Antitrust Guidance for Collectively Seeking COVID Relief from Governmental Bodies

May 6, 2020

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The COVID-19 shutdown has caused widespread economic hardship from which business sectors are seeking governmental relief. That effort entails collective activity by competitors in formulating and advocating proposals to governmental bodies or governors' offices ("petitioning activity").

The requested relief may take many forms beyond governmental funding. For example, companies may petition for statutes or executive orders that mandate standard industry practices as businesses resume or require the formation of joint facilities that reduce the costs of addressing losses that the shutdown has caused.

In other cases, the federal or state government may propose economic relief that imposes obligations on some private companies, such as insurance companies, to reduce the losses of other companies. Affected businesses, often as a group, may respond by engaging with the governmental bodies to comment on the proposals or offer alternatives.

Once a dialogue among actual or potential competitors begins, obvious antitrust issues arise. This bulletin briefly addresses the scope of the *Noerr-Pennington* doctrine that protects petitioning activity and the risks that often accompany relying on the doctrine.

Noerr-Pennington Immunity for Petitioning Activity

The *Noerr-Pennington* doctrine exempts from the antitrust laws collective petitioning activity even if the governmental relief entails collective commercial activity or restrains competition.[1] The scope and application of the *Noerr-Pennington* doctrine are complex, and companies seeking *Noerr-Pennington* protection benefit from legal guidance.

Collective petitioning is sometimes undertaken directly by companies and in other cases by trade associations. In either event, the collective activity should be confined to the preparation and execution of the petitioning activity.[2] Proposals should be directed to a governmental body or office, not a private organization such as a standard-setting body, even if governmental bodies typically adopt those standards as part of a regulatory code.[3]

Noerr-Pennington immunity does not cover commercial activity of the participants that precedes the provision of governmental relief or exceeds the activity that is mandated by governmental action.[4]

Noerr-Pennington Risks

Convening competitors in any setting to address common commercial concerns presents antitrust risks. In the *Noerr* context, petitioning plans can evolve into, or become supplemented by, private commercial plans that are not covered by *Noerr* immunity. Commercial "spillover" from petitioning activity would likely be scrutinized by the enforcement agencies and second-guessed by adversaries.[5]

In addition, the relief required from COVID economic hardship is likely to be urgent, and governmental responses may be neither prompt nor in the form requested. Industry participants may adopt on a private basis the proposals made to a

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1 *See United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *E.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144-45 (1961).

2 *Merck-Medco Managed Care, Inc. v. Rite Aid Corp.*, 22 F. Supp. 2d 447, 449 (D. Md. 1998), *aff'd sub nom. Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 201 F.3d 436 (4th Cir. 1999) (finding that, where pharmacies met to discuss petitioning the government to reject a contract with a managed care plan, "there would be nothing improper about the defendants discussing . . . strategies to influence the government to change the Plan.").

3 *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 506-07 (1988).

4 *See In re Brand Name Prescription Drug Antitrust Litig.*, 186 F.3d 781, 789 (7th Cir. 1999) ("The doctrine does not authorize anticompetitive *action* in advance of government's adopting the industry's anticompetitive proposal. The doctrine applies when such action is the consequence of legislation or other governmental action, not when it is the means for obtaining action. Otherwise every cartel could immunize itself from antitrust liability by the simple expedient of seeking governmental sanction for the cartel after it was up and going.") (internal citations omitted).

5 *See* FED. TRADE COMM'N AND U.S. DEP'T OF J., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, p. 26 n. 54 (Apr. 2000); *Polygram Holding, Inc. v. F.T.C.*, 416 F.3d 29, 37-38 (D.D.C. 2005); William H. Rooney and Michelle A. Polizzano, "*DOJ and FTC Announce Enforcement Against Pandemic Collusion in U.S. Labor Markets*," WILLKIE.COM (Apr. 15, 2020), here.

governmental body or office, transforming what was protected petitioning into joint conduct fully subject to the antitrust laws.

Documents that are generated in connection with petitioning activities may be discoverable in investigations and lawsuits challenging the joint activity. Those documents may be relevant to assessing the purpose and effect of petitioning proposals that are later adopted as joint commercial activity by the participants.

Given the challenges of securing *Noerr* protection in urgent and fast-moving circumstances, we offer five basic guidelines below.

Five Basic Guidelines for Petitioning Activity

1. Organize a well-structured setting (*e.g.*, a Zoom conference) – not competitor-to-competitor phone calls – for considering and planning joint petitioning activity.

2. Each meeting involved in the petitioning activity should have a clear agenda, and counsel should be present to verify that the discussion followed the agenda without digression.

3. The purpose of each meeting should be stated as the preparation of petitioning activity, whether initiated by the companies or in response to governmental proposals, and should exclude the independent or joint commercial activity of any participants.

4. The object of the petitioning should be well-identified as a governmental body or office, not a private organization.

5. The expression of commercial intentions should be prohibited, as any such expressions could be interpreted as an invitation to competitors to follow the suggested commercial plans.

Any proposal for joint commercial conduct, which may itself be legitimate, should be addressed in a separate setting so that (a) no participant mistakenly believes that such collective activity is covered by the *Noerr-Pennington* doctrine; and (b) counsel can assess the legal merits of the proposed collective conduct independently of *Noerr* protection.

Conclusion

The economic hardship resulting from the COVID shutdown will overwhelm many industries, providing good reason for competitors collectively to seek urgent and creative forms of relief from governmental bodies and offices. In other cases, the government itself may propose economic relief that burdens some companies in favor of others and that would benefit from industry engagement with governmental bodies.

Although the *Noerr-Pennington* doctrine protects petitioning activity, it does not protect commercial activity. Careful planning can secure *Noerr* protection and reduce related antitrust risk.

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The Antitrust Practice Group is pleased to assist with your competition questions, both specific to the pandemic and in the ordinary course of business. Please contact the authors or other members of the Antitrust Practice Group, listed below:

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