Property Casualty Insurers Association of America
Shaping the Future of American Insurance
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Antitrust Modernization Commission
Attn: Public Comments
1120 G Street, N.W.
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RE: State Action and *Noerr-Pennington* Doctrines

Property Casualty Insurers Association of America Comments

The Property Casualty Insurers Association of America (PCI) offers the following comments concerning state action and *Noerr-Pennington* doctrines. PCI, a leading property and casualty trade association, represents over 1,000 companies that write 38 percent of the US property/casualty insurance market. PCI member companies write all lines of coverage, including automobile, homeowners, workers' compensation, surplus lines and reinsurance, in all 50 states and the District of Columbia. The membership is comprised of every type of insurance company – stock, mutual, reciprocal and Lloyds.

On behalf of our member companies, PCI respectfully submits the following comments and asks that they be made part of the official record.

State Action Doctrine

The following are PCI's general comments on the state action doctrine. Under the state action doctrine, first articulated by the Supreme Court in *Parker V. Brown*, 317 U.S. 341 (1943), state-mandated or state-directed restraints are generally exempted from anti-trust liability. While providing anti-trust immunity to the actions of states themselves the state action doctrine also shields the conduct of non-state actors undertaken pursuant to a clearly articulated state law that augments competition with a regulatory scheme. In looking to apply the doctrine to non-state parties, the courts apply the "clear articulation" and "active supervision" standards. Under the "clear articulation" test the courts seek to ensure that the state actually intended to affect marketplace competition with a regulatory scheme. The "active supervision" standard is designed to ensure that states are in fact regulating the conduct in question.

Both the "clear articulation" and "active supervision" standard have been the subject of slightly varied judicial interpretation. With respect to the "active supervision" standard, the Supreme

Court, has held that a state official must engage in a "pointed reexamination" of a pricing scheme (*California Retail Liquor Dealers Association v. Midcal Aluminum*, Inc, 445 U.S. 97 (1980)) and must exercise "independent judgment and control" (*FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992)).

The FTC State Action Task Force is recommending clarification of the "clear articulation" standard to ensure that a state truly intended to alter competition by authorizing the conduct at issue and further elaboration of the "active supervision" requirement to ensure that the requirement will prevent private entities from restraining competition absent meaningful government oversight. The Task Force is further recommending a tiered approach to the application of the "clear articulation" and "active supervision" requirements to ensure that the tests are applied most strictly when the threat to competition and consumer welfare is greatest and less strictly when the threat is less severe.

With respect to property/casualty insurance, the state action doctrine provides essential additional anti-trust protection for actions taken pursuant to state regulation, especially in light of the high degree of regulation of the business. The doctrine and regulatory framework provide substantial benefits for insurance consumers by enhancing competition.

With the above general comments on the State Action Doctrine in mind, PCI offers the following answers to questions posed in Federal Register 28905 Part V B.

1-2. PCI does not believe there should be any significant change to or clarification of application of the State Action Doctrine. In our view, regarding the business of insurance, courts generally interpret the "clear articulation" prong of the doctrine so as to immunize conduct, only where the state has actually intended to displace competition by regulation. In light of the complex nature of the business of insurance, the regulation of it and the extensive interpretative case law already in place, any such change including a "deliberate adoption" requirement could result in more harm to than benefits for consumers served by the industry.

3. As noted above, the insurance industry and its accompanying regulatory framework are complex, and the case law surrounding them has been developed over a substantial period of time. Given the occasionally cyclical nature of competition in various lines of insurance, regulatory and judicial consistency are essential. Thus the tiered approach with varying levels of clear articulation and active supervision should be subject to substantially greater study before they are adopted in light of the benefits of the currently regulatory and judicial framework.

Noerr-Pennington **Doctrine**

The Noerr-Pennington doctrine shields parties from anti-trust liability for "petitioning" the federal or state governments for action. The doctrine takes it names from two landmark Supreme Court decisions (Eastern R. Conference v. Noerr Motors, 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965)) interpreting the Sherman Act and holding no violation may be predicated upon the mere attempt to influence the passage or enforcement of laws. Petitioning under the doctrine encompasses lobbying, administrative processes and litigation and the Noerr-Pennington doctrine reserves a narrow sphere of political activity from

anti-trust law. The Noerr-Pennington doctrine is applicable even for efforts to "to restrain competition or gain advantage over competitors;" however, in cases where the action toward influencing governmental action is merely a "sham" to cover attempts to interfere with the relationships of a competitor application of the anti-trust laws is justified. Likewise, the *Noerr-Pennington* doctrine does not cover every communication to the government. Rather, *Noerr-Pennington* properly shields conduct directed toward obtaining discretionary governmental action.

The *Noerr-Pennington* doctrine plays an important role in promoting the values of federalism and the right to petition the government for redress of grievances. It enables competitors to join together in efforts to petition for legislative, regulatory or legal remedies that would otherwise be precluded under anti-trust law.

The Federal Trade Commission has created a task force to study the application of the *Noerr-Pennington* doctrine and recommend appropriate case and advocacy opportunities to clarify the law. The task force is also reviewing recommendations to (1) adopt a narrow interpretation of "petitioning," (2) extend the Walker Process exception (in which efforts to defraud the government do not enjoy anti-trust immunity) to non-legislative proceedings and (3) fully recognize an independent misrepresentation exception separate and distinct from the "sham" exception. These same issues are being examined by the federal Anti-Trust Modernization Commission.

Efforts by associations to influence legislation or regulation and to petition courts on behalf of members would be severely hampered by the removal or undue restriction of the *Noerr-Pennington* doctrine.

Respectfully submitted,

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