

FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

U.S. DEVELOPMENTS

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Rule Nominated as Antitrust Chief

The President has nominated Charles Rule, currently the acting Chief of the Antitrust Division at the Department of Justice, to become the Chief of the Antitrust Division. In May, Senate hearings on his nomination were held at which the Antitrust Division's enforcement policies and Mr. Rule's plans for running the Division came under close scrutiny. Mr. Rule was questioned on his stand on various pieces of pending legislation, the AT&T case, horizontal competition, resale price maintenance, and other issues of concern to the Senate Judiciary Committee. The Committee has not completed action on Mr. Rule's nomination; several outstanding questions remain. No further hearings on the nomination are scheduled, and it appears that the Committee is keeping its options open.

Legislative Update

On the legislative front, DOJ has come out in opposition to S. 430. This bill would essentially establish certain vertical resale price maintenance agreements as *per se* violations of the *Sherman Act* by:

- (1) defining certain agreements between sellers and purchasers of goods or services

regarding the price at which purchasers resell such goods or services as sufficient in and of themselves to establish violations of the *Sherman Act*, and

- (2) setting out new presumptive evidentiary standards for judges and juries to follow in determining whether a seller and purchaser actually entered into such agreements. DOJ's opposition is partially attributable to its well-established position that resale price maintenance is not always competitively harmful. In addition, DOJ believes that such an amendment would restrict its enforcement flexibility.

In testimony before the House Judiciary Committee, Mr. Rule expressed support for the repeal of the antitrust exemption for the insurance industry contained in the *McCarran-Ferguson Act*, 15 U.S.C. s 1011-15. Rule also testified before the Committee on Small Business of the House of Representatives during its hearings on *McCarran-Ferguson* exemption. A broad coalition of consumer, labour, and banking groups has come out in support of these congressional efforts to end the insurance industry's 42-year exemption.

Deputy Assistant Attorney General Roger B. Andwelt of the Antitrust Division testified before the Senate on S. 724, which among other things, would terminate the merger authority of the Department of Transportation in the airline industry. DOJ believes it is unnecessary to treat the airline industry uniquely with respect to mergers. Mr. Andwelt quoted Secretary of Transportation Elizabeth Dole, who had written to Congress indicating:

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Experience has demonstrated that the procedures of the *Clayton Act* are far better suited to the needs of a competitive industry than the prior approval requirements contained in the *Federal Aviation Act*.

Mr. Rule also testified in opposition to S. 431 and S. 432, bills to amend the premerger notification provisions of the *Hart-Scott-Rodino Act*. S. 431 is intended to close the so-called "partnership loophole" in the premerger program. DOJ, in light of the ongoing administrative rulemaking on this issue, believes that legislation is unnecessary.

Section 7A of the *Hart-Scott-Rodino Act* now covers mergers only if the size of the parties and the size of the transaction, measured in dollar amounts, are at certain levels. S. 432 would amend section 7A by raising from \$10 million to \$15 million the threshold for the size of the acquiring person, and from \$15 to \$25 million for the size of the transaction. S. 432 would also amend the waiting period and confidentiality provisions of the *Hart-Scott-Rodino Act*. DOJ opposes each of these provisions as unnecessary.

Horizontal Competition Standard-Setting Bodies

In the United States, many industry members participate in standard-setting organizations that establish minimum standards. Because standard-setting organizations involve discussion among horizontally positioned competitors, and can be used to limit competition among them or to exclude competitors, they have been carefully scrutinized by U.S. courts under the antitrust laws. Several years ago, in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), the U.S. Supreme Court held that a standard-setting organization could be liable under the U.S. antitrust laws for anticompetitive behaviour. The Court noted that a private standard-setting organization "wields great power in the nation's economy". The standards it develops "may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country, as well as entire segments of an industry".

In several subsequent cases, a tension has developed between the so-called *Noerr-Pennington* doctrine, and the liability for standard-setting organizations. Several trial courts have held that because of their quasi-governmental status, individual companies that attempt to influence the standard-setting organization are exempt from antitrust liability under the *Noerr-Pennington* doctrine, which provides insulation from antitrust liability for activities designed to exercise the right to petition the government and influence the decisions of public officials.

In *Indian Head, Inc. v. Allied Tube & Conduit Corporation*, the trial court, on July 31, 1986, entered a judgment for the defendant notwithstanding the jury verdict and award of \$3.8 million dollars (trebled to \$11.4 million) in damages. Its order was based on an application of the *Noerr-Pennington* doctrine. Indian Head is a manufacturer of polyvinyl chloride (PVC) conduit, which is hollow tubing used in building construction. PVC conduit competes with steel conduit of which the defendant Allied is the largest producer in the United States. Allied was successful in causing PVC conduit to be excluded from the 1981 edition of the National Electrical Code (promulgated by the National Fire Protection Association) to exclude PVC conduit as a permissible type of electrical conduit. The jury found that Allied had conspired to prevent inclusion of Indian Head's product in the industry standard. The trial judge reasoned that the *Noerr-Pennington* doctrine, which protects petitioning of the government from *Sherman Act* scrutiny, also protects the attempts to influence a private standard-setting organization where, as here, governments routinely incorporate that organization's standard into their legal codes.

On appeal, the U.S. Court of Appeals for the Second Circuit vacated the District Court's judgment and remanded the case with directions to reinstate the jury's award. In reversing the trial court, the Second Circuit reviewed the history of the *Noerr-Pennington* doctrine and declined to extend immunity to anticompetitive conduct merely because it occurs in the context of lobbying activities directed toward a "quasi-legislative" body such as the National Fire Protection Association.

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The court reasoned that:

...the policies which are outlined in the doctrine do not warrant such an extension. *Noerr's* holding depended upon the unique nature of the petitions directed to the government in our political system: Justice Black focused upon the 'right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws...'. These concerns do not apply with equal force to private organizations. Ideally, a legislature acts in the public interest. If it fails to do so, its members must answer to the constituency they represent. We must, therefore, allow an unrestricted flow of information to the government to ensure a complete consideration of the issues, secure in the reasonable expectation that our representatives will act in the public interest. No similar safeguards exist to prevent a private organization from adopting policies contrary to the interests of the general public - in the instant case, establishing an anticompetitive restraint of trade....Second, extending *Noerr-Pennington* to such 'quasi-legislative' bodies would raise serious practical problems: how many and which governmental bodies must enact a code before the organization takes on a quasi-legislative nature? To what extent does the code have to be enacted? If the governmental bodies decide to amend a code before adopting it, how extensive can the changes be before the members of the organization lose *Noerr-Pennington* protection? The difficulty in answering such questions underscores the differences between petitioning the governmental body and lobbying a private organization.

Slip Op. at 9. See also *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), cert. denied 444 U.S. 924 (1979).

State Antitrust Laws

On the state level, a recent series of decisions illustrates the ongoing development of the relationship between state and federal antitrust laws. Two of the most active state antitrust laws are New York's *Donnelly Act* and California's *Cartwright Act*. The U.S. Court of Appeals for the Ninth Circuit was recently confronted with the issue of whether indirect purchasers -- barred from recovery of antitrust damages in most circumstances under federal law by the Supreme Court's *Illinois Brick* decision -- could recover under California's *Cartwright Act*. In *re Cement*

and *Concrete Antitrust Litigation*, Nos. 84-2865, 84-167, and 85-1722-1724 (9th Cir. May 27, 1987), the Court held that the indirect purchaser recovery provision of the *Cartwright Act* was preempted by federal law. (*Id.* at 22)

In its opinion, the Ninth Circuit first reviewed the Supreme Court's decisions in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In *Hanover Shoe*, the Court held that a defendant in an antitrust suit cannot assert as a defense that the plaintiff did not suffer any damages to the extent that the plaintiff passed on any of the defendant's illegal overcharges to the plaintiff's customers (the indirect purchasers).

Several years later, in *Illinois Brick*, the Court looked at the indirect purchaser issue from the other perspective. It held that indirect purchasers could not, except under special circumstances, assert claims under section 4 of the *Clayton Act*. The Court reaffirmed *Hanover Shoe* and concluded that allowing indirect purchasers to maintain actions suffered the same infirmities as the pass-on defense, and that, more importantly, the possibility of suits by both direct and indirect purchasers might result in additional litigation, multiple liability, and duplicative recoveries. (392 U.S. at 731) In summarizing *Illinois Brick* and *Hanover Shoe*, the Ninth Circuit identified three purposes or objectives of federal antitrust laws:

- (1) avoiding unnecessarily complicated litigation;
- (2) providing incentives to direct purchasers to bring private damages actions; and
- (3) avoiding multiple liability for defendants. (*Id.* at 22)

While at the federal level a bill to reverse the decision has been introduced in virtually every Congress since the decision, but has yet to be enacted, the California legislature amended the *Cartwright Act* to provide that an action may be maintained "regardless of whether such injured person dealt directly or indirectly with the defendant".

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The Ninth Circuit determined that this provision of the *Cartwright Act* was preempted by federal law. It held that:

...the indirect purchaser claims asserted here would impermissibly interfere with the three policy goals outlined in *Hanover Shoe* and *Illinois Brick*. (*Id.* at 23)

Perhaps not surprisingly, a California state court had earlier reached the opposite conclusion. In *Crown Oil Corp. v. Superior Court of the State of California*, No. A031735, February 14, 1986, the court held that "there is no conflict between the federal and state statutes concerning conduct". The Court noted that both the

Cartwright and *Sherman Acts* proscribe price fixing, and that the only conflict between the two is "a potential conflict", that "arises only when we compare federal and state remedies with respect to damages". The court observed that the:

...fact that the injured indirect purchasers may recover under state law does not obstruct the federal scheme which only permits recovery by direct purchasers.

However, at least until (if and when) the U.S. Supreme Court considers the issue, indirect purchasers may not recover damages under California's *Cartwright Act*.