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2 Noerr-Pennington Rulings Affirm Narrow Scope Of Immunity

Law360, New York (March 17, 2017, 11:10 AM EDT) -- The Noerr-Pennington doctrine immunizes private parties from antitrust liability when they petition the government to adopt or enforce a law.[1] Recent Federal Trade Commission and First Circuit decisions have reaffirmed that the doctrine's application remains narrow, particularly as it applies to private conduct or actions.

Elena Kamenir

In these two recent matters, defendants asserted the doctrine as an affirmative defense in two different contexts: in connection with trademark disputes in 1-800 Contacts, and in relation to standards-setting activity that was subsequently approved by a regulatory agency in Amphastar v. Momenta. The FTC's decision in 1-800 Contacts suggests that private settlement agreements reached after petitioning the government through activities related to litigation are not immunized under the doctrine. Similarly, the First Circuit's reversal of a lower court's broader application of the doctrine in Amphastar suggests that alleged anti-competitive conduct that occurs prior to government petitioning activity is subject to antitrust scrutiny.

Russell Cohen

In the Matter of 1-800 Contacts

1-800 Contacts is an online contact lens retailer. In August 2016, the FTC filed a complaint against the retailer, alleging that it entered into "bidding agreements" for online searches that harmed competition.[2] According to the FTC, 1-800 Contacts began sending cease-and-desist letters to other online retailers "whose search advertisements appeared in response to user queries containing the terms '1-800 Contacts' (or versions thereof)."[3] After sending these letters alleging trademark infringement, 1-800 Contacts entered into agreements with competitors to settle these disputes, agreeing, among other things, to cease bidding against each others' trademarked terms.[4] One rival refused to settle, ultimately succeeding in persuading a court to reject 1-800 Contacts' trademark infringement claims.[5]

Richard Goldstein

In response to the FTC complaint, 1-800 Contacts made the novel assertion that its settlements were entitled to Noerr-Pennington immunity because its threats to sue rivals were protected conduct: "Respondent's … cease-

and-desist letters and threats to sue are incidental to litigation and fully protected. And its efforts to enforce settlement agreements are equally protected under Noerr-Pennington, because a threat to sue based on a settling party's continued trademark infringement is still a threat to sue, whether or not it follows a settlement."[6]

By contrast, FTC staff argued that Noerr-Pennington does not cover settlement agreements between private parties.[7] The staff noted that the U.S. Supreme Court's ruling in FTC v. Actavis, which held that "reverse-payment" agreements to settle patent infringement claims are not immune from antitrust scrutiny, supported the FTC's argument.[8]

The commission agreed with FTC staff. In its decision and order, the commission determined that 1-800 Contacts was not entitled to immunity under the Noerr-Pennington doctrine, emphasizing that the complaint rested upon allegations of private settlement agreements and not 1-800 Contacts' litigation activities (e.g., its cease-and-desist letters, threats to litigate, and lawsuit filings).[9]

Amphastar v. Momenta

The antitrust dispute between Amphastar, Momenta and Sandoz centered on a testing method that was adopted by a standards-setting organization for an anticoagulant drug, enoxaparin, and an underlying patent covering that method. Plaintiff Amphastar challenged the adoption of the testing method and alleged the following:

- Nondisclosure: In 2007, the United States Pharmacopeial Convention ("USP"), which sets standards that the U.S. Food and Drug Administration can enforce and that are recognized under federal law, began working on a proposed standard for testing enoxaparin ("Method 207").[10] While deciding on a standard, the USP, in accordance with its policy, evaluated whether any patent issues would arise from its adoption of the method in order to identify whether such adoption would confer an undue advantage.[11] Plaintiff Amphastar, a pharmaceutical company that markets enoxaparin, alleged that Momenta, an assignee of a particular patent covering the testing method, never disclosed its own pending patent application based on Method 207 to the USP.[12] According to Amphastar, this nondisclosure deceived the "USP into adopting a standard test method that Defendants contended is covered by Defendants' patent rights."[13] The USP adopted the method in 2009.[14] Consequently, when Amphastar received approval to sell generic enoxaparin, the FDA required it to comply with Method 207 for testing enoxaparin.[15]

- Patent Infringement: Two days after Amphastar received FDA approval, Momenta filed suit against Amphastar, alleging that Amphastar infringed on its patent rights through its use of Method 207.[16] While activities related to the litigation were pending, Amphastar was unable to sell generic enoxaparin.[17]

- Collaboration Agreement: Further complicating the issues, in 2003, Momenta had entered into a collaboration agreement with Sandoz that granted Sandoz an exclusive license to the patent.[18] Amphastar alleged that the collaboration was structured in a way that "incentivized

> [Momenta and Sandoz] to obtain and maintain themselves as the sole source of generic enoxaparin in the United States."[19]

Amphastar filed suit, alleging that the defendants acted in an anti-competitive manner by entering into the collaboration agreement, deceiving USP during its standards-setting process, and filing a patent infringement suit against Amphastar that prevented it from entering into the generic enoxaparin market.[20] Given the FDA's requirement that Amphastar use Method 207, one issue before the court was whether the defendants were entitled to Noerr-Pennington immunity.

In July 2016, the U.S. District Court for the District of Massachusetts held that the defendants' activity was immunized under the Noerr-Pennington doctrine. The court reasoned that Amphastar's antitrust injuries resulted from the FDA's actions and not from the defendants' private conduct.[21] Importantly, the court noted that the doctrine would not immunize claims of anti-competitive harm from the collaboration agreement or lack of disclosure to the standards-setting organization. But because the complaint was not based on these theories, the court granted the motion to dismiss.[22]

On appeal, the First Circuit found that the lower court erred in granting the defendants immunity under the doctrine. Though it declined to hold that the facts in the Supreme Court's Allied Tube[23] decision — which held that standards-setting associations do not constitute "quasi-legislative" bodies even though legislatures may adopt the standards that the associations promulgate, and that adoption of such standards does not immunize the conduct — squarely applied, it voiced skepticism that Noerr-Pennington immunity could attach.[24] Sidestepping the issue, the First Circuit found that defendants' misrepresentations to the USP about its conflicts voided the immunity under established Supreme Court precedent.[25] Further addressing the scope of the doctrine, the First Circuit explained that "the mere existence of a lawsuit does not retroactively immunize prior anti-competitive conduct."[26] In other words, the patent infringement lawsuit that followed did not protect the defendants' misrepresentations to the USP.[27]

Impact

At a minimum, both 1-800 Contacts and Amphastar suggest that the agencies and courts will carefully scrutinize the pleadings to evaluate the basis and timing of the alleged injury when assessing immunity for private conduct under Noerr-Pennington.

In Amphastar, the lower court emphasized the cause of the injury, that is, that the alleged anti-competitive harms flowed from the FDA's adoption of the USP's standard and not from private standards-setting conduct that occurred earlier in the causal chain. The First Circuit reversed, reasoning that misrepresentations to a standards-setting organization void the immunity. This leaves open the question of whether the First Circuit would have reached the same decision had the dispute centered around the collaboration agreement and patent infringement suit and not misrepresentations to the USP. The court's skepticism suggests that it would still reach the same result, but its opinion does not clearly address the issue.

Similarly, 1-800 Contacts suggests that once the parties reach a private settlement, their conduct is no longer shielded from antitrust scrutiny. Ultimately, both matters underscore that for Noerr-Pennington immunity to apply, the injury alleged must be tied to actual government petitioning activity rather than private conduct, regardless of whether such conduct is characterized as petitioning activity.

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[1] See generally City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R. Conference v. Noerr Motors, 365 U.S. 127 (1961).

[2] Complaint at ¶ 2-3, In the Matter of 1-800 Contacts, Inc., FTC No. 9372 (Aug. 8, 2016).

[3] Id. at ¶ 17.

[4] Id. at ¶ 18-23.

[5] Id.at ¶ 26.

[6] Memorandum of Law of Respondent 1-800 Contacts, Inc. in Opposition to Complaint Counsel's Motion for Partial Summary Decision at 5, In the Matter of 1-800 Contacts, Inc., FTC No. 9372 (Nov. 16, 2016). 1-800 Contacts also argued that its trademark litigation was not a sham, even though the FTC did not assert that it was. Id. at 5-6.

[7] Memorandum of Law in Support of Complaint Counsel's Motion for Partial Summary Decision at 4, In the Matter of 1-800 Contacts, Inc., FTC No. 9372 (Nov. 3, 2016).

[8] Id.

[9] Opinion and Order of the Commission 3-4, In the Matter of 1-800 Contacts, Inc., FTC No. 9372 (Feb. 1, 2017).

[10] Amended Complaint for Violations of the Sherman Act; Violations of the Cartwright Act; Unfair Business Practices at ¶ 32-33, Amphastar Pharmaceuticals, Inc., v. Momenta Pharmaceuticals, Inc., No. 5:15-cv-01914 (C.D. Cal. Sept. 17, 2015) (citing to a provision concerning strength, quality, or purity from an official compendium, 21 U.S.C. § 351(b), which states that a drug shall be deemed adulterated if "it purports to be or is represented as a drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls below the standard set in such compendium").

[11] Id. at ¶ 34, ¶ 41.

[12] Id. at ¶ 43.

[13] Id. at ¶ 76.

[14] Id. at ¶ 43.

[15] Memorandum & Order at 5, Amphastar Pharmaceuticals, Inc., v. Momenta Pharmaceuticals, Inc., No.16-10112-NMG (D. Mass. July 27, 2016).

[16] Amended Complaint, supra note 10, at ¶ 50.

[17] Id. at ¶ 61.

[18] Memorandum & Order, supra note 15, at 3.

[19] Amended Complaint, supra note 10, at ¶ 24-28.

[20] Memorandum & Order, supra note 15, at 13.

[21] Id.

[22] Id. at 14.

[23] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 495-96, 501-03 (1988).

[24] Amphastar Pharmaceuticals Inc., v. Momenta Pharmaceuticals, Inc., No. 16-2113, 2017 WL 876260, at * 3 (1st Cir. Mar. 6, 2017) ("[E]ven assuming the questionable proposition that Noerr-Pennington immunity would otherwise apply, it has a well-established exception for knowing '[m]isrepresentations,' at least in the administrative and adjudicatory contexts.").

[25] Id. (citing Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972)).

[26] Id. at *4 (citations omitted).

[27] Id.

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