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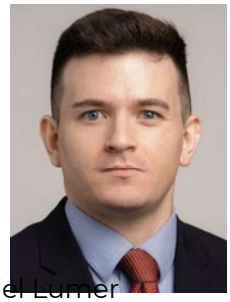
Is ESG Conduct Exempt From Antitrust Scrutiny?

By Joel Mitnick and Daniel Lumer (March 27, 2023)

In the past year, corporate efforts to advance environmental, social and governance objectives have drawn increased antitrust scrutiny.[1]

Most prominently, Republican members of Congress and state attorneys general have launched antitrust investigations into the ESG-related activities of several financial services industry coalitions, such as the Glasgow Financial Alliance for Net Zero and Climate Action 100+.[2]

While federal antitrust enforcers have not signaled that they are similarly targeting ESG efforts, Federal Trade Commission and U.S. Department of Justice officials have stated that there is no "ESG exemption" from otherwise anti-competitive activity.[3]



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However, the Noerr-Pennington doctrine does provide an exemption for certain forms of coordinated political activity.

Far less settled and discussed is the scope of an exemption for noncommercial boycotts, which may be described generally as concerted refusals to deal with primarily noneconomic objectives.

The noncommercial boycott defense could be applied as an ESG exemption to horizontal efforts aimed at advancing sociopolitical objectives, such as reductions in oil and gas investments.

This article begins with a brief summary of the Noerr-Pennington doctrine and an overview of boycott liability, before explaining the noncommercial boycott exemption and its potential, but still unsettled applicability, to ESG-related conduct.

Grounded in the First Amendment's protections of political speech and freedom of association, the Noerr-Pennington doctrine exempts efforts to "petition the government" from antitrust liability, regardless of the resulting effects on competition or underlying intent.

Among the activities that fall squarely within the zone of protected conduct are public relations campaigns, lobbying efforts and legal action. Protections for these so-called petitioning activities are regarded as settled law, and participants may coordinate these activities without any risk of antitrust liability, so long as the petitioning conduct itself is not a "mere sham" wielded to interfere directly with competition.

Unlike petitioning activities, commercial boycotts are not shielded by the Noerr-Pennington doctrine, although the degree of risk depends in part on whether the applicable legal standard is the per se rule or the rule of reason.

In NYNEX Corp. v. Discon Inc., the U.S. Supreme Court held in 1998 that a boycott can only be deemed per se unlawful when the competitive harm stems from a horizontal agreement.[4] The justices previously stated in their 1982 decision in Northwest Wholesale Stationers Inc. v. Pacific Stationery & Printing Co. that it may also be necessary for the horizontal competitors to collectively possess market power or unique access to a necessary

resource.[5]

The high court has otherwise provided limited and inconsistent guidance as to when boycotts are per se unlawful or instead subject to a rule of reason analysis, and lower courts have varied in their approaches as a result.

Still, under a rule of reason analysis, the boycotting parties bear the burden of demonstrating that the boycott's pro-competitive effects outweigh its anti-competitive effects; it is the exception, rather than the norm, for defendants to succeed in doing so.

Thus, even where per se liability may be avoided, boycotts create significant antitrust exposure for their participants. That may include firms that engage in coordinated refusals to deal with businesses that fail to meet ESG standards.

For example, boycott liability may be applicable to coordinated divestments from fossil fuel companies or horizontal refusals to deal with suppliers that contract with third parties lacking certain diversity or labor standards.

However, courts arguably could recognize an affirmative defense for boycotts motivated by ESG objectives.

In a line of decisions beginning in 1982, the Supreme Court identified an exemption to liability for noneconomic boycotts that, like the Noerr-Pennington doctrine, is predicated on First Amendment protections.

The exemption was first recognized in NAACP v. Claiborne Hardware Co., a 1982 Supreme Court case that concerned the legality of an NAACP-led boycott of white-owned Mississippi businesses that was initiated in 1966 in response to continued segregation.[6]

The court held that the boycott was exempt from antitrust liability because its purpose "was not to destroy legitimate competition" but rather "to force governmental and economic change."[7] Particular emphasis was placed by the court on the boycotters' civil rights objectives and lack of economic self-interest, as well as the absence of competition between the boycotters and targeted businesses.

Following Claiborne, the high court issued several decisions in which it reaffirmed that noncommercial activity is exempted from liability, but it denied the exemption's application to the challenged conduct.

In FTC v. Superior Court Trial Lawyers Association, the U.S. Court of Appeals for the D.C. Circuit had held in 1988 that under Claiborne, liability could not be imposed against a Washington, D.C., trial lawyers association for its boycott of public defense services in pursuit of higher attorney fees because the boycott was a form of political speech.[8]

Reversing the D.C. Circuit, the Supreme Court in 1990 concluded that the association's demands constituted a primarily economic objective rather than a political issue affecting the quality of representation that could be provided, and that the exemption was therefore inapplicable.[9]

Two years earlier, the justices in 1988 also denied the exemption's application in Allied Tube & Conduit Corp. v. Indian Head Inc., which concerned efforts by steel industry members of the National Fire Protection Association to prevent the association from enacting codes that would have benefited plastics manufacturers competing in the same markets.[10]

The Supreme Court held that boycotts undertaken in private standard-setting processes were not immune from antitrust liability and that the codes' influence on fire safety laws and regulations did not render the steel companies' objectives noncommercial.

The high court has made clear that noncommercial boycotts are exempt from antitrust liability, but it has been reluctant to apply the noncommercial designation.
Its jurisprudence has limited noncommercial activity to conduct primarily motivated by noneconomic interests, although an analytical framework has yet to be defined.
Under the precedent that does exist, however, participants in ESG-related boycotts could make several arguments in favor of the exemption's applicability.
In the above example of coordinated divestments from fossil fuel companies, the participating financial services firms may argue that their environmental "E" conduct is primarily motivated by noneconomic objectives, such as sustainability or climate change mitigation.
Moreover, the participants could also claim that such a boycott is noncommercial because it is not seeking changes in pricing and that financial services firms do not compete with oil and gas companies.

Similarly, industries that develop social "S" guidelines would seem to fit squarely within the civil rights holding of Claiborne. On the other hand, competitor agreements on governance "G" principles may be more difficult to fit within the noncommercial boycott rubric.
That said, little guidance exists as to how courts should distinguish noneconomic and economic interests, and the Supreme Court has yet to apply the exemption in any antitrust cases following Claiborne. Normative and practical concerns about the purposes and enforcement of antitrust laws, as well as safeguards for political speech, are also likely to be considered.

Given the lack of precedential clarity, it remains to be seen whether courts will exempt ESG-motivated boycotts from antitrust liability and if so, what criteria will be applied.
Competitors cannot, and should not, assume that their participation in boycotts will be shielded from liability by ESG objectives. At the same time, state attorneys general challenging such alleged boycotts may be on shaky ground.

The applicability of the noncommercial boycott exemption to ESG conduct remains an open question, and its resolution could have important implications for both antitrust enforcement and First Amendment protections.

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should not be taken as legal advice.

[1] Joel Mitnick & Daniel Lumer, Antitrust Risks of ESG Initiatives: Rhetoric vs. Reality, The National L. Rev. (Jan. 31, 2023), https://www.natlawreview.com/article/antitrust-risks-esg-initiatives-rhetoric-vs-reality.

[2] Republicans Map Out Their Agenda On ESG, Competition Pol'y Int'l (Dec. 21, 2022), https://www.competitionpolicyinternational.com/republicans-map-out-their-agenda-on-esg/; Kyle Campbell, Climate politics at heart of state probes into big banks, Am. Banker (Oct. 23, 2022), https://www.americanbanker.com/news/climate-politics-at-heart-of-state-probes-into-big-banks.

[3] Lina Khan, ESG Won't Stop the FTC, Wall St. J. (Dec. 21, 2022), https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135; Andrew Goudsward, Compliance Hot Spots: GOP Eyes ESG as an Antitrust Issue, Law.com (Nov. 9, 2022), https://www.law.com/2022/11/09/compliance-hot-spots-gop-eyes-esg-as-an-antitrust-issue-another-doj-crypto-seizure-sidley-partner-jumps-to-main-justice/.

[4] NYNEX Corp. v. Discon Inc., 525 U.S. 128 (1998).

[5] Nw. Wholesale Stationers Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 298 (1985).

[6] NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

[7] Id. at 914.

[8] Superior Court Trial Lawyers Ass'n v. FTC, 856 F.2d 226 (D.C. Cir. 1988), rev'd in part, 493 U.S. 411 (1990).

[9] FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990).

[10] Allied Tube & Conduit Corp. v. Indian Head Inc., 486 U.S. 492, 50809 (1988).