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Anticompetitive Collective Action to Influence Government Policy

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I. Legislative Action

Scenario I: Executives from 20 different Transportation Service Providers (TSPs) meet together and decide that each will charge shippers at least $4.00 per gallon as a fuel surcharge.

Question: Have the executives violated the antitrust laws?

Answer: Yes. All 20 could be facing 10 years in prison and their companies treble damages plus attorneys fees law suits by the shippers.

Scenario II: The same 20 executives meet together and decide to have Congress pass a law mandating that shippers pay TSPs no less than $4.00 per gallon as a fuel surcharge. They draft legislation, hire lobbyists, talk to members of Congress, commission studies and otherwise promote the legislation. It passes the House and Senate and is signed into law by the President.

Question: Does this violate the antitrust laws?

Answer: No. Same result as scenario one but the consequences are higher revenue, not incarceration and damages.

The basic concept is that businesses are free to join together without violating the antitrust laws to have legislative bodies enact plans that may have an anticompetitive impact. The same result, if done privately, would be a violation.

The Supreme Court addressed the issue in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). That case involved allegations that certain rail carriers took concerted action to hamper the passage of pro-trucking legislation by the Pennsylvania legislature and secure its eventual veto by the Governor of Pennsylvania. The

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Supreme Court had before it allegations of concerted action directed at a legislative body by competitors to harm other competitors by making it difficult for them to function in the market.

The Supreme Court held that the antitrust laws were not violated despite the anticompetitive impact of the concerted action by competitors. Basically it reasoned that the anticompetitive action was taken by the legislative body, and the Governor not the rail carriers although the rail carriers clearly encouraged the action that was eventually taken.

While the legislative process can sometimes be raucous and contain what may be exaggerated arguments and misleading information it nevertheless is part of the way positions become policy. Among other things the Supreme Court in *Noerr* said that the First Amendment to the Constitution guarantees the right "to petition the Government for a redress of grievances" and cannot be abridged by the antitrust laws restricting business interests from jointly asking the Government to take certain actions even if the result would be anticompetitive. 365 U.S. at 137-138.

II. Government Agency Action

Scenario III: Executives from 20 motor carriers meet together and decide to ask the Federal Motor Carrier Safety Administration (FMCSA) to issue a regulation providing that no trucking company may operate in interstate commerce unless it has a fleet of at least 50 trucks. The executives petition the FMCSA to start a rulemaking and get motor carrier groups, shipper organizations and others to support it. Eventually the FMCSA issues such a regulation. As a result a number of small motor carriers are effectively put out of business.

Question: Have the executives violated the antitrust laws?

Answer: No.

Four years after the *Noerr* decision the Supreme Court was faced with an antitrust case involving allegations of concerted action where a group of large coal mining companies along with a union had petitioned the Secretary of Labor to establish certain minimum wage levels on small mine operators, something the Secretary of Labor had the power to do. Such wage action would have a detrimental financial impact on the small mine operators that competed with the large mine operators. *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

The Supreme Court applied its approach in Noerr to this Government administrative action case to say that joint activity directed at regulatory types of Government action did not violate the antitrust laws even if the resulting action was anticompetitive in nature. It reasoned that the actual anticompetitive action was, in the final analysis, done by a Government agency not business competitors.

III. The Sham Exception

What has become known in antitrust law as the *Noerr–Pennington* doctrine has been applied in a number of situations such as filing law suits to maintain a monopoly (*Kaiser Foundation Health Plan, Inc. v. Abbott Laboratories, Inc.*, 552 F.3d 1033 (9th Cir. 2009), *Knology, Inc. v. Insight Communications Co.*, 393 F.3d 656, (2004)) and lobbying private standards setting groups that set codes often adopted by governmental bodies (*Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295 (9th Cir. 1994).)

The courts have found however, that the *Noerr-Pennington* doctrine has its limits. The most important one is the "sham exception". If concerted activity is only ostensibly directed at obtaining Government action but amounts in practice to be actually a substantial interference with the ability of competitors to function in the market without a bona fide desire or probability of obtaining the sought after Government action then the *Noerr-Pennington* doctrine may not provide protection from the antitrust laws.

The leading case on the sham exception involved the motor carrier industry, *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972). In *California Motor Transport* there were accusations that certain motor carriers had agreed to automatically protest applications by new carriers seeking state or federal motor carrier operating authority. Supposedly these protests were lodged without any real consideration of the merits of the applications and were done to exploit, for anti-competitive reasons, the regulatory process. In effect the accusation was that the protests were designed to make the regulatory process for obtaining authority expensive and time consuming therefore discouraging potential competitors from entering the market.

The Supreme Court said that *Trucking Unlimited* presented a situation where the regulatory system was perhaps being abused for anticompetitive purposes and therefore could be a sham. It then overturned the lower court rulings dismissing the antitrust action and remanded it to see if the plaintiffs could demonstrate a sham.

Later, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Supreme Court summarized the sham exception by drawing a distinction between government processes and outcomes. It stated at 1354:

> The "sham" exception to *Noerr* encompasses situations in which persons use the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. [Citation omitted]. A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable governmental action" at all, [citation omitted] not one "who genuinely seeks to achieve his governmental result, but does so through improper means."

IV. Conclusion

Collective action among competitors to influence Government decisions is rooted in the Bill of Rights and will not in itself be considered a violation of the antitrust laws. However, the *Noerr-Pennington* doctrine is not without limits such as sham activity and would not encompass activity such as bribing government officials in order to obtain an anticompetitive result, rigging bids or presenting knowingly false information to an agency.