

Legal Alert

July 15, 2011

Michael R. King
mking@gblaw.com
602-256-4405

Lies About The Competition

QUESTION: HOW CAN I LIE ABOUT MY COMPETITOR TO DESTROY ITS BUSINESS PLANS AND GET AWAY WITH IT?

ANSWER: LIE ABOUT YOUR COMPETITOR IN A ZONING HEARING OR ANOTHER LEGISLATIVE FORUM!

In 2004, Mercatus Group, LLC planned to build a medical office building in the Village of Lake Bluff, Illinois. Mercatus wanted to work with Evanston Northwestern Healthcare to put the medical office building on land that had been an automobile dealership. Unfortunately, Lake Forest Hospital thought the physician center planned by Mercatus Group would be a “huge threat” to Lake Forrest Hospital’s business.

Lake Forest Hospital launched a full-scale attack on the Mercatus project! The Hospital lobbied members of the Lake Bluff Board of Village Trustees, individually and at Village Board meetings, to deny the approvals necessary for construction of the medical office building. In addition, the Hospital began a public relations campaign to put political pressure on the Village Board to oppose the proposed new medical facility. The Hospital also told Evanston Northwestern Healthcare to stay the heck out of Lake Bluff! Along the way, the Hospital made numerous derogatory statements about both Mercatus and Evanston Northwestern Healthcare. The Hospital even went so far as to figure out which physician practice groups planned to move into the new medical office building and offered those physician groups incentives to stay out of the new facility.

Not surprisingly, the Hospital was successful in torpedoing the plan for the new medical facility. The physician groups cancelled their agreements to move into the new office building. The Village Board denied the necessary approvals for the new facility. Evanston Northwestern Healthcare terminated its deal with Mercatus. The Hospital successfully kept a competitor from opening in its market!

Why wasn’t this a violation of antitrust laws? Because the First Amendment of the Constitution prohibits Congress from making laws restricting the “right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” A precept known as the Noerr-Pennington doctrine protects those First Amendment rights by making petitioning activities immune from liability under certain laws, including federal antitrust laws.

But Mercatus said the Hospital lied in its claims about what would happen if the medical office building opened! How can it be okay to lie about the competition in order to preserve your monopoly? After all, the original Noerr Motor Freight case said:

There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

Generally, two kinds of conduct are viewed as shams that are exceptions to the Noerr-Pennington immunity: (1) sham lawsuits; and (2) fraudulent misrepresentations. But the fraud exception only applies in adjudications. As the Seventh Circuit Court of Appeals quoted in the case of Mercatus Group, LLC v. Lake Forest Hospital:

A publicity campaign directed at the general public, seeking legislative or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods.

So, if you are in a zoning or other legislative hearing, you can use unethical and deceptive practices, in fact lie about your competition, and get away with it! As the Court concluded, “In the end, the vast majority of the conduct of which Mercatus complains was a legitimate exercise of the Hospital’s right to petition the government for redress, regardless of how dishonest or distasteful that conduct might have been.”

Keep in mind that lying about your competitor to drive it out of business may still get you sued, if your unethical or deceptive behavior is not in a political setting. Laws against unfair competition, false advertising, defamation, tortious interference with economic advantage, trade libel or disparagement may still give your competitor damages for your bad behavior! If you need help finding the line between permissible and impermissible competition, please call me.