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The interplay between regulation, antitrust and other public policy goals

W Todd Miller
Baker & Miller PLLC

We face a world with an increasing number of jurisdictions enforcing antitrust laws and with broad agreement on many of the basic principles for such laws. Yet, the world of exemptions and immunities remains largely untouched by the pressures for convergence, largely because so many of these reflect political and judicial concerns that are quite particular to the individual jurisdiction. For example, the United States exempts competitive restrictions imposed and monitored by states (the 'state action doctrine'), whereas the European Commission has been actively and aggressively attempting to tear down parochial restrictions emanating from a Member State. This difference highlights the critical importance of the antitrust exemptions in understanding how strong any country's political commitment to competition law enforcement really is.

Simply put, antitrust exemptions reflect the willingness of a society (as reflected primarily by legislative action) (1) to accept broader social goals in preference to the basic goals of the antitrust laws, (2) to develop alternative schemes to 'regulate' the conduct of market participants, or (3) to succumb to special interests that are disrupted and displeased by competition. Less frequently, an exemption reflects a court's effort to balance what may appear to be competing, but fundamentally important, policy goals on which there has not been legislative guidance.

One can place the US exemptions and immunities to the antitrust laws into four broad categories: (1) public policy-based exemptions created by either the legislature or the courts that reflect a belief that the antitrust laws cannot be properly applied to certain conduct because of competing (often Constitutionally-based) policies about the intended reach of the federal antitrust laws (eg, 'free speech', 'States' rights'); (2) public policy-based exemptions that reflect a belief that the free market principles of the antitrust laws should be secondary to other regulatory or economic goals especially where there is a relevant regulatory authority charged with monitoring the market and marketing practices (eg, labour or agriculture organisations, insurance, certain aviation agreements); (3) special industry exemptions where the broader public-policy goals do not seem to justify the antitrust protection given (eg, the Newspaper Preservation Act, the Sports Broadcasting Act; the Shipping Tariff Act); and (4) individual immunities granted by law enforcement agencies to obtain testimony or discover wrongdoing (eg, leniency programmes). Because the last category is not one that is subject to pre-planning (other than getting in serious antitrust trouble but being the first to admit it to the government), it will not be discussed further. Instead, this chapter will focus broadly on the remaining three categories, and particularly on the first two. It will also briefly discuss the intersection between antitrust and administrative regulation which is the basis for many of the exemptions in category two above.

Perhaps what is most interesting about US antitrust exemptions is the seemingly haphazard way in which those exemptions have come about. Only two—the labour and the agricultural exemptions—were envisioned by Congress during the relatively early days of the creation of the antitrust laws. Others reflect political and judicial responses to the expanding notions of what constituted 'interstate commerce' which brought new and local activities into the federal antitrust jurisdictional net. When the Sherman Act and Clayton Act were passed respectively in 1890 and 1914, Congress had assumed many services were not 'commerce' and most local manufacturing and transportation businesses were not engaged in 'interstate commerce'. Thus, the basis for professional baseball's judicially created exemption in 1922 was that baseball was an 'exhibition', not 'trade or commerce', and therefore was beyond the jurisdiction of the Sherman Act.

By the 1930s, the courts had greatly expanded the reach of 'interstate commerce' and therefore the application of the federal antitrust laws to activities that had traditionally not been regarded as 'commerce', let alone 'interstate commerce' (eg, insurance, banking and the learned professions). In response, Congress carved out a number of special exemptions for industries that (a) faced detailed supervision by another federal agency (eg, transportation) or (b) were regulated by the states (eg, insurance). Along the way, Congress created exemptions for other politically important interests (eg, exports) on an ad hoc basis. It is probably fair to say that most of these exemptions that were carved out after adoption of the major US antitrust laws probably reflect old fashioned politics more than well-thought out antitrust policy.

Meanwhile, faced with this same expansion in application of the federal antitrust laws, the courts struggled in many cases with how the laws' broad reach should be tempered to deal with other regulatory schemes that did not contain express exemptions (eg, banking and securities) or that involved the political process. A few judicially-created exemptions and limitations on the application of the federal antitrust laws therefore developed. In many ways, the judicially created doctrines have proven broader and more important. There are two of particular general interest—the 'state action' doctrine and the *Noerr-Pennington* doctrine. The former immunises conduct pursuant to state direction, while *Noerr-Pennington* protects from antitrust liability collective efforts to petition the government to suppress competition. The US Supreme Court has explained that these two exemptions are "complementary expressions of the principle that the antitrust laws regulate business, not politics; *Parker* [state action] protects the States' act of governing, and *Noerr* the citizens' participation in government."

In addition, there have been a variety of rulings by courts that address the interface between a legal environment regulated by an administrative agency and a court's antitrust jurisdiction. These include notions of 'primary jurisdiction' as well as an acceptance of business justification based on regulation. Each of these are reviewed very briefly below.

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Labour and agriculture exemptions

When Congress passed the Clayton Act in 1914, it included Section 6 that specifically exempted from the general operation of the antitrust laws the creation of farmer cooperatives and labour unions ('Section 6 Entities') and collective activities by farmers and workers. Section 6 of the Clayton Act responded to some earlier Supreme Court decisions holding that workers and farmers were illegally price-fixing under the Sherman Act when they joined together to market their labour or agricultural products. Section 6 ultimately represents a broad public policy statement. The Supreme Court has explained that, with regard to cooperatives, "[b]y allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and improve their ability to weather adverse economic periods and to deal with processors and distributors." The Section 6 exemption was expanded by the Capper-Volstead Act in 1922 with regard to agricultural cooperatives and by the Norris-LaGuardia Act in 1936 with regard to labour unions.

The policy underlying these exemptions is much broader than the statutory exemptions that have led to single industry exemptions from antitrust coverage. For example, the Supreme Court has not applied the usual rule that antitrust immunities should be construed as narrowly as possible to agreements or cartels solely among Section 6 Entities and their members. In this area, the courts tend to focus on the benefit of the questioned activity to Entities' members rather than the losses to competition. This Section 6 exemption may be lost where an otherwise exempt labour or agricultural party has entered into an unreasonable agreement with a non-protected party or engaged in predation.

Beyond agreements among farmers or workers (the so-called 'statutory exemption' in labour antitrust law), the courts have also developed an additional exemption in the labour area—the so-called 'non-statutory' exemption—to protect union/employer agreements that are part of the collective bargaining system regulated under the National Labor Relations Act. Both labour exemptions have been subject to intensive litigation (including especially in the professional sports area) and have been the subject of numerous Supreme Court cases.

Last year, the most notorious of these non-statutory cases involved former Ohio State University star running back Maurice Clarett who wanted to participate in the National Football League (NFL) draft, but could not because of an NFL rule that required players to wait at least three football seasons after graduation from high school. In upholding the NFL's rule, the US Court of Appeals for the Second Circuit held that the non-statutory exemption applied because the labour market for NFL players was otherwise subject to collective bargaining and that, therefore, the NFL teams could jointly set the terms of eligibility for "employment".

The state action doctrine

The state action doctrine, first recognised in *Parker v Brown* in 1943, is a judicially created exemption to the application of the federal antitrust laws where a state has imposed a restraint on competition. The state action doctrine immunises anti-competitive conduct by private parties if a two-part test can be satisfied: (1) the challenged restraint must be one "clearly articulated and affirmatively expressed as state policy" and (2) policy must be "actively supervised" by the state itself.

Determining whether both of these elements exist in any given situation has led to significant disputes and, as a result, the state action area is one that has frequently found its way to the US Supreme Court. The other issue that is often reflected in the litigation over the doctrine is determining who is the 'state' for purposes of the doctrine's application.

This exemption must and should seem quite strange to people within the European Union. The Treaty of Amsterdam (like its predecessor the Treaty of Rome) recognises the supremacy of Community law; it has specific articles addressing (and generally condemning) such things as state monopolies. In the US, however, and in the absence of clear intent by the federal government to the contrary, the state action doctrine specifically allows a state to withdraw a sector of the economy from the competitive forces of the marketplace. As one court of appeals recently explained, "[w]hile individual anti-competitive acts of state governments may be considered unwise or counterproductive, the decision to make such choices lies within the sovereign power of the states. Congress did not intend to override important state interests in passing the Sherman Act."

The practical problem in the state action area is that courts have often been willing to uphold privately motivated, anti-competitive schemes where the 'clearly articulated policy' of the state is vague and/or the 'active supervision' by any state agency is relatively weak. Nonetheless, during the past year, the Federal Trade Commission (FTC) has pursued several household moving company associations the members of which had been engaged in collective ratemaking (ie, jointly setting prices) on the ground that the joint ratemaking did not enjoy the benefit of the state action doctrine because there was a lack of active supervision by the states involved. Two of these cases settled, but a third, involving the Kentucky Household Goods Carriers Association was tried before an administrative law judge (ALJ). In a decision that supported the FTC's pursuit of the complaint, the ALJ found that, while Kentucky had clearly articulated a desire to permit collective rate making, it did not adequately supervise the activity. For example, the state did not review the reasonableness of the rates jointly set, it did not provide for third-parties to be heard on the topic and it did not provide any written decisions. The FTC now must decide whether to adopt the ALJ's decision (which it almost certainly will); the Association would then have an opportunity to appeal an adverse FTC order to a US court of appeals.

The *Noerr-Pennington* doctrine

The *Noerr-Pennington* doctrine has been at the centre of one of the FTC's largest enforcement actions, which in turn may have broad implications for the patent antitrust area. In the *Unocal* matter, the FTC has challenged Unocal's actions in seeking to have a state air-quality board adopt certain standards for gasoline that subjected other gasoline refiners to Unocal's patents. Unocal has defended its actions as being protected by the *Noerr-Pennington* doctrine. But before discussing this case further, a brief introduction to the doctrine would likely be useful.

The *Noerr-Pennington* doctrine broadly exempts activities that constitute petitioning the government even if the result sought from the government would be anti-competitive and is done with anti-competitive intent. The basic doctrine was established in 1961 when the Supreme Court held that a joint lobbying and publicity campaign by railroads to restrict competition from trucks was exempt, even though it had elements that were false and misleading. The Court explained that imposing Sherman Act liability on the railroads "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." The doctrine has been extended to petitioning all branches of government (legislative, executive and judicial) and also administrative agencies.

In its original *Noerr* decision, the Court also signalled a limitation on application of the doctrine. The Court noted that "there may be situations where a publicity campaign, ostensibly directed towards influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sher-

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man Act would be justified." The "sham" exemption has been heavily litigated, often in the context of whether bringing litigation itself can be viewed to be improper petitioning. The Supreme Court has more recently made clear, however, that the litigation must be "objectively baseless" in order for it to be considered "sham petitioning".

Because of the assumption that the *Noerr* doctrine is largely grounded in the First Amendment right to petition, one of the more interesting issues that arises is the admissibility of evidence relating to petitioning. While all courts agree that the petitioning itself cannot form the basis for antitrust liability, the courts have taken varied approaches to admitting evidence relating to the petitioning process (such as evidence admitted for the purpose of proving anti-competitive intent). For example, the Tenth Circuit Court of Appeals has recently held that the lower court had not acted inappropriately when it admitted into evidence statements made in a petition to a state government agency to show the defendant's improper intent where the court had cautioned the jury about not using the evidence to impose liability for the petitioning itself.

The *Noerr-Pennington* doctrine lacks a clean European analogue with the only exception perhaps being the initiation of litigation. The Commission and the Court of First Instance have recognised the fundamental right to access the courts, but have also recognised that an undertaking with a dominant position could bring litigation for the purpose of harassing a competitor with a goal of eliminating competition. In this circumstance, a violation of Article 82 would likely be found.

Turning back to *Unocal*, the FTC had issued an administrative complaint in March 2003. In response to motions to dismiss filed by Unocal, an administrative law judge had dismissed the complaint on the ground that much of Unocal's activities were petitioning activity protected by the *Noerr-Pennington* doctrine. In July 2004, the Commission reversed and remanded the case for further proceedings. In what must be viewed as an extremely scholarly decision written by now-departed Chairman Muris, the Commission explained that *Noerr-Pennington* was not meant to protect all misrepresentations to the government (ie, misrepresentations were part of the "sham" exception the *Noerr-Pennington* doctrine, discussed above) and therefore Unocal's conduct should not receive *Noerr-Pennington* protection. One of the more interesting questions that Muris' decision raises is whether 'misrepresentations' to a state board that has standard setting responsibilities is more 'political' or more 'adjudicative'. As anyone watching the US media must realise, the courts are quite tolerant of the rough and tumble world of politics and this extends into the *Noerr-Pennington* world. But suggesting that, absent some other statutory requirement regarding full and accurate disclosures, statements to non-legislative governmental entities must be truthful or else give rise to antitrust liability does seem to paint politicians, who therefore implicitly do not care about such matters, in a particularly bad light. In any case, this and perhaps other issues will be subject to further proceedings as the Commission's decision remanded the case to the administrative law judge for further factual development, including the extent to which the state air-quality board relied on Unocal's statements.

Interplay between federal regulation and antitrust

In a whole variety of regulatory schemes, the extent to which private (or even governmental) antitrust litigation is contemplated must be addressed.

Express immunity

In some cases, there is an express exemption for a specific industry or specific conduct within a specific industry. See, for example, the Sports Broadcasting Act, 15 USC §§ 1291-95. Where there is an express exemption, the approach is straightforward: the court should review the scope of the exemption and determine whether it applies to the conduct at issue.

Implied immunity

Even if Congress has not explicitly exempted activities from the antitrust laws, courts have occasionally been willing to find implied exemptions where "necessary to make [the regulatory act] work". Nonetheless, the Supreme Court has made clear that repeals of the antitrust laws by implication are strongly disfavoured, and implied repeals should be found only in cases of "plain repugnancy between the antitrust and regulatory provisions".

Early in 2004, the Supreme Court reaffirmed this principle in its *Trinko* decision. While the Court recognised that the pervasive regulation of interconnection among telecommunication providers implemented by the Telecommunications Act of 1996 (TA 1996) would normally be a "good candidate for implication of antitrust immunity", it also faced an antitrust "saving" clause in the statute, the Court specifically noted that nothing in TA 1996 was meant to supersede the antitrust laws. The Court did explain, however, that the creation of a standard of conduct under TA 1996 did not also imply that the same standard would be required by the antitrust laws; and hence a telephone company's alleged denial of access as required by TA 1996 did not entitle the private plaintiff to bring an 'essential facilities' or monopolisation case under the antitrust laws.

Primary jurisdiction

The notion of primary jurisdiction is not really an immunity, but is simply a question of the appropriate forum to resolve the issue. The doctrine has been applied to stay court antitrust proceedings until an agency determination as well as to dismiss antitrust claims outright (without prejudice to re-file after final agency resolution). *Ricci* established the boundaries of the primary jurisdiction doctrine in 1973. The Court held that an antitrust action should be held in abeyance pending administrative proceedings whenever the agency consideration of matters within its jurisdiction will materially aid the court in resolving the antitrust issue. Consistent with this holding, primary jurisdiction will be invoked only if the agency action may affect the antitrust claim. Where the questions are essentially legal and do not require agency expertise in forming a decision, however, courts may refuse to invoke the doctrine.

The Second Circuit has recently addressed this issue in evaluating whether the Sherman Act's restraint-of-trade provision had been superseded by the Securities Exchange Act in a class action with respect to listing and trading equity options. The court stated that "[a]lthough some deference may be accorded to an agency's view on a matter within its particular expertise . . . .the decision as to whether . . .one statutory scheme supersedes [another] is, 'in the end', to be made by the courts."

The filed rate doctrine

One other area that addresses the intersection between regulation and antitrust is the 'filed rate' or *Keogh* doctrine. This doctrine prohibits a court from revising or allowing damages based on a tariff that has been filed (and hence approved) by a relevant regulatory agency. The doctrine originated in the Supreme Court's 1922 *Keogh* case where claims alleging damages from rates filed with the Interstate Commerce Commission were dismissed. Underlying the doctrine is the notion that a court cannot realistically second-guess the relevant regulatory agency to determine what the rate 'should have been' in the absence of the complained of conduct. While the doctrine does not automatically bar a claim for injunctive relief, it has been held to do so where it would require a court to 'dismantle' the rate that had been presumptively approved by the regulatory agency.

Conclusion

There is always a great deal of litigation over the scope of the various exemptions and immunities and discussion of the interplay between regulation and application of the antitrust laws because the judicial choices can often be important to both private parties and government agencies. The FTC's aggressive pursuit of cases implicating the *Noerr-Pennington* and state action doctrines highlights how dynamic this area continues to be. Moreover, many of the exemption laws require courts to make difficult trade-offs between conflicting policies that are often not clearly expressed in the exemption legislation. Therefore, it seems likely that the Supreme Court will continue to be the final arbiter of conflicts created by the lower courts in balancing public policy or special industry exemptions. Moreover, one can expect continued cases like *Trinko* which require an analysis of how the regulatory structure or antitrust exemption affects the duty of industry participants under the antitrust laws.

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BAKER & MILLER PLLC

2401 PENNSYLVANIA AVE, NW SUITE 300
WASHINGTON, DC 20037
TEL: +1 202 663 7820
FAX: +1 202 663 7840

CONTACT: W TODD MILLER
TMILLER@BAKERANDMILLER.COM

WWW.BAKERANDMILLER.COM

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