JOINT BUSINESS ACTIONS BY COMPETITORS: ARE ANY PERMISSIBLE?†

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I. INTRODUCTION

The provisions of the antitrust laws are sometimes characterized as quasi-Constitutional. If by this it is meant that the statutory language is vague and commends itself to varying interpretations, I am sure that many would find the comparison to the United States Constitution to be apt. However, I suppose that the comparison springs from a deeper source —that is, from the assumption that faith in the beneficent effects of free and open competition is, like the essential teachings of the Constitution, at the very heart of our concept of what makes American society function. But, even if the federal antitrust laws be taken to set forth a fundamental charter of the competitive faith,[1] the vision of their constitutional role may mislead us. These laws, unlike the Constitution, are not the apex, but only a co-ordinate part of, "the supreme law of the land."[2] We have been constantly faced with the problem of reconciling antitrust dictates with other governmental policies on the national, state and local levels in which considerations of competition are not paramount. Within the arena of federal trade regulation itself, courts and the antitrust bar have long struggled with the difficulties of reconciling the Sherman Act with other federal statutes, like the Robinson-Patman Act, where the very opposite of competition sometimes appears to be the keynote.[3] For many special industries, Congress, in its wisdom, has chosen a pattern of regulation, rather than the blessings of competition under the antitrust laws. Recently, it has been brought home to us forcibly that the borderlines between regulation and competition may not be fixed for all time. Examples of fluidity of these borders would include the unfreezing of commissions on large transactions on the stock exchanges, antitrust challenges to exclusive practices by the New York Stock Exchange and the NASD and proposals for the end of rate regulation by the ICC.[4]

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1 Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958).

2 Hecht v. Pro-Football, Inc. CCH TRADE REG. REP. (1971 Trade Cas.) ¶ 73,559, at 90,331 (D.C. Cir. April 27, 1971), *petition for cert. filed* July 23, 1971.

3 For the latest chapter in Judge Zirpoli's effort to reconcile the Sherman Act restriction on price information exchange with evidentiary requirements under the Robinson-Patman Act's meeting competition defense, *see* Wall Products Co. v. National Gypsum Co., CCH TRADE REG. REP. (1971 Trade Cas.) ¶ 73,023 (N.D. Cal. March 18, 1971).

4 With respect to deregulation of transportation rates, *see* Economic Report of the President, transmitted to Congress February 1971, pp. 122-130.

However, recent months have shown that the problem of accommodating the antitrust rules of free and open competition with other governmental policies are by no means limited to the so-called regulated industries. Classic antitrust rules of competition required accommodation or reconciliation with quite different governmental policies in fields as disparate as foreign trade, collective bargaining, lobbying, and anticompetitive state action. Moreover, the new consumerist and ecological movements have given a completely new dimension to long-standing arguments concerning the proper role of voluntary industry action to achieve such socially-approved goals as fair advertising and ethical business methods, product safety, and health.

It is far too early to offer any confident prediction as to how the borders will be drawn between antitrust and other policy considerations in these developing legal areas. However, one can already note certain characteristics of antitrust thinking which may require modification if obstacles to productive accommodation with other policies are to be removed. The principal means of accommodation appear to be the following:

(1) The consideration of competing public policies as a factor in determining whether a restraint is "reasonable" within the meaning of the Sherman Act;

(2) The application of legislative or judicial exemptions or immunities from the antitrust laws in the interest of sponsoring other policies; and

(3) The discretionary expression by governmental agencies of an intention not to proceed against actions which may be within the literal proscription of the antitrust laws.

All of these means of accommodation appear hampered in many cases by the "constititional" view of antitrust principles of competition referred to at the outset. This attitude may carry with it the implication that antitrust policies are intrinsically to be preferred to other governmental considerations, and that accommodations in the direction of such other policies must either be denied, disguised, or made with great reluctance and apology. The first of the routes of accommodation mentioned in many ways appears the most attractive. The determination that a restraint otherwise illegal may be reasonable if in pursuance of an approved public policy has the advantage of avoiding the necessity of legislative action or of the exercise of political or administrative grace. Moreover, unlike the *nolle pros* approach to antitrust law, the determination of no liability under the rule of reason shields affected industry from the danger of private treble damage actions. However, this course of accommodation is often barred by the fact that the very types of business conduct likely to be involved in pursuing approved social ends may bear at least formal resemblance to categories which are customarily proclaimed per se viola-

tions of the antitrust laws, to be condemned regardless of offered justifications.

History is very much with us. The *Socony Vacuum* decision of 1940,[5] in confirming that joint action to fix or stabilize prices was to be treated as a per se violation, rejected considerations of a purpose allegedly favorable to the economy, the removal of "surplus" gasoline from a depressed market, and also swept aside evidence of knowledge and acquiescence on the part of officers of the federal government. Few of us would be inclined to do fresh battle on the admissibility of legal justification for price fixing. However, the traditional models of per se or virtually per se categories include many other types of conduct which may well merit legal reassessment when other public policies are involved. We are told, for example, by the *Container Corporation* case[6] that the exchange of price information between competitors may be illegal in the absence of price agreement. Traditional antitrust doctrines also proscribe, with no or little room for justification, agreements among competitors on costs or elements of costs which may have a material effect on prices; on agreements to enforce standards or to exclude competitors; and on agreements to limit technological developments or to withhold products from the market. It is interesting to see how business activities in these traditional proscribed categories have fared recently, when other legal or social policies have been at play.

II. Joint Negotiations with Foreign Governments

In early 1971 we have seen what appears to have been a perfectly appropriate modification of traditional antitrust bans on joint cost negotiations by competitors with suppliers in the interest of more significant policies of foreign trade and diplomacy. I refer to the apparent approval by the federal government of the co-ordinated bargaining by oil companies of the United States and other Western companies with member Governments of the Organization of Petroleum Exporting Countries (OPEC). The negotiations conducted first with the Persian Gulf States and more recently with Libya centered on the oil-producing countries' desire to increase the rates of oil taxes and royalties and the so-called "posted prices" of oil which provide the tax and royalty base and have only an indirect relation to market prices.[7] There was a variety of reasons why it was in the interest of the United States not to cling to the antitrust dogma that each oil company bargain its tax and royalty cost separately. The Libyan Government plainly had set out to whipsaw the in-

[5] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[6] United States v. Container Corp. of America, 393 U.S. 333 (1969). *But see* Wall Products Co. v. National Gypsum Co., CCH Trade Reg. Rep. (1971 Trade Cas.) ¶ 73,023 (N.D. Cal. Mar. 18, 1971).

[7] Fortune, March 1971, at 30.

dividual companies into an expensive settlement by separate negotiations.[8] Moreover, likely alternatives to successful joint bargaining were "acts of state" which would in any event have been beyond the reach of our laws. Threats of governmental cut-off of oil production and of expropriation had been made.[9] Further, if negotiations failed, the oil countries could have worked their will by tax increase through legislation, as the Shah of Iran had said his country would do, and as Venezuela had already done.[10] The shoring up of the oil companies' bargaining position also may have had political significance. The Libyan Government had indicated that its tough bargaining stance was intended to put pressure on our diplomatic position in the Middle East.[11] The concern of the Administration for the fate of the negotiations was reflected by President Nixon's decision to send Under Secretary of State, John N. Irwin II, on a visit in January to Iran and other oil-producing countries.[12]

In view of the fact that the joint bargaining by the oil companies hardly seems controversial, it is surprising how the Government chose to cloak its blessings in mystery. Many references were made in the press to approval of the co-ordinated bargaining by the United States Government.[13] We also read that the Antitrust Division showed a favorable "business review letter" to the oil companies on January 15 but refused to give them a copy because of "diplomatic complications."[14] Later the companies referred to their receipt of a "routine business review letter" but took pains to deny "any allegation that the oil companies have been granted a waiver of immunity from the antitrust laws."[15] Finally, in March publicity was given to an exchange of correspondence between Senator Proxmire and Antitrust Division Chief Richard McLaren regarding the oil companies' joint action.[16] Senator Proxmire was concerned about a report that the oil companies had agreed to a pooling arrangement in the event Libyan oil was shut off. Mr. McLaren, while confirming the absence of power in the Department of Justice to grant immunity for violations of the antitrust laws, commented that neither the antitrust laws nor the *Standard Oil* decree of 1960[17] barring allocation of oil production prohibited concerted action by the oil companies to assure that the group approach of the producing countries would not work to the greater prejudice of some competitors than others. Mr. McLaren's re-

[8] N.Y. Times, January 29, 1971, at 6, col. 4.

[9] *Id.*; N.Y. Times, January 25, 1971, at 1, col. 6.

[10] Fortune, March 1971, at 30; N.Y. Times, January 25, 1971, at 12, col. 3.

[11] N.Y. Times, January 27, 1971, at 10, col. 4.

[12] N.Y. Times, January 18, 1971, at 5, col. 5.

[13] *E.g.*, N.Y. Times, January 21, 1971, at 11, col. 4.

[14] 496 BNA ANTITRUST AND TRADE REGULATION REPORTS, A-1 (1971).

[15] Wall Street Journal, January 28, 1971, at 4, col. 4.

[16] 509 CCH TRADE REG. REP. 8 (1971).

[17] United States v. Standard Oil Co. (N.J.), 1960 Trade Cas. ¶ 69,849. (S.D.N.Y. 1960).

sponse did not disclose any details with respect to the pooling agreement. However, to the extent his letter was confirmation of his approval of the joint bargaining, it was a sound denouement, surely, to months of mystery, but was the mystery necessary?[18]

III. Collective Bargaining

The OPEC negotiations demonstrate that one exception to the ban on joint action by competitors to determine their costs may be carved out where the costs are royalties or taxes to foreign governments. Another exception, though its limits are not fully defined, is made where the costs are labor costs. If the costs in issue were material costs, one would have little difficulty in determining that a joint agreement by purchasers to require the supplier to charge a uniform price would be illegal. When the supplier is a labor union, antitrust policy and the labor laws must hammer out their respective jurisdictions. Extremist solutions in either direction are logically possible. The antitrust purist could urge that an anticompetitive purpose plus joint business action are sufficient to make out a violation even in the context of labor negotiations. The collective bargaining advocate could counter that once it is conceded that wages are the central subject of collective bargaining the motive of a wage agreement reached by such bargaining is not subject to examination. The Supreme Court appears to have steered a middle course. The Court seems to withhold the antitrust hand from anticompetitive possibilities *within* the bargaining unit while permitting broad consideration of anticompetitive purposes when the restraint is directed outside the unit. In *United Mine Workers of America v. Pennington*,[19] the Court considered a claim that the Sherman Act was applicable to an alleged agreement between a union and large mining companies included in a multi-employer bargaining unit that the union would impose the agreed-upon wage and royalty scales upon smaller operators for the purpose of eliminating their competition. The Court observed that, by virtue of the labor exemption from the antitrust laws,[20] no antitrust case could be premised on a union's negotiation of a wage agreement with a multi-employer bargaining unit, or upon its unilateral decision to seek the same wages from other employers. The Court held, however, that the labor exemption is forfeited when it is shown that a union agreed with one set of employers to im-

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[18] A counterpart of the OPEC situation was presented by the voluntary agreement of the Japanese textile industry, with the backing of the Japanese Government, to restrict imports into the United States. It was suggested in April 1971 that United States importers carrying out the plan could be attacked under the United States antitrust laws despite the "tacit" agreement of Representative Wilbur D. Mills. N.Y. Times, April 29, 1971, at 59, col. 2.

[19] 381 U.S. 657 (1965).

[20] Clayton Antitrust Act § 6, 15 U.S.C. § 17 (1964); §§ 20, 29 U.S.C. § 52 (1964), Norris-LaGuardia Act, 29 U.S.C. §§ 101-110, 113-115 (1964).

pose a certain wage scale on other bargaining units.[21] The proper inference from *Pennington*'s holding that the labor exemption is forfeited when union-employer restraints are imposed outside the unit appears to be that antitrust assessment of behavior within the unit is precluded. This view would apparently hold even if there were evidence that certain dominant members of the unit had agreed with the union to impose a particular wage settlement on the unit for anticompetitive purposes. The justification for applying immunity within the multi-employer unit would presumably be that the appropriateness of such a unit is determined by the NLRB in certification procedures. However, the NLRB, in determining whether a multi-employer group is an appropriate bargaining unit, considers whether the members will regard the group's negotiations as binding[22] and does not determine whether certain members of the group will be likely to seek, with union aid, to impose certain settlement terms on weaker employers.

When a conspiratorial wage scale is imposed outside the unit, usual antitrust standards of proof of anticompetitive intent apply. In *Ramsey v. United Mine Workers of America*,[23] the Supreme Court has held that, in analyzing charges of antitrust liability for imposition of wage scales outside the original unit as a result of union-employer agreement, the Norris-La Guardia Act's requirement of clear proof[24] does not apply to proof of the substantive antitrust violation but only to proof of union authorization of the unlawful acts.

In the *South-East Coal* case, in which certiorari has recently been denied,[25] defendants unsuccessfully sought to limit the effect of *Pennington* by arguing that the Supreme Court had merely held that the imposition of conspiratorial wage restraints outside the bargaining unit causes a loss of the labor exemption but had not decided that such restraints cause antitrust liability to follow as a matter of course. The Court of Appeals in *South-East Coal* appeared to find a per se violation.[26]

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21 Subsequently the trial court held that proof of the alleged union-employer conspiracy had been insufficient. Lewis v. Pennington, 257 F. Supp. 815 (E.D. Tenn. 1966), *aff'd*, 400 F.2d 806 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968). In another case concerning the same history of labor negotiations, a jury verdict finding an agreement to impose the terms of the coal contract upon nonsignatories has been upheld. Tennessee Consolidated Coal Co. v. United Mine Workers of America, 416 F.2d 1191 (6th Cir. 1969).

22 *E.g.*, Quality Limestone Products, Inc., 1963 CCH NLRB Decisions ¶ 12,445

23 401 U.S. 302 (1971).

24 Norris-LaGuardia Act, § 6, 29 U.S.C. § 106 (1964).

25 South-East Coal Co. v. Consolidated Coal Co., (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971).

26 It is interesting to note that the *Pennington* distinction between restraints internal and external to the bargaining unit was sufficiently confusing to the trial court as to cause its jury instructions to become garbled. The Court of Appeals found that the trial judge "misspoke" in instructing the jury that the loss of the antitrust exemption flowed from an agreement to impose a wage scale "on the bargaining unit"; it said the trial judge meant to say "on other bargaining units." 434 F.2d 767, 776 n.9. (6th Cir. 1970).

It should be observed that, in contexts other than multi-employer bargaining, wage rates are treated by antitrust authorities much like other costs substantially affecting price. Thus, the Federal Trade Commission in an advisory opinion, while advising a dairy trade association that it would not object to a plan for the exchange of wage contracts, suggested that the plan be used with care "because an agreement among competitors as to wage rates would be illegal, since it would have the effect of fixing the price of milk."[27]

IV. Consumer and Environment Protection

The rival claims of antitrust policy and other national concerns are currently being highlighted in the field of consumer and environmental protection. The air in this field is now heavy not only with pollutants but with rhetoric. Some are apparently contending that for our waters to be clean the antitrust laws must be done away with along with the phosphates, while others fear that the United States economy is just about to be cartelized in the name of ecology and safety. In the early pronouncements, the FTC and the Antitrust Division do not seem completely at one, with the Commission avowing considerable interest in the benefits of industry self-regulation as a supplement to its limited enforcement personnel[28] and the Antitrust Division tending to stand a bit more aloof.[29] However, when one pierces the mists of this dialogue, signs of remarkable progress appear in the direction of thinking out, and in some areas working out, the respective claims of antitrust and consumer and environmental programs.

Some aid to analysis of developments may be provided by subdividing the possible types of joint action by competitors in the interest of consumerism and ecology:

(1) responsible advertising and product information;

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[27] 162 FTC Advisory Opinion Digest (1968).

[28] *E.g.*, speech of Chairman Kirkpatrick before the Antitrust Law Section of the New York State Bar Association, January 28, 1971. However, Chairman Kirkpatrick continues to warn that self-regulation and its enforcement may conflict with the antitrust laws. N.Y. Times, June 19, 1971, at 44, col. 3. In a recent speech, Basil Mezines, Executive Director of the Commission, while suggesting standards for self-regulation, has warned that self-regulation cannot replace law enforcement or business conscience. 527 BNA ANTITRUST AND TRADE REG. REP. A-2 to 3 (1971). The FTC in late 1971 announced its policy of compliance with the requirements of the National Policy Act of 1969, 42 U.S.C. §§ 4331-4335 (Supp. 1971). The Commission will prepare statements concerning the environmental impact of its proposed rules and guides and its legislative proposals. However, this policy will not apply to investigations made for enforcement purposes or to adjudicatory proceedings. 541 B.N.A. ANTITRUST AND REG. REP. A-23 (1971).

[29] Speech of Antitrust Division Chief Richard W. McLaren to the Antitrust Section of the American Bar Association, April 1, 1971. Virginia H. Knauer, the President's Special Assistant for Consumer Affairs, has also joined the ranks of those skeptical of the benefits of self-regulation, in her attack on the proposed program for advertisers drafted by the Council of Better Business Bureaus. N.Y. Times, June 26, 1971, at 37, col. 1.

(2) joint research on anti-pollution and safety devices;
(3) product standardization and certification;
(4) elimination of unsafe or unhealthy products.

A. *Advertising*

A good deal of joint action in advertising and product information appears feasible without undue antitrust risk. And the Government, despite the songs of antitrust orthodoxy which are still heard throughout the land, does not appear to be above considerable "jawboning" to induce voluntary agreements on advertising which are in the interest of public health or safety. In April, 1971, seven of the country's nine cigarette manufacturers, after conferences with the FTC and members of Congress, agreed to include a health warning in advertisements of their products.[30] This agreement can only be regarded as restrictive of competition in the sense that it deprives the parties to the agreement of the competitive tool of inducing sales by suppressing caution as to the hazards inherent in the product—hardly competitive impairment which should be regarded as an "unreasonable restraint." Actually, a much more substantial competitive restraint by voluntary action of the cigarette companies has been imposed in the past—their agreement to restrict appeal to the youth market by ending on-campus solicitation, etc. And in the Code of the National Association of Broadcasters, antitrust authorities have tolerated, possibly because of some measure of supervision by the FCC, voluntary agreements which resemble the "boycott" pattern, such as the agreement not to broadcast liquor advertisements.[31]

In the related area of product information, a significant recent development in behalf of the consumer has been the endorsement by major meat processors of a plan of the American Meat Institute to standardize date coding on packaged meats.[32]

B. *Joint research*

We are hearing discordant voices on the issue of the desirability of permitting joint research by competitors to develop product and environmental protection devices. The issue was clearly joined at the spring 1971 meeting of the Antitrust Section. Mr. McLaren asserted that "it is

[30] N.Y. Times, April 16, 1971, at 26, col. 1. It was later announced that the FTC was dissatisfied with these agreements and would seek to require health-hazard warnings. Wall Street Journal, June 21, 1971, at 10, col. 5.

[31] Levin, *The Limits of Self-Regulation*, 67 COLUM. L. REV. 604 (1967). One method which has been used by a self-regulatory group to avoid boycott charges has been to induce Governmental participation in enforcement. Recently, the National Swimming Pool Institute coupled its public warning against certain sales practices with the statement that it was working with legal authorities in several states in an effort to stop deceptive selling. Wall Street Journal, April 23, 1971, at 5, col. 3.

[32] Wall Street Journal, April 15, 1971, at 2, col. 4.

the abiding faith of the Antitrust Division that the preservation of competitive alternatives promises society the most expeditious development of safer, better quality, and cleaner products." On the other hand, Mr. Alan G. Kirk II, Deputy Counsel for the Environmental Protection Agency (EPA), expressed doubt as to whether all technological problems are best hammered out on the forge of unrestrained competition. He questioned whether the Apollo program could have proceeded on such a basis.

It is not possible to sit in early judgment on this controversy. But a few preliminary observations can be offered to clarify the dispute.

Joint research by competitors is not illegal per se under the antitrust laws. Illegality may be premised on a finding that the research venture excludes outsiders from the fruits of competitively significant technological development; discourages independent innovation by participants; or leads competitors into collusive behavior in areas unrelated to the research project. Needless to say, a joint research activity may not be used as a cover to delay and obstruct the development of product improvements as the Justice Department charged that the automobile manufacturers and their trade association were doing in the field of pollution control, in a 1969 complaint terminated by a consent decree.[33]

It cannot be said that the Antitrust Division's concern with respect to joint research activity in pollution and safety devices is frivolous. Many of the industries centrally involved in the environmental and safety crises are oligopolies led by financially strong companies. In these industries there is reason both to assume the existence of financial capability for significant independent product development and to abstain from any permissiveness which might encourage collusion.

But even in concentrated industries there may be room for informed governmental judgment that a joint technological program may be preferable to parallel efforts. Recently the Justice Department has announced that it will not object to the extension of an agreement (excepted during its original term from the scope of the 1969 consent decree) under which General Motors is furnishing American Motors technical help on certain automobile emission control projects.[34] However, this decision was apparently based on the comparatively weak competitive position of American Motors. On the broader issue of antitrust exemption for the automotive industry generally a strident debate continues. Senator Robert P. Griffin has introduced a bill providing an antitrust exemption for joint research by automotive manufacturers for the purpose of meeting or exceeding air pollution standards.[35] The bill has been supported by UAW President Leonard Woodcock, who has urged even broader exemp-

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[33] United States v. Automobile Mfrs. Assn., 1969 Trade Cas. ¶ 72,907 (C.D. Cal. 1969).

[34] Wall Street Journal, June 7, 1971, at 5, col. 4; May 26, 1971, at 4, col. 2.

[35] S. 2258, 92d Cong., 1st Sess. (1971).

tion for research efforts to meet automobile safety standards as well as pollution standards.[36] On the other hand, the Antitrust Division, in responding to a request of the Department of Transportation to outline the antitrust implications of intercompany technical exchanges in the development of vehicle safety devices, has favored independent research efforts.[37] Ralph Nader, joining the debate, has voiced strong opposition to the Griffin Bill, fearing a "spill-over of non-competition" into other areas.[38]

The Government's flexibility in permitting technical assistance to American Motors gives us some reason to hope that in other industries where firms are smaller and competition is more vigorous, joint action in research may in proper cases be given governmental encouragement even at the expense of some traditional antitrust concerns. Such a policy would be supportable if our national priorities are so reordered that safety and health are placed in equal ranking with the acts which we justify in the name of "national defense." In this connection, it should be noted that as recently as December, 1969 the Defense Production Act of 1950[39] was amended to broaden the antitrust exemption for voluntary agreements and programs made with the approval of the President to further the objectives of the Act.

C. *Product standardization and certification*

In this area the most important recent development is the response of the FTC, on March 22, 1971, to the request of the American National Standards Institute, Inc., for an advisory opinion with respect to a proposed certification program.[40] The FTC declined to issue an opinion because of the complexity of legal criteria, the uncertainty of court decisions, and the impossibility of making an informed decision in the absence of intensive investigation and collateral inquiry. However, the Commission further advised that, in order to assist in exploring the possibility of self-regulation through standard certification, it had directed its staff to commence a study to determine whether it is possible for the Commission to make a meaningful contribution to the development of a satisfactory and legal program. The Commission, pending such study, listed 16 criteria which must be considered in an evaluation of any program of self-regulation. These criteria, incorporating points made by Mr. McLaren and Chairman Kirkpatrick in previous speeches, include the following (as summarized in compressed form):

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[36] 528 TRADE REG. REP. 8 (1971).

[37] 530 TRADE REG. REP. 7 (1971).

[38] 526 BNA ANTITRUST AND TRADE REG. REP. A-15 (1971).

[39] Defense Production Act of 1950 § 708, 50 U.S.C. App. § 2158 (1950).

[40] 5 TRADE REG. REP. ¶ 19,549, at 21,621 (1971).

(1) Standardization and certification programs must not be used to fix prices or lessen competition or have the effect of boycotting or excluding competitors or controlling production or (except when clearly required by safety) reducing kinds or sizes of products available.

(2) Performance standards must be used when possible, instead of standards as to product construction or specification.

(3) Standards must be kept current to reflect technological change.

(4) Membership and certification must be open.

(5) All parties with an interest in the standardization or certification program must be accorded "due process," including timely hearings respecting standards or denial of certifications.

(6) Validation of standards and certification of products must be performed by independent laboratories.

(7) All standards must be voluntary.

The complexity of the criteria suggested by the Commission, and particularly the caution with respect to the necessity of fashioning appropriate procedures according "due process" and the stress on "voluntary" compliance, raise some question as to whether the self-regulatory function as it may emerge from its study would not require a considerable degree of governmental supervision, both with respect to development and enforcement[41] of programs. It remains to be seen whether, in the absence of new legislation conferring express regulatory authority, the Commission will be willing and able to assert a guiding role over self-regulatory programs.

Nevertheless, the Commission's view of the complexity of the legal requirements for standardization programs should not be taken as casting doubt on the immense amount of activity which proceeds in this area without antitrust challenge, and often with the participation or encouragement of the Department of Commerce[42] or other Governmental bodies. In fact, Joseph Martin, Jr., general counsel of the Commission, has observed that product standardization is lagging behind new inventions and technology, and that the need for increased standardization is "acute."[43]

D. *Product safety*

The fate of self-regulation becomes more doubtful when we turn

[41] Chairman Kirkpatrick has subsequently suggested that self-regulatory bodies monitor deceptive practices and refer them to the Government for enforcement action. N.Y. Times, June 19, 1971, at 44, col. 3.

[42] Kestenbaum, *Antitrust Questions in Voluntary Industry Standards*, 24 FOOD DRUG COSM. L.J. 606 (1969). In Structural Laminates, Inc. v. Douglas Fir Plywood Association, 261 F. Supp. 154 (D. Ore. 1966), *aff'd per curiam*, 399 F.2d 155 (9th Cir. 1968), defendant's trade association was held not to be liable for its refusal to alter a commercial standard for plywood established under the procedures of the Department of Commerce. The injury caused to those producing products which do not comply with such standards was referred to by the trial court as "congressionally sanctioned." 261 F. Supp. at 159.

[43] Federal Trade Commission News, June 24, 1971.

from product certification to joint business action for the elimination of unsafe products. Agreements to withhold products from the market are a category of joint action not customarily tested under the "rule of reason." While holding out the possibility of approving such action when the question of safety is clear, the Antitrust Division has stressed the necessity of satisfactory procedures to assure participation of all interested groups, including consumers and Government, to assure that the elimination of the product is justified. Moreover, Donald Turner, while he was head of the Division, had cautioned that in some cases a consumer may prefer a lower price to more safety and should not be deprived of the choice.[44] It appears that the Nixon Administration will favor committing the protection of product safety to a mandatory Governmental regulatory scheme rather than relying on self-regulation.[45] This year a number of legislative proposals relating to product safety have been introduced and publicly debated with considerable heat.[46] Under S. 1797, which was initially supported by the Administration, identification of consumer product risks, determination of safety standards and the banning of unsafe products are entrusted to the Department of Health, Education and Welfare. The bill authorizes the Secretary of HEW to adopt safety standards published by any Federal agencies or other qualified organizations and to accept offers from qualified persons to develop standards.[47] Although these provisions would permit industry participation in the setting of standards, the Act does not grant any exemption from the antitrust laws for such participation. Other legislative proposals would expressly disclaim any intention to grant an antitrust exemption.[48]

E. *Influencing governmental action*

One of the few safe things we can say about the developing legal field of consumerism and ecology is that the alternative to self-regulation is regulation. Businessmen as well as social groups can be expected to expend considerable energies in concerted attempts to deter actions by legislatures and rule-making bodies which they consider unfavorable and to shape emerging rules into the most palatable form. In 1971 it has become plain that these legislative and administrative battles are well

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[44] Turner, *Consumer Protection by Private Joint Action*, 1967 N.Y. STATE BAR ASS'N ANTITRUST L. SYMPOSIUM 36, at 40.

[45] Past accomplishments of self-regulation in the area of product safety are rated very low by the National Commission on Product Safety in its June, 1970, staff report on Industry Self-Regulation.

[46] S. 1797, 92d Cong., 1st Sess. (1971) (HEW proposal); S. 983 and H.R. 260 and 1569 (identical bills), 92d Cong., 1st Sess. (1971) (bill sponsored by National Commission on Product Safety); H.R. 10835, 92d Cong., 1st Sess. (1971) (compromise measure supported by the Administration).

[47] *Supra* note 46, S. 1797, § 6.

[48] *Supra* note 46, S. 983, § 48; H.R. 10835, § 303(a).

underway. An FTC rule requiring the posting of octane ratings on gasoline pumps was challenged by a lawsuit filed in March by a group of oil refiners and marketers.[49] Two large soap manufacturers challenged a proposed FTC rule requiring detergent makers to list ingredients on packages and to display pollution warnings in advertisements.[50] In Akron an ordinance banning phosphate detergents was stopped by a preliminary injunction following a joint suit filed by the Soap and Detergent Association and several of its members.[51] In the state of Washington a joint lobbying campaign by the soft-drink manufacturers and brewers was successful in inducing voters to reject narrowly an initiative banning use of no-return or low-deposit bottles.[52]

Without passing on the merits of the positions taken in any of these policy battles, it is obvious that many joint attacks by competitors on legal developments may be motivated by anticompetitive purposes. Nevertheless, some comfort has been drawn from the line of cases beginning with *Noerr*[53] and *Pennington*[54] which find immunity from antitrust liability for joint actions taken to petition governmental authorities.

In the *Noerr* case, an anticompetitive motive was clearly alleged. It was charged by 41 Pennsylvania truck operators and their trade association that 24 eastern railroads, an association of their presidents, and a public relations firm engaged by them had conducted a publicity campaign designed to foster adoption and retention of laws and law enforcement practices destructive of the trucking business. The Court held that the Sherman Act did not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. The Court's decision rested on the propositions that the question whether a law should pass or be enforced is the responsibility of the appropriate legislative and executive branches, and that such responsibility includes the power to take governmental action which may operate to restrain trade. The Court also noted that a contrary interpretation of the Sherman Act would raise important constitutional questions by interfering with the right to petition.

The result in *Noerr* was not affected by the fact that the defendants

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[49] Wall Street Journal, March 31, 1971, at 5, col. 3.

[50] Wall Street Journal, April 7, 1971, at col. 3. The suit was brought by Lever Brothers Co. and Colgate-Palmolive Co. moved for permission to intervene. To the extent the *Noerr* immunity discussed in this section may be interpreted narrowly, there may be less antitrust risk in moving to intervene in a legal proceeding than in joining at the outset as a plaintiff—possibly a new analogue to price following as opposed to price fixing!

[51] Wall Street Journal, April 1, 1971, at 25, col. 5.

[52] 504 BNA ANTITRUST AND TRADE REG. REP. E-1 (1971).

[53] Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

[54] United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

had used in their campaign the so-called "third party technique" whereby they arranged for their propaganda to emanate from supposedly independent groups. The Court left to Congress the question of whether such a delicate area of citizenship as the ethics of governmental campaigning should be regulated.

In the *Pennington* case, the Court confirmed that the *Noerr* immunity prevented the imposition of liability for joint petition of the Government regardless of the existence of an anticompetitive purpose and even when constituting a part of a larger course of concerted action. Moreover, the *Noerr* immunity was applied to alleged joint labor-business action to influence administrative action, the setting of minimum wage rates for government contractors under the Walsh-Healy Act.

However, the *Noerr* and *Pennington* cases left certain possible gaps in the general immunity for joint action in relation to Governmental bodies. In *Noerr*, the Court observed that "there may be some situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover an attempt to interfere directly with the business relations of a competitor."[55] *Pennington* noted another exception: it would be within the province of the trial judge to admit evidence of a combination to influence governmental action, if the evidence is probative and not unduly prejudicial, for the purpose of showing the purpose and character of other transactions under scrutiny as antitrust violations.[56]

Recent cases and proceedings limiting *Noerr-Pennington* indicate that the scope of immunity granted must be viewed with some caution. The "sham" exception to *Noerr* seems to have been improperly invoked in *Trucking Unlimited v. California Motor Transport Co.*,[57] where opposition to rivals' certification by the Public Utilities Commission of California and the ICC without regard to the merits was considered to be "sham" activity. However, the Court in *Noerr* did not invite an inquiry as to whether a genuine attempt to influence governmental action was itself in *bad faith*, but, instead, whether a lobbying effort was undertaken merely as a pretext to disseminate publicity intended to interfere directly with competitors' business relations. The *Trucking Unlimited* case also seems in direct contravention of the view in *Noerr* that abuses of proper ethics in recourse to governmental bodies are best treated by separate Congressional enactment and not under the broad sweep of the Sherman Act. If this aspect of *Noerr* is stressed, one can also question the correctness of *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters and Helpers Local No. 150*.[58] Here the court held that *Noerr* did not immunize the

[55] 365 U.S. at 144.

[56] 381 U.S. at 670, n. 3.

[57] 432 F. 2d 755 (9th Cir. 1970), *cert. granted*, 402 U.S. 1008 (1971).

[58] 440 F.2d 1096 (9th Cir. 1971).

use of "illegal" means to influence Government action, it being alleged that the defendants had through threats, duress and coercion induced the California State Fair officials to issue a directive forbidding the sale of any Coca-Cola upon fairgrounds during the 1966 State Fair. But it may be the teaching of *Noerr* that issues of illegality of methods used to obtain governmental actions be determined under laws relating to lobbying, obstruction of justice, and other aspects of communication between citizen and government, and not under the basically economic regulations provided by the antitrust laws. Similar reservations may be expressed about the decision in *Woods Exploration & Producing Co. v. Aluminum Company of America*[59] to the extent it holds *Noerr* inapplicable on the basis of the falseness of information filed to induce favorable action by the Texas Railroad Commission on the allocation of natural gas production allowables.[60]

However, an additional ground has been asserted in the above cases to limit *Noerr-Pennington*—the view that the immunity extends only to efforts to influence governmental action which involves policy-making considerations. On this ground it was held in *Whitten v. Paddock Pool Builders, Inc.*[61] that the immunity did not apply to efforts by three affiliated swimming pool companies to induce local government authorities acting under competitive bidding requirements to adopt exclusionary specifications proposed by the defendants. The absence of a policy making function was also relied on in the *Woods* and *Sacramento Coca-Cola* cases. In the *Trucking Unlimited* case, one of the grounds for the court's holding that the Sherman Act reached the alleged conspiracy of trucking firms to oppose without regard to the merits competitors' requests for certification by the California Public Utilities Commission and the ICC was the broad position that the rationale of *Noerr-Pennington* does not require protecting the access of courts and agencies performing adjudicative functions to information and opinion relevant to determinations of policy which they have no power to make. This distinction between policy-mak-

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[59] 438 F.2d 1286 (5th Cir.), 40 U.S.L.W. 3012 (U.S. May 15, 1971) (No. 70-173).

[60] The result in *Woods* appears to be contrary to that in Okefenokee Rural Electric Membership Corp. v. Florida Power and Light Co., 214 F.2d 413 (5th Cir. 1954), where allegations that false statements were made to induce governmental refusal to issue a highway permit failed to sustain a Sherman Act claim.
The "sham," "illegal means" or "evidentiary" loophole in *Noerr-Pennington* is apparently utilized in the Federal securities fraud case recently filed against National Bankers Life Insurance Co. in the Northern District of Texas, where it is alleged that the defendants attempted to avoid further FDIC regulation of the banks involved in alleged market manipulations by attempting, by making loans and stock profits available to governmental officials and employees, to have legislation passed by the Texas legislature that would enable State banks to be insured by a State chartered insurance company. Securities and Exchange Commission v. National Bankers Life Insurance Co. et al., U.S. District Court, N.D. Texas, Dallas Div. (Civil Action No. CA-3-4432-B), Complaint, para. 31. Permanent injunctions against Federal securities law violations have been entered in the case. Wall Street Journal September 17, 1971 at 12, col. 1.

[61] 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970).

ing and adjudication is a brave one, indeed, particularly if it were to be applied to such multi-function agencies as the FTC.

Despite these limitations, the *Noerr* immunity in its shrinking heartland is very much alive and should have great significance in the battles over environmental and consumer protection laws and regulations. This Associate Professor William Rodgers of the University of Washington learned from the FTC when it rejected, on the basis of the *Noerr* immunity, his request for investigation of a successful lobbying effort by bottlers (including threats of price increases) against legislation requiring deposit bottles in the State of Washington.[62]

F. *Exempted "State" action*

A final point should be made about the emerging struggle over the role of antitrust regulation in the supervision of joint business action in the interest of consumer protection and the war against pollution. From many of the comments from the FTC, the Antitrust Division and other Federal agencies on the merits or horrors of immunizing joint conduct from the rigors of the Sherman Act, one might almost be ready to assume that the debate is subject to resolution in a purely federal arena. This is far from the case, as we are clearly told by *Parker v. Brown*[63] and its recent progeny. In *Parker*, the Supreme Court held that a raisin marketing proration system which was administered by a committee of raisin growers and marketers appointed and supervised by State authorities under the California Agricultural Prorate Act was immune from antitrust attack as "State action." The Court said that a State may not give immunity to private persons who violate the Sherman Act by authorizing them to violate it or declaring that their action is lawful. However, the Court held that, although the organization of a prorate zone was proposed by producers and a prorate program, approved by the state commission, must also be approved by a referendum of producers, the State had made the marketing program its own by creating the machinery of the program, adopting the program, and enforcing the program through penal sanctions, in execution of a governmental policy to eliminate chaotic marketing conditions.

The *Parker* case has been so long with us that it now has an air of inevitability which it does not deserve. Robert L. Stern, who argued *Parker* for the Government, contended that the California marketing program was inconsistent with the prohibitions of the Sherman Act against monopolization, and that the Sherman Act superseded State legislation conflicting with the policy it established. He argued further that the California program was invalid under the commerce clause. Neither then

[62] Wall Street Journal, April 15, 1971, at 2, col. 4. Professor Rodgers made the interesting suggestion that there wtuld have been antitrust liability had the initiative succeeded and the threatened price increase been carried out.

[63] 317 U.S. 341 (1943).

nor since have these arguments carried the day, and neither Sherman Act preemption nor the commerce clause has provided substantial obstacles to State regulations having anticompetitive effects.

Parker has spawned a large family. Many cases have seen the *Parker* immunity claim joined with claims under *Noerr* and *Pennington*, and *Noerr* itself relied on the *Parker* decision. And one of the express rulings of *Pennington*, solidly based on *Parker*, was that no recoverable damages could be based on the governmental action of the Secretary of Labor in fixing wage rates under Walsh-Healy. But *Parker* has not been a basis for creating broad antitrust immunity for anticompetitive acts involving indirect or passive participation by federal officials, in view of the strong principle in the cases that implied antitrust exemptions will not lightly be read into federal regulatory schemes.[64]

The *Parker* line of cases dealing with anticompetitive action involving State governments and officials is not fully consistent. The most restrictive view of *Parker*, as exemplified by *Asheville Tobacco Board of Trade, Inc. v. FTC*,[65] is that for the immunity to apply, the state must have "a public policy against free competition in an industry important to it." Consistent with this view, it was held in *Paddock Pools*[66] that where the state evinces a decision in favor of competition (in that case by adopting competitive bidding regulations), restrictions on competition cannot be attributed to State action.

Other restrictions which have been placed on *Parker* closely parallel limitations on the *Noerr* immunity, and many of the cases reach similar conclusions as to the availability of each immunity. In *Woods*[67] the inducement of state action by misleading the governmental body voided the claim of the "State action" immunity. In several cases, including the *Continental Ore*[68] case decided by the Supreme Court, the distinction has been drawn between policy-making decisions by officials and business decisions by private delegates. Business decisions, and ministerial actions by lower-level officials, may be insufficiently discretionary to reflect state action and may be shown, in some cases, as in *Continental*, to be contrary to State policy.[69]

But the degree of State involvement necessary to invoke *Parker* remains in doubt. Two decisions have immunized as State action privately

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[64] *E.g.*, United States v. Philadelphia National Bank, 374 U.S. 321 (1963); Hecht v. Pro-Football, Inc., *supra* 2.

[65] 263 F.2d 502, 509 (4th Cir. 1959).

[66] Whitten v. Paddock Pool Builders, Inc., *supra* note 61.

[67] Woods Exploration & Producing Co. v. Aluminum Company of America, *supra* note 59.

[68] Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

[69] Woods Exploration & Producing Co. v. Aluminum Company of America, *supra* note 59; Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters and Helpers Local No. 150, *supra* note 58; Whitten v. Paddock Pool Builders, Inc., *supra* note 61.

set rates which have been approved by State rate regulatory bodies.[70] Considerably beyond these decisions is the recent *VEPCO* case[71] which applies *Parker* immunity to an alleged tie-in arrangement involving installation of electrical service on the ground that the State regulatory commission could have challenged the arrangement and failed to do so.

What will be the status under *Parker* of State programs to permit industry boards, under State supervision to eliminate unsafe products, agree on pollution measures, or the like? This will be an interesting development to watch. At this point, it may be sufficient to note the ironic possibility posed by *VEPCO* that the States may be given broader authority to whittle away at the sacred commands of the Sherman Act than federal legislators and antitrust administrators are presently willing to concede to themselves.[72]

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[70] Gas Light Co. of Columbus v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3009 (U.S. June 16, 1971); Allstate Insurance Co. v. Lanier, 361 F. 2d 870 (4th Cir. 1966). But in *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011 (3d Cir. 1971), it has been held that "state action" immunity does not apply to resale prices filed under a mandatory price filing system where the governmental agency had no power to review the prices.

[71] Washington Gas Light Co. v. Virginia Electric and Power Co., 438 F.2d 248 (4th Cir. 1971).

[72] In *Hecht v. Pro-Football, Inc., supra*, note 2, at 90,331, a stricter standard is apparently adopted for application of *Parker* to Federal regulatory schemes than to State progtams, namely, whether "Congress has *knowingly* adopted a policy contrary to or inconsistent with * * * the antitrust laws." (Emphasis added). In November, 1971 Antitrust Division Chief McLaren warned businessmen not to find in Phase II controls an implied license to fix prices. 537 BNA ANTITRUST AND TRADE REG. REP. E-1-E-3 (1971).