STANDARD-SETTING

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1. Introduction

a. standard-setting is Janus-faced: it may both benefit and impede effective competition; the antitrust issue is whether adoption of standards and their implementation are being used to exclude competitors

b. conflicting antitrust rules: private approval of standards is measured under rule of reason (i.e., whether likely competitive effects outweigh benefits); while the application of standards after adoption as codes by government is reviewed under *Noerr* (i.e., does the injury result from private conduct or is it due to a "petition" for government action?); as applied in the circuit courts, *Noerr* often immunizes standard-setting controlled by incumbent industries from effective antitrust scrutiny (private challengers often are newcomers without data and resources; government agencies reluctant to challenge exclusionary practices where success unlikely under current law)

2. Economic Issues

a. efficiency enhancing: standard-setting "on the merits" can be efficiency enhancing and can provide major support for innovation and market competition: by providing an agreed-upon "base" or by ensuring product quality, it increases output and the number of rivals, fosters innovation, reduces price, etc.

b. exclusionary effect: but if misused, standard-setting can block entry and increase costs by excluding new innovative products and services, especially if incorporated in governmental codes; see Robert Bork, *The Antitrust Paradox* ch. 18 (1978) ("predation by abuse of governmental procedures . . . presents an increasingly dangerous threat to competition")

   i. government is the largest purchaser in the economy and standards often affect its purchases (e.g., highway storm drainage -- Europe uses almost entirely polyethylene pipe; U.S. uses principally concrete pipe because primary standard-setting groups have not certified plastic pipe with resulting substantial overcharge in billion dollar annual market)

   ii.. the effect of standards is equally significant in private sector (e.g., steel conduit for electrical wiring versus PVC electrical conduits; a long-term battle where codes barred use of cheaper plastic products)

c. government adoption of private codes can play a critical role in their effect on competition

3. **Exclusion by Standard-Setting**

a. common occurrence: standards can and are often used to exclude newcomers and and block innovation of rivals, see 1983 FTC Staff Report, *Standards and Certification*; see also 1996 FTC Staff Report, *Competition Policy in the New High-Tech Global Market Place*

b. exclusionary impact enhanced by government adoption of codes: "cartels" imposed by law are durable and difficult to dislodge

c. exclusion by express and covert agreements or self-interested strategic action: while express agreements may occur, misuse of the standard-setting process generally is more subtle; typically the exclusion is achieved by nonpublic cooperation/coordination among incumbent producers (often through their trade associations) even though the decision by the standard-setting organization may appear to be an objective, merits-based analysis of the proposed standard by a neutral group; industry participation is justified because of its experience and expertise; disputes among industry insiders/outsiders often clouded because there invariably is some basis for challenging new products or services on the merits and experts often disagree

d. inherent vice of consensus standards where industry members participate as voting or committee members: standard-setting groups generally rely on a "consensus" process whereby adoption requires a supramajority and no written "negatives"; this process is justified as necessary to ensure that changes reflect good science validated by experience; under the consensus process, industry representatives typically are not limited to outside presentations but rather participate as voting members of the standard-setting body or of its committees and subcommittees; competitors thus in fact can manipulate the process by controlling the information provided and by massing votes or individual "nonacquiescence"; so-called "balanced committee" protections often are overcome by supramajority requirements, by allowing industry members to dominate committees from which all changes must emanate, and by permitting individual "negatives" (even from competing industry representatives) to delay the decision by sending the matter back once again for reconsideration – although each of these requirements can be justified if not available to competitors (or their agents)

4. **Primary Legal rules**

a. Adoption of Standards: *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988)(packing of meetings of National Fire Protection Association, a private association, by producers of steel conduit to vote against inclusion of a rival's plastic conduit product as an approved product in model fire code)

i. standards do not constitute illegal concerted refusals to deal if "based on the merits of objective expert judgments through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling competition" (486 U.S. at 501)

ii. damages award upheld because privately developed standard caused independent market place harm by stigmatizing the product as unsafe and unacceptable; however, the Court suggested that *Noerr* otherwise would have immunized damages caused by government implementation of standard

b. Implementation of Standards: *Sessions Tank Liners, Inc. v. Joor Mfg, Inc.*, 17 F.3d 295 (9th Cir. 1994) (defendant's participation and "deliberate misrepresentations" in voting on exclusion of a competitor's product in standard adopted by the Western Fire Chiefs Assn did not result in antitrust liability because standard did not create public stigma and cause competitor's exclusion; damages not recoverable because injury caused by the adoption of the Western Fire Chiefs' Association's standard in state fire codes and thus it was within *Noerr*)

i. the court's primary rationale was that *Noerr* does not permit judicial deconstruction of decision-makers' actions to determine whether plaintiff's injuries were the result of an "intervening cause"

ii. *Noerr* immunity applies "[b]ecause the only anticompetitive injuries that Sessions [the plaintiff] complains of are the direct result of governmental action" (17 F.3d at 301)

5. **Critique**

a. *Noerr* immunity, as interpreted in *Indian Head*, applies to the process by which the government is persuaded to adopt the code provision -- and even then there is a "sham" exception, see *Professional Real Estate Investors, Inc. v. Columbia Pictures, Industries*, 508 U.S. 49 (1993)(*Pre*)

b. *Noerr* should not be expanded, as the 9th Circuit did in *Joor Mfg*, to cover private conduct which caused the private standard-setting body to adopt the

proposed standard; the better view is reflected in *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781, 789 (7th Cir. 1999)(*Noerr* immunity applies when the anticompetitive effect is the consequence of government action, not when it is the means of obtaining it)

c. Thus, an abuse of the standard-setting process by private entities (whether through packed meetings, as in *Indian Head*, or "deliberate misrepresentations," as in *Joor Mfg*) which has the effect of excluding rivals should be condemned under usual rule of reason standards applicable to concerted refusals to deal

6. **Recommendations**

a. FTC and DOJ should police and prosecute private actions excluding rivals through abuse of standard-setting process: enforcement resources should be focused on abuses of the standard-setting process by private parties which adversely affect entry and competition; this program should extend beyond gross abuses (such as packed meetings or deliberate misrepresentations) and include self-interested actions by industry representatives to control the agenda or the decision-making process; once the plaintiff establishes the likelihood of abuse of position, the defendant should have the burden of showing that no such abuse occurred (or perhaps that the objections were based on sound science or engineering, cf. *PRE* (application of objective standards for evaluating allegedly sham litigation))

b. rulemaking or adjudication by FTC to challenge consensus processes used by standard-setting organizations that are readily subject to abuse; the rule should prohibit voting or direct participation as nonvoting members by economically interested industry participants; substantive rulemaking as authorized by 15 U.S.C. 46(g), see *National Petroleum Refiners' Assn v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), which follows APA notice-and-comment procedures per 5 U.S.C. sec. 553, would be the more efficient and fair method for establishing such a rule because the rule would have the force of law, the process would allow standard-setting organizations to comment on the rule which would have prospective effect only, and the FTC's rule would be reviewed under the deferential test applied under *Chevron* step two since the statute is "silent or ambiguous with respect to the specific issue," see *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); in particular, the rule should make clear that it is an antitrust violation for an interested industry participant to control the agenda or decision-making process

c. reinterpret *Noerr's* protection for petitions to government as being limited

to the subsequent presentation of the proposed standard to government for adoption as a legally enforceable code or as a standard to be used by the government itself, and reject the interpretation in *Joor Mfg* that presentation of the petition breaks the chain of causation of the plaintiff's injuries; at a minimum, expand the "sham exception" to *Noerr* as encompassing tainted standards (at least where, as in *Joor Mfg*, the private party promoted the defective standard to government agencies knowing that it was based on deliberate falsehoods or a corrupted process); under this proposed interpretation, *Noerr* immunity would not attach to anticompetitive conduct used to persuade the private standard-setting organization to adopt the tainted standard; i.e., it is the "Greenbook" in Southern California and the "Orangebook" in Washoe County Nevada -- both published by private standard setting entities -- that result in the exclusion of products and services not approved in those standards, not the fact that government agencies made the purchase decision; government agency reliance on the private standard is not protected "petitioning" under *Noerr*