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What are the Available Exemptions to Antitrust Liability?

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Congress and the federal courts have—over time—created **several exemptions or immunities to antitrust liability.**

The **US Supreme Court** in **National Society of Professional Engineers v. United States**

explained that “The Sherman Act reflects a legislative judgment that ultimately

competition will produce not only lower prices, but also better goods and services.” **435 U.S. 679**, 695 (1978). And “[t]he heart of our national economy long has been faith in the value of competition.” *Id.*

National Society of Professional Engineers holds, effectively, that those that think that they should not be subject to competition—for whatever reason—don’t get a free pass.

But there are several areas that do have limited exemptions to federal antitrust liability. Importantly, however, the US Supreme Court has repeatedly emphasized that courts should narrowly interpret these exemptions.

Here are the primary antitrust exemptions created by Congress and the federal courts:

State-Action Immunity. **State-action immunity** comes up a lot at **Bona law**, as we work hard to **enforce the federal antitrust laws against anticompetitive state and local conduct**. This exemption allows certain state and local government activity to avoid antitrust scrutiny. Lately, the US Supreme Court has narrowed the doctrine, **including for state licensing boards that seek its protection when sued under the antitrust laws**

(North Carolina State Board of Dental Examiners v. Federal Trade Commission).

Bona Law also advocates a **market-participant exception to state-action immunity**, but the **courts are split on that issue**.

Filed-Rate Doctrine. **The filed-rate doctrine is a defense to an antitrust action** that is premised on the regulatory rates filed with a federal administrative agency. In many regulated industries (like insurance, energy, shipping, etc.), businesses must, generally, file the rates that they offer to customers with federal agencies. The filed-rate doctrine eliminates antitrust liability for instances in which, to satisfy the antitrust elements, a judge or judge must question or second guess the level of these filed rates (i.e. that they included overcharges resulting from anticompetitive conduct).

Business of Insurance. The **McCarran-Ferguson Act** exempts certain acts that are the business of insurance and regulated by one or more states from antitrust scrutiny. **You can read more about the McCarran-Ferguson Act and its requirements at The Antitrust Attorney Blog**.

Baseball. That's right—**there is a baseball exemption to antitrust liability**. This is a judge-made doctrine developed long ago. The other sports don't have an antitrust exemption and the question of whether baseball should have one comes up periodically. If you want to learn more, **you should read the five-part series on baseball and antitrust** that **Luke Hasskamp** authored.

Agricultural Cooperatives. The **Capper-Volstead Act** provides a limited antitrust exemption to farm cooperatives. Under certain circumstances, this Congressional Act allows farmers to pool their output together and increase their bargaining power against buyers of agricultural products. You can read more about this in **Aaron Gott's article on the Capper-Volstead Act**.

The Noerr-Pennington doctrine. The Noerr-Pennington immunity—named after two US Supreme Court cases—is a limited antitrust exemption for certain actions by groups or individuals when the intent of that activity is to influence government actions. The Noerr-Pennington doctrine can apply to actions that seek to influence legislative, executive, or judicial conduct. There is, however, an important sham exception to Noerr-Pennington immunity that often comes up in litigation.

You can learn more about the Noerr-Pennington doctrine and antitrust liability here.

Statutory and Non-Statutory Labor Exemptions. The statutory labor exemption allows labor unions to organize and bargain collectively in limited circumstances, including requirements that the union act in its legitimate self-interest and that it not combine with non-labor groups. The non-statutory labor exemption arrives from court decisions that further exempt certain activities that make collective bargaining possible, like joint action by employers that is ancillary to the collective bargaining process.

You can read more about both the statutory and non-statutory labor antitrust exemptions here.

Implied Immunity. Implied immunity occurs in the rare instances in which there is no express antitrust exemption, but the anticompetitive conduct falls into an area of such intense federal regulatory scrutiny that antitrust enforcement must yield to the pervasive federal regulatory scheme.

The typical area where this comes up is with the federal securities laws, which is a good example of pervasive federal regulation. The US Supreme Court case to read for this antitrust exemption is **Credit Suisse Securities (USA) LLC v. Billing**, from 2007.

Keep in mind that courts do not easily find implied immunity of the antitrust laws—there must be a “clear repugnancy” or “clear incompatibility” between the antitrust laws and the federal regulatory regime.

Export Trade Exemptions. A little-known exemption involves export trade by associations of competitors. This antitrust exemption arises primarily from the Webb-Pomerene Act and the Export Trading Company Act. **These FTC and DOJ guidelines provide more information about this antitrust exemption.**

Foreign Sovereigns. This is less an antitrust exemption than a set of doctrines that developed around lawsuits against foreign governments.

Foreign Trade Antitrust Improvements Act (FTAIA). This poorly worded and confusing Congressional Act is not so much an exemption as an interpretation of the extraterritorial application of the federal antitrust laws. It comes up quite often.

Primary Jurisdiction. Primary Jurisdiction is not an antitrust exemption, but many sources list it as related to exemptions. This doctrine allows a court to stay an action, while a federal regulatory agency makes some initial determinations.

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