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Baker: Review of United States Antitrust Cases Involving Restraints upon
**Review of United States Antitrust Cases
Involving Restraints Upon Competition**

by Donald I. Baker*

FIRST OF ALL, for those of you who come from a parliamentary system of government you have to appreciate that the American government is more balkanized, and that questions of command, of orders, of legal rules and so forth are oftentimes in different hands than those who control them. We Americans also have a tradition of various independent groups carrying over into economic activities within the Establishment. Regulatory commissions, such as the Civil Aeronautics Board, the Interstate Commerce Commission and the Federal Trade Commission are agencies that are appointed by the President and confirmed by the Senate. These agencies are supposed to operate for a term of years and perform certain functions. The antitrust law which has developed in the United States has really involved conflict between one government agency and another, or between the Federal Government on one hand and an agency on the other hand.

The antitrust problems arise in two different kinds of situations. One is where a group of private people get together, gang up on some competitor or some potential competitor, and get the government to restrain competition. The question raised is whether there is any antitrust liability. The leading case in this area is *Noerr Motor Freight, Inc.*¹ In *Noerr*, there was a suit brought by a group of truckers against a number of railroads who had gotten together and, through a campaign of false and misleading advertising, persuaded the Pennsylvania Legislature and Governor to reject legislation that would have been highly favorable to the truckers. The report issued concerning these activities said that this was an antitrust violation—these people, motivated by foul reasons and with foul tactics, induced the government to do something to restrain competition. The Supreme Court, in a very sweeping opinion by Mr. Justice Black said “No”—that what we are talking about is the right of people to petition government. The Sherman Act is concerned with private action, not with public action; it is concerned with commercial action, not political action, and the fact that they lied and cheated and did all kinds of dastardly things is just the way our politics are conducted. Mr. Justice Black used to write with a very sweeping hand, and his opinions would often leave as many questions unanswered as answered. But how far can such inducement go? In a case called *Walker Process*,² the Supreme Court faced

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¹ *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

² *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

the issue of a patent which had been procured by fraud from the Patent Office. In other words, the patentee had gone in, lied to the Patent Office, and received a patent. Without ever considering the *Noerr* case, the Court found an antitrust violation.

The next set of cases involves actions before regulatory commissions. One case, *Woods Exploration v. Alcoa*³ dealt with a situation in which the people in an oil field got together and lied to the Texas Railway Commission, so that the Texas Railway Commission would not authorize any new drilling in the field. That was held to be an antitrust violation. That effectively meant that there was a different standard of conduct: You can get together and lie to the legislature, but you cannot get together and lie to regulators.

There is an intriguing case, *California Motor Transp. Co. v. Trucking Unlimited*.⁴ Trucking Unlimited was a group of buccaneers who wanted to get onto the roads of California. According to their complaint, all the established truckers in the business had gotten together and mounted a huge campaign to oppose every new application for a trucking certificate, with or without probable cause, and without regard to merit. So any time anyone new applied for a trucking certificate he was met by this avalanche of people coming in and protesting and litigating him to death. The Supreme Court said that this was an antitrust violation; that the established truckers were not exercising their First Amendment right to plead to the Commission to exercise its judgment. They were actually trying to block access to the Commission by making it too expensive to get there. They were using a pattern of baseless and repetitive litigation. I think that the rule derived from these cases of private efforts to use governmental processes or to induce the government to do something is that in the purely political round you can gang up to do anything you want; you can behave in thoroughly reprehensible ways. However, with the regulatory commissions, a more adjudicatory process ensues, and when you get into a situation where you stand in a position of utmost good faith to the government, *e.g.*, the Patent Office, you can advocate your position but you cannot lie, you cannot use improper tactics, and if you are proven to have bad motives you may be found to be involved in an antitrust violation.

The other side of the coin is where the government is in some sense responding to this appeal or causing anticompetitive action to take place in the economy. This is caused by a conflict between federal sovereignty on the one hand and state sovereignty on the other hand, or a conflict between the Department of Justice on the one hand and an independent regulator on the other hand. And so, in the latter class of cases you have had situations in the Supreme Court of the United States, with the United States of America on one side and some agency like the Civil Aeronautics Board or the Interstate Commerce Commission on the other. In general, the upshot is that it makes a lot of difference who is doing it, where and how, and on what terms. The

³ *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

⁴ 404 U.S. 508 (1972).

leading case in the field is *Parker v. Brown*.⁵ California produced ninety-five percent of the raisins in the country; but in the late depression it had a badly depressed raisin industry, so it passed a statute which set up a commission. The commission was presided over by the State Director of Agriculture, it had some producers on it, and it essentially provided for an orderly marketing scheme. A certain number of producers would petition for the scheme, the Commission would grant the petition, and then it went back for a referendum of all the producers. If they all agreed, then the state commission put it into effect and carried it forward. California would surely restrain commerce in some sort of basic way. The case arose under the Commerce Clause to deal with state restraints on interstate commerce. The Solicitor General raised for the first time the possibility that there might be an antitrust violation, and the Supreme Court had to reargue twice, and finally said, "Oh, don't be silly" that "this is the State of California that's doing this." Then it went through a long analysis indicating that California's actions were consistent with national agricultural policy. Although the state cannot grant antitrust immunity and by so doing vindicate what private parties have done; when the state itself is the actor, then it is immune. This was one case that had language in it for everybody.

For thirty years the lower federal court waffled. In 1974, in *Goldfarb v. Virginia State Bar*,⁶ the Supreme Court took this issue up afresh. The state Bar in Virginia had encouraged the local county bar association to have minimum fee schedules, to keep lawyers' incomes up and preserve the ethics of the profession, and so forth. A state statute had authorized the Virginia Supreme Court to supervise and to authorize the existence of this bar association. A local lawyer at the Federal Trade Commission brought a private, treble damage class action, because he could not get a low price on his house closing and said that this was a violation of the antitrust laws. The Supreme Court said, "Yea, verily it is a violation of the antitrust laws, and lawyers do not have any general exemption from the antitrust laws—they are engaged in trade and commerce." This disturbed the profession a bit. The Court then said that where the state as sovereign commands an action, then there is an antitrust exemption. Thus, the Virginia State Bar, although a mandatory organization for all Virginian lawyers, created by statute, and represented in the Supreme Court by the Virginia Attorney General, was not the sovereign state. Rather, it was merely a state agency for limited purposes. The state as sovereign was the Legislature or the Supreme Court of Virginia, and neither of those bodies had told the state Bar to fix prices. The Court said the mere fact that it was "prompted" by the state was no defense.

Then *Bates v. Arizona State Bar*⁷ came up. The state Supreme Court in Arizona had passed a rule that "lawyers shall not advertise." Two recent law school graduates advertised. They were hauled in by the state Bar, the en-

⁵ 317 U.S. 341 (1943).

⁶ 421 U.S. 773 (1975).

⁷ 433 U.S. 350 (1977).

forcement arm for the state Supreme Court. They were disciplined in a proceeding just filled with due process, confrontation, hearings and everything else, and their whole show was reviewed by the Arizona Supreme Court. But the disciplinary order was affirmed. They appealed to the United States Supreme Court on two grounds. First, that this was an antitrust violation—the state Bar was restraining competition among lawyers by this anti-advertising program. Second, that the state, by preventing them from advertising was denying them their First Amendment rights of free speech. Now, up until a couple of years ago this so-called commercial speech, had never been protected by the First Amendment. A couple of years ago the Supreme Court decided that it was so protected. Here, the Supreme Court said the state as sovereign did command it; the Arizona Supreme Court, as sovereign, had said there shall be no advertising. Henceforth, there is no antitrust liability where there is a clear command of the state as sovereign. However, this was a violation of the First Amendment, and so it was knocked down on that ground.

The question next arose whether formal state approval, not amounting to a command, was sufficient to create an exemption from liability. In *United States v. Philadelphia National Bank*,⁸ the Supreme Court held that a bank merger although specifically approved as being in the public interest by the Comptroller of the Currency, also had to pass the antitrust hurdle. There are two hurdles—the regulators' hurdle and the antitrust hurdle. The Court said that collective banking was highly regulated and that the government should make a play of competition not less important but more so; because if we do not have more competition then we will end up having more government regulation and more cartelization.

Then a utility in Detroit, Michigan filed a proposal to include in the electrical light service free light bulbs. The state Utility Commission held a number of hearings and after approving the tariff and the rates the proposal went into effect. Then along came this retail druggist who could not sell his light bulbs because it was a little hard to compete with a "free lunch"—the lunch that is not visibly expensive. He sued on the grounds that the utility was illegally tying the light bulbs to the electricity service—a violation of our anti-tie-in provisions. The Supreme Court opinion in which only four justices joined, said that, "We think that only state officials are exempt from the antitrust laws; private parties act completely at their peril." An interesting view; but there was an opinion in which a majority said that what was involved here was a mixture of private and public decision-making. In each case, notwithstanding the state participation and the decision, the private party exercised sufficient freedom of choice to enable the court to conclude that he should be held responsible for his decision. And they go on and hold that this utility is liable because its initiative resulted in this whole mix of private and public action. The Court then went on to say, "But anyway, the light bulbs weren't really very important initially in the Michigan scheme of regulation

⁸ 374 U.S. 321 (1963).

and therefore we don't have so much trouble with them." There are five things the state might have been doing: (1) the state had commanded; (2) the state had formally authorized; (3) the state had informally encouraged; (4) the state had delegated its power; (5) the state had sat benignly by knowing but not doing anything.

Then the question is who has done it? The first possibility is a sort of constitutional arm, the legislature, the executive and the judiciary. Second, "independent public officials," fulltime people paid by the state, and without any outside interests. Third, people like the state bar in *Goldfarb*; they are private people who are exercising, in a limited time for a limited function, the powers of the state. So we will call them self-regulators. Fourth, purely private individuals.

How important is it to the state? This is the class of sovereignty that is involved in this area. If it is very important to the State of California, then there are a lot more problems in having the federal court come in and tell the state it cannot do it on antitrust grounds. When we turn to talk about the international realm, anything that is exempt in a conflict between the Federal Government and the states within the federal union is going to be exempt in the foreign realm, and in the foreign realm the exemption may run considerably longer. Honestly, if it is commanded by the constitutional authorities and it is very important to the state then there is no problem. Indeed, if it is commanded by the constitutional authorities, they have the power to do it, regardless of whether it is important or not. When you start talking about commands by independent public officials, the Comptroller of the Currency or Securities and Exchange Commission, or some lesser public official, again if it is commanded then there is no antitrust liability because the parties whom you would sue under the antitrust laws, the enterprises, have obeyed a legal command; it is an involuntary act. The action was an important part of the official's duties; an independent public official cannot be sued. If, on the other hand, it is commanded by a state bar or state board or public bodies essentially made up of interested people, then there is a serious question of antitrust liability. You probably can sue the self-regulator for the command, and you may sue the ones who are commanded on the grounds that it really is one big conspiracy.

The light bulb case involved formal authorization by independent public officials. But the court said it was of minor importance to the state, therefore it was reasonable to hold the private people liable. Formal encouragement does not cut much ice under the American scheme of things, and indeed the leading case *Socony Vacuum*,⁹ was another one of these depression era situations in which the courts were dealing with an attempt to prop up an industry in trouble. The major oil companies were engaged in a scheme where they brought up so-called "distress oil" to keep the stock market price up a bit, and they were encouraged to do this by the Department of Interior. The Supreme Court just slipped it aside and said that the interest of government

⁹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

officials was fine. Also, these officials were not entrusted with the enforcement of the antitrust laws, and to allow their informal encouragement to justify the act was to entrust the antitrust laws to virtual volunteers. Informal encouragement is no particular protection, regardless of who does it, even the Chief Executive. The delegation situation involves an interesting case with a rather Canadian flavour to it, *Continental War v. Union Carbide*, decided in about 1964. During the war, the Canadian government had delegated to a Canadian subsidiary of an American firm the purchasing function to buy various metals needed for war production. According to the allegations, the Canadian subsidiary, exercising its delegated authority (the delegation was clear and legal) had chosen to squeeze the plaintiff, another United States firm, out of the market. The subsidiary bought from itself and from other people, but it refused to buy from this particular plaintiff. The Supreme Court said, "Look, sure the defendants were acting for the Canadian government, but there is no evidence that the Canadian government told them to undermine this particular class of people, or this particular person. This being so, they were subject to antitrust liability for that action." Now my own view is that this particular case goes a long way towards what I call the interventionist theory of jurisdiction. Here, the conduct was mostly going on in Canada; there was purchasing in Canada with no big impact on the American consumer interests. The truth of the matter in the delegation situation seems to be, if the government delegates to you the authority to do X in a variety of different ways and you do it in a particularly anticompetitive way, you exercise your discretion as a firm to do it in an anticompetitive way, and there is a necessary jurisdictional impact with liability.

There are also a number of cases where the courts have sustained charges that private parties conspired with state officials to restrain trade. Normally that would involve an allegation that the state official was acting outside the scope of his authority, or totally improperly. The best example of that is a case decided in the Ninth Circuit Court of Appeals, *Harman v. Valley National Bank of Arizona*.¹⁰ Harman was representing a trustee of a closed savings and loan association. The allegations and the complaint included an allegation that the remaining banks in the market had conspired with the state Attorney General, who was the Banking Commissioner in Arizona, to close this bank down. The claim was sustained in a plea form. In other words, the Court of Appeals held that this pleading would lie, but the case was never proven as far as I know. Anyway, I think that this serves to cover the sort of war front that we have had in our own internal environment. There are no American cases I can think of where there has been ratification by the state. Even when the great uranium saga is so analyzed, it appears that the presence of formal government action has been mostly after the event. Eventually because of court decisions, we got the 1974 Trade Act which provided a mechanism for formal government approval. This approach by the courts pushes you to formal action by government officials, formal

¹⁰ 339 F.2d 564 (9th Cir. 1964).

commands, formal authorizations and so forth. It takes a lot of the informality out and makes government more directly involved in a lot of different ways. And that is exactly what our antitrust law does do. The State of Arizona, or the State of Virginia cannot delegate general authority to the state board; the state has to do it itself, and it has to be authorized to do it. Our system and our approach to these antitrust cases in the domestic context pushes you to a much more legalistic scheme of things. I think that Americans really distrust the informal encouragement kind of thing. They tend to want government action spelled out more in regulations, statutes, form orders and the like. And they are literally entrusted to sort of general discretion. That being so, Americans do not feel as uncomfortable as Canadians would be watching the thing go off the scale here. They have more formalistic, more legalistic ways of doing things and you know it clearly is true (to use Joe Stanford's phrase this morning) that if you want to provide "cover" you can do it. If you are dealing with anything important, get the constitutional arms to do it and to command it! Then there is no antitrust liability problem. It is when you say, "My God, I don't want to set up all those mechanisms, all this legal thing; I want to be able to say to industry—we've got a problem and we ought to work out some solutions. We want a more open interchange back and forth, a blend of private and public decision-making—the kind of thing the Supreme Court in the Detroit-Edison case was very suspicious of." And I really do not know how to handle that issue. As I said this morning, I think there is some leeway to look to the normal standard of administration in the United States or in the country where the action is taking place. What do you do when there really is private initiative and the state says, "Oh, fine, we will go along with it. You know that wouldn't be a bad idea; it would be nice if we raised the price of" That is a different situation from the state saying, "My God, we need this industry to survive—it's a matter of national security, welfare (or something); we have to do something—and we don't know what to do." So we call the industry in and we have a chat with the industry leaders and then we decide what to do and they go out and do it. They do not do more or less than we talked about, they just do it. There is no order; the conversation can be read in a variety of different ways, a strong recommendation with implied sanctions or a friendly suggestion. A lot turns on facts and evidence.