Antitrust Exemptions and Immunities

2001-01-01

Determining the application of US antitrust laws to a course of conduct frequently requires consideration of a variety of exemptions and immunities. Some of these exemptions and immunities exist by virtue of specific legislation. Far more often, however, the exemptions and immunities have been created by the federal courts, typically when resolving conflicts between the competitive goals of the antitrust laws and economic or social goals established by federal, state or local governments. In either case, the potential application of an exemption or immunity may raise complex issues.

Federal Regulation and Jurisdiction

Implied Exemptions

The federal government regulates a large number of particular industries to a greater or lesser degree. Participants in these industries have frequently defended antitrust challenges to their conduct by relying on the federal regulation and arguing that so long as their conduct complies with the federal regulations, it cannot violate the antitrust laws. Over the years, federal courts have created a set of considerations relevant to ascertaining whether the existence of federal regulation creates an implied exemption from the antitrust laws.

The seminal case is *Silver v. New York Stock Exchange*. The complaint arose from the stock exchange's decision to disconnect the direct phone lines which gave Silver his link to information necessary to effectively participate in stock trading. The court found the decision to disconnect was the concerted joint action of all the members of the exchange which was a per se violation of the Sherman Act. However, the exchange argued it (and its members) was immune because Congress had mandated that the exchange regulate itself and create the rules and regulations governing relations between members of the exchange and non-members, like Silver.

The court recognized that there could be instances in which the conflict between the antitrust laws and some other regulatory regime might necessitate a finding of implied immunity from the antitrust laws. Implied immunity was, nonetheless, the exception rather than the rule and should occur only when the two regulatory schemes could not be reconciled with each other. In fact, the court went so far as to suggest that, "[r]epeal is to be regarded as implied only if necessary to make the [regulation] work, and even then only to the minimum extent necessary." Finding no incompatibility between exchange self-regulation and the need to abide by the antitrust laws, the court allowed Silver to bring his case.

The implied exemption doctrine articulated in Silver is highly fact dependent. As a result, the opinions are not always easily reconciled. In instances where the regulatory scheme is elaborate and far-reaching, there can be implied antitrust immunity even when the federal regulation does not specifically touch upon the precise practice at issue. See, eg., *United States v. National Ass'n of Securities Dealers, Inc.* (although the activities were not specifically required nor authorized, the SEC's general regulation is pervasive enough to confer immunity). On the other hand, the mere existence of a complex regulatory scheme does not ensure a finding of implied repeal. See, eg., *National Gerimedical Hospital & Gerontology Center v. Blue Cross* ("Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry."); *MCI Communications v. American Tel & Tel Co.* ("mere pervasiveness of a regulatory scheme does not immunize an industry from antitrust liability for conduct that is voluntarily initiated").

Even in instances in which an industry is not pervasively regulated, particular activity may be immune when that activity is either required by law or regulation, or when the activity has been "scrutinized and approved by the agency." *American Agric Movement v. Board of Trade* (supervision at issue not sufficiently "active, intrusive and appropriately deliberate"); see also *Phonetele, Inc. v. AT&T Co.* (absent pervasive scheme, defendants must show acts in question were necessitated by regulation). The level of "scrutiny" sufficient to create implied repeal in this context remains unclear and difficult to predict. Compare *Gordon v. New York Stock Exchange*, *Inc.* (SEC's history of reviewing commission rates suffices to demonstrate implied repeal) with National Gerimedical Hospital (specific actions taken under complex regulatory structure not specifically approved by regulatory body and, therefore, not immune from antitrust challenge).

Although the scale is a sliding one and predicting results is particularly difficult, the relevant factors are clear: how pervasive is the regulatory scheme; would enforcing the antitrust laws interfere with the existing regulatory scheme; has the agency reviewed the specific conduct at issue; and is the conduct mandated by a statute or regulation? The more involved the agency is with the particular activity, the more likely the courts will decline to apply the antitrust laws to that particular activity.

Primary Jurisdiction

At times, even when the circumstances do not suggest an implied exemption, the federal courts have deferred hearing the case and rendering a decision until after a regulatory agency completes its review. The primary jurisdiction rule allows agencies with specialised knowledge to act before a court intervenes. As the Supreme Court has stated:

> Primary jurisdiction... applies where a claim is originally cognisable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such case the judicial process is suspended pending referral of such issues to the administrative body for its views. (*United States v. Western Pacific Railroad*)

Although the use of primary jurisdiction does not mean that the courts will not eventually decide the case, it does at times mean that the courts will not determine particular issues. When agencies have engaged in adjudicative type procedures, and reached conclusions about particular facts, the courts typically will not reassess those facts. Instead, the court adopts the facts as determined and makes only a legal ruling. See *Utah Construction & Mining Co* .

Primary jurisdiction is a flexible doctrine which allows the courts to adopt it when it will be efficient and helpful, but also allows them to refuse to use it when it appears that the purposes of the doctrine will not be served. Courts review the cases individually and determine whether agency expertise would be helpful in resolving the factual issues. If so, the court is likely to apply primary jurisdiction. This is also true when there is a need for consistency among interpretations and decisions that only an expert agency can ensure.

On the other hand, courts decline the use of the doctrine when the administrative remedies are deemed inadequate or when the agency decision falls closer to resolving a legal issue than investigating a factual one. See, eg., *City of Mishawaka v. Indiana & Michigan Elec. Co.* (relief available through regulatory agency and judicial proceeding was complementary, not conflicting; court could award damages, but agency could not); *International Travel Arrangers, Inc. v. Western Airlines* (agency determination of "unfair competition" claim held not helpful to the court in reaching its antitrust conclusions).

The State Action Doctrine

Conduct taken pursuant to a state or local government regulatory program can be immune from the federal antitrust laws in certain circumstances. The state action doctrine was formulated by the Supreme Court in *Parker v. Brown*, a 1943 case challenging operation of a California program regulating the production and marketing of raisins. The Supreme Court held that the federal antitrust laws were not intended to restrain state action or official action directed by a state. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

Although the defendant in *Parker* was a state official, the court has subsequently applied the state action doctrine to protect actions of private persons. In *California Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc*, the court articulated a two-pronged test for antitrust immunity to apply to private parties acting pursuant to a state regulatory scheme: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy;' second, the policy must be 'actively-supervised' by the State itself." Consistent with the federalism premise underlying *Parker*, the court has emphasized that the relevant inquiry is simply whether the state has in fact acted, nor whether it has acted wisely.

The first prong of the Midcal test is intended to examine whether the state has articulated a policy to displace competition. Immediately after Midcal, lower courts divided with respect to the question of how forcefully the state had to articulate its policy in order to meet this part of the test. Did the state have to compel the challenged conduct, or was it sufficient for it only to evidence permission?

That issue was ultimately resolved in *Southern Motor Carriers Rate Conference, Inc. v. United*

States, an action challenging the collective filings of intrastate tariffs with state regulators by state authorized rating bureau of motor carriers. Rejecting a reading of state action that would have required that the states compel rating bureau membership, the court held that such a compulsion requirement would have been inconsistent with the principles of federalism, because "[i]t reduces the range of regulatory alternatives available to the State." Moreover a private party acting pursuant to an anti-competitive regulatory programme need not "point to a specific, detailed legislative authorization." Rather, it will be sufficient "if the State's intent to establish an anti-competitive regulatory program is clear." The court explained that "[t]he *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the states' ability to regulate their domestic commerce."

The second prong of the Midcal test, namely whether the state has "actively supervised," was the subject of the most recent pronouncement of the court on these issues in *Federal Trade Commission v. Ticor Title Insurance Company* . This case also involved a federal antitrust challenge to the collective filings of rates with state regulators by state-authorized rating bureau, this time rating bureau of insurance companies. To the extent that the court had applied the active supervision requirement prior to this decision, it had done so in a context in which a state had authorized anti-competitive private conduct, but had failed to establish any regulatory system for the supervision of that conduct. In such an instance, the resolution of the active supervision issue was simple - if there was no system, it was unlikely that there would be supervision.

However, in *Ticor*, state systems of regulation were in place and the question was whether the State's supervision under those systems had been adequate. In finding the supervision inadequate, the court majority held that the active supervision test requires the state to exercise "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention." The principal question to be asked is whether the state regulators played a "substantial role in determining the specifics of the economic policy." Under this ruling, the future application of the active supervision requirement becomes a fact-intensive review of prior state regulatory conduct.

The Noerr-Pennington Doctrine

The Noerr-Pennington doctrine generally holds that agreements to influence legislation and judicial or administrative action are immune from federal antitrust liability. *Eastern RR Conf. v. Noerr Motors; United Mine Workers of Amer. v. Pennington*. The essence of this doctrine can be illustrated by the facts of *Noerr* itself.

In *Noerr*, a group of railroads had collectively sought legislation designed to restrict competition from the trucking industry. The court found that because the railroads were making a genuine effort to influence legislation, they were immune from the antitrust laws. The immunity exists notwithstanding any anti-competitive motives which might have prompted their actions and the restrictive impact the legislation they sought would have in the marketplace. It is not entirety clear whether the court's conclusion rested on sensitivity to constitutionally protected freedom to petition, or on a conclusion that the Sherman Act was simply not designed to apply to political activity. In the later *Pennington* case, the *Noerr* doctrine, was extended to acts to influence administrative action and then, in *California Motor Transport Co. v. Truckers Unlimited*, to attempts to influence the judicial process.

Despite the seeming breadth of this immunity, however, the history of the doctrine is replete with litigation resulting in limitations in its scope. *Noerr* itself contained at least one seed of its own limitations. The court there acknowledged that in some situations activity, although ostensibly' directed toward influencing governmental action, might be a "mere sham" to cover an attempt to interfere directly with the business relationships of a competitor. In other words, the activity was not genuinely intended to influence governmental action. In such a case, the application of the antitrust laws would be justified.

The so-called "sham" exception to the exemption has been the subject of considerable dispute. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries (PRE)*, the Supreme Court directly considered the issue in a litigation context. A group of motion picture studios sued a hotel operator that had rented video discs to guests claiming copyright infringement. The hotel operator filed an antitrust counterclaim contending that the lawsuit was a sham designed to cloak an underlying attempt to monopolize the hotel motion picture business. The lower courts dismissed both the original claim and the counterclaim.

In affirming the dismissal of the counterclaim, the court articulated a two-part standard for ascertaining whether litigation comes within the sham exception. First, the litigation must be "objectively baseless". If an objective, reasonable litigation could reasonably expect success, the bringing of the suit is immune under *Noerr*. Second, if the litigation was objectively meritless, a court must then examine the subjective intent of the party bringing the suit to determine whether the suit constitutes an attempt to interfere directly with a competitor's business. Clearly the court's two-part standard establishes a formidable barrier to a party seeking to avoid the implications of the immunity, at least in an adjudicatory context. The appropriate standard for the application of the sham exception outside of this context is less clear.

Another limitation on the application of *Noerr* immunity has arisen when a party uses actions which themselves constitute a restraint of trade as a way of inducing the desired governmental action. In *FTC v. Superior Court Trial Lawyers Ass'n*, a group of lawyers serving indigent defendants refused to accept further cases until the fees paid for such work were raised. The court affirmed the FTC's conclusion that boycott was an unlawful restraint of trade which was not immunized by *Noerr* , concluding that *Noerr* does not immunize all conduct that is "genuinely intended to influence governmental." The court distinguished *Noerr* by suggesting that there "the alleged restraint of trade was the intended consequence of public action, in this case the boycott was the means by which [the defendants] sought to obtain favorable legislation."

Courts, have also distinguished between restraints flowing from governmental action itself and those flowing from the private efforts to influence the action. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, the standard-setting activities of a private organization were at issue. The producers of steel conduit had combined to "pack the house" in voting against proposals to approve the use of polyvinyl chloride conduit in the model code. Even though the model code was frequently incorporated into local city building codes, the court determined that there was no Noerr immunity when the "source" of the restraint was the exclusion of a competitive product from the private association's code as opposed to a government's later adoption of that code. However, in so holding, the court majority acknowledged difficulty in drawing precise lines between "anti-competitive political activity that is immunized despite its commercial impact from anti-competitive commercial activity that is unprotected despite its political impact".

Miscellaneous Exemptions

A variety of additional exemptions exists, most of them provided by statue and conferred upon a specific industry or economic activity. The more important are briefly discussed.

Business of Insurance

The McCarran-Ferguson Act, 15 USC §§ 1011-1015, provides that the "business of insurance" shall be exempt from the federal antitrust laws to the extent "regulated by state law."

Case Citations

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 US 492 (1988)

American Agric Movement v. Board of Trade, 977 F.2d 1147, 1167 (7th Cir 1992)

California Motor Transport Co. v. Truckers Unlimited, 404 US 508 (1972)

California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc., 445 US 97, 105 (1980)

City of Mishawaka v. Indiana & Michigan Elec Co., 560 F.2d 1314, 1323 (7th Cir 1977)

Eastern RR Conf. v. Noerr Motors, 365 US 127 (1961);

Federal Trade Commission v. Ticor Title Insurance Company, et. al., 504 US 621 (1992)

FTC v. Superior Court Trial Lawyers Ass'n, 493 US 411 (1990)

Gordon v. New York Stock Exchange, Inc., 422 US 659 (1975)

International Travel Arrangers, Inc. v. Western Airlines, 623 F.2d 1255 (8th Cir 1980)

National Gerimedical Hospital & Gerontology Center v. Blue Cross, 452 US 378, 388 (1981)

MCI Communications v. American Tel & Tel Co., 708 F.2d 1081, 1103

Parker v. Brown, 317 US 341 (1943)

Phonetele, Inc. v. AT&T Co., 664 F.2d 716, 743 (9th Cir 1981)

Professional Real Estate Investors, Inc. v. Columbia Pictures Industries (PRE), 508 US 49 (1993)

Silver v. New York Stock Exchange, 373 US 341 (1964)

Southern Motor Carriers Rate Conference, Inc. v. US, 471 US 48 (1985)

United Mine Workers of Amer v. Pennington, 381 US 657 (1965)

US v. National Ass'n of Securities Dealers, Inc., 422 US 694 (1975)

US v. Western Pacific Railroad, 352 US 59, 64 (1956)

Utah Construction & Mining Co., 384 US 394, 422 (1966)

It is well established that regulation by state law is sufficient if the conduct in question is either permitted or proscribed by a state law. However, the "business of insurance" in this context is not the business of insurance companies, but rather has been more narrowly construed to extend only to those activities of insurance companies that are integral to the spreading and underwriting of risk or which directly affect the relationship between insurer and insured. Moreover, the statutory exemption contains its own exception for activities which constitute a "boycott, coercion or intimidation."

Labor Organizations and Collective Bargaining

Section 6, of the Clayton Act provides exemptions which generally immunize unilateral union practices such as organizing, boycotting and picketing. The Supreme Court has also determined that collective bargaining is a protected activity.

Farming and Fishing Cooperatives

Cooperative associations of persons engaged in various agricultural and fishing activities have also received limited exemptions from the antitrust laws. These are found in the Clayton Act itself, as well as the Capper-Volstead Act, 7 USC §§ 291-292, and the Fisheries Cooperative Marketing Acts, 15 USC §§ 521-522.

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This article was originally published in The Antitrust Review of the Americas 2001*, a Global Competition Review special report atwww.global-competition.com.*

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