3007395

Remarks on

PRIVATE STANDARD-SETTING AND THE NOERR-PENNINGTON DOCTRINE

by

MARY L. AZCUENAGA
COMMISSIONER

FEDERAL TRADE COMMISSION

before the

23rd ANNUAL SYMPOSIUM
on
TRADE ASSOCIATION LAW AND PRACTICE

SPONSORED BY THE

ANTITRUST LAW COMMITTEE
THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

MARCH 4, 1987

Thank you. It is a distinct pleasure to speak to you this afternoon. I'm also pleased to be able to fill in for Chairman Oliver, who was originally scheduled to speak today, but who was unable to do so. As some of you may recall, I delivered the luncheon address for this annual symposium last year. When I received the return invitation (albeit as Dan Oliver's replacement) I thought perhaps that it was a compliment, but one of the members of my staff brought me quickly back to earth by suggesting that the invitation is merely a generous opportunity to allow me to get it right this time. Because that process could take years -- even then with uncertain results -- I think I will stay with my first interpretation.

Today, I'd like to talk with you about the antitrust liability that may result from efforts to develop model codes, which is a serious and recurring concern for associations and the attorneys who represent them. I am especially pleased to discuss the topic at this forum because many of you represent organizations that either promulgate model codes or seek to influence the substance of such codes. I must point out that the specific comments I offer today are personal; they are not necessarily the views of the Commission or any other commissioner.

When I use the term "model code," I am referring primarily to performance or safety-related standards for products that are promulgated by standard-setting organizations such as the National Fire Protection Association or the American Society of Mechanical Engineers. Most of the cases I will discuss today

concern product standards. But my comments also apply to codes governing ethical conduct by members of professional and other organizations. An example of a code of conduct that all of us are familiar with is the American Bar Association's Model Rules of Professional Conduct. Both product standards and codes of conduct are written by voluntary membership organizations. State and local governments, which have great respect for the efforts of such expert groups, often place the force of law behind those standards and codes. Given these similarities, it seems reasonable to apply the same antitrust analysis to both product standards and codes of conduct.

Standards are essential in today's complex world. According to a 1984 Bureau of Standards Report, over 32,000 standards have been promulgated by more than 420 private organizations. 1/ It is important for anyone involved in or affected by standard setting to understand the antitrust jeopardy that may attach to the process.

That may be more easily said than done. The limits of this jeopardy, at least in one key area, are not clear. Four district courts have decided that firms that seek to influence standard-setting organizations are immune from antitrust challenge. 2/

1/ National Bureau of Standards, Special Pub. No. 681, Standards Activities of Organizations in the United States 1 (1984).

2/ Indian Head, Inc. v. Allied Tube & Conduit Corp., No. 81 Civ. 6250 (S.D.N.Y. June 27, 1986), appeal docketed, Nos. 86-7734, 86-7758 (2d Cir.); Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc., 1986-1 Trade Cas. (CCH) ¶66,989 (C.D. Cal. 1986), appeal docketed, Nos. 86-6208, 86-6470 (9th Cir.); Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp., 573 F. Supp. 833 (N.D. Ill. 1983); Rush-Hampton Ind. v. Home Ventilating Inst., 419 F. Supp. 19 (M.D. Fla. 1976).

This immunity is based on the Noerr-Pennington doctrine. 3/ The Noerr-Pennington doctrine tells us that antitrust law is not designed to regulate political activity. The doctrine provides that the First Amendment right to petition for a redress of grievances shields joint activity undertaken to influence government action, whether the government activity at issue is legislative, administrative or judicial in nature and regardless of whether the action sought would result in harm to competitors.

The question I would like to discuss today is whether it is appropriate to grant antitrust immunity to efforts to influence private standard-setting organizations. Two of the cases -- Sessions v. Joor and Indian Head v. Allied Tube and Conduit -- currently are on appeal, and in each of them, the FTC and the Antitrust Division of the Department of Justice have filed a joint amicus brief recommending reversal of the holdings granting antitrust immunity. In my view, the extension of Noerr-Pennington immunity to internal communications of private standard-setting organizations is unfounded as a matter of law and unwise as a matter of policy. 4/

The district court opinions say, in essence, that efforts to persuade standard-setting organizations should have Noerr-Pennington immunity because those private organizations have so

---

3/ See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

4/ See Hurwitz, "Abuse of Governmental Processes, The First Amendment, and the Boundaries of Noerr," 74 Geo. L.J. 65, 90-93 (1985).

much influence on government decisionmakers that their actions are tantamount to government actions. I disagree with this approach because it focuses too much on the influence and impact of standard-setting organizations on government decisionmakers while ignoring the significant differences between such private groups and government agencies. The degree of influence over government decisionmaking is not the appropriate focus of the inquiry. Bribery can be very influential, but it clearly is not entitled to First Amendment immunity. Rather, the appropriate focus in deciding whether a decisionmaker is "tantamount to government" is the decisionmaker's authority and accountability.

For example, the source of a government agency's authority is the government itself and, ultimately, the public. The source of a private standard-setter's authority is the membership of the organization. A government agency is accountable to the public at large. A private organization is not. Government agency members are usually appointed by the executive and sometimes confirmed by the legislature, and the agency's final decisions are subject to judicial review. By contrast, a private standard-setting organization is accountable only to its members.

Let me describe the problem in practical terms. The development of industry standards and professional codes of conduct is, in many respects, welcome. The businesses and the industry associations you represent, namely the organizations that promulgate and contribute to model codes, provide invaluable expert assistance to both consumers and legislators. I believe strongly in consumer sovereignty in the market, and consumers

must have information in order to make wise purchase decisions. Vital consumer information, in the form of product or professional certification, in many cases has been made available by private standard-setting organizations. Legislatures also often need expert help, and they rely on standard setters too. Reasonable business conduct, including the development of industry standards, does not transgress the antitrust laws. As the Commission has said, in its amicus brief in the Indian Head case,

> The activities of private standard-setting groups are not inherently anticompetitive; indeed they may be substantially procompetitive. Influencing the decisions of such groups by presenting accurate technical information concerning safety problems of a competitor's product generally would not be subject to antitrust condemnation under the rule of reason. 5/

Antitrust problems arise when those who set standards depart from considerations only of performance or safety. There is often little individualized review of standards, especially very technical ones, that are adopted into local and state regulatory codes. Few legislators have the requisite knowledge to provide such review, and there are usually many other pressing matters for them to consider. Because legislatures and other governmental entities have grown to trust model codes and industry standards, they often adopt them into law almost automatically. The easiest way to influence government adoption or rejection of a particular standard is often to influence the

---

5/ Brief of the United States and the Federal Trade Commission, Amicus Curiae, at 7 (October 24, 1986).

standard-setting organization to grant or deny its seal of approval to the practice or product in question.

Because private standards decisions may lead to fortune or failure for a business or commercial venture, the temptation to collude can be great. The loss suffered by consumers -- for whom good products may never become available or for whom bad products are wrongly endorsed -- can be enormous. This, of course, is just the situation in which careful antitrust scrutiny and enforcement are most warranted.

How do we decide whether immunity is warranted? Do we declare lobbying of private associations tantamount to petitioning the government and extend First Amendment protection and antitrust immunity to such conduct? Or, do we distinguish between government entities and influential private entities and permit antitrust scrutiny of efforts to affect the decisions of standard-setting organizations, an area that easily engenders anticompetitive conduct?

The four district courts that have faced the issue granted immunity on the ground that those who petition standard-setting organizations are really seeking to influence the government decisionmaking process. The courts offered only a brief discussion of the issue. In essence, they said, legislatures and regulatory boards have delegated <u>de facto</u> governmental powers to private standard-setting associations, and the only practical way to influence the ultimate governmental decision is to influence the decision of the private organization. In each of these cases, the district court emphasized the overwhelming reliance on the code in question by various governmental bodies.

One of the phrases the courts used to explain why immunity is appropriate is the phrase "tantamount to petitioning the government." We could try to parse this by asking first whether the conduct is "tantamount to petitioning" and, second, whether the standard-setting organization is "tantamount to government." I think, however, that the first question doesn't get us very far. We may indeed see cases in which the conduct is so far removed from petitioning that it deserves no antitrust immunity. But the conduct in most of the cases with which we will be concerned is likely to pass that test. The whole point of the Noerr-Pennington doctrine, after all, is to protect certain conduct of a communicative nature that otherwise would be subject to examination under the antitrust laws. The more useful line of inquiry, in my view, is whether the private organizations, for purposes of determining immunity, should be considered part of government.

Throughout its history, the Noerr-Pennington doctrine has protected petitioning aimed directly at government. Noerr does not immunize communications between two members of the business community. As the Noerr-Pennington doctrine has developed over the past quarter-century, this element of the doctrine has remained constant. The Seventh Circuit in MCI v. AT&T stated that "[t]he Noerr-Pennington doctrine is concerned solely with the right to attempt to influence governmental agencies or

officials. It thus immunizes only those actions directed toward governmental agencies or officials". 7/ Similarly, the Fifth Circuit in Mid-Texas v. AT&T said that "the doctrine has been applied only to situations involving direct actions made to influence governmental decisionmaking." 8/

So, are standard-setting organizations "government"? I think not. Without doubt, standard-setting organizations may play an important role in governmental processes. Their views may receive almost unvarying adherence. But, as I indicated before, influence and impact are not the issue; authority and accountability are.

Government decisionmakers derive their authority ultimately from the citizenry at large. Legislators and the chief executive are elected by the people, and they are answerable to the electorate for their decisions. Their decisions are informed by the competing views of the public, subject to scrutiny from the media and other critics and subject to challenge in the polls and in the courts. Administrative and judicial decisionmakers usually are appointed and derive their authority from and are accountable under the law. The role of these appointed decisionmakers is to hear the conflicting views of the public and to make decisions impartially, based on the merits. They must disclose and sometimes divest private economic interests that may

---

7/ MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1159 (7th Cir.), cert. denied, 464 U.S. 891 (1983) (emphasis added).

8/ Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co., 615 F.2d 1372, 1382 (5th Cir.), cert. denied, 449 U.S. 912 (1980) (emphasis added).

compromise their impartiality. Agency decisions are subject to examination by the media, and their processes are subject to judicial review and disclosure statutes such as the Freedom of Information Act and the Government in the Sunshine Act.

The principle is the same for all branches of government. Government decisionmakers are charged with the public interest, and the public can and does hold them accountable for their decisions.

Private organizations are not held to the same standard. They are composed of individuals and firms in commerce, who presumably act to further their private commercial interests, not the public interest. I do not suggest that business should be held to a public interest standard or that private commercial interests are necessarily inconsistent with the public interest. Indeed, the assumption underlying our antitrust laws is that competition -- the vying for commerce among members of the business community acting in their selfish economic interests -- "will yield the best allocation of our economic interests . . . while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." Northern Pacific R. Co. v. United States, 356 U.S. 1, 4-5 (1958). But the facts that private organizations are self-authorized, economically motivated and accountable only to themselves should be recognized for purposes of deciding whether to apply the Noerr doctrine.

At least two courts of appeals have recognized this point. In Feminist Women's Health Center v. Mohammad, 9/ the Fifth Circuit held that complaints by doctors to a medical peer review group were not petitioning of government, even though the peer review group had great influence with the state Board of Medical Examiners, because the peer review group was not government. As the court explained:

> [D]isciplinary action by a medical peer group affords grounds for action but in no way binds the [state] Board to act. Thus, ultimate authority to enact and enforce professional standards and to adjudicate violations of law rests with the Board. Hospital medical staffs and medical societies play an important role in Florida's regulatory scheme, but that role is not a governmental one. Although the actions of such groups in reporting disciplinary findings and suspected violations to the [Board] may be petitioning activity within the meaning of the first amendment, communications within those groups are not.

In other situations, when it is properly authorized, a group composed of practicing professionals may constitute a government entity. For example, the D.C. Circuit held that a state board of pharmacy was a government agency even though most of its members were retail pharmacists. The court reasoned that the board's composition was determined by state law and, if need be, could be corrected through the political process. 10/

Although standard-setting organizations may be the gate-keepers to the province of government, usually they are not

---

9/ Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 544-46 (5th Cir. 1978), cert. denied, 444 U.S. 924 (1979).

10/ Federal Prescription Service, Inc. v American Pharmaceutical Ass'n, 663 F.2d 253, 264 (D.C. Cir. 1981), cert. denied, 455 U.S. 928 (1982).

government itself. Usually, the composition of such organizations is not determined by state law. Voting members are not appointed by the governor or subject to a legislative advice and consent process. Organizational procedures typically are not determined or reviewed by government or the courts. The leadership owes its allegiance -- indeed its fiduciary responsibility -- to its membership, not the public as a whole, although the public often will benefit from the organization's activities.

It may be interesting to consider some not-so-far-fetched implications of declaring private standards organizations to be governmental or "quasi-governmental" agencies. Would the organization be bound by the Administrative Procedure Act or equivalent state laws? What procedural challenges could be mounted by the public or by disaffected members? Would the organization have to afford members and other petitioners due process when enforcing its code against violators? Would it have to hear witnesses and allow cross-examination? If standard-setting organizations are considered governmental because the only practical way to influence legislatively adopted standards is to influence the private organization, what other individuals and groups with great legislative influence also might be considered governmental or quasi-governmental? Could petitioning the key directors of the most influential members of a standard-setting organization be protected? Would governmental status affect a petitioning organization's tax exempt status or ability to charge dues and fees? Would those who routinely seek to influence the decisions of the organization have to comply with

laws and regulations governing lobbyists? Some of these questions might border on the fanciful, but if I represented a standard-setting organization, I might consider governmental or quasi-governmental status a mixed blessing.

I question the de facto delegation of governmental authority rationale because it seems to confuse governmental influence with governmental authority. It may be true that the most practical way to influence the content of some government-approved product or ethical codes is to influence the content of the private industry codes upon which they are based. But the government still retains the final authority to act and, as impractical or difficult as it might seem, it is still possible to lobby the government body that retains final authority to write a standard into the law.

A distinction should be made between automatic adoption of a private organization's model code by government and delegation of governmental authority to those standard-setting groups. When government adopts private standards, the private organization is more accurately described as the repository of the government's trust and respect than of the government's authority. As we see in the state action area, where a clearly articulated state policy to displace competition and active state supervision are required to establish antitrust immunity, much more is required -- and should be required -- for governmental or quasi-governmental status to apply. Government relies on the work of tens of thousands of private companies and organizations -- they do studies, build highways and bridges, administer prisons, even promulgate model codes -- but the companies and organizations

themselves are not government. I believe this view is shared by the Supreme Court. In Cantor v. Detroit Edison Co., a Supreme Court plurality wrote that "nothing in the Noerr opinion implies that the mere fact that a state regulatory agency may approve a proposal ... is a sufficient reason for conferring antitrust immunity on the conduct." 11/ In the Hydrolevel case, at least 45 states had accepted the American Society of Mechanical Engineers' model code, yet the Supreme Court held the Society liable as principal for the anticompetitive conduct of some of its members. 12/ Significantly, the Court did not hold that the Society enjoyed any sort of quasi-governmental status or that improper conduct resulted in the loss of antitrust immunity that the Society and its members otherwise would have enjoyed. The Court simply held the Society subject to antitrust scrutiny and applied the principles of competition law.

Another argument for granting Noerr immunity is that if the standard-setting organizations are petitioners and the model codes are their petitions, then shouldn't there be antitrust protection for the organization's members to fashion those petitions? Maybe not. In Feminist Women's Health Center, which I mentioned a few minutes ago, the court said that although a medical peer group's expression of its opinion to the state Board of Medical Examiners might be petitioning activity,

---

11/ Cantor v. Detroit Edison Co., 428 U.S. 579, 601-02 (1976).

12/ American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 558-59 (1982).

communications within the peer group itself were not. 13/

Standard-setting groups often do not lobby or petition, but simply promulgate their codes and make them available for whatever use -- which may be considerable -- that government or private industry chooses to make of them. This hybrid impact -- the influence on private industry as well as on government -- may be significant. If there were no private impact -- if private professional associations, for example, did not use model ethical codes to judge their peers -- then it might seem more appropriate to grant Noerr-Pennington immunity because the code's only purpose would be to influence government. Of course, immunity then would be unnecessary because any injury would flow most proximately not from the private organization's promulgation of the code but from the government's adoption and enforcement of it. As the D.C. Circuit said in Federal Prescription Service v. American Pharmaceutical Association, injury that arises "only through the intervention of government action ... is not subject to the antitrust laws." 14/

Of course, most industry codes, like some tariffs filed with regulatory agencies, do have a private impact apart from their use in the lawmaking process. In three cases against AT&T -- one in the Second Circuit brought by Litton 15/, one in the Fifth

---

13/ 586 F.2d at 545.

14/ 663 F.2d at 272.

15/ Litton Systems, Inc. v. American Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984).

Circuit brought by Mid-Texas Communications 16/, and one in the Seventh Circuit brought by MCI 17/ -- the courts held that Noerr-Pennington protection is not available just because conduct may become the subject of regulatory action. In each of those cases, the plaintiffs successfully challenged the private impact of AT&T's conduct, an impact that was not directly traceable to governmental review. Similarly, where the impact of the promulgation of model codes stems from enforcement by professional associations or influence on commercial contract specifications, the fact that the code may also be enacted into law in some jurisdictions should not be sufficient to warrant antitrust immunity.

As influential as they may be, private standard-setting organizations are not government agencies, and to apply Noerr-Pennington to internal processes of these organizations is inconsistent with the doctrine's First Amendment foundations. The First Amendment right of petition protects communications between the citizens and their government. The people have a right to communicate their views, and representative government needs to know those views. As the Court said in Noerr, "to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." 18/ Private commercial relationships and

---

16/ Mid-Texas Communications Systems, Inc. v. Aerican Tel. & Tel Co., 615 F.2d 1372 (5th Cir.), cert. denied, 449 U.S. 912 (1980).

17/ MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983).

18/ 365 U.S. at 137.

communications are and should be governed by other laws, including the antitrust laws.

To grant immunity to a private standard-setting organization unnecessarily and inappropriately extends the right of petition to private communications and deprives consumers and members of the business community of the benefits of enforcement of the antitrust laws. Those laws, applied to standard-setting activity, can provide at least some of the accountability that we would normally expect from a governmental body. Without the protection that antitrust law enforcement supplies, the public accountability of such organizations is notably and detrimentally absent. Refusal to grant antitrust immunity in this area will promote free and open competition in the market and ultimately will benefit all consumers.

Thank you.