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That's Your Defense To Price-Fixing?

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Over the past few months, class action plaintiffs lawyers have responded to twoarticles we have published regarding a common practice that looks a lot like price-fixing of fees among class plaintiffs law firms in antitrust cases.[1]

The basic assertion in our two articles is that in many antitrust class actions, multiple plaintiffs law firms file duplicative cases, with each firm staking out the position in writing to the court that it is an independent actor that should be hired to represent the putative class (and, indeed, that it is adequate to do so on its own). But, each firm then fails to bid against its actual rivals by offering to lower its fees in order to induce the class to hire it (or, more precisely, the court to appoint it). Instead, the firms simply agree to work together and submit a joint fee proposal that they later present the class and the court after they complete their services. We have argued that this looks like price-fixing, and that Sherman Act Section 1 seemingly prohibits this type of per se illegal price-fixing by competitors.

Think of it is this way: If the putative class sent out a request for proposal asking 10 to 15 law firms to submit bids for the opportunity to represent it, and each firm sent in a proposal saying it was adequate for the job and should be hired — but none contained a fee proposal and, instead, the bidders shortly afterwards pulled their individual bids and submitted a joint fee proposal — that would not likely pass Sherman Act muster. Indeed, if it were a contract to build a highway or transport cargo across the ocean, or provide any other commercial good or service, it would likely result in a U.S. Department of Justice investigation and private class actions.

So far, we have not heard how the firms' conduct here is distinguishable from these obvious violations. The first response from a plaintiffs firm acknowledged that that "there is something to" the idea that this is collusion among competitors and that it was "likely valid" to consider this harmful to customers.[2] Indeed, the author noted that it is "somewhat ironic" that ostensibly independent law firms seeking to enforce the antitrust laws "maintain such cooperative relationships with their competitors in the course of doing so."[3] We agree.

More recently, a long-time practitioner from a class plaintiffs law firm that has been involved in many high-profile antitrust cases over the years disagreed with our viewthat this common practice was price-fixing.[4] The author, Daniel Small, raised two "defenses," one factual and one legal.

The factual "defense" was that there was no price-fixing when multiple law firms joined together to propose a leadership structure for carrying out the various discovery and other litigation tasks because, in divvying up the tasks, "the lawyers are not charging anybody for anything or fixing a price."

That may be true, but it ducks the issue we raised. We did not take issue with jointly proposed leadership structures. We questioned a different aspect of the firms' conduct. Each firm is unquestionably an independent entity and each publicly submits a bid to represent the class (and, in fact, claims it is "adequate" to do so). Yet, each firm fails to bid against its rivals — with lower rates — to win the business. Instead, the firms band together, get the work, and, much later in the case, submit a single fee proposal.

It is the refusal to bid against each other which is the problem, but the author did not address that. By his logic, we assume, suppliers of any good or service could respond to a request for proposal (without disclosing their prices) and subsequently withdraw their individual bids and submit a single joint price bid. We have not been able to find a case sanctioning such conduct, and Small does not cite one.

Small's second "defense" is a legal one. He argues that a refusal to bid and subsequent joint fee petition is "government-petitioning ... protected from Sherman Act liability under the Noerr-Pennington doctrine."[5] This argument is curious at best, and, notably, Small does not cite a single case holding that a joint refusal to bid is permissible simply because it is subsequently submitted to a branch of the government.

The lack of case support is not really surprising: Courts have rejected that "defense" time and time again. For example, the U.S. Supreme Court rejected it in this very context in Federal Trade Commission v. Superior Court Trial Lawyers Ass'n.[6]

In that case, the FTC brought suit against a group of Washington, D.C., lawyers who collectively refused to accept appointments under the D.C. Criminal Justice Act until the D.C. Council increased the hourly compensation for appointed counsel to a rate they all agreed upon and proposed. The lawyers argued that their conduct was immune from antitrust liability under Noerr-Pennington because it would only take effect if they were successful in petitioning the D.C. Council to increase the hourly compensation (and the council actually increased the rates under the D.C. Criminal Justice Act).

The Supreme Court flatly rejected this argument and held that the lawyers' collaborative action "constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act."[7] The court found that Noerr-Pennington did not apply to the lawyers' naked boycott and price-fixing because the lawyers' boycott "was the means by which [they] sought to obtain favorable legislation" whereas "in the Noerr case the alleged restraint of trade was the intended consequence of public action."[8]

In other words, the court clearly held that when competitors — like the class plaintiffs' lawyers here — jointly agree on prices, they cannot claim immunity simply because their price-fixing is subsequently presented to and approved by a government body.[9]

The joint conduct by class plaintiffs lawyers that we take issue with here (as the Supreme Court and a number of circuit courts recognize) is very different from classic Noerr-Pennington "lobbying" where the commercial actors are asking the legislative or judicial body to come up with its own regulatory scheme that it will impose on the industry. If a joint refusal to bid against one another and subsequent submission of a single fee proposal (exactly what the class lawyers do here) were somehow immunized under Noerr, then "every cartel could immunize itself from antitrust liability by the simple expedient of seeking government sanction for the cartel after it was up and going."[10] But that is not what Noerr applies to, and the plaintiffs'

firms here who refuse to bid against one another cannot claim immunity by simply asking the court to approve their collusive fee arrangement after the fact.

In short, we have still not heard a strong defense for a joint refusal to bid that appears to run afoul of Sherman Act Section 1, and continue to believe this type of joint action is routinely the subject of cases brought by these same plaintiffs law firms and the DOJ.

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[1] "Looks Like Price-Fixing Among Class Action Plaintiffs Firms," Law360 Competition Law, May 28, 2014; "So We Agree It's Price-Fixing, But...," Law360 Competition Law, Aug. 18, 2014.

[2] "In Defense Of Price-Fixing Among Class Action Plaintiffs Firms," Law360 Competition Law, July 3, 2014.

[3] Id.

[4] "There's No Price-Fixing Among Class Action Plaintiffs Firms," Law360 Competition Law, Sept. 4, 2014.

[5] Id.

[6] 493 U.S. 411 (1990).

[7] See id. at 422-23 (noting that the "constriction of supply is the essence of price-fixing, whether it be accomplished by agreeing upon a price ... or by agreeing upon an output, which will increase the price offered" (internal quotation marks and citation omitted)).

[8] Id. at 424–25.

[9] Courts uniformly reject Noerr-Pennington defenses where the defendants attempted to use anti-competitive practices as the means by which they petitioned the government to set higher prices. See, e.g., In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 789 ("[T]he doctrine does not authorize anticompetitive action in advance of government's adopting the industry's anticompetitive proposal. The doctrine applies when such action is the consequence of legislation or other governmental action, not when it is the means for obtaining such action."); Sandy River Nursing Care v. Aetna Cas., 985 F.2d 1138, 1141–43 (1st Cir. 1993) (finding no immunity under Noerr-Pennington for boycott and petitions by insurance companies in Maine to raise the rates for workers' compensation insurance).

[10] In re Brand Name Prescription Drugs, 186 F.3d at 789; see also Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 503 (1988) (holding that the Noerr doctrine does not extend to "every concerted effort that is genuinely intended to influence governmental action.").