

Noerr Pennington Protection

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Noerr-Pennington Doctrine Provides Right to Petition the Government

- First Amendment of U.S. Constitution guarantees the rights to free speech and to petition the government; but every petition to the government (*e.g.*, lobbying, litigation) involving commercial activity may have an anticompetitive effect.
- U.S. Supreme Court established antitrust immunity because “[t]he whole concept of representation depends upon the ability of people to make their wishes known to their representatives.” *Eastern Railroad Presidents Conference v. Noerr Motor Freights, Inc.*, 365 U.S. 127, 137 (1961).
- Doctrine has not been formally adopted outside the United States.
 - *Noerr-Pennington* rejected as an inapplicable defense by the European Court of Justice (ECJ) in *Compaigne Maritime Belge Transp. Case*.
- Article 5 of the Constitution of Brazil guarantees:
 - Right to free speech (Articles IV and IX)
 - Right to petition the government (Articles XXXIV and XXXV)
 - *Noerr Pennington* evolving in Brazil

Scope of *Noerr Pennington* Immunity

- All branches, all U.S. governments (federal and state)
 - Indications that doctrine applies to petition foreign governments
 - Some related activities covered (*e.g.*, public relations campaign)
 - Collaboration to petition the government (*e.g.*, trade associations)
 - Even petitions for government action limiting competition
- *Noerr Pennington* applied differently, depending on the branch of government petitioned.
 - Lobbying to the Legislature and Executive (“public policy advocacy”)
 - Criminal and civil court proceedings
 - Administrative/adjudicative proceedings of the Executive

Issue: Misrepresentations to the Government Under *Noerr Pennington*

- Representations made as lobbying to “legislative” body may not be acceptable before an “adjudicative” court.
 - Legislative → misrepresentations immune
 - Adjudicative → misrepresentations vitiate immunity
 - Could be anticompetitive conduct?
 - Use of lobbyists or non-lawyers in adjudicate proceedings does not mitigate the risk.
- Get antitrust advice in advance

Operation of *Noerr Pennington* Immunity

- Defense to litigation or investigation
 - Antitrust
 - Federal Corrupt Practices Act
 - Commercial/IP litigation

- Application of the Doctrine
 - Immunity (often presumed)
 - Affirmative defense

Limits of *Noerr Pennington* Immunity

- But *Noerr-Pennington* is limited:
 - Only actions reasonably necessary for the petition
 - Not direct action/effect in the marketplace
 - Exceptions
 - “Sham” petitioning – using the process rather than the result
 - Walker Process (patent infringement defense)
 - Government as a marketplace participant (dicta)

- Assume future need to demonstrate:
 - Application of the Doctrine to the activity
 - No Doctrine exceptions apply
 - Activity not otherwise unlawful
 - Assume all internal documents (e-mail) will be produced

“Sham Litigation” Not Protected

- Sham litigation defense
 - Exception to *Noerr Pennington* immunity

- Sham litigation two-prong test – *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993):
 - Lawsuit must be objectively baseless – no reasonable litigant could realistically expect success on the merits; then

 - Examination of litigant's subjective motivation – does the baseless lawsuit conceal an attempt to interfere directly with the business relationships of a competitor through the “use of governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon.”

“Sham Litigation” Not Protected

- A “smoking gun” is often needed
 - Direct evidence (e.g., non-privilege admission)
 - Circumstantial evidence (e.g., serial litigation)
 - Sham litigation developments in South America
 - *Continental* case in Brazil
 - *Monsanto* case in Argentina
 - Preempt sham litigation defense by referring to the legislative or lobbying purpose in all documents (e.g., mention the bill, regulation, hearing involved).
- ➔ Get antitrust advice in advance

Trade Associations

- Trade associations are essential business tools to:
 - Develop, communicate, lobby for public policy
 - Improve economic efficiency and transparency
- But everything a trade association does is by agreement of competitors.
 - *E.g.*, events & conference calls are venues at which competitors could “conspire”
- Most price-fixing and other per se illegal conspiracies in the United States happen in trade associations.

Must Have Proper Association Rules

- Membership requirements
 - No exclusion simply for competing with a member
 - No exclusion simply for affiliating with a competing association
- Standards of conduct for members
 - “Ethical” or “professional” rules can be useful, but also very dangerous – get antitrust advice
- Process for expelling members
 - Due process – critical, but more is needed
 - Documented violation of objective rules
 - No expulsion to enforce anticompetitive rule or agreement
 - Hard to expel if membership is critical to being able to compete – Market power? Critical assets or services?

Avoid Appearance of Price Fixing in *Noerr Pennington* Activity



- NEVER DISCUSS
 - Market-place reactions to legislation/regulations
 - Joint negotiations with private entities or government purchasing agencies
 - Future plans (advertising, production, marketing)
 - Current or future pricing
 - Sales terms and conditions
 - Bidding processes

Avoid Appearance of Joint Boycott in *Noerr Pennington* Activity



- NEVER DISCUSS
 - Dealing with certain customers
 - Dealing in certain products or geographic areas
 - Bidding for government business
 - Buying only from certain suppliers
 - Bidding processes
 - Future commercial plans
 - Market-place reactions to business or legislative developments

Avoid Appearance of Market Allocation in *Noerr Pennington* Activity



- NEVER DISCUSS
 - Market-place reactions to business or legislative/regulatory developments
 - Dealing with certain customers or government programs
 - Dealing in certain products/services or geographic areas
 - What R&D to focus on
 - Commercial plans

Issue: Data Collection and Exchange for *Noerr Pennington* Petition

- Structure to prevent even appearance of using the data or the collection process to fix prices, etc.
 - DO NOT attempt to obtain competitive information from competitors;
 - DO NOT use customers/suppliers as conduit to exchange information/reach agreements with competitors;
 - Collect only “historical” prices, costs, capacity, output levels
 - How old is enough?
 - Aggregate sufficiently before publication
 - How many survey respondents is enough?
 - Trade association or third-party contractor to collect and aggregate
 - Firewalls and other measures to ensure raw data isn’t shared among competitors
 - Consider providing to customers or the public
- ➔ Get antitrust advice in advance

Issue: *Noerr Pennington* and Selling to the Government

- Some U.S. courts hold *Noerr-Pennington* does not apply.
 - Some U.S. courts hold no protection for joint actions with such agencies – cases involved bad facts like basic bid rigging.
 - Other courts found protection for some kinds of lobbying regarding government purchasing programs.
- For joint efforts in the government purchasing area:
 - Direct joint activities to policy-making levels
 - Focus on policy arguments – not “commercial” issues
 - Make clear in all communications that trade association is not negotiating terms on behalf of its members

When You Sell To Government

- Be even MORE CAREFUL when lobbying
 - Focus on broad policy arguments
 - Lobby only high-level officials
 - Stay away from the normal procurement organization
 - Refuse requests for a “single point of contact” for negotiations
 - Remind everyone that companies act independently in the market

 - Other than lobbying, remember...
 - Lying to the government is unlawful
 - Procurement rules and contracts usually require statements that no collusive bidding
- ➔ Get antitrust advice in advance

Reasons to Adopt *Noerr Pennington**

- Constitutional importance of the value of freedom to petition the government.
- Elimination of uncertainty – South American companies are assuming *Noerr Pennington*, but must worry that defense will be rejected like it was in Europe.
- U.S. companies have marketplace advantage because they are able to petition the government for favorable legislation. South American companies should have a similar advantage.
- Harmonization of the laws will reduce transaction costs of trade.
- It is unfair to penalize a firm for advocating a position or restraint when the government is able to implement that restraint without liability.

*William Cooney, *Competition and the Noerr-Pennington doctrine: When should political activity be barred under European community competition law?*, G.W.L.J. (2003)

Conclusion

- Antitrust violations can cost companies millions of dollars and can lead to criminal and civil penalties for your company and you personally.
- Don't take chances ...
 - Think about antitrust before you write and before you meet – everything you write or they say can be used against you and your company.
 - Get antitrust counsel involved early in projects that will touch on competitively important topics.

Q&A and Comments. Obrigado.

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ADDITIONAL SLIDES

Why care about U.S. Antitrust?

- Violating U.S. antitrust law is a *CRIME*
 - Individuals - up to 10 years in jail, plus up to USD\$1M fine
 - Corporations - fines up to USD\$100M or twice the gains
 - Injunction to force violators to stop
- Civil litigation
 - Massive treble-damages lawsuits
 - Lasts years
 - Additional scrutiny by antitrust authorities (e.g., for mergers)
- U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC)
 - State authorities
 - Private parties
- Jurisdiction over anticompetitive conduct outside the U.S.

U.S. Antitrust Law

- The Premise: Consumers get better products at lower prices if suppliers compete vigorously
- Conspiracy – U.S. Sherman Act § 1
 - Forbids “agreements” in restraint of trade
 - Criminal penalties and civil litigation
- Abuse of Monopoly – U.S. Sherman Act § 2
 - Forbids monopolizing or attempting to monopolize (exclusionary conduct)
 - Civil litigation
- Price Discrimination – U.S. Robinson-Patman Act
 - Identical sales at different prices to similarly situated customers
- Mergers & Acquisitions – U.S. Clayton Act § 7, Hart-Scott-Rodino Act
 - Threat to “substantially lessen competition”
 - Mandatory pre-closing filing and review process

SHERMAN ACT

