Jack Stout

INTERFACE

Exemption from Antitrust

Limited "Exemptions" of the Sherman Antitrust Laws

by George E. Leonard

The second of a three-part series is written by George E. Leonard, who has specialized in antitrust work since the late '60s, the past 10 years with antitrust issues in the health care industry. Though he resists the claim, Leonard knows more about the economic impact of various prehospital system designs than do many of our industry's experts.

—Jack Stout

Last month's article described (hopefully in understandable terms) the elements of Sec. 1 and Sec. 2 of the Sherman Act. To reiterate briefly, Sec. 1 prohibits "every contract, combination or conspiracy" in restraint of trade, while Sec. 2 outlaws monopolies, attempts to monopolize and conspiracies to monopolize. This month's article discusses the limited statutory exemption from the antitrust laws which apply to governmental entities, as well as two areas of "exemption" from the antitrust laws which have been created by the courts.

The Local Government Act of 1984

In 1984 Congress passed the most significant exemption from the antitrust laws in many years, the Local Government Act. This act makes local units of government (cities, counties and presumably includes ambulance districts created by a unit of government) *totally* exempt from liability for triple damages under Section 4 of the Clayton Act. However, the local government can still be liable for an injunction prohibiting a violation of the antitrust laws, and for payment of attorneys' fees in obtaining that injunction. For simplicity, I will refer to all governmental units as the "city," although the exemption, as noted, applies to all local governmental units.

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Obviously, the exemption from liability for triple damages is a significant element in the decision-making process of a city, because it drastically reduces cities' exposure for antitrust threats.

However, private persons who are not employees of the city are not entitled to this exemption. Thus, an ambulance service which contracts with a city could be subject to the full range of antitrust liability, including triple damages, whereas the party with whom it contracts (the city) would be liable only to an injunction. This falls under the category of "no one ever said that everything in life was fair."

But even reasonable attorneys' fees in an injunction action can be a significant cost factor, so a city should examine its actions closely, from an antitrust point of view, before deciding to limit, exclude or regulate ambulance services or operators within the city. Despite its significant impact in this area, the Local Government Act of 1984 is not a complete panacea for the antitrust ills of local planners, and certainly is of limited, if any, help to private operators. In fact, in several cases of which I am aware (one of which I am handling), the city defendant got out of the case under this law, while the private operator (allegedly a "co-conspirator" with the city) has been left as the only defendant. Obviously, that is not a comfortable position for the remaining defendant!

The "State Action" Exemption From Antitrust Laws

The next important area of exemption has been created by judicial decision. This area is known as the "state action" doctrine. Stated as simply as possible, the doctrine is that:

1) If a city undertakes to regulate an industry or kind of business, *and,*
2) If the state legislature of that state has clearly expressed a policy to "displace competition with regulation or monopoly public service" in the particular business or industry being regulated, *and*
3) If the state's law is such that it appears that the state legislature "contemplated the kind of action" taken by the city to regulate, then,
4) The city is immune from antitrust attack.

It was this doctrine which the city of Kansas City, Missouri established that was applicable in the *Gold Cross Ambulance* case, and the city was therefore immune from any antitrust scrutiny in that case.

Again, however, private industry is not as able to claim exemption as a government entity. For a private party to claim the "state action" exemption, the above elements must

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be present, and in addition, the party must prove that the state government "actively regulates" the activity which is being challenged.

The "state action" doctrine has been the subject of a good deal of litigation recently. Such industries as real estate (zoning), cable television, trash hauling and waste disposal, and surface transportation (both fixed rail and taxicabs), as well as ambulance services, have had reported decisions dealing with the claim of "state action" exemption.

The results, not surprisingly, vary. Each industry in each state has slightly (or greatly) different facts. Some industries (e.g., utilities and insurance) are heavily regulated—and clearly are exempt—in virtually any state. Other industries, including emergency prehospital services, are regulated to a different degree, on a state-by-state basis.

No specific answer can be given, in advance, on this defense. Rather each case turns on the amount (if any) of state law and regulation of the industry involved.

For example, Arkansas clearly has a statute which allows a city to totally exclude all ambulance services, and to contract with (or to operate) a sole-provider ambulance service. Conversely, some states appear to have no regulation of ambulance services whatsoever. In between those extremes is Missouri. In the *Gold Cross Ambulance* case, we successfully persuaded the court that a Missouri state law which allowed a city to "contract with *one or more* operators" (to provide ambulance services) was a sufficient expression of legislative intent to "displace competition with . . . monopoly service" in the ambulance service, and on that basis, we won that case. However, I expect that may be about as far as a court would "reach" to find the legislative intent required to establish the exemption.

Noerr-Pennington Exemption

Another area in which limited exemption from the antitrust laws has been carved out is called by antitrust lawyers the *Noerr-Pennington* doctrine. (That name is taken from the two leading cases, the *Noerr* case and the *Pennington* case.) This exemption is based upon the First Amendment—the right of free speech and to petition our government. In essence, this exemption holds that, *even joint activity* among competitors which is undertaken to persuade a governmental entity to act, is constitutionally protected, and does not give rise to a cause of action for violation of the antitrust laws.

Further, such activity is constitutionally protected even if it is undertaken with an anticompetitive intent. As an example, if two private ambulance operators (*A* and *B*), who are competitors, jointly agree to lobby their city government to pass a regulation excluding a third competitor (*C*), and such a regulation then is passed, and *C* is driven out of business, even if *A* and *B* intended that result, their agreement is constitutionally protected, and no liability can be based upon their joint agreement. There seems to be two concepts involved in this doctrine.

First, as noted, is that the Constitution guarantees the right to persuade or petition government (free speech) under the First Amendment. Secondly, it is the *act* of government passing the ordinance, not the agreement between competitors to lobby, which harmed *C*.

This exemption is broad, but not all-inclusive. Cases in which improper lobbying occurred make it clear that the exemption has limits. Bribery of an official to make a decision has been held to be *not* constitutionally protected, thus the exemption was unavailable to the person giving the bribe. "Threats, coercion and intimidation" of officials have also been held to be not constitutionally protected, and thus the actions were subject to antitrust scrutiny.

One of my law partners successfully represented a cable TV operator who was excluded from a city, because the incumbent operator engaged in "threats, coercion, intimidation" and other illegal acts, causing the city to reverse its decision to award our client the franchise. Our client received a verdict of $10.8 million, tripled to $32.4 million. That case is on appeal, and the result may be a leading decision in deciding how broad the antitrust exemption is, and whether it applies in cases of "threats, coercion or intimidation," as earlier cases have held. However, from the size of that verdict, it can be seen that juries are not prone to favor a party who has engaged in a course of conduct which included "threats, coercion or intimidation."

Next month's article will deal with some specific factual issues which exist (to a greater or lesser degree) throughout emergency medical services nationwide, and how the antitrust laws may deal with these situations. □