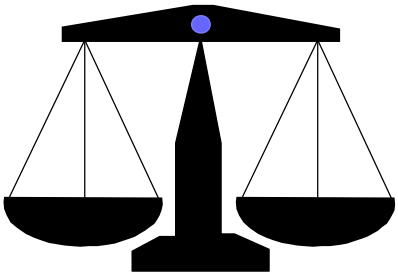

General Counsel Corner

By Peter H. Gunst, Esquire

Scrap To Baggage — The Reach of Antitrust Law

Getting away from purely petroleum issues, it seemed reasonable to review two very recent cases that explore the reach of federal antitrust law, and the limitations on that reach.

The core federal antitrust statute, the Sherman Act, condemns basic anticompetitive activity such as agreements among competitors to fix prices or limit output and abuses of monopoly power. How far the law applies is explored in two recent cases that, at first glance, hardly appear to be antitrust cases at all.

In *Baltimore Scrap Corp. v. David J. Joseph Co.*, 2001-1 Trade Cas. ¶73,144 (4th Cir. 2001), the Fourth Circuit Court of Appeals considered the stealth campaign waged by the only metal shredder in the Baltimore area in order to maintain its monopoly position.

Of concern to the monopolist was a zoning request filed by a potential competitor to open a new metal shredding facility. Presumably aware that it lacked standing to raise an environmental challenge on its own behalf, the monopolist surreptitiously bankrolled litigation by local citizen groups, who served as paper plaintiffs in a state court lawsuit being conducted by a lawyer who had been hand-picked by the monopolist.

The monopolist's role only came to light when a fax from it to its lawyer was erroneously directed to a third party. Even then, the lawyer contended in state court that he represented no one but the named plaintiffs.

Although initially successful in skirmishes aimed at precluding the potential competitor's entry into the market, the litigation ultimately failed when the state appeals court found that even the citizen groups did not have standing to pursue the litigation because they were neither aggrieved parties nor tax payers.

The potential competitor then filed an antitrust suit against the monopolist, contending that it had pursued "sham litigation" in order to restrain competition.

The *Noerr-Pennington* doctrine, named after two seminal Supreme Court cases, attempts to balance the constitutional First Amendment right of petition against the danger that certain rogue forms of government petition may be misused in order to hamstring or frustrate competition. In considering such a claim, the court primarily considers whether or not the lawsuit or other petitioning activity was objectively baseless, and whether the claim was raised only for purposes of harassment or delay.

The federal district court that considered this *Noerr-Pennington* claim concluded that the monopolist's actions were "deceitful", "underhanded" and "morally wrong." Nevertheless, it dismissed the case because it found that the earlier lawsuit was not objectively baseless, particularly because it had been successful at least in its early stages.

The Fourth Circuit Court of Appeals agreed. It rejected the argument that the monopolist should not be entitled to *Noerr-Pennington* immunity because it was not formally a party to the litigation that it sponsored and paid for.

Holding that immunity extended to parties who finance litigation, even surreptitiously, the court said that a contrary rule —

> would also severely curtail the rights of all citizens to petition the government and to associate with others who do so. The First Amendment freedoms of petitioning and of association protect groups who for whatever reason want to contribute to a lawsuit openly or to stand apart from public view while another party files a lawsuit, assuming no rule or statute independently requires disclosure of the aid.

The court also rejected the argument that *Noerr-Pennington* immunity had been forfeited because fraud had been practiced on the state court. Not reaching the propriety of the representations made to the state court, the Fourth Circuit found that they had had no real significance on the outcome of the state litigation.

This case is of note because it shows both the broad potential reach of the antitrust laws, here to a local zoning matter, and the brake placed upon that reach by countering policy concerns, here the constitutional right of petition.

Continental Airlines, Inc. v. United Airlines, Inc., 2001-1 Trade Cas. ¶73,133 (E.D. Va. 2001), likewise shows the broad potential reach of the antitrust laws.

Twenty-one of the twenty-five airline members of the Dulles Airport Airline Management Council voted to install templates at the security checkpoints at the Washington, D.C. airport, which restricted the size of carry-on luggage that passengers could take through security. The association's justifications for limiting the size of carry-on luggage were (1) speeding the boarding process, (2) limiting potential storage accidents and (3) assuring sufficient luggage storage space for all passengers, and not merely those who first boarded.

Continental Airlines, which had been promoting a more liberal carry-on baggage policy, sued in the Virginia federal district court contending that the limitation illegally restrained competition among the airlines.

Ruling on cross-motions for summary judgment, the court agreed with Continental. Using an "abbreviated" or "quick look" form of analysis that bridges the gap between *per se* illegal "naked" restraints and common competitive practices evaluated under the far more lenient Rule of Reason, the court emphasized that carry-on luggage policy was, indeed, a basis for competition among airlines.

The court found that the issues of passenger convenience and comfort raised by the association simply did not constitute a defense to the elimination of competition as to this aspect of air travel.

Rather, the baggage limitation merely insulated from competition those carriers who had failed to install sufficient onboard carry-on storage capacity. So, the next time you are inconvenienced by someone attempting to stuff a base fiddle into an overhead bin, you have the antitrust laws to thank.

Both *Baltimore Scrap* and *Continental Airlines* demonstrate the tension that exists between the broad reach of the antitrust laws and limitations placed upon that reach for reasons of policy. In these cases, a constitutional consideration could trump the law's reach, but not a concern born of practical considerations. Such are the vagaries of law.

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