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The Erosion of the Noerr Pennington Immunity.

THE EROSION OF THE *NOERR PENNINGTON* IMMUNITY

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I. INTRODUCTION

In 1961, the United States Supreme Court held that sections 1 and 2 of the Sherman Antitrust Act[1] did not apply to concerted efforts to influence the government into enacting and enforcing

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1. 15 U.S.C. §§ 1-7 (1975). Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1975), prohibits "[e]very contract, combination . . . , or conspiracy" in restraint of trade. Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2 (1975), prohibits monopolization, attempts to monopolize and combinations or conspiracies to monopolize "any part of the trade or commerce among the several States, or with foreign nations, ..."

anti-competitive legislation, regardless of the intention or motivation underlying such efforts.[2] At the same time, the Supreme Court intimated that this immunity might not protect efforts to influence the government, which were, in reality, "a mere sham to cover what was actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ."[3] This rule of immunity from the antitrust laws subsequently became known as the *Noerr-Pennington* doctrine.[4]

It is not difficult to detect the fundamental inconsistency between these two positions announced in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.* If the intention or motivation behind the petitioning activity is truly irrelevant to the existence of immunity from antitrust scrutiny, then such activity can never be condemned as a "mere sham." The possibility of such condemnation, resulting in the absence of immunity from the antitrust laws and possible liability under those laws, absolutely requires an examination of the purpose or intent underlying the petitioning activity in issue.[5]

During the twenty years since *Noerr* was decided, the Supreme Court and the lower federal courts have struggled to resolve this contradiction and establish the true scope of the *Noerr-Pennington* doctrine. In the process, widely divergent pronouncements concerning the basis of the doctrine and its intended application have been made. These efforts have been complicated by the different types of governmental institutions involved[6] and the wide

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2. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138-39 (1961).

3. *Id.* at 144.

4. The doctrine derives its name from the *Noerr* decision and from the case of *UMW v. Pennington*, 381 U.S. 657 (1965).

5. *See* Higgenbotham, *The Noerr-Pennington Problem: A View From The Bench*, 46 ANTITRUST L.J. 730, 732-33 (1978).

6. *Noerr-Pennington* immunity is broader in the legislative area than in the adjudicatory context. The doctrine's application to the administrative processes falls within either the standards applied to the legislative immunity or to the adjudicative immunity, depending upon the nature of the government action sought. *See* Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, [1981-2 Trade Cases] TRADE REG. REP. (CCH) ¶ 64, 217 (D.C. Cir.) ("[i]t is true that the courts have considered the type governmental body involved . . . when determining [what actions] are protected by *Noerr*"); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958); Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 HARV. L. REV. 863, 874 (1962).

variety of means used by private parties to influence them.[7]

This article is offered as a summary of the development of the law concerning the doctrine and its erosion by the expansion of the "mere sham" exception. Particular attention will be paid to decisions by the Supreme Court and the Court of Appeals for the Fifth Circuit.

There are a number of reasons why all practitioners, including those not generally involved in an antitrust practice, should be aware of *Noerr-Pennington* issues. In the first place, any attorney representing commercial clients who file litigation, seek administrative action, or pursue the enactment or enforcement of legislation may someday be faced with an antitrust challenge based on these actions. The antitrust immunity for such activity should be analyzed in advance. Further, the penalties involved for a violation of the Sherman Act are severe, including both treble damages for civil liability, and criminal sanctions.[8] In addition, attorneys themselves present inevitably attractive targets for those who contemplate the filing of antitrust claims based in whole or in part upon attempts to influence governmental action.

One of the principal attractions is the chance to transform conduct by a single firm or corporation into a violation of Section 1 of the Sherman Antitrust Act. This can sometimes be done by alleging that the attorney who filed litigation or otherwise petitioned the government on behalf of a single client is a co-conspirator or participant in a combination or conspiracy in restraint of trade. In this way, a defendant's own attorneys may provide the concerted activity necessary to create antitrust liability for conduct which

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7. *See, e.g.*, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972) (opposed grant of license by administrative body to competitor); Walker Process Equip., Inc. v. Food Mach. Chem. Corp, 382 U.S. 172, 177 (1965) (lawsuit against competitor to reduce competition); UMW v. Pennington, 381 U.S. 657, 669-72 (1965) (petitioning executive to enforce certain law). *See generally*, Fischel, *Antitrust Liability For Attempts To Influence Government Actions: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 80 (1977).

8. 15 U.S.C.A. § 15 (West Supp. 1980). This section provides, in pertinent part, that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fees." Corporations violating the Sherman Act with the requisite criminal intent may be fined up to one million dollars, and individuals who violate the Act may be fined up to one hundred thousand dollars and/or imprisoned for not more than three years. 15 U.S.C. §§ 1, 2 (1975). Violations are a felony. *Id.* § 1, 2.

otherwise would not fall within the scope of either section 1 or section 2 of the Sherman Act.[9] Even if this reason for targeting a defendant's attorney is absent, joining the attorney as a co-defendant or simply naming him or her as a co-conspirator may provide a plaintiff with the opportunity to defeat claims of attorney-client or work product privilege.[10] Opportunities for motions to disqualify

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9. *See* 15 U.S.C. § 1 (1975). Any violation of section 1 of the Sherman Act requires at least two or more participants. *Id.* Thus, unilateral action by a single entity will not result in a violation. *See* Golf City, Inc. v. Wilson Sporting Goods Co., 555 F.2d 426, 430-31 (5th Cir. 1977) (unilateral refusals to deal will not support inference of conspiracy violating § 1 of the Sherman Act). There can be no conspiracy in violation of section 1 between a corporation and its own employees or directors. Johnny Maddox Motor Co. v. Ford Motor Co., 202 F. Supp. 103, 105 (W.D. Tex. 1960). Insofar as section 2 of the Sherman Antitrust Act is concerned, there must be proof of the existence of monopoly, or of a dangerous probability of success in achieving it, before liability will be found with respect to conduct by a single firm. *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (monopoly power may be inferred from defendant's "predominate share" of the relevant market); Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1368 (5th Cir. 1976) (20% market share combined with low barriers to market entry was insufficient to prove a dangerous probability of attaining monopoly power), *cert. denied*, 429 U.S. 1094 (1977); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 207 n.2 (5th Cir. 1969) (finding monopoly power requires proof of at least 50% of market share). Therefore, activity by a single entity with a small share of the relevant market will not usually result in a finding of antitrust liability under sections 1 and 2 of the Sherman Act, no matter how unfair or anticompetitive that activity may be.

When conduct by a single firm includes petitioning activity or litigation within the scope of the "mere sham" exception to the *Noerr-Pennington* doctrine, however, it may be possible to join the defendant's attorneys as defendants, or to name them as co-conspirators and, thereby, establish the concerted activity required for liability under section 1 of the Sherman Act. This is true even though the firm and its attorneys share the relationship of principal and agent. *Cf.* Albrecht v. Herald Co., 390 U.S. 145, 149-50 (1968) (agent soliciting paper route customers part of combination in violation of Section 1); Tamaron Distrib. Corp. v. Weiner, 418 F.2d 137, 138-39 (7th Cir. 1969) (alleged agreement between manufacturer and manufacturer's representative, which were separate legal entities, would constitute conspiracy in restraint of trade if proved).

10. Legal advice given with respect to prior completed acts is generally privileged whether or not those previous acts were criminal. This is not true with respect to legal advice given concerning an on-going unlawful conspiracy or crime. *See, e.g.*, United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975) (privilege not extended to communications concerning plans to commit perjury); Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 342 (5th Cir. 1972) (communications made by client to attorney during or before the commission of a crime or fraud for the purpose of guidance or assistance in its commission are not privileged); Williams v. Williams, 108 S.W.2d 297, 299 (Tex. Civ. App.—Amarillo 1937, no writ) (privilege not applicable to future crime or fraud contemplated by client). Legal advice given with respect to pending litigation or other petitioning activity, which is later determined to be part of an antitrust violation, may not be privileged at all. This may be the result, even though the lawyer who is a party to the communication or advice is entirely innocent, and even when the work product privilege, instead of the attorney-client privilege, is involved. *See In re* Grand Jury Proceedings, 604 F.2d 798, 802-03 (3d Cir. 1979).

counsel may also appear with devastating results for both attorney and client. For all of these reasons, an awareness of the scope and extent of *Noerr-Pennington* immunity is essential.

One final introductory point must be made. *Noerr* and its progeny concern the scope of an immunity or exemption from the application of the federal antitrust laws. This does not mean that petitioning activity falling within the "mere sham" exception, or otherwise excluded from the protection of the *Noerr-Pennington* doctrine, is automatically or necessarily a violation of the federal antitrust laws.[11]

II. THE DEVELOPMENT OF THE *Noerr-Pennington* IMMUNITY IN THE SUPREME COURT

A. *The Development of the Law Before Noerr*

In 1943, the Supreme Court, relying on the principles of federalism and state sovereignty, ruled that the antitrust laws were not intended to be applied to states acting in a sovereign capacity.[12] In *Parker v. Brown*,[13] the Court considered the practical need for a state government to be able to regulate its citizens, even through the use of anticompetitive arrangements. The Court recognized the practical effect of ruling otherwise would render volumes of state statutes inoperative, and render state officials liable both civilly

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11. *See* George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 549, 555, 562 (1st Cir. 1974) (threats of patent litigation against plaintiff's customers and attempts to influence government purchases not violation of the antitrust laws), *cert. denied*, 421 U.S. 1004 (1975) . The First Circuit had earlier held, in the same case, that the defendant's actions were not protected by the *Noerr-Pennington* doctrine. George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33-34 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). The court concluded that "the immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes." *Id.* at 33.

12. Parker v. Brown, 317 U.S. 341, 350-51 (1943). In *Parker*, a California statute authorized state officials to establish certain programs for the marketing of agricultural commodities produced in California, so as to restrict competition among the growers and to maintain prices in the distribution of the produce. This "marketing stabilization program" authorized the formation of marketing combinations composed of a number of producers within a particular district. These combinations, although involving private individuals, were formed under the authority of state law and for the purpose of advancing a state economic program. They were, therefore, deemed state action by the Court. *Id.* at 350-51.

13. 317 U.S. 341 (1943).

and criminally for enforcing such arrangements.[14] Similarly, in *American Tobacco Co. v. United States*,[15] the Supreme Court relied on practical considerations in ruling that acts legal in and of themselves may lose that legal character if engaged in as part of a conspiracy to restrain trade or a scheme to achieve or maintain monopoly power.[16] The sum of the *Parker*[17] and *American Tobacco* rationales, coupled with the overwhelming desire of the courts to protect the right of citizens to petition the government, led the Court to *Noerr*.

B. *Noerr and Its Progeny*

In *Noerr*, a group of forty-one Pennsylvania truck operators and

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14. *Id.* The extension of the *Parker* rationale to private lobbying efforts is a logical step. The aim of the *Noerr-Pennington* doctrine is to encourage legitimate efforts to influence government action. Such immunity is derived from the related goal of encouraging public-spirited official decision making, which is governed by the doctrine of official immunity, and which protects government officials from individual liability for their official acts.

15. 328 U.S. 781 (1946).

16. *Id.* at 809. Justice Burton stated:

> It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition.

Id. at 809.

17. The *Parker* doctrine has been narrowed by recent decisions. *See, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978) (municipalities may be subject to antitrust liability for anticompetitive activities); Cantor v. Detroit Edison Co., 428 U.S. 579, 598 (1976) (states approval of tariff was not sufficient basis for implying exemption from federal antitrust laws); Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975) (fact that State Bar is state agency did not create antitrust shield under *Parker v. Brown*). In *City of Lafayette*, the court shifted its focus from the nature and identity of the defendant to the nature of the anticompetitive acts. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 393 (1978). The dissent in *City of Lafayette* challenged this departure and concluded that the appropriate inquiry should be simply whether the actor is a public or private entity, and not what acts are occurring. *Id.* at 439 (Stewart, J., dissenting). Although the *Noerr-Pennington* doctrine was not briefed, argued, or at issue in *Cantor*, the Supreme Court's opinion may have extensive impact on the scope of the *Noerr-Pennington* exemption. *See* United States v. Title Ins. Rating Bureau, Inc., 517 F. Supp. 1053, 1059-60 (D. Ariz. 1981) (citing *Cantor*). The *Noerr-Pennington* immunity "protects activities undertaken to modify or change laws" whether such laws were promulgated by the legislative or a regulatory agency. "The mere filing of something required by law does not in any way involve the right to petition. The defendant's filing of its rates is not an attempt by an individual or entity to employ the democratic process in order to effectuate change; it is mere compliance with the law". *Id.* at 1059-60.

their trade associations sued twenty-four railroads, a railroad association and a public relations firm charging conspiracy to restrain trade in, and monopolization of, the long distance freight business in violation of sections 1 and 2 of the Sherman Act.[18] The gist of the conspiracy was a joint effort to influence legislation and its enforcement by lobbying and retaining a public relations firm to conduct a publicity campaign against truckers. The sole purpose of this joint effort was to destroy competition in the long-haul freight business. The publicity campaign was described by the trial court as "vicious, corrupt and fraudulent."[19] These efforts were successful and persuaded the Governor of Pennsylvania to veto the "Fair Truck Bill," which would have permitted the truckers to carry heavier loads over Pennsylvania roads.

The Supreme Court found the railroads' activities to be beyond the scope of the Sherman Act.[20] The *Noerr* Court rested its decision on two considerations: (1) the fact that under our form of government the question of whether a law should pass, or if passed be enforced, is the responsibility of the government,[21] and (2) the absolute necessity to preserve the informed operation of governmental processes.[22] The Court reasoned the Sherman Act does not prohibit two or more persons from associating together for the purpose of persuading the legislature or the executive to take a particular action with respect to a law, even if the law would produce anticompetitive results since such activities bear very little, if any, resemblance to the combinations normally held to violate the Sherman Act.[23] Additionally, any such holding would substantially

18. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

19. *Id.* at 135-36. The trial court entered judgment for plaintiff and filed extensive findings of fact and conclusions of law. The trial court did not find that the publicity campaign was false, but only that it dramatically fragmented the truth, and by the use of emphasis and repetition distorted the facts into a falsehood. *See also* P. AREEDA, ANTITRUST ANALYSIS § 392 (3d ed. 1981).

20. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-36 (1961).

21. *Id.* at 136-37.

22. *Id.* at 137-38.

23. *Id.* at 136-37. This is the *Noerr* "essential dissimilarity" test. The dissimilarity of the concerted efforts is not conclusive on the question, but is a strong warning against treating joint lobbying efforts as an unlawful restraint. This is a very poor test, as it provides no real guidelines for the lower courts, and as such has been almost ignored by the lower courts.

impair the government's ability to operate efficiently because of the lack of information it would receive,[24] and would unjustifiably restrict constitutional freedoms of the citizens.[25] The *Noerr* Court rejected the factors reviewed by the lower courts, holding that the purpose of the defendants' activities and their intent were irrelevant,[26] and that the possible unethical conduct of the publicity experts fell within the category of "political activity" and, therefore, was not subject to the ethical restraints set forth in the Sherman Act.[27] The *Noerr* Court, however, recognized there may be situations in which efforts ostensibly directed toward influencing governmental action are a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.[28]

The Supreme Court reaffirmed and amplified *Noerr* four years later in *UMW v. Pennington.*[29] In *Pennington*, a small mining company filed a Sherman Act counterclaim against the United Mine Workers, its trustees and several large coal operators, alleging joint efforts to influence the Secretary of Labor and other government officials to establish a higher minimum wage for employees of contractors selling coal to the TVA. The intended victims of this joint action were the small coal companies who had term contracts with the TVA.[30] Despite the admitted anticompetitive inten-

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24. *Id.* at 136-37.

25. *Id.* at 137-38 ("at the same time deprive people of their right to petition in the very same instances in which that right may be of the most importance to them"). This language is the basis of the controversy concerning the statutory construction versus first amendment rationale as a basis for the *Noerr-Pennington* immunity. The Court specifically stated that it was unnecessary to decide whether the railroad's activities were protected by the first amendment. *Id.* at 132 n.6.

26. *Id.* at 136-38. The right of the citizens to inform the government of their desires cannot be made to depend upon the purpose of the intent of doing so. *Id.* at 137. Such a construction would be very detrimental to both the government's ability to gather information and the citizen's constitutional freedom. *Id.* at 137.

27. *Id.* at 136-37. The Court failed to provide why unethical conduct of private parties before a government body is sanctioned, or why the government's ability to properly perform its duties is at all lessened by imposition of sanctions against improper conduct.

28. *Id.* at 144. It is critical to note that there were no allegations of activities unrelated to the attempts to induce government action. Justice Black wrote: "There are no specific findings that the railroad attempted directly to persuade anyone not to deal with the truckers." *Id.* at 142.

29. 381 U.S. 657 (1965).

30. *Id.* at 660. In addition to seeking the influence of the Secretary of Labor, the defendants sought to restrict spot purchases of coal, which had the effect of threatening the

tions of the defendants, the Supreme Court held "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition," and even if the challenged conduct was a "part of a broader scheme itself violative of the Sherman Act."[31] The Supreme Court noted that the restraint flowed not from the joint action of defendants, but from the official's exercise of his statutory authority and duties.[32]

The *Pennington* holding expanded the *Noerr* immunity and seemingly erased any question about a "political activity" boundary for the doctrine.[33] *Pennington* did not, however, aid in determining whether the basis of the immunity is grounded in the first amendment or a statutory construction of the Sherman Act. The holding in *Pennington* apparently extended the immunity to attempts to influence government officials performing purely commercial functions,[34] but wholly failed to discuss or even refer to the *Noerr* sham exception. At the same time, *Pennington* arguably expanded the exception to include situations in which the government official is a co-consipirator.[35]

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higher minimum wage policy. The TVA purchases were governed by the Walsh-Healy Act, 41 U.S.C. §§ 35-45 (1978).

31. UMW v. Pennington, 381 U.S. 657, 670 (1965).

32. *Id.* at 671 ("the action taken to set a minimum wage for government purchases of coal was the act of a public official who was not claimed to be a co-conspirator").

33. This was a purely commercial activity, which many believed outside *Noerr's* protection. *But see* Borough of Lansdale v. Philadelphia Electric Co., [1981-2 Trade Cases] TRADE REG. REP. (CCH) ¶ 64, 218 (E.D. Penn.) ("the *Noerr* Court concluded that 'political activity' by railroads attempting to influence the decision of legislators was protected").

34. UMW v. Pennington, 381 U.S. 657, 671 (1965). It has been argued that *Pennington* is in conflict with Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). In *Continental Ore Co.*, the court refused to extend *Noerr* to a conspiracy involving private commercial activity which was not seeking to procure the enforcement of laws. *Id.* at 707. *See also* Fischel, *Antitrust Liability For Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 86 (1977).

35. UMW v. Pennington, 381 U.S. 657, 671 (1965). The Court did note that if the public officials were alleged to be co-conspirators, the immunity might not apply. *Id.* at 671. This exception has been followed by some lower courts. In Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991, 1013 (S.D. Tex. 1981) the trial court charged the jury as follows:

> Joint efforts truly intended to influence public officials to take official action do not violate the antitrust laws even though the efforts are intended to eliminate competition, unless one or more of the public officials involved was also a participant in an illegal arrangement or conspiracy. The petitioning activity must be genuine. Protection does not extend to purported petitioning that is in fact a mere sham to cover what actually is nothing more than an attempt to interfere directly with the business of a competitor. That is, protection does not extend to activities that are merely a pretext for inflicting on plaintiff an injury not caused by any governmental action.

California Motor Transp. Co. v. Trucking Unlimited[36] again affirmed the present validity of the *Noerr-Pennington* immunity, and expanded its protection to include joint activity aimed at influencing courts and administrative bodies.[37] Fourteen plaintiffs in *Trucking Unlimited* alleged that nineteen defendants combined to institute state and federal administrative and judicial proceedings designed to interfere with and defeat plaintiffs' applications for operating rights. All parties were motor carriers subject to regulation by the California Public Utilities Commission. The Supreme Court held the same philosophy which provides protection for attempts to influence the legislature governs efforts to influence administrative agencies and the courts.[38] The plaintiffs' allegations concerning the "sham" exception related to the use of power, strategy and resources to harass and deter plaintiffs so as to deny them free and unlimited access to the tribunals.[39] The Court specifically reviewed the defendant's purposes, intent and tactics.[40] The *Trucking Unlimited* Court expressly based its decision on the first amendment,[41] but did not decide whether the immunity is available only

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Id. at 1013.

36. 404 U.S. 508 (1972).

37. *Id.* at 512. The right of a person to utilize the courts or adjudicative bodies to attain anticompetitive ends was very uncertain after *Pennington*. The Supreme Court had held the filing of a baseless patent infringement suit constitutes an antitrust violation. *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 176 (1965). In an earlier decision the court had implied that the first amendment provides a right to jointly petition the courts. *See* NAACP v. Button, 371 U.S. 415, 432 (1963).

38. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972). Justice Douglas, in writing for the majority, provided:

> We conclude that it would be destructive of rights of association and petition to hold that groups with common interest may not, without violating antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

Id. at 510-11.

39. *Id.* at 511.

40. *Id.* at 512-13.

> [U]nethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witness is one example . . . . There are many other forms of illegal or reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.

Id. at 512-13.

41. *Id.* at 512-13. In a discussion of the relationship between the first amendment and the antitrust laws, however, Justice Douglas writes: "Petitioners, of course, have the right of access to the agencies and courts . . . that right . . . is part of the right to petition protected

for conduct protected by the first amendment.[42] The rationale set forth in *Trucking Unlimited* does not aid in determining when the use of administrative or judicial processes becomes a limitation on free and unlimited access, but it clearly provides that if the administrative or judicial processes have been abused, antitrust liability may result and the *Noerr-Pennington* doctrine is inapplicable.

Although *Trucking Unlimited* extended the *Noerr-Pennington* protection into the administrative and judicial arenas, it greatly expanded the *Noerr* "sham" exception.[43] The challenged activities were found to be ostensibly directed toward influencing governmental action,[44] yet were a denial of "free and unlimited access," and, therefore, a violation of antitrust law.[45] The *Trucking Unlimited* Court ruled that different standards are applicable to efforts to influence a legislative action than are applicable to efforts to influence adjudicative processes. There is conduct which is condoned in the legislative context that corrupts the adjudicative process and, therefore, results in antitrust liability.[46] *Trucking Unlimited* unquestionably represents an attempt by the Supreme Court to place a first amendment limitation on the scope of the *Noerr-*

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by the first amendment. Yet that does not necessarily give them immunity from the antitrust laws." *Id.* at 513. This passage is impossible to reconcile with the Court's refusal to review the anticompetitive purpose of the acts. *Id.* at 510-11.

42. *Id.* at 510-11.

43. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 512-13 (1972). The court defined "sham" in an adjudicatory context to include perjury, fraud, bribery, and other forms of illegal and reprehensible practice. *Id.* at 513. The citations to Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962) and Harman v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964) provide a guide to the meaning of the expanded "sham" exception. By reading these cases in connection with *Trucking Unlimited*, it is clear that joint activity to influence adjudicatory bodies is not exempt if it is an element in a larger scheme or part of unethical conduct used to abuse the process. *Id.*

44. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512 (1972). *Trucking Unlimited* was remanded to determine if the activities were directed toward influencing government action. *Id.* at 515. *See also* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961).

45. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512 (1972). The Court's finding of "a pattern of baseless, repetitive claims" is simply evidentiary, as can be noted by its citation of Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965) (an abuse of adjudicative process by the filing of one suit). *Id.* at 513.

46. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972). Sham, in the legislative or executive areas, remained defined only by the language of *Noerr*, which required a real intent to directly effect the business of competitors. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961).

Pennington immunity in the administrative and judicial areas.[47] If perjury, fraud, payment of bribes or misrepresentation is present, the first amendment limitation will remove the activities from the *Noerr-Pennington* protection[48] and possibly subject the parties to antitrust liability.

In two recent cases the Supreme Court, while claiming only to be applying the *Trucking Unlimited* rule and not modifying the scope or framework of the *Noerr-Pennington* doctrine in any way, greatly expanded the sham exception. The Court has reduced its evidentiary requirements for proving a sham from the multitudinous suits and unethical conduct of *Trucking Unlimited*, to four suits which carried the hallmark of insubstantial claims, and then to one meritorious suit which recovered seven million dollars and was affirmed by the state appellate court. In *Otter Tail Power Co. v. United States*,[49] the government brought a civil suit seeking an injunction based in part upon an allegation that litigation instituted and sponsored by Otter Tail resulted in the denying of free access to administrative bodies by competitors.[50] None of the lawsuits were successful, but they did frustrate the sale of revenue bonds to finance competing power systems. The trial court, in a decision before *Trucking Unlimited*, ruled that *Noerr-Pennington* protection was inapplicable in the judicial context.[51] The *Otter*

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47. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 516-17 (1972) (Stewart, J., concurring).

48. *Id.* at 512-13. *See, e.g.*, Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 175-177 (1965) (use of patent obtained by fraud to exclude competitor may involve antitrust violation); Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 855 (9th Cir. 1965) (bribery of purchasing agent is violation); Harmon v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964) (conspiracy to induce attorney general to place institution in receivership is antitrust transgression). *See also* Mountain Grove Cemetery Ass'n v. Norwalk Vault Co., 428 F. Supp. 951, 955 (D. Conn. 1977) ("corrupt practices that abuse administrative or judicial tribunals can prompt the removal of antitrust immunity").

49. 410 U.S. 366 (1973).

50. The government alleged the following three acts:

(1) Refusals to wholesale power to the municipal systems or to transfer it over Otter Tail's facilities from other sources;

(2) Litigation intended to delay establishment of municipal systems; and

(3) Invocation of transmission contract provisions to forestall supplying other power companies.

There was no showing that anyone was denied access to any adjudicative body. *Otter Tail*, however, did involve external anticompetitive acts, including unlawful territorial restrictions. *Id.* at 369.

51. United States v. Otter Tail Power Co., 331 F. Supp. 54, 62 (D. Minn. 1971), *aff'd*,

Tail Court remanded to the trial court, with instructions to determine if the litigation instituted for the purpose of maintaining its monopolistic position was a "sham" under *Noerr*.[52] It may be important to note that the monopolistic purpose of the litigation found by the trial court was not a per se sham. On remand, however, the trial court ruled, without discussion, that the suits constituted a sham.[53] As evidence of a sham, the *Otter Tail* Court considered the number of lawsuits[54] and whether such suits carried the "hallmark of insubstantial claims."[55] Such a focus suggests this conduct and that in *Trucking Unlimited* constituted a sham because there was no genuine attempt to influence government action, and not because of the denial of free access to the judicial bodies.[56]

Vendo Co. v. Lektro-Vend Corp.,[57] involved one suit concerning the attempted enforcement of a noncompetition agreement and the alleged violation of the antitrust laws by enforcement of this agreement. The federal district court judge granted a preliminary injunction enjoining the execution of a state court judgment.[58] The central issue presented to the Supreme Court was whether section 16 of the Clayton Act[59] authorized an injunction against state pro-

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410 U.S. 366 (1973).

52. United States v. Otter Tail Power Co., 360 F. Supp. 451, 452 (D. Minn. 1978), *aff'd mem*, 417 U.S. 901 (1974). The trial court specifically found that the litigation was instituted solely for the purpose of maintaining its monopolistic position. *Id.* at 452. "Most of the litigation sponsored by [Otter Tail] was carried to the highest available appellate court and although all of it was unsuccessful on the merits, the institution and maintenance of it had the effect of halting or appreciably slowing efforts for municipal ownership." *Id.* at 452.

53. United States v. Otter Tail Power Co., 360 F. Supp. 451, 452 (D. Minn.), *aff'd mem.*, 417 U.S. 901 (1974). The fact that the *Otter Tail* Court remanded the case to the district court for a determination of whether Otter Tail's acts constituted a "sham" clearly demonstrates that the issue of sham is a fact question.

54. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 380, *on remand*, 360 F. Supp. 451 (D. Minn. 1973), *aff'd mem*, 417 U.S. 901 (1974). It is clear that a repetitive nature is only evidentiary and not a required element. *Id.* at 380. *Accord*, Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 661-62 (1977) (Stevens, J., dissenting).

55. Otter Tail Power Co. v. United States, 410 U.S. 366, 380, *on remand*, 360 F. Supp. 451 (D. Minn. 1973), *aff'd mem*, 417 U.S. 901 (1974).

56. *Compare id.* at 377 (used monopoly power to foreclose competition and destroy competitors) *with* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512 (1972) (sought to bar competitors from meaningful access to adjudicatory tribunals).

57. 433 U.S. 623 (1977).

58. Lektro-Vend Corp. v. Vendo Co., 403 F. Supp. 527, 529 (N.D. Ill. 1975), *rev'd*, 433 U.S. 623 (1977).

59. 15 U.S.C. § 26 (1964). *See* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 635 n.6

ceedings.[60] The Supreme Court held it does not, but with no majority opinion. Justice Rehnquist, for a three member plurality, ruled that section 16 does not qualify under the Anti-Injunction Act.[61] Justice Blackmun, with the Chief Justice, held that no injunction may issue without a pattern of baseless repetitive claims.[62] Justice Stevens, joined by three other justices, dissented, concluding section 16 expressly authorized an injunction, and a single lawsuit can constitute a sham[63] if any other elements of an antitrust violation are present.[64] The Supreme Court, in *Lektro-Vend*, affirmed *Trucking Unlimited* and *Otter Tail*,[65] and specifically held that its ruling was not affecting the scope of the *Noerr-Pennington* immunity in any way.[66]

None of the three opinions in *Lektro-Vend* made any reference to the *Trucking Unlimited* test of "access barring" conduct; however, seven justices concluded that a single meritorious suit constitutes an antitrust violation, if accompanied by anticompetitive intent.[67] It should be noted that, except for the jurisdictional question presented in *Lektro-Vend*, the Court might have interpreted *Trucking Unlimited* much more broadly. Due to the con-

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(1977) ("harassing and sham state-court proceedings of a repetitive nature could be part of an anticompetitive scheme or conspiracy"). Is the *Lektro-Vend* Court requiring the proceedings to be a part of a larger scheme or conspiracy? Are the merits of the lawsuit now in question? *Otter Tail* was successful in all of its suits in the trial court. When does a suit become a "sham"? The Court seems to define it as a frivolous proceeding. *Cf.* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 634 (1977). *Lektro-Vend*, however, did not involve baseless or frivolous litigation. The offensive conduct was a court action that lasted nine years and resulted in a seven million dollar verdict for plaintiff. *Id.* at 628-29. There are four justices, and possibly seven, who will hold one meritorious proceeding can still be an antitrust violation.

60. Anti-Injunction Act, 28 U.S.C. § 2283 (1977) .

61. Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 636 (1977).

62. *Id.* at 644 (Stevens, J., dissenting).

63. *Id.* at 645 (Stevens, J., dissenting).

64. *Id.* at 645 (Stevens, J., dissenting).

65. *Id.* at 635 n.6 (neither of these cases involved injunction of pending state action so the Clayton Act never came into play).

66. *Id.* at 635. The Supreme Court in *Lektro-Vend* was merely deciding whether a *Noerr-Pennington* related lawsuit could be enjoined by a federal court after it has been commenced. *Id.* at 635 n.6. Justice Rehnquist further held that "nothing in our opinion prevents a federal court in the proper exercise of its jurisdiction from enjoining the commencement of additional state-court proceedings if it concludes from the course and outcome of the first one that such proceedings would constitute a violation of the antitrust laws." *Id.* at 635-36 n.6.

67. *Id.* at 635 n.6.

text in which the *Lektro-Vend* case arose, the state of the law is chaotic and unclear.

C. *Current Status of Supreme Court Authorities*

The immunity remains broad in the legislative area, but even in this area the lower courts are beginning to question the intent and purpose of the activities, and are, thereby, expanding the sham exclusion. In an adjudicative context the expansion of the sham exception has almost completely eroded the immunity. The evidentiary requirements have been lessened from repetitive, baseless suits to a single meritorious action which resulted in an anticompetitive effect.

III. Application Of The *Noerr-Pennington* Doctrine To The Legislative Area

A. *Overview of the Immunity in the Legislative Area*

Joint efforts by competitors or a monopolist aimed at influencing anticompetitive action by the legislature,[68] the executive branch,[69] or the administrative or judicial processes,[70] are not within the purview of the Sherman Act.[71] The scope of this immunity, how-

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68. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1960).

69. UMW v. Pennington, 381 U.S. 657, 669-70 (1965); Wall Prod. Co. v. National Gypsum Co., 326 F. Supp. 295, 314 (N.D. Cal. 1971).

70. *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972); Taylor Drug Stores v. Associated Dry Goods Corp., 560 F.2d 211, 212 (6th Cir. 1977).

71. The nonapplication of the Sherman Act has been incorrectly characterized as an "exemption" or "immunity", which the *Noerr-Pennington* rule actually characterized as conduct simply outside the purview of the Sherman Act. *Noerr* holds that certain kinds of joint activity do not fall within the scope of the Sherman Act in the first place, and not that they are removed from the Sherman Act by an exemption of immunity. *See In re* Airport Car Rental Litigation, 1981-1 Trade Cases ¶ 63, 983 (N.D. Cal.). At the risk of entrenching this misconception, however, the authors also describe the *Noerr-Pennington* doctrine as an exemption, immunity or protection. Additionally, the finding of *Noerr-Pennington* protection does not necessarily exempt conduct from other laws, and the conduct is admissible to demonstrate an overall conspiracy of greater proportions. *See, e.g.*, United States v. Southern Motor Carriers Rate Conference, 467 F. Supp. 471, 485 (N.D. Ga. 1979); Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258, 1268 (N.D. Fla. 1976); Schenly Indus., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, 272 F. Supp. 872, 885-86 (D. N.J. 1967).

ever, is ambiguous and ever-changing,[72] and no precise basis for the immunity has been articulated by the courts. The *Noerr* case provided that the exemption is based on a statutory construction of the Sherman Act,[73] while many later cases, including *Otter Tail*, expressly base the immunity on the first amendment.[74] The resolution of this ambiguity is of utmost importance, since, if the statutory construction is correct, acts not within the purview of the first amendment would remain immune from the Sherman Act;[75] and, if the first amendment rationale is correct, first amendment limitations would be applicable to the protection.[76] This ambiguity be-

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72. *See, e.g.*, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 509 (1972) (opposing ruling of administrative agency which would grant a license to a competitor); Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) (filing of lawsuit against competitor to reduce competition); George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir.) (attempts to influence governmental unit not to contract with competitor), *cert. denied*, 400 U.S. 850 (1970).

73. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136-37 (1961); *accord*, *In re* Airport Car Rental Antitrust Litigation, 1981-1 TRADE CASES ¶ 63,983 (N.D. Cal.) (overruling earlier opinion by a different judge assigned to same case); Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp, 696, 701 (D. Colo. 1975). *See also* City of Layfayette v. Louisiana Power & Light Co., 435 U.S. 389, 399 (1978) ("a concerted effort by persons to influence law makers to enact legislation beneficial to themselves or detrimental to competitors was not within the scope of the antitrust laws"); *In re* Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072, 1083 (N.D. Cal. 1979) ("*Noerr* decision rests on statutory interpretation, reinforced by first amendment policies and considerations of federalism . . . . But the first amendment analysis is not a prerequisiste for determining that joint action, which imposes no restraint is not within the scope of the Sherman Act"), *overruled on other grounds*, *In re* Airport Car Rental Antitrust Litigation 1981-1 TRADE CASES ¶ 63, 983 (N.D. Cal.).

74. *See, e.g.*, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 509-10 (1972); Mid-Tex Communications Systems, Inc. v. AT&T Co., 615 F.2d 1372,1384 (5th Cir. 1980); United States v. Southern Motor Carriers Rate Conference, 467 F. Supp. 471, 485 (N.D. Ga. 1979). *Cf.* Buckley v. Valeo, 424 U.S. 1, 49 (1976) (does not deal with antitrust violation but interprets *Noerr* as based on first amendment).

75. Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696, 702 (D. Colo. 1975) (such basis would exempt illegal and unethical lobbying). *Contra*, Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991, 1012-13 (S.D. Tex. 1981).

76. If the first amendment rationale was applied, certain areas in particular would be exempted. *See In re* Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072, 1079 (N.D. Cal. 1979) (commercial speech), *overruled on other grounds*, 1981-1 TRADE CASES ¶ 63, 983 (N.D. Cal.); Hecht v. Pro-Football, Inc., 444 F.2d 931, 941 (D.C. Cir. 1971) (commercial activity exemption), *cert. denied*, 404 U.S. 1047 (1972). Other justifications for the *Noerr-Pennington* exemption have been set forth by commentators. *See* Fischel, *Antitrust Liability For Attempts To Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 82-84 (1977); Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333, 334-35 (1967); Note, *Application Of The Sherman Act To Attempts To Influence Government Action*, 81 HARV. L. REV.

comes even more critical when the challenged conduct concerns the judicial area, due to the broader application of the "sham" exception[77] to the nonlegislative area.[78]

B. *Development of the Legislative Parameters*

The *Noerr* case was the first recognition by the Supreme Court of the right of a combination or monopolist to use efforts to persuade anticompetitive action by a legislative body.[79] The exemption was amplified in *UMW v. Pennington*[80] where the Supreme Court provided: "Joint efforts to influence public officials do not violate antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as a part of a scheme itself violative of the Sherman Act."[81] The *Noerr-Pennington* doctrine is extemely broad when applied to efforts to achieve anticompetitive ends through legislative action.[82] Even in the legislative area, however, the courts have attempted to set specific boundaries beyond which a "political combination" violates the antitrust laws. Separate and distinct requirements for application of the immunity to the legislative, administrative, and judicial

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847, 848-50 (1968). The most logical justification for the exemption is an extension of the Parker v. Brown, 317 U.S. 341 (1943) decision that state action is not illegal under the antitrust laws. If state action is exempt from the application of the Sherman Act, then so should efforts which seek state action.

77. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1960). The Court recognized there may be situations in which efforts ostensibly directed toward influencing governmental action are "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." *Id.* at 144.

78. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512-13 (1972). The basis for the additional limitations on the nonlegislative areas is the overwhelming desirability of the integrity of the adjudicatory processes of the courts and of the administrative bodies. Such conduct may not be protected if it is illegal or includes deliberate misrepresentations.

79. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136-38 (1961).

80. 381 U.S. 657 (1965).

81. *Id.* at 670.

82. *See, e.g.*, Sims v. Tinney, 482 F. Supp. 794, 800-01 (D.S.C. 1977) (dismissing claim of monopolization for proposing legislation and mass media promotion), *aff'd mem.*, 615 F.2d 1358 (4th Cir. 1979); Federal Prescription Serv. v. American Pharamaceutical Ass'n, 471 F. Supp. 126, 129 (D.D.C. 1979) (exempting efforts to enlist other organizations to lobby Congress); George Benz & Sons v. Twin City Milk Producers Ass'n, 299 F. Supp. 679, 688 (D. Minn. 1969) (plaintiff not entitled to injunctive relief to extent that claim is based on group solicitation of government action).

areas have been established. Although such parameters are more unclear and uncertain in the legislative context, it seems certain the more commercial and the less political the transaction, the more likely that the exemption will not be applied.[83]

The method utilized by the combination or monopolist in its attempts to influence government action in the legislative context may possibly include deliberate misrepresentations,[84] illegal tactics,[85] or possibly even bribery.[86] The intent of the parties[87] and

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83. *See In re* Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072, 1085 (N.D. Cal. 1979) ("the more commercial the nature of the government action the less likely the application of the *Noerr* rule"); United States v. Southern Motor Carriers Rate Conference, 467 F. Supp. 471, 485 (N.D. Ga. 1979) (" we agree with the government that the defendants' activities of collective rate formulation constitutes independently cognizable acts outside the scope of the first amendment protection or the *Noerr-Pennington* doctrine").

84. *See* Mark Aero, Inc. v. Trans World Airlines, Inc., 580 F.2d 288, 297 (8th Cir. 1978); Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1297 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

85. *See* Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696, 705 (D. Colo. 1975); Schenley Indus., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, 272 F. Supp. 872, 884 (D.N.J. 1967). Both *Cow Palace* and *Schenley Industries* held illegal lobbying tactics are irrelevant. *Contra*, Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 440 F.2d 1096, 1099 (9th Cir.) ("[i]t does not seem to this court that the doctrines of *Noerr* and *Pennington* were intended to protect those who employ illegal means to influence their representatives in government"), *cert. denied*, 404 U.S. 826 (1971). *Sacramento Coca-Cola* has been criticized by the commentators as being in conflict with *Noerr*. The express language of *Noerr* supports this criticism, but if a first amendment basis is utilized for the exemption then *Sacramento Coca-Cola* is consistent with *Noerr*.

86. *See* Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696, 704 (D. Colo. 1975). *See also* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512-13 (1972). Justice Douglas' opinion that "misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process" lends support to the position that unethical practices are tolerated in the lobbying process. The concurring opinion adopted this same distinction. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 517 (1972) (Stewart, J., concurring). "The difference in type of governmental body might make a difference in the applicability of the antitrust laws if the petitioners had made misrepresentations of fact or law to these tribunals, or had engaged in perjury, or fraud, or bribery." *Id.* at 517. Such a distinction is not made in the federal statutes which prohibit perjury and bribery in all legislative and adjudicative contexts. *See, e.g.*, 18 U.S.C. § 201 (1976 & Supp. III 1979) (bribery of federal officials); *id.* § 1001 (intentional misrepresentations or concealment); *id.* § 1621 (perjury).

The *Trucking Unlimited* Court failed to explain how behavior not protected by the first amendment (because it is prohibited) is relevant to the scope of the *Noerr-Pennington* immunity in the adjudicatory processes, but irrelevant in the political context. Such a distinction has no basis in law and is a result of the Court's effort to expand the sham exception. *But see* Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168, 177-78 (D. Del. 1979). In another context, the Supreme Court has held there is no constitutional value in false statement of fact. Gertz v. Robert Welch, Inc.,

the purpose of their conduct[88] are irrelevant under the tests set forth in *Noerr*[89] and *Pennington*.[90] Many of the later cases have, however, in attempting to define the scope of the sham exception, examined the purpose and intent of the petitioning activity.[91] There is a confusing, if not conflicting, line of cases concerning *Noerr-Pennington* application to efforts to influence government officials in a purely "commercial" or "proprietary" capacity.[92] The considerations bearing upon the exemption are varied and must be reviewed within their factual setting.

Subscription Television, Inc. v. Southern Cal. Theatre Owners

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418 U.S. 323, 339-40 (1974).

87. *See* UMW v. Pennington, 381 U.S. 657, 670-71 (1965) ("*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent").

88. Mark Aero, Inc. v. Trans World Airlines, Inc., 580 F.2d 288, 294 (8th Cir. 1978) (joint efforts outside scope of Sherman Act even if combination is formed for purpose of eliminating competitors); Schwegmann Bros. Giant Super Markets, Inc. v. Almanden Vineyards, Inc., 1980-1 TRADE CASES ¶ 63,156 (E.D. La.) (irrelevant whether defendants concerned about statute as a matter of industry regulation, or for the sole purpose of restricting competition by one competitor); *accord* Miracle Mile Associates v. City of Rochester, 617 F.2d 18, 21 (2d Cir. 1980); Sims v. Tinney, 482 F. Supp. 794, 801 (D.S.C. 1977), *aff'd mem.*, 615 F.2d 1358 (4th Cir. 1979); First Nat'l Bank v. Marquette Nat'l Bank, 482 F. Supp. 514, 520 (D. Minn. 1977).

The *Noerr-Pennington* exemption also protects joint efforts by other organizations to join in efforts of the persuaders. *See* Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, 471 F. Supp. 126, 130 (D.D.C. 1979).

89. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc. 365 U.S. 127 (1961).

90. UMW v. Pennington, 381 U.S. 657 (1965).

91. The expansion of the "sham" exception to the very broad *Noerr-Pennington* immunity has been means by which such factors are considered. *See, e.g.*, Brown v. Carr, 1980-1 TRADE CASES ¶ 63, 033 (D.D.C. 1979) (no *Noerr-Pennington* protection for petitioning zoning board to rezone to competitor's detriment, unless government determines a purpose not anticompetitive); Miller & Sons Parking v. Wrightstown Township Civil Ass'n, 415 F. Supp. 1258, 1268 (E.D. Pa. 1978), *aff'd mem.*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979) (questioning anticompetitive purpose); United States Dental Inst. v. American Ass'n of Orthodontists, 396 F. Supp. 565, 581-83 (N.D. Ill. 1975) (question of bad faith).

92. *See, e.g.*, Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 440 F.2d 1096, 1099 (9th Cir. 1971) (*Noerr* umbrella should not be extended to public officials engaged in purely commercial dealings), *cert. denied*, 404 U.S. 826 (1972); George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir.) (immunity does not extend to efforts to sell products to public officials), *cert. denied*, 404 U.S. 1047 (1972); General Aircraft Corp. v. Air America, Inc. 482 F. Supp. 3, 7 (D.D.C. 1979) (when government entity is acting in commercial capacity they are not a political body but merely a participant in market place). *Contra, In re* Airport Car Rental Antitrust Litigation, 1981-1 TRADE CASES ¶ 63, 983 (N.D. Cal.). The *Airport Car Rental* case criticizes and distinguishes the above cases in a thorough discussion of the "commercial activities" exemption.

Ass'n[93] involved a combination which successfully obtained legislation for the sole purpose of thwarting a public offering of a competitor's stock, and which knew, or should have known, the legislation would be unconstitutional. The Court of Appeals for the Ninth Circuit affirmed the trial court's refusal to submit the Sherman Act issue to the jury, ruling "[t]he theatre owners' activities were not a sham because they were actually seeking and did obtain the desired legislative action . . . . The [legislation] was not unquestionably unconstitutional . . . [and lobbying] would be considerably chilled by a rule which would require an advocate to predict whether the desired legislation would withstand a constitutional challenge in the courts and to expose itself to a potential treble damage antitrust action based on that prediction."[94] The *Subscription Television* court took a very practical approach to the immunity in its review of the purpose of the activities, the success of the activities, and what effect an opposite ruling would have on future lobbying efforts and government actions.

In *Metro Cable Co. v. CATV of Rockford, Inc.*[95] the Court of Appeals for the Seventh Circuit affirmed the dismissal of a second amended complaint by a franchise applicant which alleged that city council members "illegally combined" with a competitor who was granted an exclusive license "in exchange" for an alleged $50.00 campaign contribution. The court ruled "unethical conduct may not be immune in an adjudicative . . . setting," but since the

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93. 576 F.2d 230 (9th Cir. 1978).

94. *Id.* at 233. The courts are extremely protective of the first amendment right "to petition the government for a redress of grievances." U.S. CONST. amend 1. The first amendment has been described as "among the most precious of the liberties safeguarded by the Bill of Rights." UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967). The petition for redress had its birth in Chapter 61 of the Magna Carta. The concept of the right to petition now comprehends demands for an exercise by the government of its powers, and furtherance of the intent and prosperity of the petitioners. *See* E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY, 293-97 (13th ed. 1975).

95. 516 F.2d 220 (7th Cir. 1975). *Metro Cable Co.* involved a cable television company which applied for and failed to receive a franchise. Thereafter, it sued the company which received the franchise, its affiliate, four individuals associated with those companies, the mayor, and an alderman of the city. In substance, the plaintiff alleged WCEE-TV and its officers planned to obtain the exclusive cable television franchise; organized a company for that purpose; induced the mayor and an alderman to oppose plaintiff's application by making a campaign contribution to each of those officers; and succeeded, with the help of the mayor and the officers, in persuading the city council not only to award the franchise to CATV, but to refuse plaintiff's successive applications, without affording plaintiff a hearing. *Id.* at 224.

"council was a legislative body, acting as such, . . . the conduct challenged here thus occurred in a political [and protected] setting."[96] The *Metro Cable* court considered the success of the activities and the fact that the governmental body was merely supporting the conspirators efforts and functioning in its official capacity in granting the requested action. Such factors controlled even in the presence of alleged unethical conduct. Actual involvement in the conspiracy by a government official[97] or actual bribery of a legislator, however, may remove the conduct from the purview of the *Noerr-Pennington* protection.[98]

In a very recent case[99] presenting similar facts, the *Noerr-Pennington* doctrine was held inapplicable because the mayor and the city were found to have participated in the conspiracy.[100] The *Affiliated Capital Corp. v. City of Houston* court specifically found that the "actions of the councilmen and other agents of the city

96. *Id.* at 228. The court intimated that a different result might have occurred if an administrative or judicial body had been involved. *Id.* at 228.

97. *Id.* at 229 (government agency not alleged to be a part of the conspiracy). *See, e.g.,* Whitworth v. Perkins, 576 F.2d 696 (5th Cir. 1978) (reinstating 559 F.2d 378 (5th Cir. 1977)), *cert. denied,* 440 U.S. 911 (1979); Duke & Co. v. Foerster, 521 F.2d 1277, 1282 (3rd Cir. 1975); MCI Communications Corp. v. AT&T Co., 462 F. Supp. 1072, 1102-1104 (N.D. Ill, 1978). *But see* Huron Valley Hosp., Inc. v. City of Pontiac, 466 F. Supp. 1301, 1313 (E.D. Mich. 1979) (alleged conspiracy of state agencies to include competition fell within protection of *Noerr-Pennington*).

98. *See* Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 858 (9th Cir.), *cert. denied,* 383 U.S. 936 (1965). The *Rangen* court held that bribery of a state purchasing agent was not immune from the application of the Robinson-Patmann Act by the Parker v. Brown, 317 U.S. 341 (1943) state action exemption. *Id.* at 858. Neither the Sherman Act, nor the *Noerr-Pennington* doctrine were discussed.

99. *See* Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991, 1012-23 (S.D. Tex. 1981). The court noted that some lower courts include within the sham exception instances where the conduct of a public official is challenged, while others have decided that the "public officials/co-conspirator" represents an entirely different exception to the *Noerr-Pennington* immunity. *Id.* at 1013-14 n.22. *See, e.g.,* Kurek v. Pleasure Driveway & Park Dist., 378 F.2d 378, 391 (7th Cir. 1978) (actions of concessionaire in presenting proposal knowing that it would be used by park district to coerce plaintiffs were not dissimilar to activities Sherman Act was meant to proscribe), *cert. denied,* 439 U.S. 1090 (1979); Duke & Co. v. Foeerster, 525 F.2d 1277, 1285 (3rd Cir. 1975) ("where complaint goes beyond mere allegations of official persuasion by anticompetitive lobbying and claims official participation with private individuals in a scheme to restrain trade, the *Noerr-Pennington* doctrine is inapplicable"); Harman v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964) (since acts of State Attorney General were alleged to be those of participating conspirator court found *Noerr* would not preclude applicability of Sherman Act).

100. Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991, 1014 (S.D. Tex. 1981).

demonstrate the city's vigorous involvement in orchestrating certain aspects of the conspiracy."[101] The court held the parameters of the doctrine in the legislative area when an official is alleged to be a co-conspirator are as follows:

> When a restraint of trade is the result of valid governmental action which was induced by the joint efforts of private parties, those joint efforts are shielded by *Noerr-Pennington* immunity. When, however, the governmental action is rendered invalid by the illegal, not merely unethical, conduct of the governmental entity acting as a co-conspirator, the joint efforts of the private parties are not automatically entitled to immunity. Further, inasmuch as the government entity can act only through its agents, who are public officials, the illegal acts of those officials in their capacities become the illegal acts of the entity.[102]

The complaint in *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*[103] alleged that two restaurant associations, a labor union, and certain hotel employees had combined and conspired to challenge a permit solicited by a competitor, solicited others to take like action, threatened loss of political support, provided false publicity, and knew the opposition was a mere sham.[104] The Ninth Circuit Court of Appeals affirmed the dismissal of the complaint and announced that the sham exception did not apply to direct lobbying efforts, but only to publicity campaigns where a combination is not seeking official action by a government body.[105]

Hecht v. Pro Football, Inc. involved a group of businessmen who unsuccessfully sought to obtain a football league franchise, and consequently sued the resident professional football club, a governmental agency, and the National Football League under the Sherman Act, based upon a restrictive convenant in a lease between the team and the government agency.[106] The Court of Appeals for the

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101. *Id.* at 1016.

102. *Id.* at 1016.

103. 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

104. *Id.* at 1077.

105. *Id.* at 1080. The *Franchise Realty* holding and rationale goes far beyond that set forth in the *Noerr* case, and beyond the usual boundaries of the *Noerr-Pennington* exemption even in a legislative context. *Franchise Realty* was questioned and criticized in MCI Communications Corp. v. AT&T Co., 462 F. Supp. 1072 (N.D. Ill. 1978).

106. Hecht v. Pro-Football, Inc., 444 F.2d 931, 932 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

District of Columbia reversed a summary judgment granting *Noerr-Pennington* protection and held that such activity must be tested in accordance with the antitrust laws usually applied to contracts between private parties.[107] The court distinguished cases in which a governmental agency is not in a position to make government policy, but is "obligated to carry out the policy as already made." Ruling that *Noerr-Pennington* protection would not apply,[108] the court went on to hold that other cases on which the government is making policy would be protected. Under the facts presented such a distinction seems unjustified. If defendants are protected in seeking the legislation or other government action, how can they be subject to liability once it is enacted and is being applied according to its terms? The distinction seems to be tied to a commercial activity exemption.

In *In re Airport Car Rental Litigation*,[109] a car rental company brought suit alleging that two other car rental companies were engaging in a conspiracy to eliminate competition in the on-airport rental market, and, in furtherance of the conspiracy, jointly influenced and engaged with airport authorities to adopt and enforce certain standards regarding minimum qualifications. The plaintiff alleged that these standards and requirements precluded it from competing in the on-airport car rental market in certain cities, that the defendants entered into contracts with airport authorities which prohibited other car rental operations from entering the market, and which established unreasonably high minimum guarantees. Further, they opposed applications of other car rental companies in bad faith and fixed rental rates in the on-airport market. The court held it would apply the *Noerr-Pennington* immunity

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107. *Id.* at 947.

108. *Id.* at 942. *See also* Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1298 (5th Cir. 1971) ("acts designed to influence policy . . . is all the *Noerr-Pennington* rule seeks to protect"), *cert. denied*, 404 U.S. 1047 (1972); Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 460 F. Supp. 1359, 1384-85 (D. Hawaii 1978) ("if [defendants'] actions are not directed toward achieving a political result or affecting public policy, the *Noerr-Pennington* protections may not apply"). Neither of these cases are authority for *Hecht*, as they construed present acts not aimed at influencing government action, rather than past acts which were presently embodied in statute and contract. *See* Wood Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1289 (5th Cir. 1971); Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 460 F. Supp. 1359, 1363 (D. Hawaii 1978).

109. 1981-1 TRADE CASES ¶ 63, 983 (N.D. Cal.).

provided the plaintiff offered evidence showing that the defendants' representatives coordinated their negotiations with the governmental officials, and had met jointly with such officials to discuss the terms of the lease agreement and to present standards and criteria which the airport should require of the lessees.[110] The court concluded such joint activities were within the purview of *Noerr-Pennington* protection where the activities of the officials are within their official function.[111] The fact that the government's actions were sought by "commercial speech" or "commercial activity",[112] and that the airport authorities' actions were motivated by economic considerations and sound business judgment did not cause the actions to cease to lose their governmental character.[113]

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110. *Id.* at 63, 983.

111. *Id.* at 63, 983.

112. *Id.* at 63, 983. *Airport Car Rental* criticizes the "commercial speech" and "commercial activity" exemptions to the *Noerr-Pennington* protection. Such criticism has a basis in the first amendment analysis and in Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980), where the Supreme Court ruled that any restriction on commercial speech must directly advance a substantial interest and must not be broader than is necessary to achieve that objective. The Sherman Act probably does not meet the test of *Central Hudson* because it is not a statute narrowly tailored to serve a particular interest. Commercial speech enjoys first amendment protection, not only as an exercise of the right to speak and petition, but also as to guarantee the right of the collective public, through its government at all levels, to receive information. *Airport Car Rental* also distinguishes the line of authority recognizing the "commercial" exception to the *Noerr-Pennington* immunity. *See* California Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 512 (1972) (*Noerr-Pennington* protection extends to "business and economic interests"); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir.) (the immunity does not extend to efforts to sell products to public officials acting under competitive bidding statutes; commercial bidding statutes removed the facts from the normal Sherman Act scrutiny), *cert. denied*, 400 U.S. 850 (1970).

113. *In re* Airport Car Rental Antitrust Litigation, 1981-1 TRADE CASES ¶ 63, 983 (N.D. Cal.). If the airport officials had conspired with the rental companies, the *Noerr-Pennington* protection might not be applicable. *Id.*; *cf.* Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 399 (1978) (public agencies and officials may under certain circumstances lose the "state action" exemption where they conspire to violate the antitrust laws). The *Lafayette* Court was not presented with the question whether private defendants lose their *Noerr-Pennington* protection by conspiring with governmental officials, which is totally different from the issue decided in *Lafayette*. *Id.* at 399. The courts are split on this question. *See* Duke & Co. v. Foerster, 521 F.2d 1227, 1282 (3d Cir. 1975) (held loss of immunity in passing on the pleadings only); Harman v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964) (immunity lost where defendants conspired with attorney general). *But see* Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 229-30 (7th Cir. 1975); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 342-43 (9th Cir. 1969). *See also* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962) (participant in conspiracy was private corporation to which official authority had been delegated by government). The res-

The *Airport Car Rental* court refused to recognize the "commercial activity" exception, because it based the protection on a statutory construction.[114]

Another discussion of the "political activity" exception is set out in *Federal Prescription Serv., Inc. v. American Pharmacuetical Ass'n.*[115] In *Federal Prescription*, the lobbying activities of a national association of pharmacists and a national association of state boards of pharmacy[116], and their financing of a court action to enforce a judicial declaration[117], were held to be protected from an antitrust challenge by *Noerr-Pennington* immunity.[118] The court ruled that there was no evidence that the organizations had subverted the integrity of the governmental processes, or that the activities were something other than protected "political activities."[119] The court inquiries concerning the intent of the defendants,[120] the purpose of the activities,[121] the nature of their action,[122] and whether the activities were commercial, or solely po-

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olution of this conflict may turn on the same two questions concerning scope raised in all *Noerr-Pennington* immunity cases:

(1.) Whether the acts of the public officials were within the scope of their authority; and

(2.) Whether the private activities, notwithstanding the collaboration, were geniune efforts to influence lawful official action.

Cf. Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 592-94 (7th Cir. 1977) (one basis for finding *Noerr* inapplicable is that party was not making a genuine effort to obtain rights purposely).

114. *See In re* Airport Car Rental Litigation, 1981-1 TRADE CASES ¶ 63, 983 (N.D. Cal.).

115. [1981-2 Trade Cases] TRADE REG. REP. (CCH) ¶ 64, 217 (D.C. Cir.).

116. *Id.* The lobbying activities consisted of lobbying pharmacy boards to issue and enforce regulations inhibiting mail order prescription drug sales. *Id.*

117. *Id.* The judicial declaration was that mail order sales constituted the unlicensed practice of pharmacy in violation of state law. *Id.* The judicial question will be discussed in part IV of this article.

118. *Id.*

119. *Id.* The court did inquire concerning whether the state boards of pharmacy had been co-conspirators in the alleged scheme, which the court provided would have nullified the *Noerr-Pennington* protection. *Id.*

120. *See id.* ("anticompetitive intent alone is not enough").

121. *See id.* at 64, 217 n.7.

122. *See id.* at 64, 217 n.7. *See also* Israel v. Baxter Laboratories, Inc., 466 F.2d 272, 274, 275-79 (D.C. Cir. 1972) (seeking to undermine fair and impartial functioning of administrative agency by misrepresentation and suppression of information); Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 440 F.2d 1096, 1099 (9th Cir.) (using threats and other coercive measures to influence state fair officials), *cert. denied*, 404 U.S. 826 (1971); Wood Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1298 (5th Cir. 1971) (filing false nomination forecasts with state commission to reduce production al-

litical in nature,[123] seem to be an attempt to constrict the parameters of the *Noerr-Pennington* doctrine even in the legislative arena.

C. *Additional Considerations*

Curiously, the success of obtaining the requested government action may be a factor, or even depositive, in determining whether the Sherman Act is applicable to such conduct.[124] In *Franchise Realty*, the court specifically found an express anticompetitive purpose and the possibility that the legislative body acted erroneously, yet dismissed the complaint because the lobbying effort had been successful.[125] The *Franchise Realty* court assumed that successful petitioning can never be a sham relying on the rationale that if a claim is vindicated by the government, the government's action is objective and strong evidence that the petitioner did not knowingly prosecute a baseless claim.[126] In fact, a lower court has dismissed a complaint on the basis that a defendant "may ultimately pre-

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lowables of other producers), *cert. denied*, 404 U.S. 1047 (1972); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 29 (1st Cir.) ("fraudulent statements and threats" to gain advantage over competitor seeking same government contract), *cert. denied*, 400 U.S. 850 (1970).

123. Federal Prescription Serv. Inc. v. American Pharmaceutical Ass'n, [1981-2 Trade Cases] TRADE REG. REP. (CCH) ¶ 64, 217 n.7 (D.C. Cir.) ("private efforts to influence governmental bodies acting in an economic frame work rather than a political framework . . . having been held unprotected by *Noerr*"). *See, e.g.*, Hecht v. Pro Football, Inc., 444 F.2d 931, 940-42 (D.C. Cir. 1971) (football team bargaining for restrictive covenant in lease with government-owned football stadium not immune from antitrust suit by virtue of *Noerr*),*cert. denied*, 404 U.S. 1047 (1972); George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir.) (*Noerr* does not protect efforts to influence "public officials engaged in purely commercial dealings" and charged with the task of making "government purchases . . . according to strictly economic criteria"), *cert. denied*, 400 U.S. 850 (1970); *In re* Airport Car Rental Litigation, 474 F. Supp. 1072, 1091 (N.D. Cal. 1979) (those seeking to influence airport authorities in charge of licensing car rental operations not entitled to antitrust immunity under *Noerr* because authorities were "acting as a commercial entity").

124. *See, e.g.*, Adolph Coors Co. v. A & S Wholesalers, 561 F.2d 807, 812 (10th Cir. 1977) (acts not in bad faith or "sham" because legality of restraint had been approved by lower court); Taylor Drug Stores v. Associated Dry Goods Corp., 560 F.2d 211, 213 (6th Cir. 1977) (successful litigation can not be a sham); Bracken's Shopping Center, Inc. v. Ruwe, 273 F. Supp. 606, 608 (S.D. Ill. 1967) (successful lawsuit is not antitrust offense).

125. Francise Realty Interstate Corp. v. San Francisco Local Exec. Bd. of Culinary Workers, 542 F.2d 1076, 1079 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

126. *Id.* at 1081.

vail."[127] It is difficult to determine how or why the success of the lobbying efforts bears upon or should bear upon the scope of the Sherman Act. It appears that the only issues upon which the success factor could bear—the purpose and intent of the parties—are not relevant to a determination of the scope and extent of the *Noerr-Pennington* immunity.[128]

Additionally, *Noerr-Pennington* immunity in certain situations is in direct conflict with the Sherman Act[129] rule which prohibits the exchange of certain information among competitors.[130] The "sham" exception only reaches acts which directly interfere with the business relationships of a competitor and which do not genuinely attempt to influence government action. The exception does not reach, at least by its express terms, an exchange of information which is necessary for a legitimate and complete presentation of a matter to the legislature.[131] Although the express terms of the immunity allows all exchanges, if the exchanged information concerns prices or will directly affect price, the chance that courts will find that the concerted action does not fall within the scope of *Noerr-Pennington* immunity is greatly multiplied.[132] This distinction has no rational basis, as all facts protected by the *Noerr-Pennington* doctrine have, by definition, anticompetive results. The distinction is grounded in the courts' distaste for price fixing or price

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127. *See* Bethlehem Plaza v. Campbell, 403 F. Supp. 966, 971 (E.D. Pa. 1975) (court dismissed complaint which charged single "baseless" taxpayer suit challenging a proposed bond issue because taxpayer "may ultimately prevail").

128. *See* notes 133 thru 138 *infra* and accompanying text.

129. *See* I.C.L. Theatres, Inc. v. Columbia Pictures Industries, Inc., 1976-1 TRADE CASES ¶ 60, 964 (N.D. Tex.) (suggestions of a conflict of *Noerr-Pennington* immunity and the Sherman Act).

130. *See* United States v. Container Corp. of America, 393 U.S. 333, 337 (1969).

131. The most frequent example concerns whether an automobile manufacturers trade association is allowed to exchange information among its members to collectively decide and arrange for testimony about the cost of the incorporation of a pollution control device on new automobiles. *See* Osborn v. Pennsylvania Del. Serv. Station Dealers Ass'n, 499 F. Supp. 553, 558 (D. Del. 1980) (no first amendment threat in preventing gas boycott); United States v. Northern Californa Pharmaceutical Ass'n, 235 F. Supp. 378, 381 (N.D. Cal. 1964) (lobbying preparation or presentation of material involving price "could not be justified merely upon the grounds of the right to petition the [government]"). *But see* Crown Central Petroleum Corp. v. Waldman, 486 F. Supp. 759 (M.D. Pa.) (exemption of closing of service stations in order to publicize grievance with government), *rev'd on other grounds*, 1980-2 TRADE CASES ¶ 63, 635 (3rd Cir.).

132. *See* Battle v. Lubrizol Corp., 513 F. Supp. 995, 998-99 (E.D. Mo. 1981) ("price mechanisms as particularly suspect").

maintenance.

D. *Current Parameters in the Legislative Context*

The courts are beginning to expand the sham exception, even in the legislative area, by utilizing criteria not discussed in *Noerr*. The courts inquire (1) whether the activities are commercial or political in nature,[133] (2) whether the government official merely supports the conspirator's efforts or participates in them,[134] (3) whether there is illegal or unethical conduct involved in the lobbying efforts,[135] (4) whether price is involved in the exchange of information,[136] (5) whether the lobbying efforts were successful,[137] and (6) possibly even whether the purpose and intent of the activities was anticompetitive.[138] Although some erosion of the doctrine has occurred in the legislative area, it is still vital, and can be used to insulate otherwise illegal activity.

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133. *See* Hecht v. Pro-Football, Inc., 444 F.2d 931, 940-42 (D.C. 1971), *cert. denied*, 404 U.S. 1047 (1972); Federal Prescription Serv., Inc. v. American Pharmacuetical Ass'n [1981-2 Trade Cases] TRADE REG. REP. (CCH) ¶ 64,217 (D.C. Cir.).

134. *See* Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991, 1012-13 (S.D. Tex. 1981).

135. *See, e.g.*, Israel v. Baxtor Laboratories, Inc., 466 F.2d 272, 274, 275-79 (D.C. Cir. 1972) (seeking to undermine fair lobbying procedure by suppression of information); Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 440 F.2d 1096, 1099 (9th Cir.) (threats to influence officials), *cert. denied*, 404 U.S. 826 (1971); Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 858 (9th Cir.) (bribery of purchasing agent not immune from liability), *cert. denied*, 383 U.S. 936 (1965).

136. *See* Battle v. Lubrizol, Corp., 513 F. Supp. 995, 998-99 (E.D. Mo. 1981).

137. *See, e.g.*, Adolph Coors, Co. v. A & S Wholesalers, 561 F.2d 807, 812 (10th Cir. 1977) (acts not "sham" because approved by the lower court); Taylor Drug Stores v. Associated Dry Goods Corp., 560 F.2d 211, 213 (6th Cir. 1977) (successful litigation is not an antitrust violation); Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 229-30 (7th Cir. 1975) (successful applicant for cable franchise did not violate Sherman Act by efforts to induce city officials).

138. *See* Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 592-94 (7th Cir. 1977) (party must have genuine purpose in influencing official action); Federal Prescription Serv., Inc. v. American Pharmacuetical Ass'n [1981-2 Trade Cases] TRADE REG. REP. (CCH) ¶ 64,217 (D.C. Cir.) (court inquire into the intent of defendants and the purpose behind their activities).

IV. LITIGATION AS A VIOLATION OF THE SHERMAN ACT

A. *Overview of the Immunity in the Judicial Arena*

Prior to the Supreme Court's holding in *California Motor Transport Co. v. Trucking Unlimited*,[139] it was not believed that *Noerr-Pennington* immunity extended to conduct intended to influence the courts.[140] This belief was understandable, given the Supreme Court's own decisions announced after *Noerr*.[141] In addition, litigation rarely resembles the obviously political policymaking involved in legislative action and attempts to influence it. The absence of such political considerations naturally would seem to make *Noerr* inapplicable.[142]

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139. 404 U.S. 508 (1972).

140. The Ninth Circuit Court of Appeals carefully examined the available precedent before deciding that concerted employment of judicial and administrative processes as part of a scheme to restrain trade, was not excluded from the coverage of the Sherman Act by the *Noerr-Pennington* doctrine. *See* Trucking Unlimited v. California Motor Transp. Co., 432 F.2d 755, 760 (9th Cir. 1970), *vacated and remanded*, 404 U.S. 508 (1972).

> *Noerr* presented a powerful argument for holding that joint efforts to influence legislation and executive action are excluded from Sherman Act liability regardless of purpose, but it does not justify immunizing agreements to utilize judicial and administrative adjudicative processes in a scheme to restrain trade. The fundamental reason for the *Noerr-Pennington* exception does not apply. It is not the function of the courts to determine whether laws restraining trade will be adopted or, having been adopted, whether they will be enforced; nor is this the function of an administrative agency engaged in adjudication, ... It would be pointless to limit the reach of the Sherman Act in order to protect the access of courts and agencies engaged in adjudicative functions to information and opinion relevant to determinations they have no power to make.

Id. at 758-59.

141. *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 173 (1965) (litigation to enforce a fraudulently obtained patent may violate § 2 of Sherman Act); United States v. Singer Mfg. Co., 374 U.S. 174, 175 (1963) (suits for patent infringement and proceedings brought before the United States Tariff Commission, following certain cross-license agreements intended to confer standing to sue Japanese competitors, constituted a course of conduct violating sections 1 and 2 of the Sherman Act). Neither decision mentioned the possibility of antitrust immunity under the *Noerr-Pennington* doctrine.

142. *See* Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1296 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). In *Woods*, the Fifth Circuit Court of Appeals used this rationale in deciding that the filing of false nomination forecasts with the Texas Railroad Commission was not exempt from antitrust scrutiny. "[I]n the instant case there has been no attempt by defendants through the filing of false nominations to influence the policies of the Railroad Commission. The germination of the allowable formula was political in the *Noerr* sense, and thus participation in those rulemaking proceedings would have been protected. But the formula's subsequent implementation is

The Supreme Court's opinion in *Trucking Unlimited* made it clear that *Noerr-Pennington* immunity could apply to actions before adjudicative agencies and courts. This was the result of a necessary accommodation between the right of petition guaranteed by the first amendment and the scope of application of the federal antitrust laws.[143] At the same time, the Court expanded the scope of the "mere sham" exception, stating that "a pattern of baseless, repetitive claims" which effectively barred access by competitors to administrative agencies or the courts was not protected political expression.[144] Various types of unethical conduct also were condemned, with the implication that such conduct would not be immunized in a judicial setting.[145] The Court's earlier emphasis upon the irrelevance of the intent or purpose underlying petitioning activity was virtually abandoned, as was the earlier emphasis upon the complete and expansive antitrust immunity accorded to attempts to influence government action.[146]

Trucking Unlimited appeared to create two "mere sham" exceptions to the *Noerr-Pennington* doctrine, each depending upon the type of government action affected. Attempts to influence the legislature or the executive branch in connection with the making of governmental policy would not be condemned as a sham without

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apolitical. Once the rule is promulgated, defendants may not plead immunity in their attempt to undermine its efficacy for anti-competitive purposes." *Id.* at 1297.

143. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 509-10 (1972).

144. *Id.* at 513.

145. *Id.* at 512-13.

146. *Id.* at 517 (Stewart, J., concurring). Justice Stewart pointed out this retreat in his concurring opinion in *Trucking Unlimited*, and challenged the Court's simultaneous statements that right of access to the courts is part of the right of petition guaranteed by the first amendment and that joint agreements to petition are not necessarily given immunity from the antitrust laws. "It is difficult to imagine a statement more totally at odds with *Noerr*. For what that case explicitly held is that the joint exercise of the constitutional right of petition is given immunity from the antitrust laws." California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 517 (1972) (Stewart, J., concurring). Justice Stewart would have remanded for proof of allegations that the defendants agreed to jointly carry out a systematic and uninterrupted program of opposing all carrier operating rights, regardless of the merits or the chances of success, and also agreed to finance and publicize this plan of opposition. This agreement would have revealed conspiratorial intent to directly interfere with competitors' business relationships, instead of genuine intention to invoke the administrative and judicial processes. *Id.* at 518. Yet, even Justice Stewart would have authorized an inquiry into the intent and purpose underlying the defendants' use of administrative and judicial processes. *Id.* at 517.

proof that the defendants had no genuine intention of influencing governmental action. Abusive or unethical conduct in an adjudicative setting, however, would be considered a sham, regardless of the existence of genuine intent to petition.[147] Some courts have applied the "mere sham" exception in accordance with this dichotomy.[148] It is possible, however, to explain the discussion of abusive tactics in *Trucking Unlimited*, without multiplying the "mere sham" exception. The existence of abuses such as perjury, bribery, assertion of fraudulently obtained patents, or other claims make an inference of unlawful motivation even more plausible in the adjudicative context. Although such abuses are not condoned in the legislative area, they present more convincing evidence of bad faith and abuse when encountered in the adjudicative process.[149]

The defendants in *Trucking Unlimited* used multiple lawsuits to smother their competitors, so that effective access to administrative agencies and courts was denied their opponents. In *Otter Tail Power Co. v. United States*,[150] the Supreme Court cited *Trucking Unlimited* for the proposition that the "mere sham" exception included "the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims . . . ."[151] The district court's judgment was vacated and remanded for reconsideration in accordance with this principle, although only four lawsuits against four different municipalities were involved in *Otter Tail*. Additionally, there had been no showing of a denial of access to courts or

147. *See* Rodgers v. FTC, 492 F.2d 228, 232 n.3 (9th Cir. 1974); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 107 (1977).

148. *See* Israel v. Baxter Laboratories, Inc., 466 F.2d 272, 278 (D.C. Cir. 1971) ("No actions which impair fair and impartial functioning of administrative agency should be able to hide behind cloak of antitrust exemption"); United States Dental Inst. v. American Ass'n of Orthodontists, 396 F. Supp. 565, 581-83 (N.D. Ill. 1975) (allegations that associations sought to keep private college from receiving certification were sufficient to allege bad faith and withstand motion to dismiss for *Noerr* immunity).

149. *Cf.* Hibner, *Litigation as an Overt Act in Furtherance of an Attempt to Monopolize*, 38 OHIO ST. L.J. 245, 263 (1977). Alternatively, it may be said that such abuses help define the limits of the right of petition before the courts. These limits are stricter than when legislative petitioning is involved, and the margin for error is narrower. *See* Fischel, *Antitrust Liability For Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 107 (1977).

150. 410 U.S. 366 (1972).

151. *Id.* at 380.

agencies remotely approaching the facts of *Trucking Unlimited*.[152]

The Supreme Court's emphasis, in *Trucking Unlimited* and *Otter Tail*, upon repetitive claims and access-barring conduct as appropriate evidence of sufficient bad-faith to bring litigation within the "mere sham" exception has significantly misled a number of the lower federal courts. Absence of a pattern of baseless or unfounded litigation, which has the effect of denying access to the courts or other tribunals, does not preclude a finding of "mere sham" for purposes of *Noerr* analysis.[153] Some courts, however, have reached this mistaken conclusion. *Bethlehem Plaza v. Campbell*[154] is a typical example. *Campbell* involved allegations by a partnership formed to construct a shopping mall that two competing shopping centers had violated sections 1 and 2 of the Sherman Act by filing a spurious lawsuit which challenged a proposed bond issue to finance the plaintiff's project as an improper use of public funds. Certain disparaging and "scurrilous" advertisements were alleged as additional overt acts in the conspiracy. In dismissing the plaintiff's complaint, the district court referred to *Trucking Unlimited* and *Otter Tail* as authority for the proposition that only a pattern of baseless and repetitive litigation could fall within the "sham exception" to the *Noerr* doctrine, as extended to the adjudicating process.[155]

In spite of *Campbell* and other similar decisions,[156] the trend of

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152. Upon remand, the district court preemptorily held that the plaintiffs had stated a cause of action under the "mere sham" exception to the *Noerr-Pennington* doctrine. United States v. Otter Tail Power Co., 360 F. Supp. 451, 451 (D. Minn. 1973), *aff'd mem.*, 417 U.S. 901 (1974). It should be noted that the lawsuits by the defendant in *Otter Tail*, although few in number, did have the effect of frustrating efforts by the municipalities involved to issue bonds in order to raise sufficient capital to compete with the defendant. Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1972), *on remand*, 360 F. Supp. 451 (D. Minn. 1973), *aff'd mem.*, 417 U.S. 901 (1974). Other anticompetitive acts, such as a refusal to "wheel" power for the plaintiffs, were also committed. *Id.* at 368-72.

153. *See* 1 P. AREEDA & D. TURNER, ANTITRUST LAW § 203b, at 71 n.7 (1978). It is true, of course, that a repetitious pattern of clearly unmeritorious litigation makes proof of bad faith and abuse of the judicial processes much easier. There is, however, nothing inherently illogical in the possibility that a single lawsuit may be filed with the purpose of directly interfering with another's business so that the antitrust laws would be violated as a result.

154. 403 F. Supp 966 (E.D. Pa. 1975).

155. *Id.* at 970-71.

156. *See, e.g.*, Taylor Drug Stores, Inc. v. Associated Dry Goods Corp., 560 F.2d 211, 213 (6th Cir. 1977) (per curiam) (a single successful lawsuit is not a sham); Central Bank of Clayton v. Clayton Bank, 424 F. Supp. 163, 167 (E.D. Mo.) (single intervention in administrative and judicial proceedings to oppose the granting of a bank charter not a "sham,"

recent authority has been to the contrary.[157] Most courts are now willing to consider the institution of even a single lawsuit as a possible violation of the antitrust laws if something more is alleged with respect to abuse of the forum, predatory activity, and the like. This change is attributable in part to the Supreme Court's decision in *Vendo Co. v. Lektro-Vend Corp.*,[158] the most recent decision by the Supreme Court involving the *Noerr-Pennington* doctrine. In *Lektro-Vend*, only Justice Blackmun and Chief Justice Burger indicated that a "pattern of baseless, repetitive" claims would be an essential requirement for a finding that litigation had been employed in committing an antitrust violation.[159] Justices Stevens, Brennan, White and Marshall agreed that even a single lawsuit

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particularly since defendants prevailed in part and their claims were not baseless), *aff'd mem.*, 553 F.2d 102 (8th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); Rush-Hampton Indus., Inc. v. Home Ventilating Inst., 419 F. Supp. 19, 24 (M.D. Fla. 1976) (single proceeding brought to preserve certain provisions of state building code not "mere sham" even though misstatements of fact or unjustified conclusions were presented; there must be "some clearly established pattern of misrepresentation, or of initiation of baseless legal proceedings, or of covert pressures and tactics designed to deprive the administrative body of its ability to function independently").

157. *See, e.g.*, Sage Int'l, Ltd. v. Cadillac Gage Co., 507 F. Supp. 939, 946 (E.D. Mich. 1981) (no per se requirement that more than one claim underlie cause of action based upon "sham" litigation, nor must plaintiff allege denial of access); Technicon Medical Information Systems Corp. v. Green Bay Packaging, Inc., 480 F. Supp. 124, 127-28 (E.D. Wis. 1979) (one lawsuit brought to prevent alleged trade secret violations can constitute antitrust violation when brought in bad faith or without probable cause); Colorado Petroleum Marketers Ass'n v. Southland Corp., 476 F. Supp. 373, 378 (D. Colo. 1979) (Supreme Court did not intend to give "every dog one free bite, thus making it an irrebutable presumption that the first lawsuit was not a sham regardless of overwhelming evidence indicating otherwise"). *Cf.* First Nat'l Bank v. Marquette Nat'l Bank, 482 F. Supp. 514, 520-21 (D. Minn. 1979) (single lawsuit with no unethical conduct accompanying its institution insufficient to fall within "mere sham" exception), *aff'd mem.*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, ___U.S.___, 101 S. Ct. 1761, ___ L. Ed. 2d ___ (1981) ; Mountain Grove Cemetery Ass'n. v. Norwalk Vault Co. of Bridgeport, Inc., 428 F. Supp. 951, 955-56 (D. Conn. 1977) (to permit institution of sham claim on basis of one suit would be undue deterrent to legitimate petition of courts).

158. 433 U.S. 623 (1977).

159. *Id.* at 645. Justice Blackmun did state:

> Since I believe that federal courts should be hesitant indeed to enjoin ongoing state-court proceedings, I am of the opinion that a pattern of baseless, repetitive claims or some equivalent showing of grave abuse of the state courts must exist before an injunction would be proper. No such finding was made by the District Court in this case.

Id. at 644 n.6. Thus, Justice Blackmun's view may be based upon his interpretation of the anti-injunction statute, 28 U.S.C. § 2283 (1970), rather than his analysis of the Sherman Act.

could fall within the "mere sham" exception to *Noerr*.[160] Three of the Justices did not address the issue.[161]

The law in the Fifth Circuit has been clearly established by *Associated Radio Serv. Co. v. Page Airways, Inc.*[162] *Page* involved alleged violations of sections 1 and 2 of the Sherman Act through such tactics as enticing employees away from their current position, destruction of the plaintiff's business records, unauthorized use of proprietary business information, slandering the plaintiff's credit, and the filing of a spurious lawsuit to block the plaintiff's enforcement of a valid mechanic's lien.[163] The district court denied the defendants' motion for summary judgment which was based upon the *Noerr-Pennington* doctrine.[164] In substantially affirming

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160. "Each of the examples given in . . . the *California Motor Transport* opinion involves a single use of the adjudicatory process to violate the antitrust laws. Manifestly, when Mr. Justice Douglas wrote for the Court in that case and described 'a pattern of baseless, repetitive claims,' . . . as an illustration of an antitrust violation, he did not thereby circumscribe the category to that one example." *Id.* at 661-62 (Stevens, J., dissenting). It is interesting that none of the Justices made reference to access-barring conduct.

161. Justices Rehnquist, Stewart and Powell held that section 16 of the Clayton Act, 15 U.S.C. § 26 (1970), did not expressly authorize injunctions against state court proceedings within the meaning of the federal anti-injunction statute. *Id.* at 623.

162. 414 F. Supp. 1088 (N.D. Tex. 1976), *aff'd*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, ___U.S.___, 101 S. Ct. 1840, ___ L. Ed. 2d ___ (1981).

163. *Id.* at 1090.

164. *Id.* at 1090. The defendants argued that there could be no abuse of the judicial process within the meaning of *Trucking Unlimited*, unless it could be shown that their lawsuit was baseless and instituted without probable cause; in other words, the tort of malicious prosecution must have been committed. *Id.* at 1096. They also contended that a single lawsuit which had not yet come to trial could not be considered an abuse of the legal process, since the merits of the claim had not even been determined. *Id.* In reality, two related cases had been filed by defendants—one suit for injunctive relief and one interpleader action. Both impeded efforts by the plaintiff to collect certain debts owed to it. The district court rejected the defendants' position, stating:

> While useful in some fact situations, Defendants' analogy to malicious prosecution is not determinative. The gist of the exception to *Noerr-Pennington* immunity further articulated in *California Transport* is abuse of the legal process and not specifically the tort of malicious prosectuion. As such, the baselessness of the claims made in [a] prior proceeding is only one aspect of various possible abuses of the legal process. The gravamen of the 'tort' abuse of process is the initiation of a legal proceeding against an individual to secure an objective other than the judgment purportedly sought in that proceeding . . . . While 'abuse of legal process' as used generically in *California Transport* may be broad enough to include the tort of malicious prosecution, there can be no doubt that it also includes the narrower and conventional tort, abuse of process. Therefore, Plaintiff need only show that the Defendant instituted litigation with the *purpose* of achieving a collateral and unlawful objective to that appearing on the face of the suit and that he committed specific acts - other than those acts inci-

the judgment of the lower court after trial on the merits, the Fifth Circuit Court of Appeals stated:

> Defendants also attack the trial court's rulings regarding the admission of evidence of defendants' lawsuits against plaintiffs. This issue was fully considered by the trial court in its earlier opinion in this case . . . . The gist of that opinion is that evidence of the lawsuits was relevant since plaintiffs alleged that they were brought not for a proper purpose but for the purpose of achieving an unlawful objective — *i.e.*, to destroy plaintiffs by strangling plaintiffs' source of funds. We agree with the district court that the *Noerr-Pennington* doctrine does not extend first amendment immunity to such abusive acts . . . . It should be noted that the district court required plaintiff not only to show that the defendants had an illegal purpose in filing the lawsuits but that defendants also committed specific acts, other than those incidental to the normal use of the courts, directed at attaining the illegal objective . . . . We agree with that analysis and that requirement.[165]

Page establishes the current standard in the Fifth Circuit for a claim that use of the adjudicatory process has been a "mere sham" and, thus, is unprotected by *Noerr-Pennington* immunity. No pattern of baseless, repetitive litigation is required. No allegations that access to the courts or other tribunals has been barred are required. Only proof of an illegal purpose in filing litigation, combined with specific acts normally unrelated to use of the courts and directed at attaining the unlawful objective, is essential.[166] Presum-

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> dental to the normal use of the Courts - directed at attaining that objective . . . . In the case now before the Court, it is alleged that the purpose of Defendants' state prosecutions was to destroy Plaintiffs; there can be no doubt from Plaintiffs' allegations, which for the purposes of this order must be assumed to be true, that Defendants were attempting to manipulate the court system to strangle Plaintiffs' source of funds . . . . [T]he Noerr-Pennington doctrine does not extend immunity to such abusive acts . . . .

Id. at 1096 (citations omitted).

165. Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342, 1358 (5th Cir. 1980), *cert. denied*, ___U.S.___, 101 S. Ct. 1740, ___ L. Ed. 2d ___ (1981). The jury instruction submitted by the trial court, with respect to defendants' abuse of the judicial process and the *Noerr-Pennington* issues, is set forth verbatim in the Fifth Circuit's opinion and should be examined. *Id.* at 1358 n.27.

166. There is a certain ambiguity in the requirement that the "sham" litigation be accompanied by acts not incidental to the "normal" use of the courts and directed toward obtaining the unlawful objective. Would unethical acts which are fairly common, and yet prohibited by the Code of Professional Responsibility, constitute such acts? For example, Disciplinary Rule 5-103 (B) of the Code of Professional Responsibility prohibits a lawyer

ably the specific act requirement is engrafted to insure adequate proof of unlawful purpose in filing litigation.[167] The intent or purpose underlying the litigation is not irrelevant. Unethical activity and other abuses of the forum may result in the loss of *Noerr-Pennington* protection. In all of these ways, the "mere sham" exception to *Noerr* has been drastically expanded in the area of adjudicative processes. The resulting erosion of the *Noerr-Pennington* doctrine in this area is apparent. No one can blithely rely upon immunity from the antitrust laws in filing litigation or pursuing administrative adjudications.

B. *Acts Probative of Sham Litigation*

There are many forms of illegal or reprehensible actions which are not tolerated in the judicial arena, and which may be evidence of a "sham" proceeding for *Noerr-Pennington* purposes. Justice Douglas gave the following examples: perjury of witnesses, suits to

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from advancing or guaranteeing the payment of expenses of litigation, unless the client remains ultimately liable for such expenses. Violations of the rule are common, particularly in representational suits such as class actions. *See generally* Findlater, *The Proposed Revision of DR 5-103(B): Champerty and Class Actions*, 36 BUS. LAWYER 1667 (1981). Would illegal or unethical champerty be a specific act that would contribute toward a finding that litigation was a "sham" unprotected by *Noerr-Pennington* immunity, even though it occurs with great frequency and the prohibitions against it are rarely enforced? To the extent that the "mere sham" exception has been expanded in the judicial or adjudicatory context to prevent abuses of the judicial process, through unethical conduct which might be tolerated if legislative lobbying were in issue, the answer should be affirmative.

167. For the same reason, the Supreme Court seized upon evidence of a pattern of baseless, repetitive claims, in *Trucking Unlimited*, in finding that the petitioning activity involved was a "sham" subject to antitrust scrutiny. "One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the fact finder to conclude that the administrative and judicial processes have been abused." California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972). One would expect the Fifth Circuit to reach the same result even if specific acts of the appropriate kind could not be demonstrated, if there were sufficient objective evidence in the form of "smoking gun" memoranda or other documents, or admissions to prove that litigation had, in fact, been filed for the unlawful purpose of directly interfering with another's business. *See also* Hibner, *Litigation as an Overt Act in Furtherance of an Attempt to Monopolize*, 38 OHIO ST. L.J. 245, 263 (1977). "The overt acts external to the litigation may be probative evidence of the 'sham.' Nevertheless, acts external to the litigation should be completely unnecessary if the overall scheme or plan to eliminate competition is present, and if misrepresentations, perjury, and withholding of material evidence are present in the litigation itself." *Id.* at 263. At the same time, an ulterior, anticompetitive motive in filing a lawsuit, without more, is not sufficient to make the litigation a "sham." Sage Int'l, Ltd. v. Cadillac Gage Co., 507 F. Supp. 939, 948 n.7 (E.D. Mich. 1981).

enforce fraudulently obtained patents, conspiracy with a licensing authorities or other governmental official, and bribery.[168] Patent infringement litigation is, indeed, the most common type of prior litigation on which antitrust claims are founded.[169] This is due, in part, to ample precedent holding that even a good-faith belief in the validity of one's patent will not preclude the existence of a violation of sections 1 or 2 of the Sherman Act if a lawsuit or lawsuits are brought as part of an integral scheme to monopolize an industry, enforce unlawful tying arrangements, or otherwise violate the antitrust laws.[170]

Prior litigation need not be baseless or unfounded before it can constitute an overt act committed in furtherance of an antitrust violation. Even meritorious patent litigation may be part of a scheme to monopolize a market. This conclusion is consistent with the district court's rejection in *Page Airways* of attempts to equate the "mere sham" exception to *Noerr* with the tort of malicious prosecution.[171] As Justice Stevens pointed out in his opinion in *Lektro-Vend*: "The mere fact that the [state] courts concluded that petitioner's state-law claim was meritorious does not disprove the existence of a serious federal antitrust violation. For if it did, invalid patents, pricefixing agreements, and other illegal covenants in restraint of trade would be enforceable in state courts no matter how blatant the violation of federal law."[172] At the same time, prior claims which are meritorious obviously complicate later efforts of "mere sham" characterization. When previous litigation had demonstrable merit, there had to be significant evidence that it was motiviated by and employed for anticompetitive purposes

168. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512-23 (1972).

169. *See, e.g.*, Rex Chainbelt, Inc. v. Harco Products, Inc., 512 F.2d 993, 995 (9th Cir.), *cert. denied*, 423 U.S. 831 (1975); Chromium Indus., Inc. v. Mirror Polishing & Plating Co., 448 F. Supp. 544, 545 (N.D. Ill. 1978); Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 921, 924 (N.D. Cal. 1975).

170. *See* Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 921, 924 (N.D. Cal. 1975).

171. *See* Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342, 1358 (5th Cir. 1980). *See generally* Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715 (1973).

172. Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 662 (1977) (Stevens, J., dissenting). *But see, e.g.*, Sharon Steel Corp. v. Chase Manhattan Bank, 1981-1 TRADE CASES ¶ 64,010, 76,233 (S.D.N.Y.); Sage Int'l, Ltd. v. Cadillac Gage Co., 507 F. Supp. 939, 948 n.7 (E.D. Mich. 1981); Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168, 174-76 (D. Del. 1979).

tantamount to an abuse of the judicial process.[173]

Litigation which is not completely unmeritorious is more likely to be condemned as a "sham" when brought by a plaintiff which dominates a particular market or controls a substantial market share. If the defendant in such litigation is a small firm or a new entrant into the market with limited capital resources, a colorable claim which threatens lengthy or complicated litigation may completely destroy them as a competitor.[174] Therefore, the motivation behind such a claim should be examined with some care even if manifestations of bad faith are not immediately apparent.

Threats of litigation, made either to specific defendants or as part of a generally publicized policy or course of action, may constitute overt acts in a course of conduct resulting in a violation of the antitrust laws.[175] For obvious reasons, threats or publicity campaigns are particularly likely to cause antitrust problems if the recipient of such threats is given the choice of stopping activity that is pro-competitive and, thereby, escaping administrative or judicial opposition.

Any sort of deception in connection with the support, institution

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173. *See* Ad Visor, Inc. v. Pacific Tel. & Tel. Co., 640 F.2d 1107, 1110 (9th Cir. 1981). In *Ad Visor*, sixty-three suits, brought by a yellow pages publisher against a single advertiser and its advertising agency, were held to fall within the ambit of *Noerr-Pennington* immunity. The Ninth Circuit Court of Appeals emphasized the fact that all of the defendant's litigation was probably meritorious, since plaintiffs had conceded the existence of the underlying debts, or most of them, in an earlier trial. *Id.* at 1110. "[M]ultiplicity, by itself, does not vitiate the *Noerr-Pennington* protections." *Id.* at 1109. Although the decision did not mention that the plaintiffs and the defendant were not competitors, this fact also lends support to the conclusion that the Pacific Telephone and Telegraph Company was not multiplying its claims in bad faith.

174. *See generally* Jentes, *Assessing Recent Efforts to Challenge Aggressive Competition as an 'Attempt to Monopolize'*, 49 ANTITRUST L.J. 937, 948-49 (1981); Hibner, *Litigation as an Overt Act-Development and Prognosis*, 46 ANTITRUST L.J. 718, 722-23 (1978).

175. *See, e.g.*, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 509 (1972) (publicity concerning announced policy opposing all applications to obtain or transfer common carrier operating rights); Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 837 (9th Cir. 1980) (publicizing intention to file lawsuits and delay judicial resolution of claims unless competitor's proposed shopping center eliminated from urban renewal plans); Colorado Petroleum Marketers' Ass'n v. Southland Corp., 476 F. Supp. 373, 375-76 (D. Colo. 1979) (letters threatening legal action unless plaintiffs increased retail prices of gasoline, and efforts to publicize subsequent litigation in order to deter others from lowering retail prices); *cf.* Harshberger v. Reliable-Aire, Inc., [1981-2 Trade Cases] TRADE REG. REP. (CCH) ¶ 64,242, 73,985-87 (Tex. Civ. App.—Corpus Christi, no writ) (venue case; threats to file antitrust litigation if plaintiff did not withdraw from Corpus Christi market as element of violation of state antitrust laws).

or conduct of a lawsuit is another element which may contribute to a finding that the litigation is only a "sham" under *Noerr*.[176] In this regard, the "sham" exception is obviously more expansive in the adjudicative area than when petitioning activity before a legislature is involved.[177] False statements to the adjudicatory body involved (or to anyone else for that matter) are potential evidence of a "sham."[178] Other evidence may include more traditional "abuses" of the litigation process, such as filing numerous and identical or similar lawsuits against the same defendants, unwarranted refusals to consolidate, filing voluminous and substantially identical sets of interrogatories, and any other actions which can be characterized as intentional during the conduct of "sham" litigation.[179]

There are occasions when merely filing litigation or administration claims will substantially frustrate a competitor's efforts to enter a market or otherwise compete with the plaintiff. This may occur, for example, when the mere existence of litigation will preclude the issuance of bonds necessary to finance a competitor's market entry.[180] It may be that an administrative body has an established practice of denying applications to start a new business in a regulated industry if simultaneous applications are filed by competitors or if united opposition to such an application develops. If this is the case, great care must be taken to avoid inviting claims that one's decision to petition the adjudicatory body in issue was not based on the merits. It is much easier and more credi-

176. *See* Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 836 (9th Cir. 1980) (openly filing nine lawsuits, covertly financing four others, and challenging development of competitor's shopping center).

177. Precisely the sort of covert activity mentioned by the Ninth Circuit Court in *Codding* as indicative of bad faith and "sham" litigation was rejected by the Supreme Court in *Noerr* as irrelevant to the issue of antitrust immunity. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 141-42 (1961).

178. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512 (1972) (perjured testimony is indication of sham); Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1297 (5th Cir. 1971) (filing false information with a court or agency is unprotected). One commentator has expressed the following advice for a plaintiff attempting to prove the existence of "sham" litigation: "Look for false statements, not only to adjudicatory bodies, but to the press, to customers, to competitors and to other actors in the . . . violation." Donelan, *Noerr-Pennington Trials: Practical Problems for the Offense*, 46 ANTITRUST L.J. 737, 739 (1978).

179. *See* Donelan, *Noerr-Pennington Trials: Practical Problems for the Offense*, 46 ANTITRUST L.J. 737, 740 (1978).

180. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973); Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 836 (9th Cir. 1980).

ble for a plaintiff to argue that the petitioning activity was a "sham" actually intended to directly interfere with and prevent competition if, in fact, competition is frustrated to a significant degree by simply initiating litigation.

Any sort of joint petitioning action by competitors, such as that accomplished through trade associations or professional societies, may be a source of antitrust liability. Even if the petitioning activity is itself within the scope of *Noerr-Pennington*, previous meetings, discussions or solicitations of support between competitors within such associations or societies may not be a protected exercise of the right to petition the government. In *Feminist Women's Health Center, Inc. v. Mohammad*,[181] the Fifth Circuit Court of Appeals reversed a summary judgment rendered in favor of certain defendants on the basis of the *Noerr-Pennington* doctrine for this reason, among others.

Mohammad involved claims by the Feminist Women's Health Center that certain physicians had, *inter alia*, conspired to boycott the Center's Tallahassee abortion clinic and fix the prices of abortions in the Tallahassee area in violation of both federal and state antitrust laws. Allegations of monopolization and attempts to monopolize the market for providing women's health and abortion services were also made. The defendants, all of whom were members of the gynecology and obstetrics staff of Tallahassee Memorial Hospital, had written a letter to the state agency charged with responsibility under state law for enforcing medical ethics requesting investigation of possible violations of the Medical Practice Act by the Center.[182] After the plaintiff filed suit, members of a local med-

181. 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

182. *Id.* at 537. The letter stated that the out-of-town doctors were performing abortions at the Center, without providing the continuous aftercare required by state law, and requested an investigation of this state of affairs. The Fifth Circuit Court of Appeals found the letter to be within the possible scope of *Noerr-Pennington* protection, but held that this issue could not be determined on a motion for summary judgment. The court held:

> The [district] court required the plaintiff to meet the high burden of proof of sham conduct suggested by the Supreme Court's opinion in *Otter Tail* . . . . *Otter Tail* and *Trucking Unlimited* acknowledge that a showing of a pattern of repetitive baseless claims is strong evidence of sham petitioning, but they do not hold that such evidence is *essential* to proof of sham. The *Noerr* doctrine presents no bar if the plaintiff proves that the petitioning was not a genuine effort to influence public officials to take governmental action . . . . Absent clear direction from the Supreme Court, we see no reason for erecting a special, high burden of proof in this area.

Id. at 543 n.6. (emphasis in the original).

ical society adopted a resolution to provide moral and financial support in the defense of the litigation.[183] The Court considered both of these occurrences to be at least potentially immune from antitrust scrutiny under *Noerr*.[184] Other actions taken by the defendants, however, were not even arguably protected by the *Noerr-Pennington* doctrine as a matter of law.[185]

The unprotected actions taken by the defendants included a letter written to the head of a residency program at a neighboring hospital, informing him that some of his residents had performed abortions at the Center and telling him of the defendants' opinion that the Center was not in compliance with state law.[186] Similarly, the defendants' communication with the Capitol Medical Society, a private organization of local physicians, expressing the opinion that physicians in the Society should not associate with organizations advertising their medical services was not immune from antitrust scrutiny.[187] Finally, communications among the staffs at the Tallahassee and Jacksonville hospitals concerning the advisability of having some of their members practice at the Center were held to be unprotected by *Noerr*. The court stated, with regard to such communications, that:

> Hospital medical staffs and medical societies play an important role in Florida's regulatory scheme, but that role is not a governmental one. Although the actions of such groups in reporting disciplinary findings and suspected violations to the [Board of Medical Examiners] may be petitioning activity within the first amendment, commu-

183. *Id.* at 538.

184. *Id.* at 542. Whether the letter written by the hospital staff was a "sham" excluded from *Noerr* immunity remained an issue of fact to be determined by a jury. As for the joint resolution by the medical society, there was no room for doubt. *Noerr* protected the joint action by these competitors as a matter of law. The Court seemed heavily influenced by the fact that the resolution was a defensive act, passed in response to the plaintiff's suit. This served as a guarantee of sincerity. "There is no genuine issue as to the physicians' intent in adopting the resolution. It cannot be seriously urged that either the physicians' defense of this lawsuit or the medical society's resolution of support is a sham." *Id.* at 543.

185. *Id.* at 542.

186. *Id.* at 538.

187. *Id.* at 537. The court reached this conclusion after an analysis of the Florida law and the status of private medical societies as regulators of medical ethics. Since the Capitol Medical Society was not, in essence, a regulatory arm of the state, the court found that communications with it could not be considered acts of petition for government action protected by *Noerr*. *Id.* at 543-45.

nications within those groups are not.[188]

It is difficult to read the *Mohammad* opinion carefully without reaching the conclusion that it significantly vitiates *Noerr-Pennington* immunity for petitioning activity. This is particularly true with respect to the marked division drawn by the Fifth Circuit between communications actually directed to adjudicatory bodies or directly related to the sincere defense of litigation and other communications occurring at the periphery of such protected activity. Read in its entirety, the opinion seems to indicate that anticompetitive intent alone may remove *Noerr-Pennington* protection.[189]

Finally, agreements among competitors to share the cost of prosecuting or defending litigation, although generally covered by the *Noerr-Pennington* doctrine, may become evidence of a "sham" litigation. Agreements may be considered shams if they exist along with abuse of the adjudicatory process by coercive or exclusionary conduct designed to deprive competitors or others of access to the judicial or administrative processes or otherwise intended to deter them from exercising their adjudicatory rights.[190]

The foregoing discussion has offered illustrations of the factors which have influenced the courts in the past in determining the extent of *Noerr* immunity. As the District Court for the District of Columbia stated recently, "[i]n practice, the distinction between the legitimate dissemination of views and the manipulation of governmental processes for anticompetitive purposes has been difficult to draw, and in various cases the courts have come to conclusions that are not always easy to reconcile."[191] The wisest course is the caution that comes with understanding that the shield of *Noerr-Pennington* is no longer either as broad or as strong as it once was, particularly when the adjudicative process is concerned.

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188. *Id.* at 545.

189. *Cf. id.* at 537. This is particularly true with respect to the court's analysis of the letter written by the defendants to the head of the State Board of Medical Examiners. *See* note 182 *supra* and accompanying text.

190. *See* Gould v. Control Laser Corp., 462 F. Supp. 685, 693 (M.D. Fla. 1978). *Gould* probably overstates the extent of *Noerr* protection for such arrangements by its reliance upon the "access-barring" language of *Trucking Unlimited*, but it is not obviously inconsistent with *Mohammad* in this respect.

191. United States v. AT&T Co., [1981-2 Trade Cases] TRADE REG. REP. (CCH) ¶ 64,277, 74,239 (D.D.C.).

C. *Litigation of Noerr-Pennington Issues*

There are several practical points which should be made before concluding this examination of the *Noerr-Pennington* doctrine. Perhaps the most important is the fact that evidence of activity protected under *Noerr* may still be admissible in antitrust litigation under some circumstances. The Fifth Circuit Court of Appeals has announced the following test:

> Evidence of activity that is protected by the *Noerr* doctrine may be admitted to show the purpose and character of other activity if doing so is not overly prejudicial to the defendants . . . . Admissibility . . . should be governed by a test that weights the probativeness of and the plaintiff's need for the evidence against the danger that admission of the evidence will prejudice the defendant's first amendment rights.[192]

This is in accord with the general principle, approved by the United States Supreme Court in *Pennington*, that evidence of prior or subsequent transactions may be introduced to show the purpose or nature of the particular transaction under scrutiny, even though the prior or subsequent transactions cannot be part of the basis of the litigation.[193] Thus, the existence of *Noerr-Pennington* issues in litigation generally should not limit the scope of

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192. Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 543 n.7 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

193. *See* UMW v. Pennington, 381 U.S. 657, 670 (1965). In *Pennington*, the Supreme Court commented that even where activity is immunized under *Noerr*, "[i]t would, of course, be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the established judicial rule of evidence that testimony of prior to subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transaction under scrutiny." *Id.* at 670 n.3 (citations omitted). *See also* Borough of Lansdale v. Philadelphia Elec. Co., [1981-2 Trade Cases] TRADE REG. REP. (CCH) ¶ 64,218, 73,856 (E.D. Pa.); Nike, Inc. v. Rubber Manufacturers Ass'n, Inc., 1981-1 TRADE CASES ¶ 63,879, 75,564 (S.D.N.Y.). *But see* Fischel, *Antitrust Liability for Attempts to Influence Government Actions: The Basis and Limits of the Noerr Pennington Doctrine*, 45 U. CHI. L. REV. 80, 121 (1977). "The first amendment rationale of *Noerr* suggests that evidence of anticompetitive conduct protected by *Noerr* should not be admitted to show that related activity was improperly motivated. Admitting evidence of conduct protected by *Noerr* to prove an antitrust violation, even if accompanied by the dubious protection of a restrictive instruction, would discourage exercise of the constitutional right to petition the government." *Id.* at 121. Recently, the Fourth Circuit held that the *Noerr-Pennington* exemption does not extend to discovery of evidence. *See* North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., No. 81-1057 (4th Cir. Dec. 7, 1981).

discovery afforded any party.

If evidence of petitioning activity protected under *Noerr-Pennington* is admitted in subsequent litigation, the party against whom it is introduced should be careful to request an appropriate limiting instruction. If such an instruction is requested, it may be reversible error for the court to refuse to give it.[194]

Whether activity within the "mere sham" exception to *Noerr* will also constitute a violation of the antitrust laws is a subject beyond the scope of this article. There is authority, however, for the proposition that if prior litigation is part of a conspiracy in restraint of trade or other antitrust violation, the costs of defense can be recovered as damages under section 4 of the Clayton Act.[195] Those engaged in the process of defending litigation obviously brought in bad faith or for the purpose of harassment should counterclaim for the recovery of attorneys' fees and costs, whether or not an antitrust claim is immediately apparent. There is authority to support such an award without recourse to the antitrust laws,[196] and recovery may make issue preclusion through the doctrine of collateral estoppel available if later antitrust claims are filed against the former plaintiff.

Claims of "sham" litigation unprotected under *Noerr* may also be used defensively as an exception to the general rule that the defense of "unclean hands" is unavailable in an antitrust action.[197] When antitrust litigation is part of a coercive scheme which violates the antitrust laws, constitutes an abuse of process or otherwise falls within the "mere sham" exception to *Noerr-Pennington*,

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194. *See* Household Goods Carriers' Bureau v. Terrell, 452 F.2d 152, 157-58 (5th Cir. 1971).

195. 15 U.S.C.A. § 15 (West Supp. 1980). *See* Kearney & Trecker Corp. v. Cincinnati Milacron, Inc., 562 F.2d 365, 374 (6th Cir. 1977); Dairy Foods, Inc. v. Dairy Maid Products Coop., 297 F.2d 805, 808-09 (7th Cir. 1961); *cf.* Rahal v. Crestmont Cadillac Corp., 1981-1 TRADE CASES ¶ 64,141, 76,847-849 (N.D. Ohio) (cost of defending litigation considered antitrust damages only when institution of lawsuit was sham brought to enhance antitrust violation).

196. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980); Ellingson v. Burlington Northern, Inc., [1981-2 Trade Cases] TRADE REG. REP. (CCH) ¶ 64,235, 73,945 (9th Cir.).

197. *See* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 214 (1951) (plaintiff's alleged price-fixing activities no defense to claims that defendants had conspired to fix maximum resale prices); Magna Pictures Corp. v. Paramount Pictures Corp., 265 F. Supp. 144, 149 (C.D. Cal. 1967) (plaintiff's antitrust violations cannot justify defendants' illegal conduct).

the defense of "unclean hands" has been successful.[198] Claims for injunctive relief can also be successfully defeated when these facts exist.[199]

In settling litigation, plaintiffs should draft their settlement agreements with great care. If a defendant will agree in writing that legitimate issues warranting litigation in good faith do exist, the possibility that the same defendant will later successfully claim that the prior litigation was a "mere sham" can be significantly reduced. A general or mutual release of any and all claims may also cover unknown or unasserted antitrust claims so as to preclude later litigation over the merits of the earlier action.[200]

V. CONCLUSION

Recent developments in the *Noerr-Pennington* doctrine make its scope and application unclear. At least in the area of adjudicative petitioning, almost any sort of coercive, exclusionary, abusive or access-barring conduct may catalyze later antitrust litigation. When this happens, evidence of the intentions and purposes underlying previous petitioning activity inevitably will be relevant, in spite of the original pronouncements by Justice Black in *Noerr*. The ultimate consequence may be an erosion of the principles of res judicata, loss of the attorney-client privilege and a host of other consequences unforeseen by the parties to the prior litigation or other petitioning activity.[201]

This development in the federal antitrust laws results from the

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198. *See* Ancora Corp. v. Stein, 445 F.2d 431, 434 (5th Cir. 1971); SCM Corp. v. Radio Corp. of America, 318 F. Supp. 433, 472 (S.D.N.Y. 1970).

199. *See* Heldman v. United States Lawn Tennis Ass'n, 354 F. Supp. 1241, 1249 (S.D.N.Y. 1973); Louisiana Petroleum Retail Dealers, Inc. v. Texas Co., 148 F. Supp. 334, 337 (W.D. La. 1956).

200. *See* Ingram Corp. v. J. Ray McDermott & Co., 1980-1 TRADE CASES ¶ 63,277 (E.D. La.); AAMCO Automatic Transmissions, Inc. v. Taylor, 368 F. Supp. 1283, 1287 (E.D. Penn. 1973).

201. *See* Higgenbotham, *The Noerr-Pennington Problem: A View From the Bench*, 46 ANTITRUST L.J. 730, 736 (1978). "A plaintiff will pick and choose portions of the earlier suit that it wants to offer and no sound thinking defendant is going to allow it to stop at that point. Once the skunk is in the courtroom, in the words of the trial lawyer, one must try to bring back such auras of a perfume as may have existed earlier. So, the case is effectively going to be retried. . . . " *Id.* at 736. *See also* Memorex Corp. v. IBM Corp., 555 F.2d 1379, 1384 (9th Cir. 1977) (to defend against plaintiff's claims of bad-faith trade secret litigation, defendant could introduce same evidence introduced in earlier litigation to show good faith basis for filing state action).

fact that in our society "[p]redation by abuse of governmental procedures . . . presents an increasingly dangerous threat to competition . . . [and] offers almost limitless possibilites for abuse."[202] As the courts continue to attempt resolution of the tension between first amendment freedoms and protection of free competition and the integrity of the legislative, administrative and judicial processes, all attorneys should be aware that this area of the law is in a state of flux. This awareness alone will be valuable when litigation is filed, administrative proceedings are commenced, or legislative petitioning is undertaken.

202. R. BORK, THE ANTITRUST PARADOX 347-49 (1978).