

## Antitrust Implications of Physician Work Stoppages

The Academy of Medicine of Cleveland/Northern Ohio Medical Association (AMC/NOMA) realizes that frustration and anger among physicians is on the rise because of the recent professional liability insurance crisis. Physicians are finding it increasingly difficult to find and/or afford professional liability insurance. Physicians are searching for solutions and ways to express their frustration. To that end, physicians are seeking legislative changes to resolve the current professional liability insurance crisis.

During the debate on tort reform in Ohio, the AMC/NOMA provided testimony and input to assure the passage of meaningful legislation. In addition, we are working with other groups to find additional legislative solutions to the problem. The AMC/NOMA anticipates that in the coming months legislation will be filed to implement additional tort reform recommendations such as establishing medical review panels, creating a patient compensation fund, requiring certification of attorneys, requiring expert reports and review of claims, establishing a sliding fee scale for attorney contingency fees; and establishing other alternative dispute mechanisms.

Physicians are searching for solutions and ways to express their frustration. The level of frustration and anger among physicians has risen to the point where some physicians are now talking about participating in a work stoppage to exert pressure on the legislature to enact legislation to resolve the professional liability insurance crisis. Physicians in Ohio have seen physicians in other states participate in work stoppages to pressure their legislatures to enact legislation and are beginning to think about participating in similar work stoppages here in Ohio.

Before any physician participates in a work stoppage, there are two things physicians need to know. First, Ethical Opinion E-9.025, “Collective Action and Patient Advocacy” of the American Medical Association provides, in pertinent part that: Strikes reduce access to care, eliminate or delay necessary care, and interfere with continuity of care. Each of these consequences is contrary to the physician’s ethic. Physicians should refrain from the use of the strike as a bargaining tactic.

Second, physicians need to be aware of the fact that the Sherman **Antitrust** Act prohibits agreements between two or more persons that unreasonably restrain trade, including certain types of **boycotts** or strikes. Unilateral action by one physician, on the other hand, will not trigger the **antitrust** laws, even if that action results in a restraint of trade. Specifically, Section 1 of the Sherman **Antitrust** Act provides that: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The penalties for violating the Sherman Act are severe. The Sherman Act provides that any person violating the **antitrust** law is guilty of a felony and will be punished by a fine not exceeding \$10,000,000, if a corporation, or, if another person, by a fine not exceeding \$350,000. The **antitrust** laws also provide that any person who is injured by the **antitrust** conduct may bring an action in court and may recover treble damages. Similarly, any attorney general may bring an action to enforce the **antitrust** laws, and may also recover triple damages.

In construing the Sherman Act, the courts have held that certain types of agreements or practices between two or more persons are so plainly anticompetitive that they are conclusively presumed to be illegal. Included in this category of agreements or practices are agreements among competitors to fix prices or to restrict output. These types of agreements or practices are considered “per se” violations of Section 1 of the Sherman Act. Agreements or practices that do not fall within this category are analyzed under the “rule of reason” to determine whether, under all of the circumstances of the case, the agreement unreasonably restrains trade. Under the “rule of reason” analysis, a plaintiff must prove (1) an anticompetitive effect of the participant’s conduct on the relevant market, and (2) that the conduct has no procompetitive benefit or justification. The presumption in cases brought under the Sherman Act is that the “rule of reason” applies.<sup>1</sup>

Included under the type of agreement or practice that has been considered a “per se” violation of the Sherman Act is a boycott among competitors where the participants have agreed or conspired to participate in the boycott to raise prices or to improve their individual economic interests. A “boycott,” in its simplest aspects, is defined to be an agreement among economic competitors to sever or limit economic relations with another economic competitor or competitors. The United States Supreme Court has held that the “per se” approach is generally limited to **boycotts** “in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.”<sup>2</sup>

The federal courts have also held that **boycotts** designed to drive out competitors, to raise prices, or to achieve some economic benefit to those participating in the boycott are viewed as illegal “per se.” At the same time, the courts have held that concerted actions on non-price restrictions, or **boycotts** not designed to raise prices, but to achieve some other goal are not illegal “per se,” but, instead, are analyzed under the “rule of reason.” Some of these cases involve application of the so-called *Noerr-Pennington* doctrine. Due to the conflict between the First Amendment and the **antitrust** laws, the federal courts created an exception to the Sherman Act that provides immunity from the **antitrust** laws for joint efforts to influence government officials, including the executive, judicial and legislative bodies of the government. This exception to the Sherman Act is referred to as the *Noerr-Pennington* doctrine. The courts, however, take a narrow view of this exception so it is important that any joint actions by physicians conform to the requirements established by the courts for this exception. If the courts decide that the joint action by physicians is not genuinely aimed at procuring favorable governmental action, this immunity is not available.

There are several important federal cases that have interpreted the *Noerr-Pennington* doctrine that merit discussion. First, in one case, the court determined that an economic boycott by NOW that was politically motivated to achieve a legislative goal was not within the scope of the Sherman Act and, therefore, did not violate the **antitrust** laws.<sup>3</sup>

In that case, NOW organized an economic boycott of states that failed to ratify the Equal Rights Amendment. The court stated that it believed Congress’ concern in enacting the Sherman Act was not the elimination of **boycotts**, but the elimination of **boycotts** used by a competitor against a competitor in the business of competing. In other words, the court believed that the scope of the Sherman Act was limited to commercial **boycotts** as opposed to social or political activities. The court concluded that NOW’s boycott was not in violation of the Sherman Act. It is important to note that one of the factors used by the court in arriving at its decision was the court’s finding that the NOW boycott was “non-economic,” in that it was not undertaken to advance the economic self-interest of the participants.

In another case involving the *Noerr-Pennington* doctrine, the United States Supreme Court tried to distinguish between the degrees of **antitrust** immunity for acts of petitioning the government.<sup>4</sup>

It stated that the scope of the protection afforded by the *Noerr-Pennington* doctrine depended on the source, context and nature of the anticompetitive restraint at issue. Absolute immunity from the **antitrust**

laws will result when the restraint is the result of valid governmental action as opposed to private action. In addition, where the anticompetitive restraint results directly from private action, the restraint will not form the basis for **antitrust** liability if it is “incidental” to a valid effort to influence governmental action. The court concluded that the activity in question was not immune under the *Noerr-Pennington* doctrine because it involved a commercial activity and not a valid effort to influence governmental action.

Finally, in another case interpreting the *Noerr-Pennington* doctrine, the United States Supreme Court held that a strike by competing lawyers who performed court-appointed criminal defense work in the District of Columbia violated the Sherman **Antitrust** Act.<sup>5</sup>

In that case, the lawyers complained that their reimbursement rate for their services was too low to allow them to provide effective legal assistance to indigent criminal defendants. The court stated that the social justifications offered by the lawyers for their strike did not make their strike any less illegal, because the undenied objective of the strike was an economic advantage for those who participated in the work stoppage. The court refused to justify the work stoppage by the lawyers under the *Noerr-Pennington* doctrine because, while in *Noerr* the alleged restraint of trade was the intended consequence of the public action, in this case the boycott was the means by which the lawyers sought to obtain favorable legislation. As a result, the court found that the work stoppage by the lawyers constituted a “per se” violation of the Sherman Act.

These cases interpreting the Sherman **Antitrust** Act are very important because they demonstrate that the courts take a dim view of any work stoppage where the purpose of the work stoppage is closely tied to the individual economic interests of the participants in the work stoppage. First of all, a concerted work stoppage by competing physicians that is designed to reduce output or to improve the economic well-being of the participants, will, most likely, be viewed as a “per se” violation of the **antitrust** laws. The courts will conclusively presume these types of work stoppages to be illegal without looking into the claimed purpose or overall competitive effect of the work stoppage. On the other hand, if the purpose of the work stoppage is not closely tied to the individual economic interests of the participants in the work stoppage, but instead is tied to pressuring the legislature to enact legislation to ensure the availability and accessibility of professional liability insurance, the courts may elect to analyze the work stoppage under the “rule of reason” test and not view the work stoppage as “per se” illegal.

These cases also demonstrate that a work stoppage by competing physicians that is not designed with the sole purpose of influencing the legislature to enact tort reform legislation will not be protected under the *Noerr-Pennington* doctrine and will not be entitled to absolute immunity from the Sherman Act. If physicians participate in a concerted action to go on strike because they cannot afford the premiums for professional liability insurance or because they seek legislation to make that insurance more affordable, it is highly likely that the courts will treat the work stoppage as a “per se” violation of the Sherman Act. Work stoppages designed to improve the economic well being of the participants will be viewed as illegal. On the other hand, a concerted activity by physicians may not violate the **antitrust** laws if it is “incidental” to a valid effort to influence governmental action to enact legislation that is not designed to improve the economic well being of the participants, even though the anticompetitive activity may also have a commercial impact. In other words, if the work stoppage by physicians is the primary means by which the participating physicians intend to pressure the Legislature to enact legislation, the courts will probably view the work stoppage as illegal. If the work stoppage is only incidental to valid efforts to lobby the Legislature to enact legislation to make professional liability insurance more available and accessible, the work stoppage may not be viewed as illegal, even though the work stoppage may have a commercial impact.

In summary, it is highly likely that if physicians jointly decide to participate in a work stoppage or strike and withhold their services from hospitals and patients, even in an emergency situation, and the aim of the

strike is to improve the economic well-being of the physicians participating in the strike, the courts will treat the work stoppage as “per se” illegal, and the participants will be subject to the criminal and civil penalties available for violations of the Sherman Act. In addition, such a strike would also violate Ethical Opinion E-9.025, discussed above, because patients would be deprived of access to care and the strike would eliminate or delay necessary care. The cases discussed above clearly show that any strike designed to lower professional liability insurance premiums to make the insurance more affordable to the participants of the strike will most likely be illegal. A work stoppage cannot be designed with that goal, and must minimize any anticompetitive harm, including harm to patients. If physicians are not available to provide emergency services to patients when needed, the anticompetitive harm caused by the work stoppage may be viewed as overriding any benefit derived from the strike.

***This article is presented for educational purposes to aid physicians in their individual decision-making process in determining whether to participate in a work stoppage and should not be taken as a substitute for legal advice. Individual physicians should contact a private attorney to receive legal advice as to whether they should participate in any work stoppage. Portions of this article were reprinted with the permission of the Florida Medical Association..***

<sup>1</sup>  
Levine v. Central Florida Medical Affiliates, Inc., 72 F.3d 1538 (11<sup>th</sup> Cir. 1996).

<sup>2</sup>  
F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447 ((1986).

<sup>3</sup>  
State of Missouri v. National Organization for Women, 620 F.2d 1301 (8<sup>th</sup> Cir. 1980).

<sup>4</sup>  
Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988).

<sup>5</sup>  
F.T.C. v. Superior Court Trial Lawyers, 493 U.S. 411 (1990).