GOVERNMENTAL ACTION AND ANTITRUST IMMUNITY

Although statutory exemptions from the antitrust laws proliferate as government involvement in economic activity increases,[1] the courts in most instances studiously avoid creating their own exemptions.[2] When immunities from the antitrust laws have been granted by the Supreme Court, great care has been taken to ascertain that the interests of the public were under other legislative protection.[3] Yet two recent cases, exempting any transaction involving "valid governmental action," threaten to curb the effectiveness of the antitrust laws. These cases exempt not only legislatively authorized actions by government agencies but also unauthorized contracts between private parties and the agencies.

The first case, *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*,[4] shields from the antitrust laws an exclusive contract between a government agency and a private party for services within the responsibility of the agency. The second, *Hecht v. Pro-Football, Inc.*,[5] relying almost solely on *Wiggins*, extends immunity to a trade-restraining contract for the use of a public facility between a private party and the government agency responsible for managing the facility.

Hecht, Kagan, and Miller, joint venturers desiring to organize a second professional football team in Washington, D.C., sought treble damages and injunctive relief against the owners of a professional football team (the Washington Redskins), the National Football League, and the D.C. Armory Board, the public authority which manages Robert F. Kennedy Stadium in the District of Columbia. Plaintiffs saw a violation of the Sherman Act in the Armory Board's lease of the stadium to the Washington Redskins with a provision that no other professional football team could use the facility for thirty years.[6]

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[1] *E.g.*, 15 U.S.C. § 18 (1964) (exempting from the antitrust laws transactions approved by the SEC, FCC, CAB, ICC, and FPC); *see* Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV. L. REV. 847 (1968); 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 & nn.102 & 103 (1969), and sources and examples cited therein.

[2] United States v. First City Nat'l Bank, 386 U.S. 361, 368 (1967); Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213, 218 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963); California v. FPC, 369 U.S. 482, 485 (1962).

[3] *See, e.g.*, United Mine Workers of America v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); Parker v. Brown, 317 U.S. 341 (1943); Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333, 343-44 (1967).

[4] 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966).

[5] 312 F. Supp. 472 (D.D.C. 1970).

[6] Plaintiffs claimed under § 4 of the Clayton Act, 15 U.S.C. § 15 (1964) for alleged violations of §§ 1-3 of the Sherman Act, 15 U.S.C. §§ 1-3 (1964).

But District Judge Jones granted the defendants' motions for summary judgment because the exclusive lease was a valid governmental action.[7]

Judge Jones rests his opinion almost entirely on the valid governmental action rationale of *Wiggins*, the only judicial foundation for exempting trade-restraining contracts between private contractors and government agencies empowered to manage public facilities. Both decisions erroneously assume that the delegation of power to manage a public facility confers an immunity from the antitrust laws for all of the agency's actions. This assumption is based on a misreading of the three Supreme Court authorities cited in both cases:[8] *Parker v. Brown*,[9] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[10] and *United Mine Workers of America v. Pennington*.[11] Furthermore, this assumption once made precludes judicial consideration of the precise scope of the powers delegated to the government agency, and of the corollary question of legislative or executive consideration of the benefits of regulation as opposed to competition.

I. The *Parker* Exemption

The Supreme Court in *Parker v. Brown*[12] faced a challenge to a raisin marketing scheme under California's Agricultural Prorate Act, legislation designed in part to avoid debilitating competition in the industry by placing a portion of each grower's crop within the control of a committee of growers authorized to determine when conditions favored sale. The Court sustained this program only after finding that the state legislature had decided that a form of public regulation was preferable to free competition.[13] The trade-restraining activities were exempt from the antitrust laws because they were state actions. The *Parker* exception to antitrust prohibitions thus turns on the prerequisite that "[t]he state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application."[14]

By contrast, neither in *Wiggins* nor in *Hecht* was the agency delegated the legislature's power to regulate a particular facet of commerce; nor had the legislature determined that regulation was the greater good.

Although never facing the question of congressional consideration of a professional football monopoly in Washington, D.C., the court in *Hecht* does conclude that Congress impliedly authorized the granting

[7] 312 F. Supp. at 477.

[8] 362 F.2d at 55-56; 312 F. Supp. at 475.

[9] 317 U.S. 341 (1943).

[10] 365 U.S. 127 (1961).

[11] 381 U.S. 657 (1965).

[12] 317 U.S. 341 (1943).

[13] A similar reading of *Parker* is found in George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc., 424 F.2d 25, 30 (1st Cir. 1970), *discussed at* text accompanying notes 33-38 *infra*.

[14] 317 U.S. at 352.

of a long-term lease with the Redskins.[15] But neither the legislative history nor the Armory Board's enabling act itself implies authorization of an *exclusive* lease.[16] The conclusion should have been that Congress did not delegate to the Armory Board the power to make a trade-restraining contract.

But *Hecht* relied on *Wiggins*. Legislatively charged with managing Logan Airport for Boston, the Port Authority executed an exclusive ground services contract with Butler Aviation-Boston, Inc., a competitor of Wiggins Airways.[17] Although the First Circuit ruled that the contract constituted valid governmental action, the Authority's enabling statute contains no indication that the Massachusetts legislature delegated to the Authority the power to authorize a ground services monopoly at Logan Airport.[18] Nor did the court suggest that the legislative history implied such a delegation.[19]

The *Wiggins* court thus exploited the language of *Parker* defining an exemption of governmental action:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.[20]

By ignoring the reliance of *Parker* on a legislative decision to substitute regulated monopoly or oligopoly for competition, both *Wiggins* and *Hecht* permit the *Parker* exemption to cloak with immunity every contract with a government agency.

II. The *Noerr-Pennington* Exemption

Both *Wiggins* and *Hecht* cite the Supreme Court decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[21] and *United Mine Workers of America v. Pennington*[22] for the proposition that efforts by private parties to obtain favorable trade-restraining legislative or administrative action are beyond the scope of the antitrust laws.

Noerr, the earlier decision, involved a publicity campaign waged by the railroads to weaken the competitive position of the trucking industry by influencing the passage and enforcement of laws. Re-

15 *See* 312 F. Supp. at 477.

16 *See* H.R. Rep. No. 2146, 85th Cong., 2d Sess. 4-5, 12 (1958); D.C. Code Ann. §§ 2-1720 to -1729 (1966).

17 362 F.2d at 54.

18 *See* Mass. Selected Special Laws 1956, ch. 465, in 10 Mass. Ann. Laws (1967).

19 *See* 362 F.2d at 55.

20 *Parker v. Brown*, 317 U.S. at 350-51, *quoted in Wiggins*, 362 F.2d at 55-56.

21 365 U.S. 127 (1961).

22 381 U.S. 657 (1965).

versing a judgment for the truckers, the Court found that efforts to influence the passage or enforcement of legislation, regardless of anticompetitive motive, could not constitute a Sherman Act violation. First,

> the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity [to restrain trade] and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity . . . .[23]

Second, the Court feared that a contrary holding would pose substantial constitutional questions.[24]

Noerr was followed four years later in *Pennington*. As part of a conspiracy to drive small operators out of business, union officials and large coal mine operators combined to persuade the Secretary of Labor to establish a high minimum wage for employees of coal companies supplying the TVA. Rejecting the Sixth Circuit's restrictive interpretation of *Noerr*, the Supreme Court held that the right to petition public officials constituted a Sherman Act defense regardless of " 'a purpose or intent to further a conspiracy to violate a statute.' " [25] The Court remanded the case for determination of damages caused solely by the other aspects of the anticompetitive conspiracy.

In both cases the alleged antitrust violation was lobbying for government action in restraint of trade. In *Noerr* the power of the Pennsylvania legislature to consider, and of the governor to veto, a law favorable to the trucking industry was clear and needed no discussion; in *Pennington* the Court noted the Secretary of Labor's authorization under the Walsh-Healey Act to establish a minimum wage.[26] The restraint of trade sought in *Noerr* was legislative and executive; in *Pennington*, legislatively authorized. In this respect *Pennington* resembles *Parker*.[27] But in *Wiggins*, unlike *Pennington* and *Parker*, there is no indication that the legislature intended to delegate to the Port Authority its power to make an exclusive ground services contract at Logan Airport.[28] And in *Hecht*, Congress apparently did not include among the Armory Board's powers the authority to grant an

[23] 365 U.S. at 137.

[24] *Id.* at 138.

[25] 381 U.S. at 669-70.

[26] *Id.* at 660; *see* 41 U.S.C. §§ 35-45 (1964).

[27] Similar to *Parker* is the recent case of Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969), in which the Clark County Commission, acting pursuant to statutory authorization by the Nevada legislature, sold the defendant an exclusive franchise to sell garbage collection services in the unincorporated portion of the county, thereby driving the plaintiff out of business.

[28] Text accompanying notes 17-19 *supra*.

exclusive lease for Kennedy Stadium.[29] Thus, although *Wiggins* and *Hecht* did not turn on lobbying efforts, the Supreme Court's two lobbying decisions bolster the proposition that restraints of trade by government agencies are legal only when the legislature specifically empowers the agency to ignore the antitrust laws.

The proposition finds further support in the Supreme Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[30] in which the anticompetitive actions of a corporate purchasing agent of the Canadian Government were assailed. The Court refused to hold the defendant exempt from the antitrust laws apparently because the defendant was not truly a public body and was itself a principal actor in the Sherman Act conspiracy. But another reason for finding liability was that "there was 'no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium . . . .' " [31] This fact the Court considered sufficient to distinguish the case from *Noerr*, and the distinction was subsequently continued in *Pennington*.[32]

In sum, then, *Wiggins* and *Hecht* create a class of exemptions under the rubric of "valid governmental action" which has no solid foundation in *Parker, Noerr*, or *Pennington*.

III. Toward a New Test

Fortunately, a crack has appeared in the *Wiggins* doctrine. The First Circuit in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*[33] espoused much the same interpretation of the three earlier Supreme Court decisions as that urged herein. *Whitten* involved a challenge to efforts by a swimming pool builder to persuade local government agents authorized to construct pools to adopt bid specifications to which competing builders could not conform. Judge Coffin ruled that the defendant's actions fell outside the *Parker* exemption because the statutes empowering local officials to purchase pools specifically required competitive bidding, a requirement which contradicted any suggestion that the legislature had authorized the adoption of exclusionary specifications.[34]

The court correctly distinguished *Noerr* and *Pennington* on two grounds. First, the "guile, falsity, and threats" of Paddock did not constitute "an effort to influence the passage or enforcement of laws." [35]

[29] Text accompanying notes 15-16 *supra*.

[30] 370 U.S. 690 (1961).

[31] 381 U.S. at 671 n.4 (quoting *Continental Ore*, 370 U.S. at 706). For a fuller discussion of *Continental Ore*, see Comment, *American Antitrust Law and Canadian Patent Rights*, 118 U. Pa. L. Rev. 983, 1000-01 (1970).

[32] *See* 381 U.S. at 671 n.4.

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

[34] *Id.* at 31. This is the same court that decided *Wiggins*.

[35] *Id.* at 32.

Second, the bidding officials were not "vested with significant policy-making discretion;" [36] had Paddock desired a change in the legislative policy that pool construction contracts be awarded competitively, it should have approached the legislature.[37]

The decision thus recognized that an antitrust exemption for valid governmental action, or for efforts to obtain such action, depends initially on an inquiry into the validity of the action.[38] The Supreme Court had no need to discuss this question in *Parker* or *Noerr*, but it touched on it in both *Pennington* and *Continental Ore.* In assuming that the Port Authority and the Armory Board had the "power" to make exclusive contracts, rather than examining whether the legislatively granted authority extended this far, the *Wiggins* and *Hecht* courts strayed from the path of immunity charted by *Parker, Noerr,* and *Pennington.* A court should exempt agency action from the antitrust laws only after it is satisfied that the legislature specifically delegated to the agency the power to regulate by restraint of trade. Besides its validity under the Supreme Court precedents, this test is supported by substantial policy considerations. First, judicially created immunities from the antitrust laws should be strictly limited to the problems they address. In *Noerr* and *Pennington* the Supreme Court sought to alleviate the tension between the Sherman Act's prohibition of joint efforts in restraint of trade and the first amendment guarantee of the right to petition government officials. Second, innumerable federal, state, and local facilities are administered by agencies like the Port Authority and the Armory Board. Without this check, agencies governing every aspect of the public sector could make trade-restraining contracts with private parties in complete disregard of the advantages of competition. Whenever an administrative agency, chosen for its narrow expertise in operating a public facility, may exalt regulation over competition even though the legislature has neither itself weighed the merits nor decided specifically to delegate such power, the public is deprived of the protection of the antitrust laws.

The proposed standard would eliminate only the blanket immunity which the *Wiggins* and *Hecht* decisions have drawn over agency contracts. Although an agency and its private contractors would no longer obtain dismissals of antitrust complaints, a court could still find on the merits that their trade-restraining contracts fell within the rule of reason and thus did not violate the antitrust statutes. But the courts in *Wiggins* and *Hecht* never reached this question and thus denied the public the protection to which it was entitled.

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[36] *Id.* at 33.

[37] *Id.*

[38] *Id.* at 30 ("[T]he assertion that an act is 'valid governmental action . . . suggests inquiry rather than ends it.'") (quoting Comment, *supra* note 1, at 345) (deletions by the court).