



MEMORANDUM

From: Immunities and Exemptions Study Group
To: All Commissioners
cc: Andrew J. Heimert and Commission Staff
Date: May 6, 2005
Re: Immunities and Exemptions Study Plan

Issues Adopted by the Commission for Study

- A. Should antitrust immunities and exemptions be eliminated if not justified by the benefits they provide, or should they otherwise be time-limited?
- B. Should the antitrust exemptions for exporters set forth in the Webb-Pomerene Act and Title III of the Export Trading Company Act be eliminated?
- C. Should the state action doctrine be clarified or otherwise changed?
- D. Should the *Noerr-Pennington* doctrine be clarified or otherwise changed? [Defer request for comment and hearings until after FTC report issues]

Questions for Public Comment

State Action Doctrine

1. Should courts change or clarify the application of the state action doctrine?
 - A. Do courts currently interpret the “clear articulation” prong of the state action doctrine so as to immunize conduct only in circumstances in which the state intended to displace competition? Do courts unduly rely on “foreseeability” analysis in applying the “clear articulation” prong?
 - B. Should courts rely on the elements proposed by the FTC Staff’s State Action Task Force (state authorization of conduct at issue and deliberate adoption of a policy to displace competition in the manner at issue) to determine whether the “clear articulation” prong is satisfied? *See* Federal Trade Commission Staff, *Report Of The State Action Task Force* 51 (Sept. 2003) (“FTC Report”).
 - C. Should there be other changes to interpretation and application of the “clear articulation” prong?
2. Should courts change or clarify application of the active supervision prong?
 - A. Do courts currently interpret the “active supervision” prong of the state action doctrine so as to subject immunized activity to meaningful state oversight?

- B. Should courts rely on the elements proposed by the FTC Staff’s State Action Task Force (development of adequate factual record, written decision, and specific assessment) to determine whether the “active supervision” prong is satisfied? Are these elements workable in practice? *See* FTC Report at 55.
 - C. Should courts make any other changes when interpreting and applying the “active supervision” prong?
3. Should courts require different degrees of “clear articulation” by legislators and different levels of “active supervision” by executive or regulatory entities depending upon the circumstances (a “tiered approach”)?
 4. Do courts in applying the state action doctrine currently account for spillover effects (anticompetitive conduct immunized by one state that has a deleterious effect on consumers in other states)? If not, should courts address spillover effects under the state action doctrine? What standards should govern that analysis?
 5. How should courts apply the state action doctrine to various governmental entities?
 - A. Should state agencies and departments be subject to the “active supervision” prong of the state action doctrine? If so, who should actively supervise these state entities?
 - B. When should courts treat “quasi-governmental” entities as a private actor (subject to the “active supervision” prong) or as a municipality (potentially not subject to the “active supervision” prong)?
 - C. Should courts apply the “active supervision” prong to a municipality or state entity when it acts as a “market participant”? If so, how should that entity’s activities as a regulator be distinguished from its activities as a “market participant”?
 - D. Should Congress repeal the Local Government Antitrust Act of 1984?

General Immunities and Exemptions

1. Should Congress eliminate existing immunities and exemptions (and not enact future ones) unless the benefits exceed the costs?
 - A. What generally applicable methodology, if any, should Congress use to assess the costs and benefits of immunities and exemptions?
 - B. Should Congress analyze different types of immunities and exemptions differently? Are those that do not protect core anticompetitive conduct (*e.g.*, price fixing) preferable to those that exempt all joint activities? Are those that eliminate, for example, treble damages, but retain single damage liability acceptable?
 - C. Should Congress subject immunities and exemptions to a “sunset” provision, thereby requiring congressional review and action at regular intervals as a condition of renewal?
 - D. Should the proponents of an immunity or exemption bear the burden of proving that the benefits exceed the costs?

E. In conducting its general evaluation of immunities and exemptions, the Commission seeks to compile a comprehensive list of all antitrust immunities and exemptions, as well as to identify those immunities and exemptions that significantly impact commerce. Please provide any additions and/or modifications to the list of immunities and exemptions enumerated below as well as any pertinent information about impact, benefits, and costs (including references to any empirical studies quantifying such benefits and costs):

1. Agricultural Marketing Agreement Act. 7 U.S.C. §§ 608b, 608c.
2. Anti-Hog-Cholera Serum and Hog-Cholera Virus Act. 7 U.S.C. § 852.
3. Airline flight schedule exemption. 49 U.S.C. § 40129.
4. Air transportation exemption. 49 U.S.C. §§ 41308-09.
5. Baseball exemption. *See, e.g., Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972); Curt Flood Act, Pub. L. No. 105-297, § 2, 112 Stat. 2824 (1998).
6. Capper-Volstead Act. 7 U.S.C. §§ 291-92.
7. Charitable Donation Antitrust Immunity Act. 15 U.S.C. §§ 37-37a.
8. Defense Production Act. 50 U.S.C. app. § 2158.
9. Export Trading Company Act. 15 U.S.C. §§ 4001-21.
10. Filed rate/*Keogh* doctrine. *See, e.g., Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156 (1922).
11. Fishermen's Collective Marketing Act. 15 U.S.C. §§ 521-22.
12. Health Care Quality Improvement Act. 42 U.S.C. §§ 11101-52.
13. Local Government Antitrust Act. 15 U.S.C. §§ 34-36.
14. McCarran-Ferguson Act. 15 U.S.C. §§ 1011-15.
15. Medical resident matching program exemption. 15 U.S.C. § 37b.
16. Motor transportation exemption. 49 U.S.C. § 13703.
17. Natural Gas Policy Act of 1978. 15 U.S.C. § 3364(e).
18. Need-Based Educational Aid Act. 15 U.S.C. § 1 note.
19. Newspaper Preservation Act. 15 U.S.C. §§ 1801-04.
20. Non-profit agricultural cooperatives exemption. 15 U.S.C. § 17.
21. Railroad transportation exemption. 49 U.S.C. § 10706.
22. Shipping Act. 46 U.S.C. app. §§ 1701 *et seq.*
23. Small Business Act. 15 U.S.C. §§ 638(d), 640.
24. Soft Drink Interbrand Competition Act. 15 U.S.C. §§ 3501-03.

25. Sports Broadcasting Act. 15 U.S.C. §§ 1291-95.
26. Television Program Improvement Act. 47 U.S.C. § 303c.
27. United States Postal Service exemption. *See, e.g., United States Postal Serv. v. Flamingo Indus. Ltd.*, 540 U.S. 736 (2004).
28. Webb-Pomerene Export Act. 15 U.S.C. §§ 61-66.
29. National Cooperative Research and Production Act. 15 U.S.C. §§ 4301-06.
30. Standard Setting Development Organization Act. 15 U.S.C. §§ 4301-05, 4301 note.
31. Labor exemptions (statutory and non-statutory). *See, e.g.*, 15 U.S.C. § 17; 29 U.S.C. §§ 52, 101-10, 113-15, 151-169; *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

Hearings

- Four panels of approximately three hours each.
1. General overview of immunities and exemptions
 - Scholar(s)
 - Economist(s)
 - DOJ and/or FTC representative(s)
 2. Illustrative immunities and exemptions
 - Representatives from relevant industries
 - Opponents of immunities and exemptions at issue
 3. State action doctrine
 - FTC State Action Task Force representative
 - NAAG representative
 - Municipal government representative
 - Representative from state regulatory body or special purpose authority
 - Scholar(s)
 4. Noerr-Pennington doctrine
 - [To be determined]