help a particular business, he/she still needs to get enough other members of Congress onboard to move the legislation through both chambers and get passed by a majority of both chambers, overcome concerted efforts by affected

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25 *Allied Tube* at 503.
26 *Allied Tube* at 505.
27 *Id.*
28 *Allied Tube* at n. 10.
29 Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity,* 80 CALIF. L. REV. 1177, 1192 (1992).
30 City of Columbia v. Omni Outdoor Advertising, Inc. 499 U.S. 365, 381 (1991).
31 Friends of Rockland Shelter Animals, Inc. (FORSA) v. Mullen, 313 F. Supp. 2d 339 (S.D. N.Y. 2004). See also Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp., 573 F. Supp. 833 (N.D. Ill. 1983).

parties to derail it throughout the process, and get the President to sign it. Maybe you can convince a handful of politicians to support legislation that helps your company, but will it be enough?

One solution: strength in numbers. Forming an association has its advantages. Support from an industry association gives greater weight to proposed legislation. There's more political cover in supporting a broad swath of industry over a particular company. Associations also represent that many more jobs in that many more districts, always of interest to elected representatives. And there are more parties with a stake in the proposed legislation who can be counted on to "whip" support for the bill.

Associations have their disadvantages as well. They carry their own antitrust risks. The simple formation of a trade association does not permit its members to engage in behavior that would be illegal outside of the trade association (e.g., sharing pricing data, dividing markets, and generally engaging in non-competitive collusive activity). Trade associations often have higher costs, requiring separate staff. They also tend to act more slowly – trade association activities generally require the approval of a majority of its membership.

Again, to play it safe, make sure to consider the antitrust risks as part of any lobbying strategy.

Some Practical Tips for First Time Petitioners

So say you're ready to ask Congress for a favor. Momentum for a bill is almost always driven by the politics of the moment; but it can be stalled or spurred by messaging. Messaging an "ask" from Congress could be the subject of its own article, but here are some pointers:

Momentum for a bill is almost always driven by the politics of the moment; but it can be stalled or spurred by messaging.

- Know in advance what you want: pitching legislation on Capitol Hill is like pitching business to new clients. You should go into any meeting with a compact binder of materials (which can be immediately sent to staff after the meeting as a .pdf) that clearly outline what you're asking for, why it's a good thing, who already supports such an idea, and (if possible) what draft language for legislation might look like.
- Big picture: the pitch behind the legislation should always be why it's good for a broader swath of American than just you.
- Scout the field: know which politicians have previously supported similar legislation, and which have previously opposed. Thomas.loc.gov is an invaluable source for searching for previous bills, their histories, and co-signatories. Best of all, it's free.
- Start local: your local representatives are most likely to grant you an audience. As long that they wouldn't oppose the legislation, you should try to meet with them first. Oftentimes, their staff can help introduce you to staff in other relevant offices.
- Don't waste the stamps: Don't bother mailing anything to the Hill. Mail gets delayed by 1-3 weeks for routine anthrax screening. Email it or hand-deliver it.

Conclusion

In sum, forward-thinking companies should consider legislative advocacy as part of their overall business strategy. Companies are afforded a great deal of protection from the antitrust laws in seeking helpful legislation from state and federal legislatures. But no immunities are absolute, and any company looking to play in this field would be wise to weigh the antitrust risks involved before moving forward.

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