SheppardMullin

Articles

FTC ALJ Dismisses Standard Setting Complaint

12.01.2003

Relying largely on the *Noerr Pennington* doctrine, an Administrative Law Judge ("ALJ") of the FTC has dismissed a Complaint against Unocal brought by the Commission staff. In a 70 page opinion issued on November 26, 2003, the ALJ held that alleged misrepresentations by Unocal to a government standard setting body about its patents were immune, and that similar allegations against Unocal with respect to private industry groups could not be adjudicated by the Commission since they involve substantial questions of patent law not within the Commission's jurisdiction. This decision represents a significant setback to the Commission's efforts to narrow the scope of the *Noerr Pennington* doctrine, and its efforts to police alleged abuses of the standard setting process.

The background for the Commission's action is as follows. In the late 1980s and early 1990s, a California state agency, the California Air Resources Board ("CARB") initiated rule making proceedings to determine regulations and standards for the composition of low emission gasoline. Participants in this proceeding included Unocal as well as other major oil refiners. CARB eventually adopted a standard which overlaps substantially with Unocal patents. The Complaint alleged that during this rule making process, Unocal failed to disclose the existence of such patents and affirmatively misrepresented that it had no proprietary interest in the standard being promulgated. It allegedly wasn't until CARB and the other refiners had adopted the standard, and the other refiners had spent millions of dollars to comply with the new CARB regulations, that Unocal obtained and disclosed its patents. When the other refiners filed suit to declare the patents invalid or not infringed, Unocal counterclaimed against the other major refiners for infringement of the patents it allegedly failed to disclose in the standard setting process. The courts found that Unocal's patents were valid and infringed, and ordered the other refiners to pay royalties which collectively could exceed $500 million. The Commission alleged that this course of conduct by Unocal was an unfair method of competition under Section 5 of the FTC Act. Unocal filed a motion to dismiss based on *Noerr Pennington* and other grounds in March, 2003, and this ALJ decision granted that motion to dismiss.

The *Noerr* doctrine is derived from two 1960s era Supreme Court decisions which essentially hold that "petitioning" conduct is immune from the antitrust laws for two reasons. First, the antitrust laws do not regulate political, as opposed to commercial, activity. Second, the First Amendment to the Constitution protects the right of parties to petition for redress of grievances, and imposing antitrust liability for such petitioning would conflict with the First Amendment. *Noerr* itself involved a publicity campaign by railroads to obtain the passage of legislation restraining competition from truckers, and *Pennington* was a joint effort by large coal companies and unions to persuade the Secretary of Labor to take steps to eliminate competition from non-union companies. *Noerr* immunity was later extended by the Supreme Court to adjudicatory and administrative proceedings in the 1972 *California Motor Transport* decision. *Noerr* immunity applies even though the clear purpose of the petitioning is to suppress or restrain competition.

The ALJ noted that the Supreme Court has a "broad view" of the *Noerr Pennington* doctrine. While fraud and misrepresentations are protected by *Noerr* immunity with respect to petitioning directed at a legislative body, misrepresentations are not condoned in adjudicatory proceedings and thus are not protected by *Noerr*. *Kottle v. Northwest Kidney Ctrs*, 146 F. 3d 1056, 1060 (9th Cir. 1998) ("the political arena has a higher tolerance for outright lies than the judicial arena does.") Here the staff Complaint asserted that the CARB rule making proceedings were adjudicatory, not legislative, and therefore Unocal's conduct was not immunized by the *Noerr* Doctrine.

The ALJ reviewed the California statutes creating and governing CARB, and concluded that it was a legislative rather than an adjudicatory body. The ALJ decision emphasized that CARB had discretion in formulating gasoline standards, had the authority to make policy, and, while CARB could conduct adjudicative proceedings, the rule making proceedings at issue in this case were not conducted in an adjudicatory fashion. Unlike adjudicatory proceedings where an agency is wholly dependent on the parties for truthful information, here CARB held workshops and hearings, solicited input from industry groups and otherwise conducted an independent investigation before issuing its standards. Thus, it was more analogous to a legislative proceeding where *Noerr* immunity applies even though the alleged petitioning includes misrepresentations and deliberate deception.

The ALJ also rejected various other arguments asserted by Complaint Counsel as to why *Noerr* immunity should not apply. The fact that the government agency was unaware that it is being asked to adopt or participate in a restraint of trade does not, according to the ALJ cause the loss of *Noerr* immunity. While the state action doctrine does require such knowledge, and a conscious decision by a government agency to displace competition, no such requirement exists for *Noerr*. The fact that *Noerr* immunity applies in the legislative context despite misrepresentations shows that, unlike the state action doctrine, the government officials need not know they was participating in a restraint of trade. The ALJ further held that the sham exception applies only when one uses a government process, as opposed to its outcome, as an anticompetitive weapon. Thus, the sham exception does not apply here since it is the CARB regulations themselves, not the process leading to them, that restrain competition by overlapping with the Unocal patents. The ALJ further distinguished the *Walker Process* case which imposes antitrust liability for fraud on the PTO since PTO proceedings are adjudicative, and thus the misrepresentation exception does apply. *See Walker Process Equipment, Inc. v. Food Mach. & Chem. Corp.*, 382 US 172 (1965). Finally, the ALJ held that *Noerr* does apply to proceedings under Section 5 of the FTC Act, noting that in prior cases the FTC itself had urged that the doctrine does apply to Section 5 proceedings, and case law holds that it applies to the antitrust laws generally.

The Complaint also alleged that Unocal made false statements to private industry groups doing research on auto emissions who reported their findings to CARB. To the extent that such groups were part of Unocal's alleged scheme to induce CARB to act, the ALJ held that this was "indirect petitioning" likewise protected by the *Noerr* doctrine. To the extent that such conduct was independent of CARB, the ALJ held these allegations involved substantial issues of patent law, mainly the scope of the patents. Since under 28 U.S.C. 1338(a) jurisdiction over patent law questions lies with the federal courts, the ALJ held that the Commission had no jurisdiction to adjudicate such issues in the context of a Section 5 proceeding.

There is little doubt that the ALJ decision will be appealed to the full Commission, and eventually wind its way through the courts. Thus, we have not heard the last word on these issues. The ALJ decision certainly does adopt a broad view of the *Noerr* doctrine but one that is consistent with many court decisions and consistent with the policy bases underlying *Noerr.* The ALJ's conclusion that the Commission lacked jurisdiction to adjudicate patent law issues is questionable, at least where such issues arise in the context of the use of

patents in an alleged scheme of anticompetitive conduct which may otherwise violate Section 5 of the FTC Act. The ALJ decision, however, may well have a substantial impact on the application of the *Noerr* doctrine in standard setting cases, and more generally on the scope of the misrepresentation exception in other types of cases involving the *Noerr* immunity.

Practice Areas

Antitrust and Competition