

# CLARIFYING THE STATE ACTION AND NOERR EXEMPTIONS

TIMOTHY J. MURIS\*

I.	INTRODUCTION .....	443
II.	THE FTC AND STATE ACTION .....	445
A.	<i>Current Issues with the Doctrine</i> .....	445
B.	<i>Proposed Clarifications</i> .....	447
C.	<i>Recent Commission Activity Involving State Action</i> .....	448
1.	Health Care .....	448
2.	The Internet.....	450
III.	THE FTC AND NOERR-PENNINGTON .....	453
A.	<i>Current Issues with the Doctrine</i> .....	453
B.	<i>Proposed Clarifications</i> .....	454
C.	<i>Recent Commission Activity Involving Noerr- Pennington</i> .....	455
IV.	CONCLUSION .....	457

## I. INTRODUCTION

I would like to thank the Federalist Society for inviting me to speak. I want to address the role of antitrust in a topic that I know concerns many of you deeply: the growth of government. The “rent-seeking”<sup>1</sup> society seems to manifest itself in more and more of our economy. About one-third of our gross domestic product is government.<sup>2</sup> Even under Republican administrations, with the

---

\* Chairman, Federal Trade Commission. This article is adopted from a speech delivered on November 15, 2002, before the Federalist Society Panel on Competition and Regulatory Federalism. This article reflects the views of Chairman Muris and not necessarily those of the Commission or any other Commissioner.

1. Rent-seeking is the socially costly pursuit of wealth transfers. See, e.g., Jagdish Bhagwati, *Directly Unproductive, Profit-Seeking Activities*, 90 J. POL. ECON. 988 (1982); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967).

2. Of this total, federal outlays comprise 20% with the remainder state and local spending. Government Printing Office Homepage, *A Citizen's Guide to the Federal Budget: Budget of the United States Government, Fiscal Year 2001*, at

exception of President Ronald Reagan's first term, federal regulation and the number of federal regulators continued to grow.<sup>3</sup> Federal regulatory costs are approaching \$1 trillion, and the number of full-time federal employees promulgating and enforcing regulations alone stood at nearly 136,000 in 2002.<sup>4</sup>

Two antitrust exemptions help protect and foster that regulatory growth: the state action and *Noerr-Pennington* doctrines. Both have been broadly interpreted by some courts, and their overbroad interpretation has been widely criticized from the right and from the left. For example, as early as 1978 Robert Bork observed "an enormous proliferation of regulatory and licensing authorities at every level of government," and warned that the "profusion of such governmental authorities offers almost limitless possibilities for abuse."<sup>5</sup> More recently, the Antitrust Section of the American Bar Association noted that antitrust "immunity drives a large hole in the framework of the nation's competition laws."<sup>6</sup>

We know much of this growth in government harms consumers. It reflects rent-seeking, pure and simple. At its core, antitrust exists to protect consumers. Antitrust law is not a cure for rent-seeking, but I want to suggest today that it can be much better tailored to address the problem. To do so, we must properly interpret the two antitrust exemptions that protect not only legitimate government activity, but also rent-seeking.

The first exemption, for state action, was first articulated in *Parker v. Brown*.<sup>7</sup> The doctrine emerged in response to efforts to apply antitrust rules designed to regulate business conduct to the activities of state governments. The Supreme Court based the doctrine on the relatively non-controversial notion that, in passing the Sherman Act, Congress intended to protect competition, not to limit the sovereign

---

<http://www.gpoaccess.gov/usbudget/fy01/guide01.html> (last visited Mar. 23, 2004).

3. CLYDE WAYNE CREWS, JR., CATO INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 27 (2003), [http://www.cato.org/tech/pubs/10kc\\_2003.pdf](http://www.cato.org/tech/pubs/10kc_2003.pdf).

4. See OFFICE OF INFO. AND REG. AFFAIRS, OFFICE OF MGMT. AND BUDGET, MAKING SENSE OF REGULATION: 2001 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES AND STATE, LOCAL, AND TRIBAL ENTITIES (2001), <http://www.whitehouse.gov/omb/infoereg/costbenefitreport.pdf>.

5. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 347 (1978).

6. SECTION OF ANTITRUST LAW, AM. BAR ASS'N, THE STATE OF ANTITRUST ENFORCEMENT—2001, at 42 (2001), <http://www.abanet.org/antitrust/antitrustenforcement.pdf>.

7. 317 U.S. 341 (1943).

regulatory power of the states. Thus, pursuant to the doctrine, actions that could be attributed to “[t]he state itself” would be immunized from antitrust scrutiny.<sup>8</sup> Since *Parker*, however, the doctrine has been expanded in unnecessary ways that have anticompetitive effects.

The second, and related, antitrust exemption I will discuss involves private parties who are shielded from liability for the anticompetitive effects flowing from their efforts to “petition” the government, whether through lobbying, administrative processes, or litigation. This exemption is better known to antitrust scholars as the *Noerr-Pennington* doctrine. As with state action, the court opinions in this area have not been entirely consistent, and leave ample room for clarification.

Both the state action and *Noerr* exemptions have long been concerns of the Federal Trade Commission (“FTC”), and both were active issues in the 1980s when I was at the Commission during the Reagan administration. This article will describe the FTC’s current efforts to clarify these important areas of law. The Commission has given considerable thought to the federalism and First Amendment interests that these exemptions promote. When called upon to address the scope of the state action and *Noerr-Pennington* doctrines—whether through advocacy, amicus briefs, or litigation—the FTC has made every effort to articulate those interests coherently to leave ample room for competition to benefit consumers. While we recognize the importance of these two doctrines, we should still pursue the goal of proscribing anticompetitive rent-seeking.

## II. THE FTC AND STATE ACTION

### A. *Current Issues with the Doctrine*

In 1943, the Supreme Court created the state action doctrine in *Parker v. Brown*.<sup>9</sup> *Parker* stands for the proposition that the federal antitrust laws, and the Sherman Act in particular, were not intended to restrict the lawmaking power of state legislatures. As a result, *Parker* treats actions of a state legislature as capable of effecting an implied repeal of the antitrust laws of sufficient breadth to accomplish the state’s objective. Since *Parker*, the scope of state action immunity from the antitrust laws has increased considerably. At times, courts

---

8. *Id.* at 352.

9. *Id.*

have failed to consider carefully whether the anticompetitive conduct in question was truly necessary to accomplish the state's objective.<sup>10</sup> Other courts have granted broad immunity to quasi-official entities, including entities composed of market participants, with only a tangential connection to the state.<sup>11</sup>

To be sure, state action immunity may entail significant benefits. For example, immunizing state regulatory schemes from antitrust challenge has fostered the development of a diversity of such schemes. This process creates "natural experiments" from which regulators may learn and, when working optimally, can increase efficiency at all levels of government.<sup>12</sup>

Overbroad immunity, however, entails significant costs as well. The myriad state regulatory regimes can present substantial challenges to firms engaged in interstate commerce and, if not properly managed, could pose a serious threat to the national economy. This threat is magnified by the potential for interstate "spillovers," which force the citizens of one state to bear the burden of anticompetitive regulations from a neighboring state.<sup>13</sup> *Parker* itself involved an agricultural marketing program regulating raisin

---

10. Rather than looking for specific authorization, some courts have found that broad, nebulous grants of regulatory authority necessarily encompass anticompetitive conduct. *See, e.g., Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1298 (11th Cir. 1998) (stating that association of property insurers' power to enter into service contracts encompassed "potentially anticompetitive adjustment and revision of standards and selection criteria"); *Sterling Beef Co. v. City of Fort Morgan*, 810 F.2d 961, 964 (10th Cir. 1987) (stating that municipalities' power to acquire gas distribution systems encompassed "all the powers necessary to permit the city to attain a monopolistic position as to gas distribution"); *Indep. Taxicab Drivers' Employees v. Greater Houston Transp. Co.*, 760 F.2d 607, 611 (5th Cir. 1985) (finding that municipalities' power to enter into contracts governing airport services encompassed the power to enter into anticompetitive contracts).

11. *See, e.g., Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033, 1039 (5th Cir. 1998) (granting board of accountancy broad immunity); *Crosby v. Hospital Auth. of Valdosta and Lowndes County*, 93 F.3d 1515, 1524 (11th Cir. 1996) (granting hospital authority broad immunity); *Hass v. Or. State Bar*, 883 F.2d 1453, 1456 (9th Cir. 1989) (granting state bar broad immunity).

12. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("[Federalism] allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry."); *see also* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988).

13. The possibilities for adverse spillovers have been considered by a number of authors. *See, e.g.,* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23 (1983); Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1217-29 (1997).

production that extended to California growers only.<sup>14</sup> Because the vast majority of the affected raisins were sold outside California, however, out-of-state consumers bore the burden of this program. The spillover problem highlights the fact that a well-ordered federalist system cannot, and should not, focus exclusively on preventing encroachment from the national government. Preventing state governments from acting opportunistically toward one another is an important policy concern as well.<sup>15</sup>

### B. *Proposed Clarifications*

To address the concern that some courts have interpreted the state action doctrine too expansively and have created conditions hospitable to opportunistic “spillover” regulations and unsupervised delegations of state power, the FTC convened a State Action Task Force in June 2001. The Task Force is currently evaluating the feasibility and desirability of promoting a number of specific developments in the state action doctrine, including:

- Clarifying the proper interpretation of the “clear articulation” requirement—the first prong of the two-prong test the Supreme Court devised in 1980 in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*—to ensure that the state truly intended to displace competition by authorizing the anticompetitive conduct at issue.<sup>16</sup>
- Further elaborating the standards for the “active supervision” requirement—the second prong of the *Midcal* test—to ensure that the requirement has “teeth” and will prevent private entities from restraining competition free from meaningful government oversight.<sup>17</sup>
- Considering explicit recognition of a “market participant” exception to the state action doctrine based on the statement in *City of Columbia v. Omni Outdoor Advertising, Inc.* that immunity

---

14. 317 U.S. at 345-46 (observing that “[t]he California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers,” but that “[b]etween 90 and 95 per cent of the raisins grown in California are ultimately shipped in interstate or foreign commerce”).

15. See, e.g., Michael S. Greve, *Federalism’s Frontier*, 7 TEX. REV. L. & POL. 93, 95 (2002) (“Federalism surely must limit the national government’s powers over the states and protect intergovernmental immunities (in some domain, to some extent). However, it must also protect states from aggression and exploitation by other states; moreover, it must protect the common economic market from regulatory balkanization.”).

16. 445 U.S. 97, 105 (1980).

17. *Id.*

“does not necessarily obtain when the State acts not in a regulatory capacity but as a commercial participant in a given market.”<sup>18</sup>

### C. Recent Commission Activity Involving State Action

#### 1. Health Care

The work of the State Action Task Force has provided the basis for advocacy comments on state legislation seeking to create an antitrust exemption for collective bargaining among physicians. The FTC has long opposed the broad and unnecessary grant of such antitrust immunity. Thus, when asked recently to comment on physician collective bargaining bills in Ohio, Washington, and Alaska, Commission staff reiterated that the proposed exemptions: (1) would authorize physician price fixing, and (2) would *not* improve the quality or care.<sup>19</sup>

In each instance, the critical state action issue raised was whether the proposed oversight regime satisfied the “active supervision” requirement. In the course of articulating broader antitrust concerns about the proposed legislation, and specific failings under the state action doctrine, the staff also suggested more robust active supervision standards as potential improvements to the bill. In particular, the staff observed that the requirement of a “written decision, expressly considering the potentially anticompetitive implications of a proposed contract and attempting to quantify the consumer impact and expected effect on consumer prices” would increase the likelihood of a finding of active supervision, especially if issued after public notice and an opportunity for the public to comment.<sup>20</sup>

Because physicians are attempting to immunize price-fixing, this

---

18. 499 U.S. 365, 374-75 (1991).

19. Letter Commenting on House Bill 325 from Office of Policy Planning, FTC Bureau of Competition, to Hon. Dennis Stapleton, Chairman, Ohio House of Representatives Insurance Commission (Oct. 16, 2002), *available at* <http://www.ftc.gov/os/2002/10/ohb325.htm> (last visited Mar. 24, 2004) [hereinafter Ohio Letter]; Letter Commenting on House Bill 2360 from Office of Policy Planning, FTC Bureau of Competition, to Hon. Brad Benson, Ranking Minority Member, State of Washington House of Representatives Financial Institutions and Insurance Committee (Feb. 8, 2002), *available at* <http://www.ftc.gov/be/v020009.pdf> (last visited Mar. 24, 2004); Letter Commenting on House Bill 325 from Office of Policy Planning, FTC Bureau of Competition, to Hon. Lisa Murkowski, Chair, Alaska House of Representatives Labor and Commerce Committee (Jan. 18, 2002), *available at* <http://www.ftc.gov/be/v020003.htm> (last visited Mar. 24, 2004).

20. Ohio Letter, *supra* note 19, at 6.

issue has important consequences. In the past year, the Commission has reached settlements with five groups of physicians for allegedly colluding to raise consumers' costs. Three of the cases are in Denver,<sup>21</sup> one is in Napa,<sup>22</sup> and one is in Dallas-Fort Worth.<sup>23</sup> The number of physicians involved ranged from eight in Napa to more than twelve hundred in Dallas-Fort Worth.

Those who would justify such conduct suggest that it is necessary to counter the monopoly power of insurers. A recent *American Medical News* editorial, for example, referred to the "competition of physician 'Davids' against health plan 'Goliaths,'" and suggested that federal antitrust enforcement has "unfortunately favored the big guys."<sup>24</sup> Yet the American Medical Association's ("AMA") own data indicates that insurer market concentration is not a problem in either Denver or Dallas-Fort Worth—the markets that accounted for four of the five physician price fixing cases brought by the Commission in the past year.<sup>25</sup>

The conduct the Commission challenged is naked price fixing, plain and simple. It is summarily condemned under the antitrust laws, because it has no pro-competitive justifications.<sup>26</sup> Of course, it does not follow that all collective conduct is problematic. The antitrust laws actually provide a considerable degree of flexibility in dealing with efficiencies and quality, as long as the conduct in question is, on

---

21. R.T. Welter and Assoc., Inc., et al.; Analysis To Aid Public Comment, 67 Fed. Reg. 55262 (Aug. 28, 2002); Physician Integrated Services of Denver, Inc.; Analysis To Aid Public Comment, 67 Fed. Reg. 36190 (May 23, 2002); Aurora Assoc. Primary Care Physicians, L.L.C.; Analysis To Aid Public Comment, 67 Fed. Reg. 36188 (May 23, 2002).

22. Obstetrics and Gynecology Med. Corp. of Napa Valley, et al.; Analysis To Aid Public Comment, 67 Fed. Reg. 18010 (Apr. 12, 2002).

23. System Health Providers; Analysis To Aid Public Comment, 67 Fed. Reg. 55258 (Aug. 28, 2002).

24. *It's About Time: Insurers Facing Antitrust Scrutiny*, AM. MED. NEWS, Oct. 14, 2002, at 22.

25. AM. MED. ASS'N, COMPETITION IN HEALTH INSURANCE: A COMPREHENSIVE STUDY OF U.S. MARKETS app. 2, at 39 (2001). In the Denver market, the AMA calculated that the combined Herfindahl-Hirschman Index ("HHI") figure for health maintenance organizations and preferred provider organizations was 1336. *Id.* The AMA did not calculate an HHI for Napa Valley. The Merger Guidelines treat an HHI of 1300 as the low end of a moderately concentrated market. See DOJ and FTC Horizontal Merger Guidelines, 57 Fed. Reg. 41552, 41558 (Sept. 10, 1992) ("The Agency divides the spectrum of market concentration as measured by the HHI into three regions that can be broadly characterized as unconcentrated (HHI below 1000), moderately concentrated (HHI between 1000 and 1800), and highly concentrated (HHI above 1800).").

26. See *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 342-58 (1982) (holding "naked" maximum-price-fixing among competing physicians to be a *per se* violation of the Sherman Act's prohibitions on contracts in restraint of trade).

balance, pro-competitive and the efficiencies derive from the challenged conduct.<sup>27</sup> Quality is obviously an important part of the competitive mix when purchasing health care, and competition law does not hinder the delivery of high quality care. The Commission is always willing to consider arguments about how a particular transaction or conduct will improve quality. Clinical integration that increases quality of care, for example, has been treated as permissible, pro-competitive collective conduct.<sup>28</sup> Collaborative conduct of this sort does not violate the antitrust laws because there are substantial pro-competitive benefits. When a group has no justification for its price fixing, however, the inquiry ends, and the antitrust laws summarily, and appropriately, condemn the conduct.

## 2. *The Internet*

The State Action Task Force also spawned a spin-off task force focused on Internet issues. A frequent misconception of the “New Economy” is that the Internet is a wide-open, unregulated space—a pure free marketplace. The Commission’s Internet Task Force found that this is often not true, as many generally applicable regulatory regimes have been extended to on-line competitors, often with significantly anticompetitive results.<sup>29</sup>

The Internet Task Force continues to explore ways to reduce or eliminate these barriers to expanded e-commerce. The Task Force’s activities include:

- *Contact Lens Sales*. In March 2002, the FTC staff commented to the Connecticut Board of Examiners for Opticians, which is

---

27. For example, current antitrust law permits physicians to negotiate collectively with health plans in various circumstances in which consumers are likely to benefit. Indeed, the Health Care Statements describe multiple antitrust-compliant methods by which physicians may organize networks and make other joint arrangements to deal collectively with health plans and other physicians. See Statement of the Department of Justice and Federal Trade Commission Enforcement Policy on Providers’ Collective Provision of Non-Fee-Related Information to Purchasers of Health Care Services, 4 Trade Reg. Rep. (CCH) ¶ 13,153, at 20,808 (Sept. 5, 1996); Statement of Department of Justice and Federal Trade Commission Enforcement Policy on Providers’ Collective Provision of Fee-Related Information to Purchasers of Health Care Services, *id.* at 20,809 (Sept. 5, 1996).

28. See, e.g., FTC Staff Advisory Opinion: MedSouth Inc. (Feb. 19, 2002) at <http://www.ftc.gov/bc/adops/medsouth.htm> (last visited Feb. 27, 2004) (concluding that *per se* analysis would be inappropriate for proposed innovative form of clinical integration, which included joint negotiation of payer contracts, given that the collective negotiation of fees was sufficiently related to, and reasonably necessary for, the achievement of the quality of care benefits).

29. See Federal Trade Commission Chairman Timothy J. Muris, Remarks at FTC Internet Workshop (Oct. 8, 2002), at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/muris.htm> (last visited Feb. 28, 2004).

currently considering whether to require stand-alone sellers of replacement contacts to obtain Connecticut optician and optical establishment licenses.<sup>30</sup> Working with the Connecticut Attorney General's Office, the staff comment argued that such a requirement "would likely increase consumer costs while producing no offsetting health benefits," and that such a requirement in fact "could harm public health by raising the cost of replacement contact lenses, inducing consumers to replace the lenses less frequently than doctors recommend."<sup>31</sup>

- *Real Estate Closings.* The Commission and the Department of Justice have opposed one type of state regulation of these services. The agencies jointly filed comments opposing proposals in both North Carolina and Rhode Island to require attorneys to be physically present for all real estate closings and refinancings.<sup>32</sup> These regulations could seriously impede on-line mortgage lenders, who often rely on lay closers rather than on attorneys with a physical presence in the state. In letters to the North Carolina State Bar and the Rhode Island Legislature, we argued in favor of consumer choice, citing empirical evidence showing that non-lawyer closings can save consumers significant amounts of money, sometimes up to \$400 per transaction, and can increase convenience for consumers, because non-lawyers often are more willing to travel and meet consumers after work.<sup>33</sup>
- *Casket Sales.* On September 5, 2002, the Commission filed an *amicus* brief in federal district court in a case in which an Internet-based casket seller challenged a state law that requires all sellers of funeral goods to be licensed funeral directors.<sup>34</sup> The Commission's brief stated that the FTC's Funeral Rule was adopted, in part, to

---

30. Comments of the Staff of the Federal Trade Commission before the Connecticut Board of Examiners for the Opticians (Mar. 27, 2002), at <http://www.ftc.gov/be/v020007.htm> (last visited Feb. 28, 2004).

31. *Id.* at 13.

32. Letter Commenting on Proposed North Carolina State Bar Opinions Concerning Non-Attorneys' Involvement in Real Estate Transactions from Federal Trade Commission and Department of Justice, to E. Fitzgerald Parnell III, President, North Carolina State Bar (July 11, 2002), available at <http://www.ftc.gov/os/2002/07/non-attorneyinvolvement.pdf> (last visited Apr. 28, 2004); Letter Commenting on House Bill No. 7462 from Federal Trade Commission and Department of Justice, to Rhode Island House of Representatives (Mar. 29, 2002), available at <http://www.ftc.gov/be/v020013.pdf> (last visited Apr. 28, 2004) [hereinafter Rhode Island Letter]; Letter Commenting on North Carolina State Bar Opinions Concerning Non-Attorneys' Involvement in Real Estate Transactions from Federal Trade Commission and Department of Justice, to North Carolina State Bar Ethics Committee (Dec. 14, 2001), available at <http://www.ftc.gov/be/V020006.htm> (last visited Apr. 28, 2004) [hereinafter North Carolina Letter].

33. North Carolina Letter, *supra* note 32; Rhode Island Letter, *supra* note 32, at 7-8.

34. Memorandum of Law of Amicus Curiae the Federal Trade Commission, Powers v. Harris, 2002 WL 32026155 (W.D. Okla. 2002) (No. CIV-01-445-F), <http://www.ftc.gov/os/2002/09/okamicus.pdf>.

open casket sales to competition from sellers other than funeral directors, and that the Rule protects consumers by promoting competition among providers of funeral goods, including independent on-line casket retailers.<sup>35</sup>

• *Internet Workshop.* To address these issues more systematically, on October 8-10, 2002, the Commission hosted a workshop to address potentially anticompetitive efforts to restrict competition on the Internet.<sup>36</sup> The workshop was intended to enhance the Commission's understanding of particular practices and regulations, and focused on a variety of industries, including: (1) wine sales; (2) cyber-charter schools; (3) contact lenses; (4) automobiles; (5) casket sales; (6) on-line legal services; (7) telemedicine and on-line pharmaceutical sales; (6) auctions; (7) real estate, mortgages, and financial services; and (8) retailing.<sup>37</sup> The workshop solicited input from several perspectives, including the views of online businesses, their brick-and-mortar competitors, state regulators, and consumer advocates.

Besides these matters, there are several non-public investigations involving significant state action issues. Many of these are likely to be modeled after the Commission's enforcement efforts in the 1980s. At that time, the Commission challenged municipal taxicab regulations,<sup>38</sup> resulting in deregulation in some cities. During the same time period,

---

35. *Id.* at 1. Plaintiffs' principal claim in *Powers* was that a provision of the Oklahoma Funeral Services Licensing Act ("FLSA") that required sellers of funeral goods, including caskets, to be licensed funeral directors violated the Commerce Clause. The Funeral Board defended the constitutionality of the provision by arguing that it was rationally related to a legitimate state interest: the protection of Oklahoma consumers. In support of this consumer protection rationale, the Board asserted that the objectionable FLSA provision advanced the same objectives as the FTC's Funeral Rule. While declining to take a position on the underlying Commerce Clause issue, the Commission filed a brief for the sole purpose of explaining the purpose and operation of the Funeral Rule, which, unlike the FLSA provision, is intended to *increase* competition. Ultimately, the district court concluded that the Oklahoma provision satisfied the rational basis test. *Powers*, 2002 WL 32026155, at \*18. *But see* *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (holding that a very similar Tennessee provision did *not* satisfy the rational basis test). In reaching its conclusion, the district court distinctly did *not* accept the Board's argument that the FLSA provision was merely an extension of the FTC's Funeral Rule.

36. *See* Federal Trade Commission Homepage, Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet (Oct. 8-10, 2002), at <http://www.ftc.gov/opp/e-commerce/anticompetitive/index.htm> (last visited Mar. 24, 2004).

37. Potentially anticompetitive barriers to e-commerce in these industries have also been the subject of Commission testimony before Congress. *See State Impediments to E-Commerce: Consumer Protection or Veiled Protectionism? Before the House Subcomm. on Commerce, Trade, and Consumer Protection*, 107th Cong. (2002) (Testimony of Ted Cruz, Director, Office of Policy Planning, Federal Trade Commission), available at <http://www.ftc.gov/os/2002/09/020926testimony.htm> (last visited Apr. 16, 2004).

38. *See, e.g.,* *City of New Orleans*, 105 F.T.C. 1 (1985); *City of Minneapolis*, 105 F.T.C. 304 (1985).

the Commission also sued the title insurance industry for price fixing. That case ultimately went to the Supreme Court, which found for the FTC.<sup>39</sup>

### III. THE FTC AND *NOERR-PENNINGTON*

#### A. *Current Issues with the Doctrine*

A second exemption from the antitrust laws is the *Noerr-Pennington* doctrine—first articulated by the Supreme Court in *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*<sup>40</sup> and *United Mine Workers of America v. Pennington*.<sup>41</sup> Under *Noerr*, a private party petitioning for government action—even anticompetitive government action—is shielded from the antitrust laws. Like the state action doctrine, the *Noerr-Pennington* doctrine, as originally conceived, sensibly reserved a narrowly defined sphere of political activity from enforcement of the antitrust laws.

Unfortunately, the *Noerr* doctrine has also mimicked the evolution of the state action doctrine, with the scope of the exemption in some courts increasingly expanding to pose a risk of consumer harm. Parties have been granted *Noerr* protection even if the anticompetitive conduct at issue had no “petitioning” component whatsoever.<sup>42</sup> A few courts have extended the doctrine to cover even abusive tactics, such as repetitive lawsuits,<sup>43</sup> that were clearly intended to delay a competitor’s entry or raise its costs, rather than legitimately to petition government. Further, as the Commission’s recent investigations into generic drug competition have revealed,<sup>44</sup> so-called “sham” petitioning—often in the form of “petitioning” a court through litigation—can have significant anticompetitive effects. The case law on shams remains varied, however, with some courts interpreting this key exception to the *Noerr* doctrine in a manner that

---

39. *FTC v. Tigor Title Ins. Co.*, 504 U.S. 621 (1992).

40. 365 U.S. 127 (1961).

41. 381 U.S. 657 (1965).

42. *See, e.g.*, *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367-68 (5th Cir. 1983) (holding that threats of litigation, regardless of whether directed to specific parties or published generally, constitute immunized petitioning).

43. *See, e.g.*, *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 862 (5th Cir. 2000) (holding that the Supreme Court’s decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), which appeared to create a repetitive petitioning exception to *Noerr*, “is limited to the confines of the ‘sham’ exception”).

44. *See infra* Part III.C.

all but eviscerates its limiting effect.<sup>45</sup>

### B. Proposed Clarifications

To address these concerns, the Commission convened a *Noerr-Pennington* Task Force in the summer of 2001.<sup>46</sup> The Task Force is currently evaluating the feasibility and desirability of promoting a number of specific developments in the *Noerr-Pennington* doctrine, including:

- Applying a restrictive view of the varieties of conduct that constitute immunized “petitioning”—currently adopted in cases involving tariff filings<sup>47</sup> and private settlements<sup>48</sup>—to broader contexts.
- Extending the *Walker Process*<sup>49</sup> exception to *Noerr-Pennington* immunity beyond the Patent and Trademark Office (“PTO”) context to analogous non-legislative proceedings.

---

45. See, e.g., *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1080-81 (8th Cir. 1999) (holding that a petition cannot be a “sham” when the opposing party’s summary judgment request is denied).

46. See generally John T. Delacourt, *The FTC’s Noerr-Pennington Task Force: Restoring Rationality to Petitioning Immunity*, 17 ANTITRUST 36 (2003); John T. Delacourt, *Protecting Competition by Narrowing Noerr: A Reply*, 18 ANTITRUST 77 (2003).

47. See *Litton Sys. v. American Tel. & Tel. Co.*, 700 F.2d 785, 807 (2d Cir. 1983).

AT&T erroneously assumes that a mere *incident* of regulation—the tariff filing requirement—is tantamount to a request for governmental action akin to the conduct held protected in *Noerr* and *Pennington*. . . . AT&T cannot cloak its actions in *Noerr-Pennington* immunity simply because it is required, as a regulated monopoly, to disclose publicly its rates and operating procedures.

*Id.* See also *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1138 (3d Cir. 1993) (a collective rate filing is not a petition); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1181 (8th Cir. 1982) (utility rate filings are not petitions, and tariff filings “may not be used as pretext to achieve otherwise unlawful results”); *New England Motor Rate Bureau*, 112 F.T.C. 200, 284 (1989) (joint applications to regulators for tariff changes are not petitions), *vacated on other grounds*, 908 F.2d 1064 (1st Cir. 1990).

48. See *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 641 (E.D. Mich. 2000).

When parties petition a Court for judicial action, [*Noerr*] protection attaches, but when they voluntarily withdraw their disputes from the court and resolve it by agreement among themselves there would be no purpose served by affording *Noerr-Pennington* protection. The parties by doing so must abide with any antitrust consequences that result from their settlement.

*Id.* (quoting *In re N.M. Natural Gas Antitrust Litig.*, MDL No. 403, 1982 WL 1827, at \*6 (D.N.M. Jan. 26, 1982)). Cf. *Andrx Pharm., Inc. v. Biovail Corp.* Int’l, 256 F.3d 799, 819 (D.C. Cir. 2001) (“The Agreement is not unlike a final, private settlement agreement resolving the patent infringement litigation by substituting a market allocation agreement. Such a settlement agreement would not enjoy *Noerr-Pennington* immunity and neither does the Agreement here.”).

49. *Walker Process Equip., Inc., v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

- Fully recognizing an independent misrepresentation exception—separate and distinct from the “sham” exception set forth in *Professional Real Estate Investors v. Columbia Pictures Industries* (“PRE”) <sup>50</sup>—to *Noerr-Pennington* immunity.

### C. *Recent Commission Activity Involving Noerr-Pennington*

To date, the most significant impact of the work of the *Noerr-Pennington* Task Force has involved generic pharmaceuticals. We currently have numerous investigations raising significant *Noerr* issues, and the Task Force has worked closely with our enforcement staff to address those issues. Additionally, in January 2002, the Task Force played an active role in an amicus brief<sup>51</sup> filed in *In re Buspirone*.<sup>52</sup> This case addressed whether Bristol-Myers Squibb Co. (“BMS”) violated the antitrust laws by fraudulently listing a patent on its branded drug, BuSpar, in the Food and Drug Administration’s Orange Book,<sup>53</sup> thereby foreclosing generic competition. The Commission’s brief asserted that BMS’s listing conduct was not shielded by the *Noerr* doctrine. On February 19, 2002, the district court issued an order adopting much of the Commission’s reasoning and rejecting BMS’s immunity claim. Besides the favorable result in that particular case, the opinion constituted a substantial step toward adoption of two of the Task Force’s proposed clarifications of the *Noerr-Pennington* doctrine.

First, the court held that Orange Book filings are not “petitioning” covered by *Noerr*.<sup>54</sup> Rather, they are ministerial filings that do not call for an exercise of governmental authority or discretion. This argument, largely left unaddressed by the parties, was advanced forcefully in the Commission brief. Second, the court held that, even if Orange Book filings did constitute petitioning, plaintiffs’ allegations were sufficient to satisfy the *Walker Process* exception.<sup>55</sup> Notably, this is one of the first decisions to apply the *Walker Process*

---

50. 508 U.S. 49 (1993).

51. Memorandum of Law of Amicus Curiae the Federal Trade Commission in Opposition to Defendant’s Motion to Dismiss, *In re Buspirone Patent Litig.*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002) (No. 1410 (JGK)), available at <http://www.ftc.gov/os/2002/01/busparbrief.pdf>.

52. 185 F. Supp. 2d 363.

53. The Orange Book is an administrative publication formally titled *Approved Drug Products with Therapeutic Equivalence*.

54. *In re Buspirone*, 185 F. Supp. 2d at 370.

55. *Id.* at 372-75.

exception outside the PTO context.<sup>56</sup> As a third, and final, rationale for its decision, the court held that, even if Orange Book filings did constitute petitioning, plaintiffs' allegations were sufficient to satisfy the "sham" exception to *Noerr*.<sup>57</sup> The FTC brief had advanced all three alternative holdings.

Shortly after the *Buspirone* ruling, the Commission reached a successful conclusion in one of our own pharmaceutical cases. In April 2002, the Commission announced its first complaint against, and consent order with, Biovail.<sup>58</sup> Biovail—a Canadian pharmaceutical manufacturer—had allegedly engaged in wrongful Orange Book listing conduct for the purpose of blocking generic competition with its branded drug, Tiazac.

In addition to these matters, the Commission currently has numerous non-public investigations underway. An example of the type of case the Commission is developing is the *U-Haul* case, which was brought in 1985, when I was Director of the FTC's Bureau of Competition.<sup>59</sup> The complaint alleged that U-Haul and its parent, AMERCO, attempted to monopolize the market for rental moving equipment by engaging in sham litigation against a competitor, Jartran, in a Chapter 11 reorganization proceeding. In particular, the complaint alleged that U-Haul's conduct in the bankruptcy constituted a sham because it was "intended primarily to delay or prevent

---

56. See *id.* at 373 (explaining that the *Walker Process* exception "allows for antitrust suits when a party has fraudulently obtained a patent and seeks to maintain a monopoly over a product by bringing patent infringement suits against competitors" and that "[n]either the Supreme Court nor the Court of Appeals for the Federal Circuit has addressed whether the *Walker Process* exception would apply to a fraudulent listing of a patent in the Orange Book along with subsequent lawsuits seeking to exploit the listing"). The uncertainty regarding the validity of the *Walker Process* exception outside the PTO context appears to have resulted from the fact-specific manner in which the Supreme Court originally described the requirements of the exception. See *Walker Process*, 382 U.S. at 177 ("Walker's counterclaim alleged that Food Machinery obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office. Proof of this assertion would be sufficient to strip Food Machinery of its exemption from the antitrust laws."). The Federal Circuit's confirmation of the continuing existence of the *Walker Process* exception, post-*PRE*, did little to resolve this uncertainty. See *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1071 (Fed. Cir. 1998) (explaining that the *Walker Process* exception can be satisfied without the additional "sham" inquiry required under *PRE* "because *Walker Process* antitrust liability is based on knowing assertion of a patent procured by fraud on the PTO, very specific conduct that is clearly reprehensible").

57. *In re Buspirone*, 185 F. Supp. 2d at 376.

58. This complaint was later filed against Biovail. *In re Biovail Corp.*, No. C-4060 (F.T.C. filed Oct. 2, 2002), available at <http://www.ftc.gov/os/2002/04/biovailcomplaint.htm>. The *Biovail* case marked the Commission's first use of an antitrust enforcement action to remedy the effects of an allegedly improper, anticompetitive Orange Book listing.

59. *In re AMERCO*, 109 F.T.C. 135 (1987) (complaint issued June 24, 1985).

Jartran's reorganization as a competitor."<sup>60</sup> The Commission ultimately settled the case with U-Haul. Among other terms, the consent agreement provided that U-Haul would not initiate or participate in any judicial or administrative proceeding in which U-Haul's main purpose was to harass or injure a competitor or potential competitor.<sup>61</sup>

#### IV. CONCLUSION

Both the state action and *Noerr-Pennington* doctrines were originally articulated as sensible limitations on federal antitrust authority. Unfortunately, overly expansive interpretations have not only divorced these doctrines from their original objectives but, in many instances, have also caused substantial consumer harm. The Commission's recent experience has demonstrated that antitrust exemptions can have significant impact on important sectors of the modern economy, including healthcare, pharmaceuticals, and e-commerce. Restoring these exemptions to their original, limited scope is thus a matter of more than academic interest. While clarifying the scope of state action and *Noerr-Pennington* doctrines alone cannot prevent unnecessary rent-seeking and anticompetitive government, it is an important skirmish in a larger battle. That battle has long been of considerable importance to the Federalist Society, and I am confident that its members will continue the fight.

---

60. *Id.* at 139.

61. *Id.* at 135.

