Conspiring to Save the Planet


By Demian A. Ordway and Peter J. Brody

Concerned that the EPA was preparing to roll back automobile efficiency and greenhouse gas standards, the State of California **announced** in July that it had reached agreement "on a voluntary framework to reduce emissions" with Ford, Honda, BMW, and Volkswagen. Importantly, the automakers agreed to apply the framework not just to those of their cars sold in California, but to all of their cars sold nationwide. The Justice Department responded by opening an **investigation** into whether the agreement violated federal antitrust law and **issued** subpoenas last month to the four automakers. Commentators elsewhere **have argued** that any antitrust action against the automakers is unlikely to succeed, and this article will not rehash their assessments. But the California case raise a more general question: how can businesses work together to advance the broader social good without violating the antitrust laws?

Answering this question is challenging because antitrust law has long viewed cooperation among competing business with great skepticism. Any effort to restrict the way in which rivals compete potentially diminishes competition itself, the social good that the antitrust laws were designed to safeguard. As the head of the DOJ's Antitrust Division recently **argued**, "[n]o goal, well-intentioned or otherwise, is an excuse for collusion or other anti-competitive behavior that runs afoul of the antitrust laws." Applying this reasoning, the Wall Street Journal's Editorial Board **argued** that the California fuel-standards deal was effectively an agreement to raise prices on traditional gas-powered vehicles and steer customers towards electric cars. As the argument goes, if consumers want more electric cars, Ford can simply make more. It doesn't need an agreement with Honda, BMW, and Volkswagen to do so unless it was illegally seeking protection from competition.

Fortunately, not all agreements among competing businesses pose the same risk under the antitrust laws. Businesses looking to cooperatively advance broader social goods like protecting the environment can do so in ways that minimize their exposure. Concerted efforts to lobby for government action are generally immune from scrutiny under the antitrust laws, as are certain instances of state-authorized conduct. Alternatively, competing businesses can pursue joint ventures with the goal of establishing non-mandatory, "green" standards or developing new eco-friendly products or services. This article briefly explores some of these strategies.

GETTING THE GOVERNMENT TO HELP – LOBBYING AND STATE ACTION

Lobbying the government is one of the few instances of competitor cooperation that is largely immune from antitrust scrutiny. As the Supreme Court explained in *United Mine Workers of America v. Pennington*, joint lobbying efforts "do not violate the antitrust laws even though intended to eliminate competition."[1]

Consistent with the *antitrust* laws, competitors can jointly hire a public relations firm, generate and distribute advertisements supporting their cause, and otherwise direct their efforts jointly towards influencing the passage of legislation or regulation to remedy the targeted social ill. Courts have even suggested that bribing government officials cannot serve as a basis for a violation of the antitrust laws when done for the purpose of bringing about government action.[2] Only joint lobbying that is a "sham" or mere cover for illegal activity will lack immunity. Under that carve-out, competitors may not, for example, abuse the judicial process by filing claims in bad-faith[3] or use lobbying itself as a means to delay a competitor's entry. For immunity to attach, the lobbyists' goal must still be government action.[4]

State legislation or regulation can also immunize conduct that has no relation to lobbying and would otherwise be illegal under federal antitrust law. Under the state-action immunity doctrine, a private entity that "acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition" can be "exempt from scrutiny under the federal antitrust laws."[5] Ford, Volkswagen, BMW, and Honda took a step in this direction when they agreed to work with California to create a cooperative public-private regulatory scheme; the **framework** is voluntary for now, but California has promised to enact it by regulation if the federal government's forthcoming emissions regulations are insufficient. And there is ample precedent for state-authorized, eco-friendly private action. In *Yeager's Fuel, Inc. v. Pennsylvania Power*

& Light Co., the Third Circuit rejected an antitrust challenge in the "residential heating market," holding that Pennsylvania's program favoring energy "'conservation, load management, and alternate energy supply products' as alternatives to expanding capacity" provided state-action immunity to the defendant utility's provision of "cash grants and other incentives [to builders and developers], and [offer to] consumers [of] a special electric rate for installation of high-efficiency electric heating systems."[6]

The legality of state-authorized restraints on competition – whether generated by purely private entities[7] or state regulatory boards that are made up mostly of market participants[8] – is judged under the two-prong test set out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* ("*Midcal*").[9] First, the restraint on competition "must be 'one clearly articulated and affirmatively expressed as state policy.'"[10] "[S]econd, the policy must be 'actively supervised' by the state itself."[11] It is not enough that the conduct exempted from antitrust scrutiny is "efficient, well-functioning, or wise." Without a clear statement and active supervision, state-action antitrust immunity will be unavailable.[12]

The benefits of state-action immunity can be substantial. If its requirements are met, conduct that would otherwise violate the antitrust laws is immunized from both private lawsuits and Federal Trade Commission claims.[13] But pursuing a strategy that seeks protection under the state-action immunity doctrine is not without risks. To ensure compliance with *Midcal*'s first prong, lobbying businesses should endeavor to develop a legislative or administrative record in support of any contemplated conduct that is facially anticompetitive. To ensure compliance with *Midcal*'s second prong, businesses should do their best to ensure that the regulating governmental entity is attentive and involved, and that policies are updated in response to changes in market conditions.[14] State officials must "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[15]

The risks posed by relying on state-action immunity, albeit outside the context of efforts to protect the environment, are illustrated by *Patrick v. Burget*. In that case, the Supreme Court considered the legality of a state-mandated program in Oregon that tasked hospitals with performing peer review of physicians working there.[16] Petitioner, a surgeon at the only hospital in the town of Astoria, was invited to join the only clinic in town, but declined and set up his own private practice.[17] Clinic physicians who also worked the hospital then complained that petitioner's treatment of one of his patients had fallen below the standard of care, and his license to practice medicine at the hospital was ultimately revoked by the hospital's peer-review board.[18] The Court held that the state-action doctrine did not protect the defendant physicians because *the state government* had not done enough to manage the peer-review system.[19] Put another way: even though the doctors had participated in a system that was (1) aimed at protecting the public from malpractice and (2) authorized by law, they were liable because the state had not exercised its supervisory authority at a granular level.[20]

In the event of litigation, mounting a defense based on state-action immunity also carries some procedural risk. Defendants bear the burden of proof, and should they fail to carry it, the *prima facie* elements of an antitrust claim may not be as difficult for the plaintiff to establish.[21] There is also a circuit split over whether the denial of state-action immunity is immediately appealable.[22] Until that split is resolved, defendants in at least the Fourth, Sixth, and Ninth Circuits may face costly discovery and protracted litigation if their defense is denied at the trial level.

DOING IT YOURSELF – CERTIFICATION PROGRAMS AND OTHER JOINT VENTURES

Of course, seeking government intervention is not the only way to minimize antitrust risk for competing businesses looking to cooperate. Federal antitrust law does not proscribe all such cooperation, just that which restrains competition and has a net anticompetitive impact.

Competitors hoping to work together to protect the environment might consider establishing a private entity whose sole purpose is to certify products that adhere to environmental standards. Well-known examples of this include the U.S. Green Building Council's **LEED** program and the Forest Stewardship Council's **certification** of responsible forest management.[23] Instead of working with California to promulgate binding regulations, Ford, Honda, Volkswagen, and BMW could have funded the creation of a certification body for cars with limited or no greenhouse emissions. Although private standards or certification bodies have been the subject of antitrust scrutiny,[24] voluntary certification, if done properly, is likely to have few antitrust concerns. By statute, standards-setting activity is "judged on the basis of its reasonableness, taking into account all relevant factors affecting competition,"[25] and private certification and standards-setting can, as the Third Circuit has recognized, create the sorts of "efficiencies" that "enhance[e] consumer welfare and competition in the marketplace."[26] As such, standard-setting and certification processes, when truly voluntary[27] and applied in a non-discriminatory fashion,[28] have been upheld by courts.

Of course, as with lobbying, certification programs cannot simply operate as a cover for conduct that otherwise violates the antitrust laws. In *In re Processed Egg Products Antitrust Litigation*, a group of chicken farms created a voluntary certification program, the "United Egg Producers Certification Program," under which producers could certify eggs as compliant if they followed certain animal-friendly guidelines, like minimum cage sizes for hens.[29] But the agreement, which certainly promoted animal welfare, was nevertheless alleged to have been a sham, the purpose and effect of which was reducing the overall supply of eggs.[30] The district court held that plaintiffs' claims were viable, and a trial on the purchasers' claims **began** in November.

More generally, competing businesses have often collaborated on joint ventures for purposes of innovating or offering new products and services relating to the environment or other broad social goods. In **2017**, for example, General Motors and Honda announced a joint venture to build hydrogen fuel cell engines at a factory in Michigan. And this past summer, Ford and Volkswagen **reached** a similar agreement to collaborate on electric and self-driving vehicle technology. Such joint ventures have a low risk of being challenged under the antitrust laws because the parties likely do not have market power, because there is no evidence that any end-products will be sold at supra-competitive prices, and because the agreements don't appear to prevent the automakers from otherwise competing with each other.[31] Moreover, courts evaluating these joint ventures should consider the likely positive benefits of the agreements, including reductions in costs, innovation, and economies of scale that allow new products to come to market.[32]

Congress has also demonstrated its support for such collaborations in the National Competitive Research Act of 1984 and the National Cooperative Research and Production Act of 1993.[33] Challenges to joint ventures registered under those statutes are guaranteed to be reviewed under the more deferential "rule of reason" standard for actions brought under the federal antitrust laws, and treble damages are unavailable to litigants seeking to challenge the ventures.[34] Thus, Ford, Honda, BMW, and Volkswagen could have collaborated (and still can) to develop greenhouse gas-reducing technologies without state involvement and still faced a low risk of antitrust scrutiny.

Nevertheless, even where joint ventures seek to develop new technologies, products, or services, participants should ensure that the venture does not function to reduce output or increase prices of non-venture products, outcomes that will be difficult to justify in the rule of reason inquiry.[35] Further, joint venture participants should ensure that their collaboration does not extend beyond the core purposes of the agreement.[36]

CONCLUSION

The strategies discussed in this article are still limited and not without risks under the antitrust laws. But for many challenges posed by environmental concerns, collaborative, private efforts may be the most productive way forward and should be given serious consideration.

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[1] 381 U.S. 657, 670 (1965).

[2] Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 203 (citing *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 378 (1991)).

[3] *See, e.g., CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 850–51 (1st Cir. 1985).

[4] *City of Columbia*, 499 U.S. at 381.

[5] *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 219 (2013).

[6] 22 F.3d 1260, 1267 (3d Cir. 1994) (quoting 52 Pa. Code § 69.31).

[7] *Phoebe Putney*, 568 U.S. at 225.

[8] *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1110 (2015)

[9] 445 U.S. 97 (1980).

[10] Id. at 105 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)).

[11] Id. (quoting *City of Lafayette*, 435 U.S. at 410 (opinion of Brennan, J.)).

[12] *N. Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1112.

[13] *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

[14] *See, e.g., Lotus Business Grp. LLC v. Flying J Inc.*, 532 F. Supp. 2d 1011, 1023 (E.D. Wis. 2007) (finding the active supervision requirement not met where Wisconsin failed to oversee costs and markup percentages in its gasoline price program, including failing to change a component of its scheme for nine years).

[15] *Patrick v. Burget*, 486 U.S. 94, 100–01 (1988); but see N.C. State Bd. of Dental Examiners, 135 S. Ct. at 1116 (noting that "day-to-day involvement" and "micromanagement" are not required).

[16] *Id.* at 96, 102.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 102.

[20] *Id.* at 102–03.

[21] *Yeager's Fuel, Inc. v. Penn. Power & Light Co.*, 22 F.3d 1260, 1266 (3d Cir. 1994).

[22] *Compare Martin & Mem. Hosp. at Gulfport*, 86 F.3d 1391, 1395–95 (5th Cir. 1996) and *Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286, 1289–90 (11th Cir. 1986) *with SolarCity Corp. v. Salt River Project Agricultural Improvement & Power Dist.*, 859 F.3d 720, 722 (9th Cir. 2017), *S. Car. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 441–47 (4th Cir. 2006), *and Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 567–68 (6th Cir. 1986).

[23] Inara Scott, *Antitrust and Socially Responsible Collaboration: A Chilling Combination?*, 53 Am. Bus. L. J. 97, 105–06 (2016).

[24] *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988).

[25] 15 U.S.C. § 4302.

[26] Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 309 (3d Cir. 2007); see also Hajin Kim, 22 N.Y.U. Envt'l L. J. 181, 194–99 (2015) (providing an overview of the pro-competitive benefits of environmental certification).

[27] *See, e.g., United State Bd. of Oral Implantology v. Am. Bd. of Dental Specialties*, 390 F. Supp. 3d 892, 905–07 (N.D. Ill. 2019).

[28] *ECOS Elecs. Corp. v. Underwriters Labs.*, 743 F.2d 498, 501 (7th Cir. 1984); *Eliason Corp. v. Nat'l Sanitation Fdn.*, 614 F.2d 126, 129–30 (6th Cir. 1980). *See also* Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 Yale J. Reg. 147, 199–200 (1993).

[29] 902 F. Supp. 2d 704, 713 (E.D. Pa. 2012).

[30] 206 F. Supp. 3d 1033 (E.D. Pa. 2016).

[31] *See, e.g., Texaco Inc. v. Dagher*, 547 U.S. 1, 5–6 (2006) (approving a joint venture where defendants "participated in [the relevant] market jointly through their investments in [the joint venture]," rather than as competitors).

[32] *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1334–35 (Fed. Cir. 2010); see also Federal Trade Commission and Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* ("J.V. Guidelines") at 14–15 ("Most [joint research] agreements are procompetitive, and they typically are analyzed under the rule of reason," but noting that this rule is not absolute).

[33] *See* 15 U.S.C. §§ 4301–06.

[34] 15 U.S.C. §§ 4302, 4303(a), 4304(a)(2).

[35] Areeda & Hovenkamp § 2101; *see also* Scott, 53 Am. Bus. L. J. at 139–40(describing a series of informal private agreements related to the conservation of fishing stocks, which were approved by the federal government on the assumption that overall output would not decline).

[36] *Cf. Dagher*, 547 U.S. at 7–8.