



FTC/DOJ Health Care Hearings: State Action and *Noerr-Pennington* Issues

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FTC STATE ACTION TASK FORCE

State Action Basics

- ♦ *Parker v. Brown*, 317 U.S. 341 (1943) –
Actions of “the state itself” immune from antitrust enforcement.
- ♦ *Midcal*, 445 U.S. 97 (1980) –
Exercises of delegated authority immune from antitrust enforcement when:
 - (1) pursuant to a “clearly articulated” state policy, and
 - (2) “actively supervised” by the state.



FTC STATE ACTION TASK FORCE

The Expanding Scope of State Action Immunity

- ◆ “Clear Articulation” –
Inferring intent to displace competition from a grant of general corporate powers.
- ◆ “Active Supervision” –
Lack of clear guidance with respect to supervisory procedures.



FTC STATE ACTION TASK FORCE

Possible Approaches to Clarifying the State Action Doctrine

- ◆ Clarify the proper interpretation of the “clear articulation” requirement.
- ◆ Elaborate clear standards for the “active supervision” requirement.
- ◆ Advocate a tiered approach to govern the application of the “clear articulation” and “active supervision” requirements.
- ◆ Consider explicit recognition of a “market participant” exception to state action immunity.



ADVOCACY: CONNECTICUT EYES

FTC Staff Letter to Connecticut Board of Examiners for Opticians

Requiring stand-alone sellers of replacement contact lenses to obtain Connecticut optician and optical establishment licenses would:

- ◆ increase the price of replacement lenses,
- ◆ reduce consumer convenience,
- ◆ potentially harm consumer health (*i.e.*, by inducing consumers to replace lenses less frequently), and
- ◆ potentially serve as a barrier to the expansion of e-commerce.



ADVOCACY: PHYS. COLLECTIVE BARGAINING

FTC Staff Letters to State Legislatures (Alaska, Washington, and Ohio)

State legislation creating an antitrust exemption for physician collective bargaining with health plans:

- ♦ would likely raise costs and reduce access;
- ♦ would *not* improve the quality of care; and
- ♦ in the absence of an adequate mechanism for “active supervision,” would potentially subject participating price-fixing physicians to antitrust liability.



INDIANA MOVERS AND WAREHOUSEMEN, INC.

File No. 021-0115 (Mar. 18, 2003)

Elements the Commission will consider in determining whether the “active supervision” requirement has been satisfied in future cases:

- ◆ the development of an adequate factual record, including notice and an opportunity to be heard;
- ◆ a written decision on the merits; and
- ◆ a specific assessment – both qualitative and quantitative – of how private action comports with the substantive standards established by the state legislature.



FTC *NOERR-PENNINGTON* TASK FORCE

Noerr-Pennington Basics

- ♦ *Noerr*, 365 U.S. 127 (1961) –
Antitrust immunity for “petitioning” conduct directed toward a legislature.
- ♦ *Pennington*, 381 U.S. 657 (1965) –
... toward the executive branch.
- ♦ *California Motor Transport*, 404 U.S. 508 (1972) –
... toward a court (*i.e.*, the filing of lawsuits).



FTC *NOERR-PENNINGTON* TASK FORCE

The Expanding Scope of *Noerr-Pennington* Immunity

- ◆ The definition of “petitioning” continues to grow –
see Coastal State Marketing (immunizable “petitioning” may entail no government involvement at all).
- ◆ While the “sham” exception continues to shrink –
see Porous Media Corp. (post-*PRE*, mere denial of defendant’s summary judgment request demonstrates the absence of “sham”).



FTC *NOERR-PENNINGTON* TASK FORCE

Possible Approaches to Clarifying the *Noerr-Pennington* Doctrine

- ◆ Apply a more restrictive view of the varieties of conduct that constitute immunized “petitioning.”
- ◆ Apply the *Walker Process* exception to *Noerr* beyond the patent prosecution context.
- ◆ Advocate full recognition of an independent material misrepresentation exception to *Noerr*.
- ◆ Clarify the parameters of a pattern, or repetitive petitioning, exception to *Noerr*.



IN RE BUSPIRONE

185 F. Supp. 2d 363 (S.D.N.Y. 2002)

The FTC's *amicus* brief successfully argued that:

- ♦ A drug company's submission of patent information for listing in the FDA's Orange Book is a ministerial act that does not constitute "petitioning."
- ♦ The FDA's Orange Book listing process is sufficiently analogous to the patent prosecution process to warrant extension of the *Walker Process* exception to *Noerr*.



BRISTOL-MYERS SQUIBB CO. (“BMS”)

File Nos. 001-0221, 011-0046, 021-0181 (Mar. 7, 2003)

Elements of BMS’s pattern of anticompetitive petitioning conduct, as alleged in the FTC’s complaint:

- ◆ BMS deceived the PTO to receive unwarranted patent protection for its products.
- ◆ BMS deceived the FDA by listing patents in the Orange Book that did not satisfy the listing criteria.
- ◆ BMS filed meritless patent infringement lawsuits, thereby triggering multiple 30-month stays of generic drug approval under the Hatch-Waxman Act.
- ◆ BMS entered into collusive agreements to further delay generic entry.



UNION OIL CO. OF CALIF. (“UNOCAL”)

Dkt. No. 9305 (complaint issued Mar. 4, 2003)

Potential *Noerr* issues raised by “patent ambush” conduct alleged in the FTC’s complaint:

The facts alleged in the FTC’s *Unocal* complaint could potentially support:

- ◆ Application of an independent misrepresentation exception to *Noerr*.
- ◆ Application, beyond the PTO context, of the *Walker Process* exception to *Noerr*.