

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

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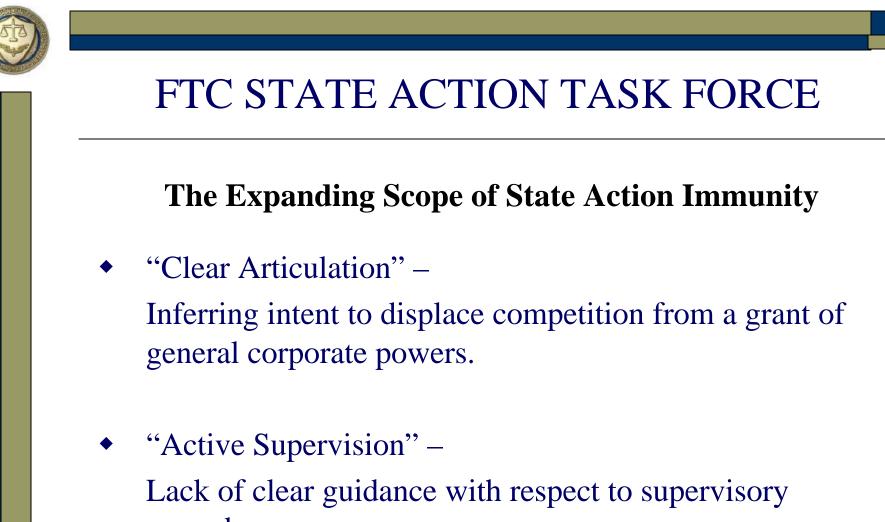
FTC STATE ACTION TASK FORCE

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.



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:

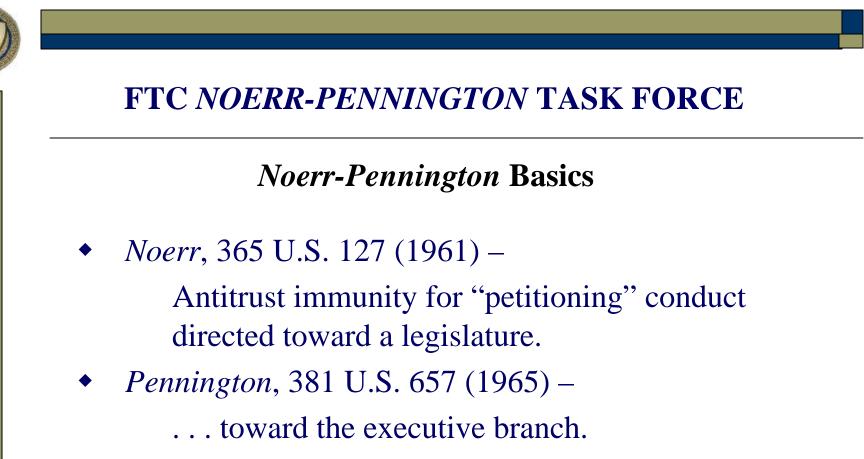
- would likely raise costs and reduce access;
- would *not* improve the quality or care; and
- in the absence of an adequate mechanism for "active supervision," would potentially subject participating price-fixing physicians to antitrust liability.



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.



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*.