

Health Care Antitrust Advisory



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Noerr-Pennington Immunizes Hospital From Antitrust Liability For Lobbying Campaign Against Competitor

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The *Noerr-Pennington* doctrine, which protects the First Amendment right to petition the government, has traditionally been used to shield lobbying activity from antitrust liability, even when such activity's intent is to harm a competitor. In a recent decision, the Seventh Circuit affirmed a district court's dismissal of an antitrust suit, holding that the *Noerr-Pennington* doctrine protected the defendant hospital's deceitful and objectionable tactics employed in lobbying to prevent the construction of a competing medical facility.

In *Mercatus Group, LLC v. Lake Forest Hosp.*, No. 10-1665 (7th Cir. May 26, 2011) Plaintiff Mercatus Group, LLC ("Mercatus") claimed that Defendant Lake Forest Hospital (the "Hospital") violated Section 2 of the Sherman Act by encouraging the local licensing board to deny Mercatus permission to build a competing medical facility. The Seventh Circuit's decision makes clear that, with very few exceptions not present in this case, the First Amendment considerations that underlie *Noerr-Pennington* will trump antitrust concerns even when the defendant's tactics might otherwise be subject to criticism.

The Court noted that "regardless of how dishonest or distasteful [the Hospital's] conduct might have been," it was nonetheless protected under *Noerr-Pennington* as "a legitimate exercise of [its] right to petition the government for redress." Ultimately, the Court explained that "[t]o the extent Mercatus was harmed by the Hospital's actions, any remedies might arise under Illinois tort law, not federal antitrust law."

Background

In 2005, Mercatus began plans with its partner, Evanston Northwestern Healthcare (ENH), to build a medical office center in the Village of Lake Bluff, Illinois. The Hospital, located nearby in Lake Forest, Illinois, perceived the proposed Mercatus facility as a threat to the Hospital's ability to compete for patients in the local market.

To protect itself from the potential competitive threat, the Hospital launched a multi-pronged campaign that consisted of: (1) a lobbying effort to convince the Lake Bluff Board of Trustees (the "Board") to deny Mercatus the necessary zoning permission for its project; (2) a public relations campaign to encourage Hospital employees, donors and the public to pressure the Board to oppose Mercatus' plan; (3) pressure on ENH to pull out of the partnership with Mercatus and to stay out of the local market; and (4) the urging of physicians not to relocate their practices to the Mercatus facility.

The Hospital's campaign was successful. The Board denied permission to Mercatus, ENH pulled out of its relationship with Mercatus, and physician groups that had previously intended to relocate to the

Mercatus facility decided against such a move.

Mercatus sued in federal district court, alleging that the Hospital's multi-pronged campaign, which Mercatus claimed consisted of many misrepresentations, violated Section 2 of the Sherman Act. The district court held that the Hospital's lobbying campaign was protected by the *Noerr-Pennington* doctrine, and that its misrepresentations did not otherwise give rise to antitrust liability. The Seventh Circuit affirmed.

Seventh Circuit's Decision

The Seventh Circuit addressed the question of whether the *Noerr-Pennington* doctrine shields from antitrust liability misrepresentations made by one competitor about another in relation to local zoning proceedings. In holding that it did, the Seventh Circuit affirmed the district court's ruling. The Seventh Circuit noted that, even if the Hospital had made material misrepresentations in its lobbying efforts and related public relations campaign, "such misrepresentations are legally irrelevant because those meetings were inherently political in nature." Regarding the Hospital's actions unrelated to its lobbying campaign, including its pressure on ENH and physician groups, the Seventh Circuit further held that such "contacts constituted mere speech that was not actionable under the Sherman Act."

Protected Acts under *Noerr-Pennington*

"The *Noerr-Pennington* doctrine," according to the Seventh Circuit, "recognizes that our democratic system of government derives its very vitality from its citizens' ability to reject the status quo and to advocate for changes in the law." The Seventh Circuit cited two exceptions to the protections offered by the *Noerr-Pennington* doctrine: (1) sham lawsuits; and (2) fraudulent misrepresentations.

Relying on the fraud exception, Mercatus argued that the Hospital should not be protected by the *Noerr-Pennington* doctrine because the Hospital made misrepresentations in its lobbying efforts, including false statements that the proposed Mercatus facility would "cause a \$2 million loss to [the Hospital], drive the Hospital out of business, and prevent [the Hospital] from providing charity care." Likewise, in its public relations campaign, Mercatus alleged that the Hospital falsely portrayed Mercatus as a threat to "charity care and general health care services." Nonetheless, even assuming that such statements were in fact false, the Seventh Circuit held that the Hospital's lobbying activities were immune under the *Noerr-Pennington* doctrine.

The Seventh Circuit explained that, under the fraud exception, "a misrepresentation renders an adjudicative proceeding a sham only if the misrepresentation (1) was intentionally made, with knowledge of its falsity; and (2) was material, in the sense that it actually altered the outcome of the proceeding." Finding that the zoning proceedings before the Board were legislative, not adjudicative, the Seventh Circuit held that the fraud exception did not apply. The Court cited the following factors to consider when determining whether a proceeding is adjudicative or legislative: (1) the general nature of the authority exercised by the relevant government body; (2) the formality of such governmental body's process; (3) whether such process is subject to political influences; (4) whether any testimony in the process was given under oath; and (5) whether the governmental body's actions were discretionary or guided by set standards.

Applying these factors, the Court determined the Board's proceedings were generally conducted at informal public meetings, both the Hospital and Mercatus engaged in *ex parte* lobbying of the Board, the testimony before the Board was not under oath, and there were no specific standards governing the Board's decision in the matter.

Upon determining that the Hospital's lobbying campaign was protected by the *Noerr-Pennington* doctrine and not subject to the fraud exception, the Seventh Circuit likewise held that the Hospital's related public relations campaign enjoyed the same antitrust immunity. The Court reasoned that, because the Board's decision in this matter was "ultimately a political decision" and "injuries [to a competitor] are inevitable whenever a business attempts to rally the public to encourage government action that will adversely affect [such competitor]," *Noerr-Pennington* immunity applies despite the

Hospital's false statements.

Acts Outside *Noerr-Pennington*

Mercatus further argued that the Hospital's actions outside of its lobbying campaign violated the antitrust laws. Mercatus again alleged that the Hospital made false statements in its communications with other businesses, including an assertion "that Mercatus was not in compliance with federal anti-kickback regulations." The Seventh Circuit held that, although these acts were not protected by the *Noerr-Pennington* doctrine, they nonetheless did not rise to the level of an antitrust violation.

First, the Court ruled that the Hospital's pressure on ENH to terminate its relationship with Mercatus and to stay out of the Hospital's market did not violate the Sherman Act because the Hospital's acts were "not backed by any sort of coercive conduct that might give rise to antitrust liability." ENH was free to choose whether or not to compete with the Hospital. Second, the Court held that Mercatus failed to present sufficient evidence that the Hospital's misrepresentations regarding Mercatus and its efforts to urge physicians not to move their practices to the Mercatus facility constituted actual or attempted monopolization in violation of Section 2, finding that the antitrust laws do not prohibit merely "unfair, impolite or unethical" conduct.

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Please let us know if we may provide you with a copy of the decision, or if you would care to discuss the impact of this case on your business. Mintz Levin lawyers have significant experience litigating antitrust cases and providing business counseling in order to avoid litigation at the outset. We would be pleased to help you guide your business toward successful avoidance of antitrust concerns.

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