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Trade Regulation -- Antitrust Immunity -- Quasi-Governmental Action -- Hecht v. Pro-Football, Inc.

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evidentiary issue regarding Section 6 of the Norris-LaGuardia Act, national policy in labor-antitrust violation situations is in need of clarification. This submission is supported by noting the three way division of the *Pennington* Court and the number of justices dissenting in *Ramsey*. To resolve this situation, Congress must clarify its intent and the national policy by introducing legislation defining the limits of labor's exemption from antitrust liability. Union and employer representatives need to know what subjects they may discuss at the bargaining table, and what activities they may pursue, without fear of antitrust liability. Absent such legislation, the collective bargaining process is in danger of being driven underground, in contravention of the policy of fostering that process as expressed in Section 2 of the Norris-LaGuardia Act.[78]

The effect of the Court's decision in *Ramsey* is to reaffirm, clarify, and give force to the *Pennington* doctrine and to define the evidentiary standard required by Section 6 of the Norris-LaGuardia Act. However, congressional action is needed to resolve the status of labor's exemption from antitrust liability in order to remove the danger which existing ambiguities present to the collective bargaining process.

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Trade Regulation—Antitrust Immunity—Quasi-Governmental Action—*Hecht v. Pro-Football, Inc.*[1]—The Armory Board of the District of Columbia, a quasi-public body empowered to operate and maintain federal government facilities in the district,[2] was authorized by the federal Stadium Act[3] to build, operate and maintain an athletic stadium.[4] Accordingly, under a contract with the Department of Interior which previously had purchased the site, the Board built R.F.K. Stadium and leased it to Pro-Football, Inc., the corporate organization of the Washington Redskins football team.[5] The lease provided that at no time during a thirty year term would the Armory Board rent the stadium to any other professional football team.[6] Relying upon this exclusive covenant, the Board refused to lease

[78] 29 U.S.C. § 102 (1970).

[1] 444 F.2d 931 (D.C. Cir. 1971), petition for cert. filed, 40 U.S.L.W. 3081 (U.S. July 23, 1971) (No. 71-121).

[2] 2 D.C. Code § 1706 (1967).

[3] 2 D.C. Code §§ 1720-28 (1967).

[4] 2 D.C. Code § 1720 (1967).

[5] 444 F.2d at 932-33.

[6] 444 F.2d at 933. The exclusive covenant provided, in part, that:

> [The Armory Board] . . . shall have the right to lease or otherwise permit the use and occupancy of the Stadium during any period . . . provided that at no time during the term of this Lease Agreement shall the Stadium be let or rented to any professional football team other than the Washington Redskins.

Id. at 933.

the stadium to the petitioners, three local businessmen who had sought to operate a professional football franchise in the District of Columbia. The petitioners brought a private action under Section 4 of the Clayton Act[7] against the Redskins, the National Football League and the three members of the Armory Board,[8] alleging violations of Sections 1, 2, and 3 of the Sherman Act[9] and claiming damages therefor. They alleged that the exclusive covenant in the lease constituted a contract in restraint of the business of professional football in the District of Columbia and that the Redskins had engaged in an attempt to monopolize, and had monopolized, professional football in the District of Columbia.[10] The defendants contended that the execution of the lease by the Armory Board constituted governmental action immune from the operation of the antitrust laws.[11] Both parties filed motions for summary judgment.

The District Court for the District of Columbia accepted the defendants' contention, holding that:

> [T]he leasing of the stadium was pursuant to the mandate of the [Stadium] Act and was governmental action. As such it was . . . exempt from the antitrust laws . . . . No violation of the [Sherman] Act can be made out even where there is a restraint upon trade or monopolization if it resulted from valid governmental action.[12]

On appeal, the District of Columbia Circuit HELD: reversed, antitrust immunity denied to the defendants.[13] The court remanded the case to the district court for consideration of the alleged Sherman Act violations, stating that the thirty year lease had to be evaluated in accordance with the antitrust laws as usually applied to contracts between private parties.[14] The district court's decision to grant immunity was predicated upon a finding that the execution of the lease was in furtherance of and constituted valid governmental action.[15] The court of appeals, however, determined that the Armory Board's

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7 15 U.S.C. § 15 (1970).

8 2 D.C. Code § 1702 (1967). This section provides that the Armory Board is to be comprised of the President of the Board of Commissioners of the District of Columbia, the Commanding General of the District of Columbia Militia, and a third person not employed by the federal or District of Columbia governments.

9 15 U.S.C. §§ 1-3 (1970).

10 444 F.2d at 932. The petitioners also alleged that the Redskins, the National Football League and the individual Armory Board members all had conspired to restrain and monopolize professional football in the district, that R.F.K. Stadium was the district's only suitable location for professional football and that the Armory Board's refusal to lease made it virtually impossible for them to obtain a professional football franchise in the district. Id. at 932-33.

11 Hecht v. Pro-Football, Inc., 312 F. Supp. 472, 474 (D.D.C. 1970).

12 312 F. Supp. at 477.

13 444 F.2d at 932.

14 Id. at 947.

15 312 F. Supp. at 477.

action pursuant to the lease was not such a uniquely or essentially governmental act as to warrant immunity. The court also ruled that the Armory Board's action was not a policy decision that warranted immunity. Furthermore, the court was unable to discern in the Stadium Act any congressional intent to immunize the Board's action against antitrust proscription.

Immunity for valid governmental action is an outgrowth of the state action immunity judicially implied by the Supreme Court in *Parker v. Brown*.[16] The Court in *Parker* had to determine whether the California Agricultural Prorate Act,[17] which authorized the establishment of state agricultural regulatory programs, was violative of the Sherman Act. The Prorate Act authorized the creation of an advisory commission to regulate competition and prices in certain agricultural commodities. The commission,[18] consisting of the State Director of Agriculture and private individuals appointed by the Governor, had the power to approve, disapprove, or modify programs proposed by a program committee.[19] The director of the program committee was required to institute and administer the program, if approved by a referendum vote of the producers.[20]

The plaintiff in *Parker* alleged, *inter alia*, that a raisin marketing program adopted pursuant to the Prorate Act constituted a contract or conspiracy in restraint of trade. The thrust of the complaint was that private producers had been allowed to act in restraint of trade.[21] The plaintiff further alleged that the Prorate Act had been superceded by the Agricultural Marketing Agreement Act of 1937,[22] a federal statute. The Supreme Court held the regulatory program to be valid state action and therefore immune from the antitrust laws. Speaking for the majority, Chief Justice Stone stated that:

> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no

[16] 317 U.S. 341 (1943).

[17] Act of June 5, 1933, ch. 754, 1933 Cal. Stat. 1969, as amended, West. Cal. Agric. Code §§ 59501-60011 (West 1967).

[18] The regulatory programs which the advisory commission could approve were those intended to conserve the agricultural wealth of the state and to prevent economic waste in the marketing of crops. A program could be instituted for a particular commodity if the commission were petitioned to do so by ten private producers of that commodity. 317 U.S. at 346.

[19] Upon petition for a prorate marketing program, a public hearing would be held to determine whether the program could prevent agricultural waste without permitting unreasonable profits to the producers. Upon an affirmative finding, the advisory commission was authorized to grant the petition. The Director of Agriculture was authorized to select a committee from a list of nominees chosen by the producers to formulate the program. Id. at 346-47.

[20] Id.

[21] Private growers were not only allowed to approve the program through referendum, they were also members of the commission that regulated the program after its institution. Id. at 352.

[22] Act of June 3, 1937, ch. 296, 50 Stat. 246, as amended, 7 U.S.C. §§ 601 et seq. (1970).

> conspiracy in restraint of trade . . . but, as sovereign, imposed the restraint as *an act of government* which the Sherman Act did not undertake to prohibit.[23]

In addition, the Court found that the Prorate Act had not been superseded by the Agricultural Marketing Agreement Act of 1937.[24] The Court apparently reasoned that the Sherman Act proscriptions were not intended to apply to state governmental action even though that action was initiated, and to some extent implemented, by private producers. The Sherman Act's legislative history indicates that its purpose was to suppress unlawful combinations involving individuals and corporations, not states.[25] *Parker* reflected this purpose in holding the exercise of governmental functions immune from the antitrust laws.

Parker has recently been interpreted in *E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority*,[26] a case factually similar to *Hecht*. The plaintiff in *Wiggins* alleged that the Massachusetts Port Authority,[27] a quasi-public body, had entered into an agreement with a private base operator[28] which restrained trade[29] by establishing an exclusive maintenance operation at Logan Airport in Boston. The district court dismissed the suit on the ground that the plaintiff's complaint did not state a claim upon which relief could be granted.[30] The court of appeals affirmed, holding that the Port Authority's actions in operating an airport under legislative mandate, and in entering into the lease, constituted actions of "an instrumentality or agency of the state"[31] which, under the *Parker* doctrine, were exempt from antitrust proscription. The *Wiggins* court also dismissed the plaintiff's contention that the Port Authority was engaged in a purely proprietary activity.[32]

A most recent case raising the *Parker* immunity doctrine was *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*[33] In *Whitten* both parties were engaged in the manufacture of swimming pool gutters. Paddock had attempted to influence an architect to recommend Paddock's product specifications for adoption by a local school board. The recommendation would give Paddock an advantage

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23 317 U.S. at 352 (emphasis added).

24 Id. at 354. The Court determined that the Marketing Act of 1937 contemplated the existence of state programs at least until such time as the Secretary of Agriculture established a federal marketing program. Id.

25 Id. at 350-51.

26 362 F.2d 52 (1st Cir. 1966).

27 Mass. Gen. Laws, ch. 91 app., §§ 1-2 (1956).

28 362 F.2d at 53. A base operation provides facilities, fuel, supplies, and services used by aircraft, crews, and passengers. Such an operation is vital to air transportation. Id. at n.2.

29 Id.

30 Id. at 54.

31 Id. at 55.

32 Id.

33 424 F.2d 25 (1st Cir. 1970).

in the required competitive bidding procedures.[34] Whitten alleged, *inter alia*, that Paddock had violated Sections 1 and 2 of the Sherman Act[35] by conspiring with its dealers and representatives to require the use of its own specifications in the public swimming pool industry, with the intent to exclude all other manufacturers.[36]

The district court granted Paddock's motion for summary judgment.[37] However, on appeal, the First Circuit reversed, holding that Paddock's attempts to influence the architect were not outside the purview of the antitrust laws. The court indicated that *Whitten* was distinguishable from both *Parker* and *Wiggins* by a consideration of the degree of governmental involvement in, and supervision over, the alleged wrongful activity.[38] The court did not believe that the architect with whom Paddock had dealt was engaged in an essentially governmental function.[39] Furthermore, the *Whitten* court read *Parker* as conferring antitrust immunity *only* when the legislature determines that competition is not the *summum bonum* in a given field and purposely attempts to provide an alternative to it through public regulation.[40] The court stated:

> In the case at bar . . . the state policy is neither anti-competitive nor neutral. When the government acts under laws requiring competitive bidding, it signifies its intent to respond to the signals of a competitive market . . . an intent . . . entirely consistent with the aims of the Sherman Act. This intent would be frustrated . . . if some sellers could nevertheless engage in anti-competitive practices *merely because they were dealing with the government.*[41]

In *Parker* the express legislative policy of the prorate program was to regulate competition in order to stabilize the raisin industry. In *Whitten*, however, there was no indication that the legislature wanted to restrain or regulate trade. On the contrary, the competitive bidding procedures evidenced a legislative intent to promote competition. The *Parker* Court implied that before it would grant antitrust immunity the activity in question had to be both *uniquely* and *essentially* governmental in nature.[42] In granting immunity, the *Wiggins* court empha-

[34] Id. at 28. The public and quasi-public agencies forming the primary market for both the Whitten and Paddock products operated under a multiplicity of state and local bidding procedures. Id. at 27-28.

[35] 15 U.S.C. §§ 1, 2 (1970).

[36] 424 F.2d at 27.

[37] Id. at 26.

[38] Id. at 30. See Comment, *Alabama Power Company* v. *Alabama Electric Cooperative:* Rural Electrification and the Antitrust Laws—Irresistible Force Meets Immovable Object, 55 Va. L. Rev. 325, 344-47 (1969), for a discussion of the *Parker* immunity and the necessary degree of governmental action.

[39] 424 F.2d at 31.

[40] Id. at 30.

[41] Id. at 31 (emphasis added).

[42] 317 U.S. at 350-52. The *Parker* Court indicated that the prorate program was

sized the *essentially* governmental character of the Port Authority's activity,[43] apparently rejecting the *Parker* standard that the activity must meet both elements before immunity can attach. In denying immunity, however, the *Whitten* court went beyond these two characteristics and placed its emphasis on the *degree* of governmental involvement present.[44] The *Whitten* court required the presence of significant and pervasive governmental involvement rather than mere casual governmental connection before it would grant immunity.

The court in *Hecht* first distinguished *Parker* by noting that the immunized activity in that case had involved not merely state action but state *regulatory* action.[45] The *Hecht* court apparently indicated that when governmental regulation is involved there is less need for the proscriptions of the antitrust laws. A distinguishing feature of regulated industries is that there is a lesser possibility of overreaching by private parties due to the governmental supervision. In both *Parker* and *Wiggins* public or quasi-public bodies had supervised or regulated private activities. Although *Wiggins* involved only supervision over the operation of Logan Airport, the case is similar to *Parker* in that the private activity involved was an integral part of the proper operation of the airport. In *Hecht* there was no governmental regulation of professional football nor did the Armory Board have any responsibility to evaluate the effect of its action on that industry. Furthermore, the private activity involved was not essential for the proper operation of the stadium.

In both *Parker* and *Hecht* private parties could cause a quasi-governmental body to act in a manner that would possibly restrain trade. In *Parker* commodity producers were instrumental in establishing a regulatory program which would stabilize commodity prices. Any resulting restraint upon competition was essential to the valid governmental objective of securing agricultural stability. In *Hecht*, the Redskins obtained an agreement from the Armory Board which, if carried into effect, would prevent any professional football competition in the District of Columbia for thirty years.[46] This possible restraint on competition is different in degree from that in *Parker* and, in addition, is not aimed at accomplishing a valid governmental objective. This latter fact also distinguishes *Hecht* from *Wiggins*. In *Wiggins* the base operator was contributing to the overall governmental function of the Port Authority, for the public's benefit, while in

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essentially governmental by noting that although private parties proposed and approved particular programs, the state created the machinery for establishing, adopting and enforcing them. The Court further indicated that the prorate program was uniquely governmental by noting that the antitrust implications of the regulatory scheme in the prorate program and the necessity for state penal sanctions to obtain compliance with the program made it impossible for private parties alone to carry out the program. Id.

[43] 362 F.2d at 55.

[44] 424 F.2d at 30.

[45] 444 F.2d at 937.

[46] Id. at 933-34.

Hecht, the Redskins were not directly contributing to any governmental program.

In *Parker*, the Prorate Act was clearly *uniquely* governmental and apparently *essentially* governmental so that *Parker* would seem to imply that action must be *both* uniquely and essentially governmental in order to be granted antitrust immunity. *Wiggins*, however, would seem to indicate that the *Parker* immunity would apply to *essentially* governmental functions not *uniquely* governmental, since the Port Authority's operation of Logan Airport arguably was not unique to government. In *Hecht* the Armory Board, as the lessor of R.F.K. Stadium, was not engaged in a unique governmental function. As a lessor of a football facility, the Board was engaged in a proprietary activity in that it was caring for and operating governmental property. The execution of the lease was similar to action taken by private proprietors of other sports facilities. Since the Armory Board's action was not *uniquely* governmental, the question then remains whether the Armory Board's action was *essentially* governmental. The *Hecht* court determined that it was not:

> [W]hen Congress empowered the Armory Board to . . . operate . . . [the Stadium], it was empowering the Armory Board to do what another governmental agency . . . could have done as straight forward governmental action. . . . But what Congress did not do is create the Board . . . to own and manage . . . [the Redskins]; hence . . . the Board . . . [is not] performing a function that a purely governmental agency itself could have performed.[47]

The *Hecht* court appears to imply that the Board's activity was clothed with a private character in that the Board had agreed to provide and operate football facilities for a private enterprise. This arrangement is in contrast to that of *Parker* where private producers, in implementing a regulatory program, took part in a public activity. Furthermore, Pro-Football, Inc. was not participating in a governmental function as was the base operator in *Wiggins*. The *Hecht* defendant engaged in a purely private undertaking, professional football, while merely using government facilities. Under *Parker* then, *Hecht* appears to have been decided correctly because neither uniquely nor essentially governmental action was involved.

The *Hecht* court distinguished *Parker* on another important ground. The court noted that in *Parker* the raisin prorate program was harmonious with the federal statute that had established the national agricultural regulatory programs.[48] The *Hecht* court viewed the federal statute in *Parker* as evidence of a congressional intent to allow regulatory programs to restrain trade.[49] In *Hecht* there was

[47] Id. at 939.
[48] Id. at 937.
[49] Id.

available no federal statute, other than the Stadium Act, to which the court could look to determine congressional intent. The court determined that the Stadium Act evidenced no such intent.

In granting immunity the district court in *Hecht* relied upon *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[50] and *United Mine Workers of America v. Pennington.*[51] The court of appeals, however, ruled that these two Supreme Court cases were inapposite. *Noerr* involved an alleged conspiracy by a number of railroad companies to restrain trade in long distance freight hauling. The petitioners, a group of trucking companies, alleged that the purpose of a publicity campaign conducted by the railroads was anticompetitive because it was designed both to impair the public image of the truckers and to facilitate the passage and enforcement of laws aimed at regulating the trucking industry.[52] Despite the defendants' anticompetitive motive, the Supreme Court held that the antitrust laws did not prohibit private concerted attempts to persuade the legislature or the executive to take actions resulting in a restraint of trade.[53] The Court focused upon two primary considerations in reaching its decision. The first was the Court's concern with protecting the First Amendment right to petition.[54] The Court ruled that it could not discern in the Sherman Act a congressional intent to infringe the right to petition because nothing in the Act's legislative history indicated an intention to regulate political activity.[55] Secondly, the Court reasoned that the power of the government to take action regulating trade would be greatly impaired if industry's access to government legislators and executives were to be limited.[56]

Pennington is said to have broadened the *Noerr* immunity to include concerted anticompetitive efforts aimed at persuading "public officials" to take action in restraint of competition.[57] In *Pennington* the plaintiffs alleged, *inter alia*, that the United Mine Workers and several large coal producers had conspired to restrain trade. The defendants allegedly had attempted to curtail competition by obtaining

[50] 365 U.S. 127 (1961).

[51] 381 U.S. 657 (1965).

[52] 365 U.S. at 129. The complaint alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1970). The railroads admitted that the publicity campaign had been designed to influence the passage and enforcement of laws, but denied that they were motivated by a desire to interfere with the truckers' business. Id. at 129, 131.

[53] Id. at 139-40.

[54] The First Amendment of the U.S. Constitution states that Congress shall make no law abridging the right of the people to petition the government. U.S. Const. amend. I.

[55] 365 U.S. at 137. The Court prevented any possible infringement of the right to petition by granting immunity without specifically defining the scope of that right.

[56] Id. at 136-37, 139. The Court also stated that the right of the people to inform their elected representatives should not depend upon either their intent or their financial interest. Id. at 139.

[57] See Comment, Antitrust Immunity: Recent Exceptions to the *Noerr-Pennington* Defense, 12 B.C. Ind. & Com. L. Rev. 1133, 1139-40 (1971).

from the Secretary of Labor the establishment of a minimum wage[58] for certain coal producers previously exempt from it,[59] and by urging the Tennessee Valley Authority (TVA) to curtail purchases from other exempt producers.[60] The Supreme Court held that these joint efforts to influence public officials did not violate the antitrust laws even though they were aimed at the elimination of competition.[61] The Court concluded that "[s]uch conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."[62]

In finding the *Noerr-Pennington* immunity inapplicable, the *Hecht* court placed great emphasis upon *Whitten*. The *Whitten* court had distinguished *Noerr* and *Pennington* by noting that:

> [*Noerr's*] . . . entire thrust . . . is aimed at insuring uninhibited access to government policy makers . . . . [T]he efforts of . . . [Paddock] to impose his product specifications on [an] . . . architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws . . . . *Noerr* stressed the importance of free access to public officials *vested with significant policy making discretion*. We doubt whether *Pennington* . . . would have extended the *Noerr* umbrella to *public officials engaged in purely commercial dealings*. . . .[63]

The *Whitten* court felt that the concern of the *Noerr* Court regarding the right to petition was of little significance in an essentially commercial setting.[64] In *Hecht*, since the Armory Board was not making governmental policy but rather was acting in a proprietary capacity in a commercial context, the court ruled that the Board occupied a position similar to that of the architect in *Whitten*, and found *Whitten's* interpretation of the *Noerr-Pennington* rationale applicable.

Even assuming that the Board's execution of the lease was a policy decision, in that the Armory Board had to decide between an exclusive or nonexclusive lease, this was not the type of policy decision protected by *Noerr-Pennington*. *Noerr* stressed the importance of free access to public officials vested with *significant* policy making

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[58] 381 U.S. at 660. The minimum wage would be established under the Walsh-Healy Act, 41 U.S.C. §§ 35-45 (1970).

[59] Id. at 660. The requirement that smaller coal producers comply with the minimum wage would cause an increase in their production costs thus making their coal less competitive. Id.

[60] Id. The TVA would then have to purchase from producers complying with the minimum wage. Id. at 660-61.

[61] Id. at 670.

[62] Id. The district court had instructed the jury that efforts to influence the Secretary of Labor were illegal if they constituted part of a broader conspiracy to drive small producers out of business. Pennington v. United Mine Workers of America, 325 F.2d 804, 817 (6th Cir. 1963).

[63] 424 F.2d at 32-33.

[64] Id. at 33.

discretion and *Pennington* dealt with activity that could have had industry-wide consequences. Success by the *Pennington* defendants in their attempt to effect a change in the coal purchasing policy of the TVA would affect all coal producers dealing with the TVA. In *Hecht*, however, the Redskins' lease did not have industry-wide ramifications. If the execution of the lease was in fact a policy decision, it was not one of the same magnitude as those in *Noerr* and *Pennington*.[65]

The *Hecht* court also found *Trucking Unlimited v. California Motor Transport Co.*[66] more applicable than either *Noerr* or *Pennington*. In *Trucking Unlimited* a group of truckers allegedly had used its superior financial position to oppose smaller competitors' license requests from the California Public Utilities Commission. The Ninth Circuit held that the *Noerr-Pennington* immunity was not applicable because the defendant truckers were attempting to influence nonpolicy governmental decisions. The *Whitten* court determined that *Trucking Unlimited* had limited the scope of the *Noerr-Pennington* doctrine to situations where only attempts to influence legislative or executive bodies involved in making policy decisions would be accorded antitrust immunity. The holding in *Whitten* indicates that if a quasi-public or public body acts in a policy making capacity then immunity should be granted to protect the right to petition since policy decisions usually involve basic political considerations. However, when a governmental body acts in an essentially proprietary capacity in a commercial setting, its decisions are or should be based primarily on economic, not political, factors. Since *Noerr* was concerned with protecting efforts of political persuasion, then, arguably, decisions based essentially on economic grounds should not be immune.[67] The *Hecht* court relied on *Whitten* in this regard—apparently reasoning that the primary considerations in executing the lease were economic. *Hecht* also determined that the government's ability to regulate trade, another concern of the *Noerr* court, would not be impaired in denying immunity since no policy decision to regulate trade was involved in the case.[68] *Hecht's* reliance on *Whitten* and *Trucking Unlimited* apparently was grounded in a belief that the immunity developed in *Noerr* and *Pennington* was overbroad. Both *Whitten* and *Trucking Unlimited* suggested that courts should focus upon the nature of a party's activity to determine whether it involves an attempt to influence public officials vested with significant policy making discretion of a political nature. In denying immunity, the *Hecht* court stressed both the nonpolicy and the proprietary-commercial nature of the Armory Board's action.

The court considered and rejected the argument that the Stadium

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[65] 444 F.2d at 947.

[66] 432 F.2d 755 (9th Cir. 1970), petition for cert. granted, 40 U.S.L.W. 3012 (U.S. June 1, 1971) (No. 1419).

[67] See Comment, Application of the Sherman Act to Attempts to Influence Government Action, 81 Harv. L. Rev. 847, 854-55 (1968).

[68] 444 F.2d at 947.

Act and its legislative history revealed an *express* exemption from the antitrust laws.[69] The court stated that it would find an express exemption for the action of the Armory Board only upon a showing in the Stadium Act of a clear and specific congressional intent to grant immunity.[70] The Stadium Act does provide that "[i]n order to carry out the purposes of . . . [the Act], the Board is . . . authorized *without regard to any other provision of law* . . . to determine all questions concerning the use of the stadium . . . [and] to rent or lease . . . the stadium . . . ."[71] The defendants in *Hecht* relied upon this clause to show an express exemption. In interpreting the meaning of this provision, however, the court pointed to a limitation in the Act providing that no contract in excess of three thousand dollars was to be executed without competitive bidding,[72] and stated that it would be inconsistent for Congress to exempt the execution of the lease from antitrust proscription while subjecting other contracts in excess of three thousand dollars to competitive forces. In addition, the court, in a manner similar to that of the *Whitten* court, regarded the competitive bidding provision of the Stadium Act as evidence of a legislative intent to maintain competition among private parties with whom the Board dealt.[73] The *Hecht* court also noted that had Congress intended to exclude the applicability of the antitrust laws it would have done so in statutory language as clear and specific as that used in the provision requiring competitive bidding practices.[74]

The court was unable to find any support in the Stadium Act's legislative history to show that by the clause "without regard to any other provision of law" Congress had intended to place the Armory Board's actions beyond the scope of the antitrust laws.[75] Determining that the inferences to be drawn from the legislative history supported the opposite hypothesis, the court focused on a report of the Chairman of the Senate's District of Columbia Committee, which discussed the Stadium Act. The Chairman had reported that:

> The [District of Columbia] committee felt that, inasmuch as the stadium is to be, *in the nature of a private venture*, it was more desirable that the Board be *vested with the authority to make its own decisions* as to the letting of the concessions, without placing restrictions upon the Armory Board.[76]

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69 Id.

70 Id. at 945.

71 2 D.C. Code § 1723 (1967).

72 2 D.C. Code § 1723 (1967). Subsection 3 states that the Board is authorized to acquire property and equipment and to sell or dispose of such property except that no contract for more than $3,000 shall be entered into without competitive bidding. Id.

73 444 F.2d at 945.

74 Id.

75 Id.

76 103 Cong. Rec. 13567 (1957) (remarks of Senator Bible) (emphasis added).

The court interpreted this statement to mean that, because the stadium was in the nature of a private venture for some purposes, the Committee's intention was for the Armory Board "to be free from the aegis of . . . [certain] regulations applying to government agencies which would hamper functioning as a private business."[77] Consequently, the phrase in the Stadium Act, "without regard to any other provision of law," was meant by Congress to refer only to regulations applying to government agencies, such as federal procurement regulations, not to the antitrust laws.[78]

Since Congress had *explicitly* granted antitrust exemptions in the past,[79] the *Hecht* court determined that it could not interpret the general language of the Stadium Act as bestowing an express exemption. Exemptions from the antitrust laws have generally been expressly granted by statute for governmentally supervised industries that require controlled competition.[80] Anticompetitive activity that is usually prevented by the antitrust laws is here prevented or regulated by a governmental agency. Antitrust proscription is not required since it would interfere with the governmental control.[81] Further, Congress has provided limited antitrust exemptions to both regulated and unregulated industries for special business reasons.[82] Where certain industries enjoy limited antitrust exemption, they are often subject to special legislation which parallels the federal antitrust laws.[83] In *Hecht* the antitrust laws might have interfered with governmental supervision in the sense that the Board was a supervisory body authorized to maintain and operate R.F.K. Stadium.[84] While application of the antitrust laws might have interfered with the Armory Board's complete discretion with respect to the stadium, the Board's supervisory authority was proprietary and not regulatory in nature so that its supervision could not be deemed to displace the antitrust laws in controlling anticompetitive activity. Furthermore, the *Hecht* court was able to find no special business considerations which would have justified antitrust exemption. The court was unable to discern anything in the surrounding circumstances indicating that the exclusive convenant in the lease was necessary in order to induce the Redskins

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77 444 F.2d at 946.

78 Id.

79 The Telecasting of Professional Sports Contests Act, 15 U.S.C. §§ 1291-95 (1970), is a good example of an explicit antitrust exemption. Section 1291 provides that "[t]he antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting organized professional team sports . . . by which any league of clubs participating in professional . . . [sport] contests sells . . . all or any part of the rights of such league's member clubs in the sponsored telecasting of the games. . . ."

80 See, e.g., 15 U.S.C. § 62 (1970); 46 U.S.C. § 814 (1970).

81 See United States v. Borden Co., 308 U.S. 188, 195-202, (1939), for an interesting discussion of the scope of an expressed antitrust immunity.

82 See, e.g., 15 U.S.C. § 17 (1970), in which labor organizations are given an antitrust exemption.

83 See, e.g., 15 U.S.C. § 522 (1970); 7 U.S.C. §§ 192-93 (1970).

84 2 D.C. Code § 1720 (1967).

to sign the lease. Whether the Redskins would have signed the lease without the thirty year exclusive provision is speculative.[85] However, because R.F.K. Stadium is the only suitable site for professional football in the District of Columbia, the court decided that the Redskins probably would have signed the thirty year lease even without the exclusive provision.[86] Therefore, the *Hecht* court concluded that no special business considerations existed which would justify a liberal reading of the Stadium Act.

Having concluded that the Stadium Act did not provide an express exemption from antitrust proscription, the *Hecht* court then attempted to determine whether Congress, in the Act, knowingly had adopted a policy contrary to the antitrust laws thereby impliedly exempting the Armory Board's activities. The court stated that, since both the Stadium Act and the antitrust laws were federal statutes, "the proper inquiry [is] . . . to what extent Congress has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws . . . ."[87] A similar inquiry is made when a court must determine which congressional intent prevails in a regulated industry when the antitrust laws conflict with a private action taken with the approval of the regulatory body.

In this regard, the *Hecht* court discussed two Supreme Court decisions, *Silver v. New York Stock Exchange*[88] and *United States v. Philadelphia National Bank*.[89] In *Silver*, two nonmembers of the New York Stock Exchange who had been denied telephone connections on the Exchange[90] alleged that the Exchange and several of its members had conspired in violation of Section 1 of the Sherman Act in refusing to deal. The Exchange claimed that as a national stock exchange it was a regulated industry under the Securities Exchange Act of 1934,[91] and was thereby exempt, to the extent regulated, from the antitrust laws.[92] The court in *Silver* had to reconcile the antitrust laws with a public policy, expressed in the Securities Exchange Act, which contemplated that securities exchanges would be engaged in a form of self-regulation that might produce anticompetitive effects.[93]

85 444 F.2d at 946.

86 Id.

87 Id. at 935.

88 373 U.S. 341 (1963).

89 374 U.S. 321 (1963). The *Hecht* court also cited United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) and United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964), in regard to the implied immunity issue. In both cases the Supreme Court held that the granting of broad powers to a regulatory agency did not render the antitrust laws inapplicable. 444 F.2d at 943.

90 373 U.S. at 344. The plaintiffs maintained that these telephone connections were essential to their business on the exchange floor. Id. at 344-45.

91 15 U.S.C. §§ 78a et seq. (1970).

92 Silver v. New York Stock Exch., 196 F. Supp. 209, 216 (S.D.N.Y. 1961). The Exchange argued that the plaintiffs' telephone connections had been terminated pursuant to its constitution and that its action was therefore outside the scope of the antitrust laws. Id.

93 373 U.S. at 349.

Since the Securities Exchange Act contained no express exemption from the antitrust laws, the Court stated that any repeal of the antitrust laws would have to be discerned by implication.[94] The Court held that the Securities Exchange Act did not impose upon the Exchange a duty of self-regulation so extensive and complete as to constitute an implied repeal of the antitrust laws,[95] and that, therefore, it could not immunize the Exchange from their operation.[96] The Court ruled in *Silver* that an implied repeal would be found only if necessary to allow the Securities Exchange Act to function properly and, even then, only to the extent necessary.[97] In *Philadelphia National Bank*, the Court held that bank mergers approved by the Comptroller of the Currency were not immune from the antitrust laws despite the Comptroller's power to consider competitive factors prior to approving mergers.[98] The petitioner sought an injunction under Section 7 of of the Clayton Act[99] to prevent a bank merger approved by the Comptroller. The defendants contended that the Bank Merger Act,[100] in directing the Comptroller to consider competitive factors, impliedly immunized the merger from challenge under the antitrust laws. Rejecting this argument, the Court held that the antitrust laws applied to the merger, noting that an implied repeal of the antitrust laws by a regulatory statute is strongly disfavored.[101]

Both *Silver* and *Philadelphia National Bank* involved regulatory action based on federal statutes. In the former, the Securities Exchange Act imposed upon the New York Stock Exchange a duty of self-regulation, while in the latter, the Bank Merger Act required the Office of the Comptroller of the Currency to regulate proposed mergers. In both cases the Court examined both the regulatory body's responsibility to consider antitrust matters and the pervasiveness of the regulatory pattern. In neither case was the Court able to discover in the regulatory statutes a preeminent congressional intent to preempt the operation of the antitrust laws. Since the antitrust laws serve to insure that individual businesses will compete unhindered by concerted anticompetitive actions, a court that finds an antitrust exemption without also finding an overriding and preeminent congressional intent would undermine congressional purpose. *Silver* and *Philadelphia National Bank* also indicate that preemption of the antitrust laws will not be judicially implied unless they directly conflict with a statute designed to accomplish a significant public objective. In both cases the Court ruled that even if found, an implied exemption would have been

[94] Id. at 357. The Court noted in this regard that repeals by implication are not favored. Id.

[95] Id.

[96] Id. at 360-61.

[97] Id. at 357.

[98] 374 U.S. at 351-52.

[99] 15 U.S.C. § 18 (1970).

[100] 12 U.S.C. § 1828 (1970).

[101] 374 U.S. at 348.

applied only to the extent necessary to make the particular act or program operative.

The *Hecht* court, in accord with both *Silver* and *Philadelphia National Bank*, was unable to find the congressional intent to exempt from antitrust purview action taken pursuant to the Stadium Act. The court noted as significant the fact that in both *Silver* and *Philadelphia National Bank* there existed regulatory statutes embodying governmental policy of an importance equal to that of the antitrust laws.[102] The court examined the Armory Board's responsibilities and its "supervisory" scheme and concluded that while the maintenance of a stadium for the District of Columbia was of considerable importance to the people of the district, the Stadium Act did not further a policy as important as that regulating securities exchanges or banks.[103] Since in neither *Silver* nor *Philadelphia National Bank* could the Supreme Court find an implied exemption despite the important congressional objectives embodied in the conflicting regulatory statutes, the argument that the Stadium Act impliedly preempted the antitrust laws appears spurious. Furthermore, antitrust proscription in *Hecht* would not vitiate the purpose of the Stadium Act nor make the Act's implementation substantially more difficult, for it could not be conclusively shown that the exclusive thirty year lease was essential for the operation of R.F.K. Stadium. Thus, it appears that the *Hecht* court was correct in concluding that the Stadium Act embodied no overriding congressional intent to displace the operation of the antitrust laws.

Viewed in light of the facts in *Hecht*, the shortcomings of the *Parker* immunity become evident. In *Parker* the Supreme Court did not elaborate precise criteria for determining when antitrust immunity should be granted to governmental or quasi-governmental action but instead simply categorized the regulatory process in that case as governmental action. A broad reading of *Parker* made possible the extension of immunity to many areas where the government was only remotely involved. However, the *Parker* immunity has been both explicitly defined and narrowed by *Hecht*. The court in *Hecht* refined the government immunity doctrine by suggesting that its application be preceded by a close analysis of both the *kind* and *degree* of governmental activity. The court realized that the danger present in broadly applying the *Parker* immunity was that the antitrust laws may thereby be implicitly repealed, or at least, unduly infringed. Further distinctions in both the kind and the degree of the governmental action involved will be necessary to prevent an abridgement of the antitrust laws by private parties who deal with an increasing number of state and federal governmental and quasi-governmental bodies. *Hecht* also examined the *Noerr-Pennington* doctrine and indicated that when a quasi-governmental body is acting in an essentially proprietary capacity and its decisions are based primarily on economic factors, the

[102] 444 F.2d at 946.

[103] Id. at 947.

concern of the *Noerr* Court with the right to petition is of little importance. Furthermore, *Hecht* properly evaluated and applied the criteria used by the Supreme Court in *Silver* to determine that the congressional intent expressed in the Stadium Act did not preempt that of the antitrust laws. The rationale of the *Hecht* court has considerable merit and should provide the basis for further distinctions in the area of antitrust immunity.

FREDERICK J. DEANGELIS

Administrative Law—Reviewability of Final Orders under the FIFRA—Limits on Administrative Discretion—*Environmental Defense Fund, Inc. v. Ruckelshaus.*[1]—In October, 1969, the Environmental Defense Fund, Inc. (EDF) and other public interest organizations representing ecological priorities petitioned the Secretary of the Department of Agriculture[2] under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[3] to issue notices of cancellation for the registrations of all products containing DDT and to suspend immediately those registrations because of the imminent hazard posed to the public health by widespread use of DDT[4]. The Secretary issued notices of cancellation for four uses of DDT,[5] but he deferred his decision on the remaining uses pending a preliminary study of the matter. He took no action on the request for suspension.

In December, 1969, the petitioner sought review of the Secretary's action in the United States Court of Appeals for the District of Columbia.[6] The Secretary moved to dismiss for lack of jurisdiction,

[1] 439 F.2d 584 (D.C. Cir. 1971).

[2] The functions of the Secretary of Agriculture under the Federal Insecticide, Fungicide and Rodenticide Act have been transferred to the Administrator of the Environmental Protection Agency. 5 U.S.C. App. § 2(8)(i)(1970).

[3] 7 U.S.C. §§ 135-135k (1970).

[4] The statutory grant of authority contained in the FIFRA gives the Administrator considerable discretion to determine whether the registration of an economic poison should be immediately suspended. The Administrator may order suspension when he determines that a pesticide does not conform with a provision in the FIFRA or when he finds that such action is necessary to prevent an imminent hazard to the public. The Administrator must give the affected party notice of such action and, if the party is a registrant, must afford him the "opportunity to have the matter submitted to an advisory committee and for an expedited hearing." The suspension procedure maintains the status quo and allows the registrant to submit evidence refuting any claim that the pesticide presents a danger to the public health. 7 U.S.C. § 135b(c)(1970).

[5] 34 Fed. Reg. 18827 (1969). The cancellation notices directly affected the following uses of DDT:

(a) all uses on shade trees, including elm trees, for control of the elm bark beetle which transmits the Dutch elm disease;
(b) all uses on tobacco;
(c) all uses in or around the home except limited uses for control of disease vectors, as determined by public health officials;
(d) all uses in aquatic environments, marshes, wetlands and adjacent areas, except those which are essential for the control of disease vectors, as determined by public health officials.

[6] 428 F.2d 1093 (D.C. Cir. 1970).