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SPECIAL FOCUS: ANTITRUST

The *Noerr-Pennington* Exemption: Freedom to Stifle Impending Competition - Maybe

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Entry by a competitor into a highly concentrated market can benefit consumers by leading to lower prices, innovation, and increased competition. In the case of health care services, a new hospital or other type of provider that enters a market otherwise dominated by a large incumbent, or the expansion of another incumbent, can offer health plans and their enrollees an alternative to the dominant provider. There are often barriers to entry, to be sure, even when a potential entrant is well-funded and eager to compete. As the Seventh Circuit's recent decision in *Mercatus Group, LLC v. Lake Forest Hospital*, 631 F.3d 834 (7th Cir. 2011), makes abundantly clear, an incumbent provider can successfully block a competitor from entering the market in some situations; and, it can avoid antitrust liability despite acting with anticompetitive intent, especially when the blockage results from the incumbent provider's petitioning the government for anticompetitive action. But when the petitioning includes making intentional misrepresentations, the standards become less clear.

In *Mercatus*, the plaintiff, Mercatus Group, LLC (Mercatus), planned to build a physician outpatient center in the Village of Lake Bluff, Illinois. Lake Forest Hospital (Lake Forest), located in nearby Lake Forest, recognized Mercatus's planned entry as a huge threat to its business. To shelter itself from this threat, Lake Forest initiated a pointed campaign designed to prevent Mercatus from entering the market. Most notably, Lake Forest lobbied members of the Lake Bluff Board of Village Trustees (Board), both individually and at a number of public Board meetings, urging the Board to deny Mercatus required land-development approvals for new construction. Among the actions taken by Lake Forest to prevent

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Mercatus's entry were its allegedly false statements to the Board that Mercatus would drive Lake Forest out of business and prevent Lake Forest from providing charity care. In addition, Lake Forest stated that competition from Mercatus would cost Lake Forest at least \$2 million a year in lost profits and would "definitely damage" the health care needs of the community. Ultimately, Lake Forest's efforts were successful: The Village Board denied Mercatus the development and site-plan approval necessary to build its physician center.

Frustrated with Lake Forest's concerted efforts to curb its planned development, Mercatus filed a Sherman Act, Section 2 claim against Lake Forest, alleging that Lake Forest's efforts to derail its plans constituted monopolization or attempted monopolization. Specifically, Mercatus argued that Lake Forest violated the antitrust laws by making patently false statements about the effects of Mercatus's entry into the market. The District Court held that Lake Forest's statements, even if patently false, were immunized from antitrust liability by the First Amendment's right to petition the government, otherwise known in antitrust parlance as the *Noerr-Pennington* exemption (*Noerr-Pennington*), named after the two Supreme Court decisions establishing the exemption.

Noerr-Pennington provides immunity from antitrust liability on parties that combine or act unilaterally to restrain competition if the restraint results from their lobbying or petitioning a governmental body for anticompetitive action. The exemption applies regardless of the petitioner's anticompetitive purpose or intent and regardless of the type of governmental body lobbied. While the exemption is broad in scope, courts have struggled to determine the circumstances, if any, in which misrepresentations made to governmental bodies by those petitioning the government might destroy the exemption.

The courts have made it clear that in the *legislative* process "anything goes" — i.e., even the petitioner's gross lies do not destroy the exemption. The controversy has been whether the same principle applies in adjudicative processes — e.g., proceedings before courts and administrative agencies acting in an adjudicative, rather than a legislative, capacity. And if not, then the question becomes the nature of misrepresentations necessary to destroy the exemption.

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On appeal to the Seventh Circuit, Mercatus argued that *Noerr-Pennington* should not protect Lake Forest from antitrust liability because Lake Forest made numerous material misrepresentations and omissions of fact to the Board. Lake Forest, in response, argued that the Board functioned solely in a legislative capacity, and that therefore, its alleged misrepresentations were absolutely protected by the exemption regardless of their veracity.

The Seventh Circuit first analyzed whether the Board was acting in an adjudicative or legislative capacity when it denied Mercatus's land-use application. In doing so, the court considered a number of factors that distinguish a legislative process from an adjudicative process, including the general nature of the Board's authority; the Board's fact-finding process; the limits on admissibility of evidence; the extent to which the parties engaged in *ex parte* lobbying of Board members; and whether any testimony at the Board's hearing was given under oath or affirmation, subject to prosecution for perjury.

Applying these factors in a totality-of-the-circumstances approach, the court found that the Board's actions were legislative. According to the court, it was important that both parties engaged in *ex parte* lobbying of individual Board members; that no testimony was given under penalty of perjury; that information-gathering was informal; and that the Board's ultimate decision on Mercatus's land-development application was not guided by enforceable, definite standards subject to review, as they would be if the process were adjudicative.

Thus, the court concluded that the Board, in denying Mercatus's application, acted in a purely legislative fashion and that, therefore, Lake Forest's misrepresentations were immune from antitrust liability under *Noerr*, irrespective of their materiality or falsity. But the court noted that the result could have been different had it found that the Board was acting in an adjudicative capacity. Even then, however, the court explained that under the fraud exception to *Noerr-Pennington*, misrepresentations would render an adjudicative proceeding a sham (thus destroying the exemption) only if a petitioner's misrepresentations were (1) material, in that they altered the

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outcome of the proceeding; and (2) intentionally made, with knowledge of their falsity.

The *Mercatus* decision highlights the difficulty courts have had in applying *Noerr-Pennington*'s fraud exception. Indeed, there is a split among the circuits, as courts have announced conflicting tests for determining when a misrepresentation in an adjudicative proceeding rises to the level that it falls outside Noerr's exemption. For example, some courts have held that misrepresentations destroy the exemption only if they deprive an adjudication of its "legitimacy." Other courts have held that intentional misrepresentations are fraudulent only if they affect the very "core" of a litigant's case. At least one court has held that even misrepresentations in adjudicative processes are protected as long as the petitioner was truly seeking governmental action. The Supreme Court itself has not explicitly decided whether and, if so, to what extent, *Noerr* permits the imposition of antitrust liability for a petitioner's fraud or other misrepresentations.

Mercatus underscores the important point that firms have a great deal of leeway in terms of petitioning the government to take action that blocks other firms from entering the market — such as opposing competitors' certificate-of-need applications in states requiring them. Firms taking action within a legislative setting need adhere to no boundaries: anything goes, including misrepresentations and blatant lies. In adjudicative settings, however, while the leeway they have is broad, the governing legal standard is much less clear. Because of the circuit split, there is much uncertainty as to how much protection *Noerr-Pennington* provides for misrepresentations. This uncertainty can mean the difference between antitrust immunity, on one hand, and treble damages on the other. The amorphous status of the fraud exception to the *Noerr-Pennington* doctrine will likely remain until the Supreme Court provides more definitive guidance.

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