First Amendment Rights Provide Antitrust Shield for Successful Petitioning to Block Potential Rival

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How far can a competitor go in an effort to convince a local government to block a potential rival from setting up shop in its area without running afoul of the antitrust laws?
Last week, the U.S. Court of Appeals in Chicago ruled that a hospital was shielded from antitrust liability for allegedly making misrepresentations during local zoning proceedings and engaging in a public relations campaign in its effort to prevent the opening of a competing "physician center." The challenged conduct was protected by the so-called *Noerr-Pennington* doctrine. Summary judgment in favor of the hospital (695 F.Supp2d 811, **CCH 2010-1 Trade Cases ¶76,919**) was affirmed.

The action was brought against Lake Forest Hospital by a developer of physician centers—medical office buildings where physicians can provide diagnostic services, such as X-rays and ultrasounds. The developer, Mercatus Group, LLC, operated a physician center in Vernon Hills, Illinois. It alleged that the hospital was violating the antitrust laws by campaigning to block a new physician center in neighboring Lake Bluff. The hospital was allegedly monopolizing or attempting to monopolize markets for "comprehensive physician services" and "diagnostic imaging services" in eastern Lake County, Illinois, in violation of the Sherman Act.

The hospital successfully lobbied members of the Lake Bluff village board to deny the approvals necessary for the Lake Bluff center. In addition, the hospital launched a public relations campaign encouraging the local community to put political pressure on the village board to oppose the new physician center.

Noerr-Pennington Doctrine

In order to protect the freedom to petition the government guaranteed under the First Amendment, the *Noerr-Pennington* doctrine immunizes such petitioning activity from antitrust liability. While a "sham" exception to the doctrine existed for fraudulent misrepresentations, the exception did not apply in this instance. The village board acted in a legislative capacity when it declined to approve the proposed physician center. The fraud exception to the *Noerr-Pennington* doctrine did not apply to legislative proceedings, guided as they were by political considerations, the court explained. Moreover, the public relations campaign was also sheltered by the doctrine, since it was inextricably intertwined with the hospital's efforts before the village board.

Derogatory and Territorial Communications

The developer also alleged that the hospital told a competing hospital system, which was partnering with Mercatus, to stay out of Lake Bluff and made a number of derogatory statements about Mercatus. The competing system eventually terminated its business relationship with the developer.

Unlike the hospital's public relations campaign, the court did not see any discernible connection between these communications and the proceedings before the village board. As a result, they were outside the scope of the *Noerr-Pennington* doctrine's reach. Although the conduct was not shielded, it did not establish an antitrust violation.

Neither the hospital's territorial admonitions to the competitor nor its alleged derogatory comments about the developer, even if false, were actionable under the Sherman Act, the court ruled. The statements were not backed by threats or any coercive enforcement mechanisms. "All the Hospital did was say aloud what every business already thinks about its competitors: stay out of my territory," the court explained. Moreover, to the extent that a falsehood resulted in some harm to a competitor, that was a matter better suited for the laws against unfair competition or false advertising, not the antitrust laws, according to the court.

“Physician Strategy”

Lastly, the court rejected a challenge to the hospital’s “physician strategy,” under which the hospital attempted to convince certain affiliated physician practice groups not to relocate their practices to the planned physician center. The hospital purportedly offered the groups various incentives not to do so.

There was little to indicate why the hospital’s actions might be considered anticompetitive or predatory to support a monopolization claim, in the court’s view. Mercatus appeared to merely complain that the hospital had the audacity to try to retain the business of the physicians through whom the provider admittedly sought to draw substantial income away from the hospital. This was an example of the very type of competition the antitrust laws were designed to protect, according to the court.

The May 26, 2011, decision in *Mercatus Group, LLC v. Lake Forest Hospital*, No. 10-1665, will appear at **CCH 2011-1 Trade Cases ¶77,469**.