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ANTITRUST IMMUNITY FOR JOINT EFFORTS TO INFLUENCE ADJUDICATION BEFORE ADMINISTRATIVE AGENCIES AND COURTS—FROM *NOERR-PENNINGTON* TO *TRUCKING UNLIMITED*

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Breadth of Noerr *Rationale Applied to the Legislative and Executive Branches of Government*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[1] the United States Supreme Court unanimously announced a broad antitrust immunity[2] for concerted political activity designed to influence enactment of laws by a legislature or enforcement of laws by executive government agencies. In order to comprehend this far-reaching subordination of the antitrust laws to the paramount right of private groups to petition government, the factual context and rationale of the Court's opinion are set forth in particularized fashion.

The development of intermodal types of transportation by railroads and truckers[3] precipitated what the Court described as an economic "life

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[1]365 U.S. 127 (1961).

[2]In this discussion the term "antitrust immunity" is used to refer to conduct the Court through judicial construction regards as never intended by Congress to come within the scope of the antitrust laws, in this instance, the Sherman Act.

This is distinguished from the term "antitrust exemption" which, in the federal area, usually refers to conduct which would otherwise fall within the antitrust laws but is exempted therefrom. This may result from judicial interpretation of the antitrust statutes or when they are read *in pari materia* with other laws. Other areas of antitrust exemption are the creations of specific congressional legislation.

See generally Section of Antitrust Law, *Antitrust Exemptions*, 33 A.B.A. ANTITRUST L.J. 1 (1967). On regulated industries and antitrust exemptions, *see generally* S. C. OPPENHEIM & G. E. WESTON, FEDERAL ANTITRUST LAWS 37-75 (3d ed. 1968).

[3]*See* S.C. OPPENHEIM, The National Transportation Policy and Intercarrier Competitive Rates, ch. 1 (1945).

or death" struggle between the railroads and motor carriers for the very profitable business of long hauls of freight. Out of this rivalry stemmed an antitrust suit by a group of truck operators and their trade association against twenty-four eastern railroads, their association, known as the Eastern Railroad Presidents Conference, and their public relations firm, charging a conspiracy to restrain trade and to monopolize the long-distance freight business in violation of Sections 1 and 2 of the Sherman Act.[4]

The Court noted that the complaint in essence alleged that the railroads had conspired by engaging a public relations firm "to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers."[5] One of the specified charges was that the defendants had persuaded the Governor of Pennsylvania to veto a proposed statute which would have allowed the truckers to carry heavier loads over Pennsylvania roads. The plaintiffs sought treble damages and an injunction restraining the continuance of the allegedly unlawful practices.

In an extensive opinion by Justice Black, the unanimous Court first ruled that

> no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws. . . . Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action . . . no violation of the [Sherman] Act can be made out.[6]

Noting further that under our form of government the policy of enactment or enforcement of a law is a matter for the legislative or executive branch, the Court declared it was equally clear that

> the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.[7]

Concerted action to that end, the Court observed, was "essentially dissimilar" from agreements traditionally condemned as illegal per se

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[4]15 U.S.C. §§ 1-2 (1970).
[5]365 U.S. at 128.
[6]*Id.* at 135-36.
[7]*Id.* at 136.

Sherman Act violations.[8] The legislative and executive branches of representative democracy

> act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.[9]

The legislative history of the Sherman Act, the Court continued, reveals that its purpose was to regulate business activity, not political activity. The Court noted that a contrary interpretation "would raise important constitutional questions," such as the right of petition guaranteed by the Bill of Rights.[10]

In further explication of its rationale, the Court took pains to underscore the breadth of the antitrust immunity in other respects. Accepting the district court's finding that the sole purpose of the railroads in seeking to influence the enactment and enforcement of laws was "to destroy the truckers as competitors for the long-distance freight business," that fact would not "transform conduct otherwise lawful into a violation of the Sherman Act." For the right of the people to inform their government representatives "cannot properly be made to depend upon their intent in doing so."[11] So long as the conduct is directed toward obtaining governmental action, its legality is not affected by any anticompetitive purpose to bring advantages to the railroads and disadvantages to the competitive truckers.

Next the Court pointed out that even though the so-called "third party technique" of a publicity propaganda campaign,[12] camouflaged as spontaneous declarations of independent groups, falls short of generally approved ethical standards, such tactics are still political activity. Said the Court:

> The proscriptions of the [Sherman] Act, tailored as they are for

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[8]One such violation would be an agreement among competitors to fix the market price. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927). Horizontal territorial restrictions were most recently condemned as illegal per se in United States v. Topco Associates, Inc., 92 S. Ct. 1126 (1972).

[9]365 U.S. at 137.

[10]365 U.S. at 138. One of the defenses of the railroads was that the activities complained of were constitutionally protected under the First Amendment. The Court's response was that its view regarding the proper construction of the Sherman Act made it unnecessary to consider that defense. *Id.*

[11]*Id.* at 138-39.

[12]*Id.* at 140. The railroads employed a public relations firm and the truckers also employed the third-party technique. The district court found that the truckers' campaign for the most part was directed at obtaining legislation beneficial to them rather than harmful to the railroads.

> the business world, are not at all appropriate for application in the political arena.[13]

The Court even ruled out deliberate deception of the public and public officials as irrelevant when the publicity campaign is to influence legislation and law enforcement.

There were no specific findings that the publicity campaign directly sought to induce anyone to refuse to deal with the truckers. Moreover, the Court observed, the knowing infliction of some direct but incidental injury upon the truckers did not render illegal the publicity campaign aimed at influencing legislation.

Finally, the Court announced a "sham" exception to its sweeping pronouncements of antitrust immunity:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the truckers' complaint is fully credited, as it was by the courts below, that effort was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case.[14]

It is evident that, apart from the "sham" exception, the Court consciously avoided any rationalization for justifying application of the Sherman Act. Rejecting that approach of the courts below, Justice Black unequivocally declared:

> In doing so, we have restored what appears to be the true nature of the case—a "no-holds-barred fight" between two industries both of which are seeking control of a profitable source of business.[15]

Noerr *Extended In Pennington*

It is little wonder that the virtually complete antitrust immunity the Court announced in *Noerr* for concerted political activity evoked fear

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[13] *Id.* at 141.
[14] *Id.* at 144.
[15] *Id.*

that private groups were given a blank check for embarking upon anti-competitive schemes.

United Mine Workers of America v. Pennington[16] is usually cited as affirming *Noerr* but on its particularized facts it is in reality an extension of the *Noerr* antitrust immunity. In *Pennington* a small bituminous coal operator filed a treble damage counterclaim alleging a conspiracy between UMW and certain large coal operators to place onerous financial burdens on small, nonunionized coal mines, thus making them unable to compete.

The counterclaim alleged that as part of the conspiracy the large coal mine owners had successfully induced the Secretary of Labor to establish under the Walsh-Healy Act[17] a minimum wage for employees of contractors selling coal to the Tennessee Valley Authority. It was alleged that the minimum wage was higher than in other industries and made it difficult for the small coal operators to compete in the TVA market under term contracts. It was also alleged that the large operators had urged the TVA to adhere to the spirit of the Walsh-Healy Act by curtailing its spot market purchases, a tactic which precluded the small operators from bidding on the remaining TVA business. This, it was further alleged, would foster the conspiracy among the large mine operators to dump large tonnages of coal on the TVA spot market at very low prices with the purpose of driving the small operators out of business.

In the pertinent part of a lengthy opinion dealing with the exemption of labor unions from the antitrust laws, the majority opinion of Justice White declared that "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."[18] Consequently, the Court concluded that:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, standing alone or as part of a broader scheme itself violative of the Sherman Act.[19]

As one commentator aptly points out,[20] Justice White referred to *Noerr* as involving an alleged conspiracy "on evidence consisting *entirely* of activities of competitors seeking to influence public officials."[21] In *Pennington* Justice White found reversible error in an instruction to the

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[16]381 U.S. 657 (1965).

[17]41 U.S.C. § 35(b) (1970).

[18]381 U.S. at 670 (1965).

[19]381 U.S. at 657.

[20]Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333, 336 (1967). *See also Concerted Action to Influence Governmental Bodies*, BNA ANTITRUST & TRADE REGULATION TODAY 27 (1967).

[21]381 U.S. at 669 (Emphasis added).

jury which did not exculpate other means of conspiring beyond the influencing of public officials.

Noerr's *Compatibility With American Political Traditions Evaluated*

The core concepts of the *Noerr* doctrine should have occasioned little surprise among antitrust specialists except possibly for the exoneration of deliberate deception of the public and public officials in the "third-party technique" publicity campaign used by both the railroads and truckers. For the Sherman Act reflects a mixture of political and social values as well as purely economic motivations.

The standards of the major Sherman Act prompted Chief Justice Hughes to characterize the statute in these terms:

> As a charter of freedom, the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.[22]

But judicial interpretations of the Sherman Act are focused on the statute as a charter of *economic* freedom. The Attorney General's Antitrust Committee Report begins with the following declaration:

> The general objective of the antitrust laws is promotion of competition in open markets. This policy is a primary feature of private enterprise. Most Americans have long recognized that opportunity for market access and fostering of market rivalry are the basic tenets of our faith in competition as a form of economic organization.[23]

The Committee, however, did not fail also to note that:

> Antitrust is a distinctive American means for assuring the competitive economy on which our political and social freedom under representative government in part depend.[24]

The *Noerr* rationale took cognizance of the need for accommodating the antitrust goals of maintaining and promoting a dynamic private enterprise competitive process and the reality that antitrust policy must function in a democratic system where the profound values of political freedoms and social goals interact with business activities for profit. The *Noerr* Court thus formulated guidelines for reconciliation of the above objectives on a premise not precisely articulated in the Sherman Act but nevertheless presumed to be in harmony with its Congressional intent.

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[22]Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

[23]REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 1 (1955).

[24]*Id.* at 2.

The *Noerr* doctrine, applicable to federal, state and local levels of government, properly recognized that group lobbying pressure is as American as hot dogs and hamburgers. Many lower federal courts subsequent to *Noerr* and *Pennington* and before the Supreme Court decision in *Trucking* gave full effect to the breadth of exoneration from antitrust liability which the unqualified Supreme Court's language in both opinions commanded.[25]

The Trucking Unlimited[26] *Rationale—Abuse of Adjudicatory Processes and the "Sham" Exception to* Noerr

The district court had summarily dismissed the complaint upon the ground that the alleged conduct was within the immunity of *Noerr-Pennington*.[27] The Ninth Circuit Court of Appeals reversed.[28] One of its grounds was that *Noerr-Pennington* applied only to concerted efforts to influence legislative enactment and executive enforcement of laws. The alternative ground was that the alleged activities fell within the "sham" exception of *Noerr-Pennington*.

Allegations of Trucking Unlimited *Complaint*

The complaint was filed in a civil antitrust suit under Section 4 of the

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[25]*E.g.*, George Benz & Sons v. Twin City Milk Producers Ass'n, 299 F. Supp. 679 (D. Minn. 1969); Schenley Indus., Inc. v. New Jersey Wine & Spirits Wholesalers Ass'n, 272 F. Supp. 872 (D.N.J. 1967); United Stats v. Johns-Manville Corp., 259 F. Supp. 440 (E.D. Pa. 1966); A.B.T. Sightseeing Tours, Inc. v. Gray Line N.Y. Tours Corp., 242 F. Supp. 365 (S.D.N.Y. 1965).

Noerr-Pennington was held inapplicable in George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, ___ U.S. ___ (1972); Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 440 F.2d 1096 (9th Cir. 1971) (group intimidation of government official by threats and coercive conduct).

In *Woods Exploration* it was alleged that the defendants filed false forecasts with the state Railroad Commission of the amount of natural gas the defendants expected to market. A judgment for defendants was reversed on two grounds: (a) the filing of the false forecasts was not designed to influence governmental policy within *Noerr's* immunity; and (b) the Commission's regulations, which may have taken the false estimates into account, did not constitute state action within Parker v. Brown, 317 U.S. 341 (1943). See text *infra* for discussion of the interrelation of the two doctrines.

[26]California Motor Transp. Co. v. Trucking Unlimited, 92 S. Ct. 609 (1972). The majority opinion was written by Justice Douglas. Justice Stewart, joined by Justice Brennan, wrote a concurring opinion. Justices Powell and Rehnquist did not participate in the decision.

[27]Trucking Unlimited v. California Motor Transp. Co., 1967 CCH Trade Cas. ¶ 72,298 (N.D. Calif. 1967). *See* Note, *Antitrust: The Brakes Fail on the* Noerr *Doctrine*, 57 CALIF. L. REV. 518 (1969).

[28]Trucking Unlimited v. California Motor Transp. Co., 432 F.2d 755 (9th Cir. 1970).

Clayton Act for injunctive relief and treble damages brought by fourteen (14) plaintiffs engaged as highway trucking companies operating under certificates issued by the California Public Utilities Commission (PUC) for intrastate traffic and under authorizations of the Interstate Commerce Commission (ICC) for interstate traffic. The complaint charged nineteen (19) defendant trucking companies, likewise operating as competitors under authority of the PUC and ICC, with a conspiracy to monopolize commerce in transportation of goods in violation of Sections 1 and 2 of the Sherman Act.

It was alleged that the purpose of the conspiracy was to put the plaintiffs and their competitors out of business; to that end, the defendants agreed jointly to finance, carry out and publicize a systematic and uninterrupted program of opposing, with or without probable cause and regardless of the merits, virtually every application for additional operating rights or for registration and transfer of operating rights, before the California PUC, the ICC and the courts.

It was further alleged that the defendants carried out their agreement in the following respects: (a) appearing as protestants in all proceedings begun by plaintiffs and others or by instituting oppositions to applications, transfers or registrations; (b) establishing a trust fund to finance the above activities, by monthly contributions in amounts proportionate to each defendant's annual gross income; and (c) publicizing and making known to plaintiffs and others in like position the above program.

Other allegations stated that without the agreement among defendants, protests and oppositions would not have been made as part of a program; that the defendants also jointly resisted rehearings, reviews or appeals sought by plaintiffs or other competitors; that defendants have depleted the resources of plaintiffs and other competitors in resisting the defendants' conspiratorial conduct; that defendants have defeated applications of plaintiffs and other competitors on the basis of decisions which, but for the defendants' conspiracy, would not have been adversely rendered if the agencies and courts had not been deprived of the benefit of facts and information because of the conspiracy.

The foregoing allegations of the complaint cover the essential allegations quoted verbatim in the concurring opinion of Justice Stewart. The majority opinion of Justice Douglas, after quoting one allegation concerning the purpose of the complaint, added the following paragraph largely in Justice Douglas' own characterization of the allegations regarding the "sham" exception of *Noerr*:

> More critical are other allegations, which are too lengthy to quote, and which elaborate on the 'sham' theory by stating that the power, strategy, and resources of the petitioners were used to harass and deter respondents in their use of administrative and

> judicial proceedings so as to deny them 'free and unlimited' access to those tribunals. The result, it is alleged, was that the machinery of the agencies and courts was effectively closed to respondents and petitioners indeed became 'the regulators of the grants of rights, transfers, and registrations' to respondents—thereby diminishing the value of the business of respondents and aggrandizing petitioners' economic and monopoly power.[29]

Majority and Concurring Opinions in Trucking Unlimited Analyzed

In the light of the above summation of the allegations of the complaint, the reasoning and conclusions of the majority opinion of the Court and the criticisms in the concurring opinions of Justices Stewart and Brennan may be better understood.

First, we note that the majority opinion, remanding the case for trial, concluded with the statement that taking the allegations of the complaint "at face value" for purposes of a motion to dismiss the complaint, the allegations "come within the 'sham' exception in the *Noerr* case, as adapted to the adjudicatory process."[30]

The core of the disagreement between the majority and concurring Justices appears to pivot on the judicial criteria for resolving the fact issue of conduct within the "sham" exception in *Noerr*. Was the concerted conduct of the defendants motivated by an intent to block access of the plaintiffs and other competitors to the PUC and ICC and the courts or was the conduct a good faith exercise of the right of petition protected by the First Amendment? While this is a question of fact for trial on the merits, the Court sought to provide the legal standards for application to the particularized facts of each case.

There is no doubt that *Trucking Unlimited* extends the *Noerr-Pennington* antitrust immunity to joint activities to persuade administrative agencies and courts exercising their adjudicatory functions.[31] But the

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[29]92 S. Ct. at 612. *See* Note, *Antitrust: The Brakes Fail on the* Noerr *Doctrine*, 57 CALIF. L. REV. 518 (1969).

[30]92 S. Ct. at 614.

[31]There may be a threshold question of whether the government body or enforcement official is being induced to act in an adjudicative capacity as against a legislative or administrative capacity. Sometimes the terms "quasi-legislative" and "quasi-judicial" are used. *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

Professor Kenneth Davis defines an administrative agency as "a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rule making." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1:01 (1958) (hereinafter cited as DAVIS). Davis differentiates rule making from adjudication as follows: "A rule (or a 'regulation'—a term used interchangeably with 'rule') is the product of rule making, and rule making is the part of the administrative process which resembles a legislature's enactment of a statute. Adjudication is the part of the administrative process that resembles a court's decision of a case." *Id.* at § 5:01.

scope of that immunity and the legal criteria for determining its metes and bounds generated conflicting approaches between the majority and concurring Justices.

A first reading of both opinions may create the impression that Justices Stewart and Brennan, who agreed on remanding the case for trial, took out of context a few sentences in Justice Douglas' majority opinion as a basis for a mere semantic dispute. Close analysis of both opinions, however, should dispel this superficial impression.

The concurring opinion reflects more than meets the eye when it flatly asserts that "[t]oday the Court retreats from *Noerr* and in the process tramples upon First Amendment values."[32]

That resounding attack is made despite two conclusions stated in the majority opinion. After observing that "Certainly the right to petition extends to all departments of the government," the Court said:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the 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.[33]

After a review of several first amendment cases, the majority declared it was clear

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The above distinctions may present troublesome initial questions of determining the capacity in which the governmental agency or official is acting. The Ninth Circuit Court of Appeals declared that "Licensing proceedings are adjudicative rather than legislative in nature." 432 F.2d at 758 n.4. The court cited Davis at § 7:02, characterizing as adjudicative "facts about the parties and their activities, businesses, and properties." Also cited is Judge Friendly's article on *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, describing as judicial "the application of standards of greater or less generality to concrete cases." *Id.* at 874.

The Ninth Circuit Court of Appeals in *Trucking Unlimited* took pains to apply the above distinctions in its discussion of *Pennington*. It said that

> There is nothing to indicate that the administrative action sought to be influenced [in *Pennington*] was adjudicatory; the language of the *Pennington* opinion suggests that it was not. Clearly, the decision of TVA officials to purchase their coal requirements on the open market was not adjudicatory in character. The nature of the 'approach' to the Secretary of Labor is unclear. The Secretary has a good deal of discretion in determining whether to initiate proceedings under the Walsh-Healey Act to set a minimum wage in a given industry. . . . Moreover, even if we assume that defendants sought to influence the wage determination itself, the proceeding by which that determination is made, though including a hearing . . . is nonetheless rule-making and quasi-legislative in nature. . . .

432 F.2d 755, 759 n.5.

[32]92 S. Ct. at 614.

[33]12 S. Ct. at 612.

> (1) that any carrier has the right of access to agencies and courts, within the limits, of course, of their prescribed procedures, in order to defeat applications of its competitors for certificates as highway carriers . . . .[34]

These affirmative declarations that the *Noerr-Pennington* philosophy also shelters the approach of groups of citizens to administrative agencies and courts as an integral part of the right of petition did not satisfy the concurring Justices. The concurring opinion, after noting certain abuses of the adjudicatory process, which it said were not alleged in the *Trucking Unlimited* complaint, contrary to the implications in the majority opinion, stated:

> And in the absence of such conduct, I can see no difference, so far as the antitrust laws and the First Amendment are concerned, between trying to influence executive and legislative bodies and trying to influence administrative and judicial bodies.[35]

So far as the underlying issue of abuse of the adjudicatory process is concerned, both opinions agree that conduct such as perjury, fraud[36] or bribery[37] corrupt those processes. Justice Douglas added another example of a conspiracy with a licensing authority to eliminate a competitor as a possible antitrust violation.[38] Justice Stewart added misrepresentation of fact or law as an abuse before an adjudicatory tribunal.

The two opinions are also in agreement that intent or purpose is the crucial element in resolving the question of fact whether the conduct is within the "sham" exception. Justice Douglas noted allegations of the complaint that the conspirators

> sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process . . . It is alleged that petitioners [defendants] "instituted the proceed-

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[34]*Id.* at 614.

[35]*Id.* at 615 (Brennan & Stewart, JJ., concurring).

[36]Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965). That case held that obtaining a patent grant from the United States Patent Office by knowingly and willfully misrepresenting facts may violate section 2 of the Sherman Act, provided all elements of violation of that provision are proved. The Ninth Circuit Court of Appeals cited *Walker* and other patent-antitrust cases, which were relied upon by Trucking Unlimited in its Supreme Court Brief at 50 *et seq.*

[37]*Citing* Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965) (bribery of a public purchasing agent held a violation of the brokerage Section 2(c) of the Robinson-Patman Act).

[38]*Citing* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). In that case Justice White distinguished *Noerr* on the ground that the defendants "were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." 370 U.S. at 707.

> ings and actions without probable cause, and regardless of the merits of the cases" . . . .[39]

While those allegations were said not to determine invocation of First Amendment rights, the majority opinion continued,

> but they may bear upon a purpose to deprive the competitors of meaningful access to the agencies and courts. As stated in the concurring opinion, such a purpose or intent, if shown, would be "to discourage and ultimately prevent the respondents from invoking" the processes of the administrative agencies and courts and thus fall within the exception to *Noerr*.[40]

The divergence between the majority and concurring opinions with respect to the scope of the First Amendment right of petition and the corresponding scope of antitrust immunity is compounded by certain passages in the majority opinion which have colorations of subjective reactions to the allegations of the complaint rather than a formulation of a solely objective statement of the legal test relevant to the "sham" exception. In the absence of record evidence on a motion to dismiss the complaint, the Court's intimation of views on the merits may influence the attitude of the district court during the trial or, in a jury case, may likewise affect the judge's instructions to the jury. One such passage is the following:

> 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 factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result viz. effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."[41]

Another disputed comment is specifically referred to in the concurring opinion as follows:

> The Court concedes that the defendants' "right of access to the agencies and courts to be heard on applications sought by competitive highway carriers . . . is part of the right of petition protected by the First Amendment." Yet, says the Court, their joint agree-

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[39]California Motor Transp. Co. v. Trucking Unlimited, 92 S. Ct. 609, 612 (1972).

[40]*Id.*

[41]*Id.* at 613.

> ment to exercise that right "does not necessarily give them 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.[42]

Justice Stewart did not refer to two other portions of the majority opinion which may also be subject to the criticism of being tainted with subjective commentary.

In one of his conclusions Justice Douglas, referring to the right of any carrier to defeat applications of its competitors, said that

> its purpose to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts *may be implicit in that opposition*.[43]

In still another paragraph Justice Douglas, noting that "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' . . . which the legislature has the power to control," and further noting that "[c]ertainly the constitutionality of the antitrust laws is not open to debate," continued:

> A combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted and purposeful activities of the groups are ways of building up one empire and destroying another. As stated in the concurring opinion, that is the essence of those parts of the complaint to which we refer. If those facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful.[44]

The foregoing quotations from the majority and concurring opinions reveal the burden placed upon the trier of fact in determining whether the "sham" exception in *Noerr* applies.

Justices Stewart and Brennan, on the one hand, stress giving the broadest possible scope under the *Noerr* antitrust immunity to the right of petition, safeguarded by the First Amendment, to efforts to influence administrative agencies and the courts, short of proof of specific abuses before those bodies mentioned *supra*. This approach otherwise makes no distinction between influencing the adjudicatory processes and influencing the legislative and executive branches of government. On the other

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[42] *Id.* at 615 (Brennan & Stewart, JJ., concurring) (citations omitted).

[43] *Id.* at 614 (emphasis added).

[44] *Id.*

hand, the concurring Justices declared that the plaintiffs are entitled to a liberal construction of the complaint allegations in seeking to prove that the "real *intent*" of the conspirators was within the "sham" exception stated in *Noerr* as "an attempt to interfere directly with the business relationships of a competitor."[45]

The majority opinion of Justice Douglas, however, underscores the balancing of the First Amendment right of petition, which is not absolute,[46] against the prohibitions of the antitrust laws when there is abuse of the adjudicatory processes and resulting blocking of competitors from access to the administrative agencies and the courts.

To that extent the majority opinion portends a contraction of the scope of the *Noerr-Pennington* antitrust immunity applied to adjudication before administrative agencies and courts as distinguished from petitioning the legislative and executive enforcement branches of government.[47] This divergence from the approach in the concurring opinion obviously creates uncertainty in antitrust counseling and in appraising the related thrust of the First Amendment right of petition. But there is nothing startling in the antitrust field in this process of drawing the line between permissible and illicit concerted conduct of competitors. This often involves questions of degree and of the relation of the facts found in a trial on the merits. As *Noerr* emphasized, joint actions of competitors

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[45]*Id.* at 615 (Brennan & Stewart, JJ., concurring), *quoting* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961).

[46]The majority opinion of Justice Douglas stated that

> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.

92 S. Ct. at 613.

Also cited on that point are two Sherman Act cases: Associated Press v. United States, 326 U.S. 1 (1945) and Citizen Publishing Co. v. United States, 394 U.S. 131 (1969). 92 S. Ct. at 613-14.

Justice Douglas further stated that "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils,' (*see* NAACP v. Button, 371 U.S. 415), ..." 92 S Ct. at 614.

[47]This was perceptively anticipated by the majority opinion of the Ninth Circuit Court of Appeals in *Trucking Unlimited*, where the court said:

> The overwhelming public interest in uninhibited communication between the people and their legislators and law enforcement officials that justifies immunizing joint efforts to influence those authoritites from antitrust liability despite either wrongful purpose or the use of distortion and deception, does not apply to presentations to judges and administrative officials in the course of adjudicative proceedings. Unlike legislators and law enforcement officials, judicial and administrative adjudicators do not act in a representative capacity. There is a marked difference between the processes by which they arrive at decisions, the materials upon which they may properly rely, and the atmosphere consistent with effective performance of their respective functions.

432 F.2d at 759 n.6 (citation omitted).

in lobbying to influence legislation or executive enforcement of laws are "essentially dissimilar" from the traditional illegal per se Sherman Act violations. *Trucking Unlimited* also recognizes that essential dissimilarity when competitors jointly seek to persuade the administrative tribunal or the court in adjudicatory proceedings. This appears to make normally appropriate an extended Rule of Reason inquiry into all of the relevant facts and surrounding circumstances. If that is so, resolution of the crucial question of the intent or purpose of the concerted efforts will enable the trier of fact to use its finding on intent to interpret the other facts found in full context of the record evidence and to evaluate the probable effects of the totality of findings of fact.

As we stated *supra*, in retrospect the blanket antitrust immunity approach of *Noerr-Pennington* to concerted efforts of a group of competitors, or a trade or professional association,[48] to influence legislation or law enforcement comports with American traditions of freedom of political action. *Trucking Unlimited* properly does not constrict that freedom in the areas of the legislature and the executive branch of government. But even before the Supreme Court ruling in *Trucking Unlimited*, several lower federal courts did not literally apply the "no-holds-barred" contest *Noerr* seemingly sanctioned.[49]

The majority opinion in *Trucking Unlimited* correctly distinguished the sweeping *Noerr-Pennington* antitrust immunity in the political arena from its less extensive scope before adjudicatory tribunals. Abuses of adjudicatory processes should not be condoned under the rubric of freedom of political expression. For beyond the abuses specified in the majority and concurring opinions in *Trucking Unlimited*, there is a basic difference between the give and take and compromises of the legislative process, or the allowable range of importuning executive enforcement officials, and the procedures prescribed for orderly and impartial resolution

[48]Trade and professional associations frequently resort to concerted and organized efforrs to influence legislation or enforcement of laws. Those activities have broad antitrust immunity under *Noerr-Pennington* when they are political in nature. *Trucking Unlimited* may now make antitrust counseling more significant if an association resorts to an administrative agency or the courts and its conduct raises questions regarding abuse of adjudicatory processes.

On industry and government relations generally and the Federal Regulation of Lobbying Act, *see* G. LAMB & C. SHIELDS, TRADE ASSOCIATION LAW & PRACTICE (Trade Regulation Series), ch. 11 (rev. ed. 1971).

See Oppenheim, *Antitrust Policy and Third-Party Prepaid Prescription Drug Plan*, 40 GEO. WASH. L. REV. 244 (1971) for relevance of *Noerr-Pennington* and *Parker v. Brown*, note 50 *infra*, to activities of pharmaceutical associations.

[49]*See* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970), discussed *infra*; Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, ___ U.S. ___; *cf.* Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, ___ U.S. ___ (1972), discussed note 54 *infra*.

of adversary adjudicatory proceedings before an administrative agency or a court. The *Trucking Unlimited* majority opinion places no ban on joint efforts merely seeking to persuade the tribunal to rule in favor of the competitive interests espoused by the group. But the majority of the Court was on sound ground in rejecting the view that pressure group tactics, imbedded in the historic American sanction of lobbying activities aimed at informing the legislators or government enforcement officials, should have the same unlimited scope before adjudicatory bodies.

We have focused upon the relation of *Noerr-Pennington* to adjudicatory processes which may raise antitrust questions in both the regulated industries sector and in private enterprises not under such regulatory controls. We therefore do not purport to review lower federal court rulings solely on *Noerr-Penington* applied to the legislative and executive branches of government. Those decisions were also not considered relevant in *Trucking Unlimited* and hence none of them were cited in either the majority or concurring opinions.

Intersection of Noerr-Pennington *and* Parker v. Brown

Antitrust counselors, however, may derive some guidance from the limitations several lower federal courts placed upon *Noerr-Pennington* and the corollary doctrine of *Parker v. Brown*,[50] where the Supreme Court held that the federal antitrust laws do not apply to valid state

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[50]317 U.S. 341 (1943). Brown, a raisin producer, sued to enjoin Parker, State Director of Agriculture, and others from enforcing the California Agricultural Prorate Act, a program for marketing raisins in California. One of Brown's contentions was that the program violated the Sherman Act. The defendants were authorized by the statute to promulgate a marketing proration plan to achieve the objective of the statute by remedying overproduction of raisins, thus preventing agricultural waste without allowing unreasonable profits to producers. The program could become effective only with the approval of an Advisory Commission and if approved, had to be submitted to a referendum of producers and passed before having the force of law subject to criminal penalties for violations. The Director of Agriculture was authorized, subject to Commission approval, to select a program committee composed of producers and other private persons.

In dealing with the validity of the prorate program and the alleged violation of the Sherman Act, the Court, per Chief Justice Stone, held that the program involved state action and not action of private parties, even though the latter participated in the decision-making process. The Court therefore concluded that the restraint of trade was imposed by the state acting as a sovereign and was not the kind of restraint the Sherman Act undertook to prohibit.

Chief Justice Stone said that the program "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." 317 U.S. at 350.

He added that "[W]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-351.

This article does not purport to review cases where *Parker* issues alone are presented, as, for example, in Washington Gas Light Co. v. Virginia Elec. Power Co., 438 F.2d 248

regulatory programs enacted by the state as a sovereign. In *Noerr* the Court cited *United States v. Rock Royal Co-operative, Inc.*,[51] and *Parker v. Brown* as holding that

> where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out.[52]

Justice Stewart's concurring opinion cited both of the above decisions as a corollary of the conclusions reached in *Noerr*. But this has not deterred several lower federal courts from reading exceptions into *Noerr-Pennington* and its intersection with *Parker v. Brown*.[53] The types of conduct held to be outside the shelter of the above Supreme Court cases as applied to legislative enactments and law enforcement were properly condemned and should have signaled a basis for predicting that the Supreme Court would not countenance a wholly unrestricted antitrust immunity applied to adjudicatory proceedings.

This is exemplified in several private suits involving competitors where the court declined to construe either the *Parker v. Brown* or *Noerr-Pennington* antitrust immunity, considered separately or together, as conferring total antitrust immunity upon all actions of a state agency or public officials induced by private firms. As Judge Wilkey perceptively observed in *Hecht v. Pro-Football, Inc.*,[54] the mere fact that state action

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(4th Cir. 1971) and Gas Light of Columbus v. Georgia Power Co., 440 F.2d 1135 (4th Cir. 1971). *But see* Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109 (W.D. Pa. 1969). *See also* Asheville Bd. of Trade v. Federal Trade Commission, 263 F.2d 5020 (4th Cir. 1959); Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1961), cert. denied, 385 U.S. 930 (1966). In *Asheville, supra* the court recognized the *Parker* exemption but added: "On the other hand, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful,' " citing Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951).

See Comment, *Governmental Action and Antitrust Immunity*, 119 U. PA. L. REV. 521 (1971); Bachelder, *State-Approved Transactions*, 33 A.B.A. ANTITRUST L.J. 99 (1967).

[51]307 U.S. 533 (1939). This involved a federal regulatory program under the Agricultural Marketing Act administered by the Secretary of Agriculture.

[52]365 U.S. at 136.

[53]*See* note 25 *supra*.

[54]444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 92 S. Ct. 701 (1972). The District of Columbia Armory Board, pursuant to authority, leased the Kennedy Stadium for thirty years to the Washington Redskins, with the exclusive right to use that facility for football games. Plaintiffs, potential competitiors, brought suit charging that the lease violated the Sherman Act. The court, per Judge Wilkey, held that the validity of restrictive provision in the lease must be tested by the federal antitrust laws as usually applied to contracts between private parties.

The court began its analysis with the *Parker* doctrine since the parties had presented their argument on that basis. It is noteworthy that Judge Wilkey, apparently having in mind the federal power of Congress to enact laws for the District of Columbia, construed *Parker* as limited to a finding that the action of the state is consistent with federal regulatory policy.

and a state agency are involved "is only the beginning of the inquiry" and does not automatically exclude application of antitrust policy prohibitions.

The cases to which we refer raise antitrust implications as applicable to the adjudicatory processes involved in *Trucking Unlimited* as to inducement of legislation and enforcement of laws. They distinguish between action by the state in its sovereign capacity and situations where restraint of trade, monopolization, or attempt to monopolize result from commercial or business operations of a state agency. When the state enters the marketplace as a purchaser of goods and services under procurement programs, its business operations are normally governed by economic considerations dissimilar from criteria when the state acts in its sovereign capacity.[55] In *Parker v. Brown* the Supreme Court indicated an area where the state may not be immune from antitrust sanctions when it said:

> [W]e have no question of the state or its municipalities becoming a participant in a private agreement or combination by others for restraint of trade.[56]

If such conduct is banned by *Parker v. Brown* or *Noerr-Pennington* or both doctrines in connection with efforts to induce legislation or enforcement of existing laws, we believe that *a fortiori* the same conduct would be banned under the rationale of the majority opinion in *Trucking Unlimited*. With that in view, we turn to cases presenting that issue.

George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.[57] is one illustrative situation. Whitten and the three affiliated corporations of Paddock are competitors specializing in the manufacture of pipeless swimming pools for sale primarily to public agencies. Paddock is by far the largest supplier of pipeless pools. Whitten brought a civil antitrust suit charging that Paddock's selling efforts violated Sections 1 and 2 of the Sherman Act by conspiring to require the use of the Paddock specifications in the public swimming pool industry with the intent to exclude the competition of Whitten. The district court granted summary judgment dismissing Whitten's complaint. In vacating the summary judgment and remanding the case for proceedings consistent with its opinion, the court

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In *Hecht* the District of Columbia was apparently treated as equivalent to state regulation, but the governing statute with respect to the Board was federal. *But see* E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966). There the Port Authority operated an airport under a legislative mandate and leased the airport as an exclusive base of operation to a private corporation. The court held that was a valid governmental function not subject to the federal antitrust laws.

[55]*E.g.*, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), cert. denied, 400 U.S. 850 (1970), discussed *infra*.

[56]317 U.S. at 351-52.

[57]424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

of appeals stressed that it was addressing itself only to the question of immunity from the antitrust laws and not with the broader issue of whether Paddock's conduct in fact violated the Sherman Act. It judged the issues by what it set forth as an "artificially stark set of facts."[58]

The court of appeals stated that public agencies operated under various state and local competitive bidding procedures. It is the common practice for a public body to retain an architect who drafts the technical specifications on which the bids will be based. To a high degree Paddock has been successful in persuading architects to adopt Paddock's own and exclusive specifications. The court assumed it to be established that Paddock falsely advertised itself as the only manufacturer of pipeless swimming pool equipment; made false statements about Whitten's lack of experience; and threatened litigation against public bodies contracting with, or contemplating contracting with, Whitten.

Considering the case as one where the government acts in a proprietary capacity of purchasing goods and services to satisfy its own needs, the court of appeals rejected Paddock's reliance upon *Parker v. Brown* and *Noerr-Pennington* as defenses.

With respect to *Parker v. Brown*, the court said:

> Our reading of Parker convinces us that valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternative form of public regulation.
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> In terms of such deliberate government occupation of a field normally left to the free winds of competition, this case falls at the opposite end of the spectrum from *Parker*.[59]

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[58] *Id.* at 27.

[59] *Id.* at 30. In Ladue Local Lines, Inc. v. Bi-State Dev. Agcy., 433 F.2d 131 (8th Cir. 1970), Bi-State, a joint agency of the states of Missouri and Illinois created by the legislatures of those states, had acquired with the approval of the Interstate Commerce Commission fifteen companies engaged in motor bus operations in the St. Louis metropolitan area, where the public transportation system was operated as a monopoly. Plaintiff, engaged in private bus transportation in the metropolitan St. Louis area charged the Bi-State agency with violation of the Sherman Act.

The court, relying on Parker, held that Bi-State, having acted pursuant to legislative authorization, was not subject to the antitrust laws. The court said:

> When a state determines that it is in the public interest to operate a public transportation system as a monopoly, or when two states enter into a congressionally approved compact to do so, the antitrust laws do not apply, whether the operation is labeled proprietary or governmental. The fact that the effect of the compact gives Bi-State a monopoly, and that competitive interests of private concerns are harmed does not violate the Sherman Act. We deem it well settled that when a state announces a public policy against free competition in an industry essential to it, state control and regulation of that industry, even to the extent of eliminating competition, is permissible.

Distinguished from the cases where the state policy is neutral or silent regarding restraints of trade, the instant case, said the court, is one where "state policy is neither anti-competitive nor neutral."[60] The court concluded that:

> When the government acts under laws requiring competitive bidding, it signifies its intent to respond to the signals of a competitive market on the same terms as any other consumer, an intent which is entirely consistent with the aims of the Sherman Act. This intent would be frustrated, and the ultimate cost to the public substantially increased, if some sellers could nevertheless engage in anti-competitive practices merely because they were dealing with government.[61]

With respect to Paddock's claim of a *Noerr-Pennington* defense, the court addressed itself to "the question of whether a particular attempt to influence a public official is the kind of political activity which *Noerr* protects."[62] Answering that question in the negative, the court said:

> *Noerr* stressed the importance of free access to public officials vested with significant policy-making discretion. We doubt whether the Court, without expressing additional rationale, would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings when the case turned on other issues.[63]

The court differentiated a case where a petitioner sought legislation to change public bidding requirements. In the case at bar

> The state legislators, by enacting statutes requiring public bidding, have decreed that government purchases will be made according to strictly economic criteria. . . . Paddock's dealings with officials who administer the bid statutes should be subject to the same limitations as its dealings with private consumers. . . . We conclude, therefore, 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.
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> This conclusion does not, in our view, encroach on the freedom of speech and right to petition protected by the First Amendment.[64]

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[60]424 F.2d at 31.

[61]*Id.*

[62]*Id.* at 33.

[63]*Id.*

[64]*Id.*

In *Whitten* the court, after pointing out that the two doctrines are often treated as one, said:

> The two are not coterminous. For example, an unsuccessful attempt to influence government action may fall within the *Noerr-Pennington* immunity, but not the *Parker* immunity. Conversely, a state regulatory agency may decide to restrain competition without prompting; the benefactors, not having solicited government action, would enjoy a *Parker* immunity but not one based on *Noerr-Pennington*. Moreover, because of its First Amendment overtones, the *Noerr-Pennington* immunity is arguably broader than the *Parker* exemption.[65]

Reading *Whitten* as a case where it could be found as a fact that Paddock's conduct had the purpose or intent of depriving Whitten and other competitors of meaningful access to competitive bidding procedures under state and local statutes, *Whitten* can be classified as a scheme to corrupt public officials administering those statutes. Such conduct should be ruled beyond antitrust immunity regardless of whether it falls within the legislative, executive or *Trucking Unlimited* adjudicatory category of governmental functions.

Two Ninth Circuit Court of Appeals cases show difficult distinctions which may confront a court in deciding where to draw the line between *Parker* or *Noerr-Pennington* immunity and conduct beyond the pale of the federal antitrust immunity.

In *Harman v. Valley National Bank of Arizona*,[66] the complaint alleged that appellees induced the state Attorney General to file an action resulting in placing a financial institution in receivership. So far as informing the Attorney General of irregularities in the conduct of a competitor was concerned, the court viewed that as within the *Noerr* exemption. But the court mentioned two factors it said might not necessarily bar relief in the appellant's treble damage action charging violation of the Sherman Act. One was the allegation that the acts of the Attorney General were acts of a coconspirator. The other factor was stated as follows:

> The complaint can be read as alleging that appellees' joint effort to influence the Attorney General was but one element in a larger, long-continued scheme to restrain and monopolize "commercial banking in general in the State of Arizona."[67]

In *Sun Valley Disposal Co. v. Silver State Disposal Co.*,[68] Judge Browning, who wrote the opinion in *Harman* for a unanimous three judge

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[65] *Id.*

[66] *Id.* at 29 n.4.

[67] 339 F.2d 564 (9th Cir. 1964).

[68] *Id.* at 566.

panel and sat on a panel of different judges in *Sun Valley*, confessed error in failing to note that *Pennington* held that efforts to influence public officials exercising their official powers do not violate the Sherman Act "even though they are part of a broader scheme which does violate the Act."[69] In his concurring opinion in *Sun Valley*, Judge Browning therefore said, "to the extent that [*Harman supra*] . . . holds to the contrary it is no longer good authority."[70]

In *Sun Valley*, a garbage disposal firm brought a treble damage suit alleging violation of the Sherman Act. The complaint alleged that its competitor induced county commissioners to grant an exclusive disposal franchise in the county to one of Sun Valley's competitors. Sun Valley, relying on *Harman, supra*, contended that the competitor made misrepresentations in its bidding and that some commissioners participated in the alleged conspiracy.

The court held that the personal motives of the county commissioners were irrelevant under *Noerr* and noted that *Pennington* lessened the authority of *Harman, supra.*

There is nevertheless room for applying a distinction between "a broader scheme" directed at activating legislation or enforcement of existing legislation within the *Noerr-Pennington* immunity and conduct unrelated to the intended reach of a state statute within the *Parker* exemption.

Confusion may arise from failing to apply the above distinction. *Noerr-Pennington* and *Parker* are not always inseparable within the same contours of policy issues. The two doctrines may be disparate under the particular circumstances of the case.

Illustrative is *Semke v. Enid Automobile Dealers Ass'n.*[71] There the plaintiff, who did not have a license to distribute new automobiles, operated a car buying service of obtaining on order from his customers automobiles of different makes from car dealers. The defendants concertedly persuaded the Oklahoma Motor Vehicle Commission to file a suit to enjoin permanently the plaintiff from conducting his car buying service.

In addition to petitioning the Commission, the defendant engaged in activity allegedly illegal, namely, inducing local media to refuse to accept plaintiff's advertising, and defendants also refused to provide warranty service or to sell parts to the plaintiff for servicing the cars he sold.

The district court charged the jury that the plaintiff could not recover damages for injury to his unlicensed business which was illegal under the state statute.[72]

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[69]420 F.2d 341 (9th Cir. 1969).

[70]*Id.* at 344 (Browning, J., concurring in part).

[71]*Id.*

[72]5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73,892, at 91,705 (10th Cir. 1972).

The court of appeals, in a perceptive opinion by Judge Doyle, held that the licensed car dealers acted lawfully within the *Noerr-Pennington* immunity[73] and the *Parker* exemption, but this did not extend to conspiracies unrelated to enforcement of the Oklahoma licensing statute.[74]

Effects of Trucking Unlimited *Rationale on Antitrust Counseling*

The analysis in this article recognizes that the majority and concurring opinions in *Trucking Unlimited* leave a murky area of predictability for the antitrust counselor on the question of intent or purpose. On the one hand, there are the parties who will rely upon a sweeping application of the *Noerr-Pennington* antitrust immunity. On the other hand, there are the parties who will claim that misuse of governmental adjudicatory processes brings the case within the Sherman Act liability of conspirators whose conduct is intended to suppress competition by causing injury to their competitors.

As previously indicated, there is no prospect that the courts can formulate a single guide for discerning and drawing the line for neatly classifying cases within the ambit of antitrust immunity and those which fall within the "sham" exception of *Noerr* because of an illegal intent to interfere directly with the business relationships of competitors.

The uncertainty and resulting counseling difficulty should come as no surprise to antitrust specialists. The judicial process in antitrust cases still involves a tug-of-war between the illegal per se doctrinal approach and an extended Rule of Reason analysis.[75]

Trucking Unlimited allows great latitude for attempts to activate legislatures and law enforcement officials within *Noerr-Pennington*. But the majority of the Supreme Court, while recognizing the profound values of the First Amendment and right of petition, wisely perceived the need for applying a check rein upon misuse of governmental judicatory processes.

The antitrust counselor will be faced with a major hazard of trying to evaluate how a court will resolve the crucial question of intent just as the court itself may have difficulty in arriving at findings of fact on that issue. There should be no undue difficulty, however, in identifying the types of conduct, such as those specified in the majority and concurring opinions in *Trucking Unlimited*, which are per se illegal as corruption of the administrative and court adjudicatory procedures.[76]

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[73]320 F. Supp. 445 (W.D. Okla. 1970).

[74]There was no evidence of fraud, corruption or misuse of state process to bring the case within the "sham" exception of *Noerr*.

[75]The Court said this introduced a species of *in pari delicto* or contributory illegality as a defense.

[76]The most recent example is United States v. Topco Associates, Inc., 92 S. Ct. 1126 (1972), holding illegal per se under the Sherman Act a horizontal allocation of territories

to small or medium sized regional supermarket chains, members of a cooperative buying association with exclusive licenses to sell the association's private label brands. Justice Blackmun concurred in the result. Chief Justice Burger wrote an extensive dissenting opinion and declared:

> I do not believe that our prior decisions justify the result reached by the majority. Nor do I believe that a new *per se* rule should be established in disposing of this case, for the judicial convenience and ready predictability that are made possible by *per se* rules are not such overriding considerations in antitrust law as to justify their promulgation without careful prior consideration of the relevant economic realities in the light of the basic policy and goals of the Sherman Act.

92 S. Ct. 1126 at 1137. *Cf.* United Stats v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); White Motor Co. v. United States, 372 U.S. 253 (1963) (vertical territorial limitations). In his dissent, Chief Justice Burger disagreed with the majority's description of United States v. Sealy, Inc., 388 U.S. 350 (1967) as being "on all fours with" *Topco*. 92 S. Ct. 1126, at 1138 n.3. *See* Elman, *"Petrified Opinions" and Competitive Realities*, 66 COLUM. L. REV. 625 (1966); Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1964); S. C. OPPENHEIM & G. E. WESTON, FEDERAL ANTITRUST LAWS—CASES AND COMMENTS 3-21 (3d ed. 1968); 561 B.N.A. Antitrust & Trade Reg. Rep. B-1 (May 2, 1972).

Antitrust practitioners are aware of the problem of proof of the element of "deliberateness" as part of the offense of "monopolization" under Section 2 of the Sherman Act, and of the problem of proof of a subjective specific intent as part of an attempt to monopolize, another Section 2 offense. *See* S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS—CASES AND COMMENTS, ch. 7, § 2 (single firm monopolization) & ch. 7, § 4 (attempt to monopolize) (3d ed. 1968).

[76] *E.g.*, notes 18-20 *supra*. In Israel v. Baxter Laboratories, Inc., No. 24,622 (D.C. Cir., May 17, 1962), plaintiffs charged the defendants, two drug companies, with conspiring to keep their drug from being approved by the federal Food and Drug Administration, thereby favoring defendants' similar competitive drug. As characterized in the court's opinion, the plaintiffs alleged that "the defendants conspired to keep the plaintiffs' drug off the interstate market . . . by influencing the Food and Drug Administration to deny fair consideration of the new drug applications filed by plaintiffs" and "carried out this conspiracy by suppressing, concealing and misconstruing information concerning the two drugs before the FDA".

In remanding the case to the district court with directions to retain jurisdiction of the subject matter, the court of appeals, in an excellent opinion by Judge Wilkey, also the author of the court's opinion in *Hecht v. Pro Football, supra* note 54, relied upon the Supreme Court's rationale in *Trucking Unlimited* as the *"coup de grace"* to defendants' defense based upon *Noerr-Pennington.*

After referring to the basic concern expressed by several courts with respect to "the integrity of the regulatory process", Judge Wilkey said:

> No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption.

After reviewing judicial decisions narrowing the applicability of the *Noerr-Pennington* doctrine, Judge Wilkey concluded that the plaintiffs' allegations in the instant case fell within the "sham" exception to *Noerr-Pennington:*

> Plaintiffs in the case at bar allege that the real purpose of defendants' joint efforts is to preclude, not induce, fair FDA consideration of the safety and efficacy of plaintiffs' drug Cothyrobal for interstate sale, and

A good faith resort to *Noerr-Pennington* for an avowed and open political purpose of making known to the legislature factual information and views to induce new legislation or amendment of existing legislation should also be readily ascertained by the antitrust counselor. In that area misrepresentation and unethical conduct are condoned under *Noerr* but such practices may backfire and should be avoided as a practical matter.

When efforts are directed at activating a government body or an individual government official entrusted with law enforcement, the differentiation of the licit from the illicit may become blurred. The counselor must ascertain the nature and scope of the statutory authority as well as the range of discretion vested in the government commission or official. This is relevant to a determination of whether the petitioners are merely seeking to activate authorized administrative or executive enforcement or whether they have engaged in misuse of adjudicatory processes of the government agency or official. In this area intentional use of baseless claims and deceptive practices should not be immune from Sherman Act prohibitions against either individual or conspiratorial abuse of adjudicatory channels when there is evidence to support a finding of a design dirrectly to injure business relationships with competitors.

Control over entry into the market or continuing to do business therein is today subject to a plethora of federal, state and local regulatory and licensing enactments administered by commissions and licensing authorities.[77] The majority opinion in *Trucking Unlimited* warned against blocking access of competitors to those government agencies or to market entry dependent upon licensing or renewal of licenses. This does not deny an individual competitor or a group of competitors the right to show that additional competitive firms would be contrary to the public interest standards of the particular regulatory or licensing statute. Radically different, however, is a situation where there is no statutory authority or discretion to reduce or preclude competitive rivalry as an alternative to an open competitive market. There is also the initial question of whether the action of the government agency or official is purely administrative in nature or adjudicatory.[78]

The frequent reference to concerted conduct of competitors in the *Trucking Unlimited* opinions of the Court leaves open an inference that

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as such should be viewed as falling within the 'sham' exception to Noerr-Pennington.

Judge Wilkey's opinion in *Hecht v. Pro Football*, supra and in *Israel v. Baxter Laboratories*, should contribute substantially as guides to the judicial process of appraising either allegations or evidence which foreshadow a narrowing of *Noerr-Pennington's* applicability when there is misuse of the processes of administrative regulatory agencies and the courts.

[77]*See* Truitt, *Interstate Trade Barriers in the United States*, 8 LAW & CONTEMP. PROB. 209 (1941) (governmental marketing barriers).

[78]Note 31 *supra*.

similar conduct of an individual competitor would or may be sheltered by antitrust immunity. If such a distinction was intended by the Court, it is of doubtful validity. A single firm which has a monopolistic or dominant position in an industry or business should be as accountable for abuse of the administrative or court adjudicatory processes as a combination of competitors who collectively possess like market power. On the crucial question of intent under the "sham" exception of *Noerr*, the market power of the single petitioner or a combination of petitioners should be regarded as only one factor in resolving the question of intent. An illegal intent to abuse the adjudicatory process should not turn on mere business size or on oligopoly market structure in the relevant market affected by the petition for law enforcement.

Finally, the antitrust counselor must be prepared to consider on the particularized facts of each case whether the issue is entirely confined to the *Parker* doctrine that there is no violation of the Sherman Act when the restraint of trade or monopolization results from valid state action or whether *Parker* is interconnected with *Noerr-Pennington* so that both doctrines must be considered.

The analysis of those aspects in this article shows that *Parker* alone, or the intersection of *Parker* and *Noerr-Pennington*, add elements of uncertainty in counseling beyond that involved in merely applying the *Trucking Unlimited* rationale to determine whether the conduct is within the *Noerr-Pennington* antitrust immunity or within the "sham" exception. In any event, it is clear that while "The heart of our national economic policy long has been faith in the value of competition,"[79] *Parker* nevertheless teaches that the Sherman Act does not preempt state action in enacting a state statute which substitutes a policy of regulation for a policy of competition like that subject to Sherman Act enforcement.[80]

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[79]Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951).

[80]*Cf.* Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 A.B.A. ANTITRUST L.J. 950 (1970).