

16.5: Exemptions

Learning Objectives

By the end of this section, you will be able to:

- Know and describe the various exemptions from US antitrust law.

Regulated Industries

Congress has subjected several industries to oversight by specific regulatory agencies. These include banking, securities and commodities exchanges, communications, transportation, and fuel and energy. The question often arises whether companies within those industries are immune to antitrust attack. No simple answer can be given. As a general rule, activities that fall directly within the authority of the regulatory agency are immune. The agency is said to have exclusive jurisdiction over the conduct—for example, the rate structure of the national stock exchanges, which are supervised by the Securities and Exchange Commission. But determining whether a particular case falls within a specific power of an agency is still up to the courts, and judges tend to read the antitrust laws broadly and the regulatory laws narrowly when they seem to clash. A doctrine known as primary jurisdiction often dictates that the question of regulatory propriety must first be submitted to the agency before the courts will rule on an antitrust question. If the agency decides the activity complained of is otherwise impermissible, the antitrust question becomes moot.

Organized Labor

In the Clayton Act, Congress explicitly exempted labor unions from the antitrust laws in order to permit workers to band together. Section 6 says that “the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor...organizations,...nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.” This provision was included to reverse earlier decisions of the courts that had applied the Sherman Act more against labor than business. Nevertheless, the immunity is not total, and unions have run afoul of the laws when they have combined with nonlabor groups to achieve a purpose unlawful under the antitrust laws. Thus a union could not bargain with an employer to sell its products above a certain price floor.

Insurance Companies

Under the McCarran-Ferguson Act of 1945, insurance companies are not covered by the antitrust laws to the extent that the states regulate the business of insurance. Whether or not the states adequately regulate insurance and the degree to which the exemption applies are complex questions, and there has been some political pressure to repeal the insurance exemption.

State Action

In 1943, the Supreme Court ruled in *Parker v. Brown* that when a valid state law regulates a particular industry practice and the industry members are bound to follow that law, then they are exempt from the federal antitrust laws. *Parker v. Brown*, 317 U.S. 341 (1943). Such laws include regulation of public power and licensing and regulation of the professions. This exemption for “state action” has proved troublesome and, like the other exemptions, a complex matter to apply. But it is clear that the state law must require or compel the action and not merely permit it. No state law would be valid if it simply said, “Bakers in the state may jointly establish tariffs for the sale of cookies.”

The recent trend of Supreme Court decisions is to construe the exemption as narrowly as possible. A city, county, or other subordinate unit of a state is not immune under the *Parker* doctrine. A municipality can escape the consequences of antitrust violations—for example, in its operation of utilities—only if it is carrying out express policy of the state. Even then, a state-mandated price-fixing scheme may not survive a federal antitrust attack. New York law required liquor retailers to charge a certain minimum price, but because the state itself did not actively supervise the policy it had established, it fell to the Supreme Court’s antitrust axe.

Group Solicitation of Government

Suppose representatives of the railroad industry lobby extensively and eventually successfully for state legislation that hampers truckers, the railroads’ deadly enemies. Is this a combination or conspiracy to restrain trade? In *Eastern Railroad President’s*

Conference v. Noerr Motor Freight, Inc., the Supreme Court said no. *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). What has come to be known as the *Noerr* doctrine holds that applying the antitrust laws to such activities would violate First Amendment rights to petition the government. One exception to this rule of immunity for soliciting action by the government comes when certain groups seek to harass competitors by instituting state or federal proceedings against them if the claims are baseless or known to be false. Nor does the *Noerr* doctrine apply to horizontal boycotts even if the object is to force the government to take action. In *FTC v. Superior Court Trial Lawyers Assn.*, the Supreme Court held that a group of criminal defense lawyers had clearly violated the Sherman Act when they agreed among themselves to stop handling cases on behalf of indigent defendants to force the local government to raise the lawyers' fees. *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411 (1990). The Court rejected their claim that they had a First Amendment right to influence the government through a boycott to pay a living wage so that indigent defendants could be adequately represented.

Baseball

Baseball, the Supreme Court said back in 1923, is not “in commerce.” Congress has never seen fit to overturn this doctrine. Although some inroads have been made in the way that the leagues and clubs may exercise their power, the basic decision stands. Some things are sacred.

Key Takeaway

For various reasons over time, certain industries and organized groups have been exempted from the operation of US antitrust laws. These include organized labor, insurance companies, and baseball. In addition, First Amendment concerns allow trade groups to solicit both state and federal governments, and state law may sometimes provide a “state action” exemption.

Exercises

1. Do a little Internet research. Find out why Curt Flood brought an antitrust lawsuit against Major League Baseball and what the Supreme Court did with his case.

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