Seventh Circuit Nixes Sherman Act Claims Based on the Noerr-Pennington Doctrine and Implied Antitrust Immunity

After 15 years of heavily contested litigation, the United States Court of Appeals for the Seventh Circuit recently put the kibosh on antitrust claims arising out of the futures trading market. The decision in *U.S. Futures Exchange, L.L.C. v. Board of Trade of the City of Chicago* sheds light on the potential breadth of both the Noerr-Pennington doctrine and antitrust immunity defenses, particularly for corporations engaged in heavily regulated industries.

**Background**

Back in 2003, U.S. Futures Exchange, L.L.C. (USFE) sought to establish an electronic futures trading platform that would compete against traditional floor-trading exchanges. To do so, USFE needed certain approvals from the Commodity Futures Trading Commission (CFTC), an independent federal agency created by Congress in 1974. When the CFTC solicited public comment on USFE’s application, the Chicago Board of Trade (CBOT) and the Chicago Mercantile Exchange (CME) together filed 54 separate objections. According to USFE, these objections by its prospective
competitors were baseless and delayed its entry into the market (Delay Theory). USFE also accused CBOT and CME of separately colluding to deprive USFE of access to the financial liquidity that it needed to get its new exchange off the ground (Open Interest Theory) by convincing the CFTC to approve a new rule governing CBOT’s clearinghouse operations.

After USFE’s new electronic exchange flopped, USFE filed suit for Sherman Act violations and tortious interference. The case slowly proceeded through multiple amended complaints, several motions to dismiss, and a venue change. On the defendants’ third motion for summary judgment, the Northern District of Illinois disposed of USFE’s claims on their merits. The Seventh Circuit affirmed that judgment in its decision last week.

The Noerr-Pennington Doctrine and its Exceptions

Judge Manion, writing for a three-judge panel including Judge Kanne and Judge Brennan, analyzed the underpinnings of the Noerr-Pennington doctrine in explaining why USFE’s Delay Theory failed as a matter of law. Named after two Supreme Court antitrust decisions from the 1960s and based on the First Amendment’s protection of “the right of the people ... to petition the Government for a redress of grievances,” the Noerr-Pennington doctrine provides antitrust immunity for defendants’ efforts to petition legislative bodies, administrative agencies, or courts for relief that allegedly has anticompetitive effects. See Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 841 (7th Cir. 2011).

CBOT and CME argued the objections to USFE’s application that they submitted to the CFTC qualified as constitutionally protected petitioning activity. USFE responded by claiming that the fraudulent misrepresentation and sham litigation exceptions applied, bringing the Defendants’ allegedly anticompetitive conduct outside the protections of the Noerr-Pennington doctrine.

The Fraudulent Misrepresentation Exception

With respect to administrative proceedings, the false misrepresentation exception only applies to statements made during “administrative adjudications,” not those made in a legislative or political setting. The Seventh Circuit thus assessed the process employed by the CFTC in reviewing USFE’s application, concluding that it fell on the “legislative” side of the legislative/adjudicative fence.

Analogizing CBOT’s and CME’s objections before the CFTC to public notice-and-comment administrative rulemaking, the Court emphasized the informal nature of the CFTC’s process (permitting ex parte communications, lacking sworn testimony, and generally forgoing evidentiary rules) and the CFTC’s consideration of political lobbying efforts. Judge Manion also noted that CFTC regulations do establish formal administrative adjudication proceedings for applicants appealing an application denial (unlike USFE, whose application had only been delayed). Although the Court conceded that the CFTC’s proceedings involve “a combination of legislative and adjudicative features,” it ruled that the CFTC’s “exercise of rulemaking-like authority” made the process a legislative one. As a result, the Seventh Circuit held that the false misrepresentation exception was unavailable to USFE for avoiding
application of the *Noerr-Pennington* doctrine.

**The Sham Litigation Exception**

The Court similarly rejected USFE’s arguments for the sham litigation exception, reiterating that the scope of the exception is “extraordinarily narrow.” It applies only if the plaintiff can demonstrate two things: (1) that the defendant’s petition was objectively meritless and, only then, (2) that the defendant brought its petition in subjective bad faith. Objectively reasonable suits and administrative proceedings enjoy *Noerr-Pennington* immunity regardless of the defendant’s subjective intent behind bringing them.

USFE had argued that the volume of objections filed by CBOT and CME demonstrated a “pattern” of baseless, repetitive claims, creating a question of fact regarding whether they were filed as a sham. In doing so, USFE relied on opinions from four federal courts of appeals that distinguish claims alleging a “pattern” of sham petitioning activity from one-off petitions (i.e., the pattern alone can establish the application of the sham litigation exception). But the Seventh Circuit panel sided with the First Circuit in rejecting this distinction and holding that a plaintiff must always demonstrate that the defendant’s petitions were objectively meritless, regardless the number of petitions. The defendant’s subject intent alone is never sufficient. Assessing the facts, the Court concluded that although the CFTC eventually approved USFE’s application over CBOT’s and CME’s objections, the objections were reasonable in light of the CFTC’s extensive consideration and administrative action on them. The Seventh Circuit noted that “[p]roving sham petitioning in a legislative context like this one is virtually impossible.”

**Implied Antitrust Immunity**

Moving to USFE’s Open Interest Theory, USFE alleged that CBOT and CME conspired to deprive it of the liquidity needed to operate effectively. Again, given the case’s setting in the highly regulated futures trading industry, the underlying facts were entangled in administrative regulation. USFE claimed CBOT and CME executed their conspiracy by convincing the CFTC to approve a new exchange rule for CBOT’s own clearinghouse operations. Federal law provides the CFTC with regulatory authority over the rules governing clearinghouses and the clearing of futures transactions.

The CBOT and CME contended that the complex regulatory regime established by Congress for futures exchanges precluded antitrust liability. They argued that CFTC approved the rule change after considering potential anticompetitive effects, so disgruntled competitors cannot use the antitrust laws to Monday-morning quarterback such regulatory decisions in the courts. Applying the Supreme Court’s four-part implied immunity test from *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007), the Seventh Circuit concluded that the doctrine immunized the actions of the CBOT and CME because (1) the CFTC had clear authority to approve exchange rules, (2) the CFTC actively exercised that regulatory authority in approving the rule in question, (3) the CFTC did so in the face of arguments about the proposed rule’s anticompetitive effects, and (4) the rule approved by the CFTC fell “squarely within the heartland of the regulated area.”
Concluding Thoughts

The Seventh Circuit’s decision last week illustrates the breadth of the antitrust immunity provided by the Noerr-Pennington doctrine—and the narrowness of its exceptions. Where allegedly anticompetitive conduct arises in administrative or regulatory environments, defendants should carefully assess whether their behavior can be characterized as constitutionally protected government petitioning. The Seventh Circuit’s application of implied antitrust immunity beyond its traditional roots in securities cases also represents a win for antitrust defendants. As the Court recognized, “Implied immunity is neither a securities doctrine nor a commodities doctrine. It is an antitrust doctrine.” These developments are particularly relevant for companies engaged in heavily regulated industries, regardless of their specific line of business.

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