

# Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the *Noerr-Pennington* Doctrine

Earl W. Kintner\* and Joseph P. Bauer\*\*

## INTRODUCTION<sup>1</sup>

Section 1 of the Sherman Act makes it unlawful for persons to en-

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\*Senior Partner, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.; Former Chairman and General Counsel, Federal Trade Commission. A.B. 1936, DePauw University; J.D. 1938, Indiana University.

\*\*Professor of Law, Notre Dame Law School. A.B. 1965, University of Pennsylvania; J.D. 1969, Harvard University.

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<sup>1</sup> A number of articles and notes have addressed this topic. In addition to those commentaries cited *infra* notes 65, 85, see, e.g., Baker, *Exchange of Information for Presentation to Government Agencies: The Interplay of the Container and Noerr Doctrines*, 44 ANTITRUST L.J. 354 (1975); Bern, *The Noerr-Pennington Immunity for Petitioning in Light of City of Lafayette's Restriction on the State Action Immunity*, 1980 ARIZ. ST. L.J. 279; Bien, *Litigation as an Antitrust Violation: Conflict Between the First Amendment and the Sherman Act*, 16 U.S.F.L. REV. 41 (1981); Cockerill, *Application of Noerr-Pennington and the First Amendment to Politically Motivated Economic Boycotts: Missouri v. NOW*, 13 LOY. L.A.L. REV. 85 (1979); Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333 (1967); Crawford & Tschoepe, *The Erosion of the Noerr-Pennington Immunity*, 13 ST. MARY'S L.J. 291 (1981); Donelan, *Noerr-Pennington Trials: Practical Problems for the Offense*, 46 ANTITRUST L.J. 737 (1977); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977); Hibner, *Litigation as an Overt Act — Development and Prognosis*, 46 ANTITRUST L.J. 718 (1977); Hibner, *Litigation as an Overt Act in Furtherance of an Attempt to Monopolize*, 38 OHIO ST. L.J. 245 (1977); Higginbotham, *The Noerr-Pennington Problem: A View From the Bench*, 46 ANTITRUST L.J. 730 (1977); Howe, *The Noerr-Pennington Doctrine and Inroads Into It — Recent Supreme Court Decisions and Some Guidelines for Trade Association Activity*, 26 MERCER L. REV. 527 (1975);

gage in a "combination . . . or conspiracy, in restraint of trade."<sup>2</sup> A variety of undertakings by persons seeking legislative action, judicial relief, administrative agency activity, or action by the executive branch of government may result in governmental steps which restrain competitors or diminish competition. Indeed, the very act of seeking governmental intervention, even if unsuccessful, may have adverse competitive effects. Similarly, "monopolization or attempts to monopolize," proscribed by section 2 of the Sherman Act,<sup>3</sup> might actually be advanced by governmental activities or by an individual merely seeking governmental assistance. Other provisions of the antitrust laws may also involve or be advanced by governmental intervention and private requests for such assistance.

Although such conduct may raise competitive concerns, petitions by individuals or groups of individuals for governmental action or intervention implicate other important political and constitutional values. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>4</sup> the seminal decision dealing with the interface of antitrust prohibitions and the right to seek governmental relief, the Supreme Court identified

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Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests*, 55 S. CAL. L. REV. 983, 993-1006 (1982); McMahon, *Recent Significant Developments in "State Action" and Noerr-Pennington Exemptions: From Boulder to the "Sham" Exception*, 14 U. TOL. L. REV. 531 (1983); Miller, *Antitrust and Certificate of Need: Health Systems Agencies, the Planning Act, and Regulatory Capture*, 68 GEO. L.J. 873, 900-18 (1980); White, *Participant Governmental Action Immunity from the Antitrust Laws: Fact or Fiction?*, 50 TEX. L. REV. 474 (1972); Comment, *Noerr-Pennington Antitrust Immunity and Proprietary Government Activity*, 1981 ARIZ. ST. L.J. 749; Comment, *Antitrust Immunity: Recent Exceptions to the Noerr-Pennington Defense*, 12 B.C. INDUS. & COM. L. REV. 1133 (1971); Note, *Physician Influence: Applying Noerr-Pennington to the Medical Profession*, 1978 DUKE L.J. 701; 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); Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV. L. REV. 847 (1968); Note, *The Quagmire Thickens: A Post-California Motor View of the Antitrust and Constitutional Ramifications of Petitioning the Government*, 42 U. CIN. L. REV. 281 (1973); 57 CALIF. L. REV. 518 (1969); 62 CORNELL L. REV. 628 (1977); 56 NOTRE DAME LAW. 326 (1980); 33 ROCKY MTN. L. REV. 413 (1961); 30 VAND. L. REV. 75 (1977); 20 WASHBURN L.J. 130 (1980); see also I P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 201-206 (1978).

<sup>2</sup> 15 U.S.C. § 1 (1982). See generally II E. KINTNER, *FEDERAL ANTITRUST LAW* chs. 9-10 (1980).

<sup>3</sup> 15 U.S.C. § 2 (1982). See generally II E. KINTNER, *FEDERAL ANTITRUST LAW* chs. 11-14 (1980).

<sup>4</sup> 365 U.S. 127 (1961).

the various reasons why private requests for such action are generally immunized from challenge under the antitrust laws. First, permitting an antitrust action to be predicated on private requests for governmental action would impair the government's ability to function. In a representative democracy, the government is acting on behalf of its citizens and must know what they believe would best serve their interests. Therefore, it is important that these channels of communication be kept open and encouraged.<sup>5</sup> Second, prohibiting private requests would raise serious constitutional questions. The first amendment protects freedom of speech and the right to petition governmental officials. Even if Congress had sought to limit these constitutional rights when it enacted the Sherman Act in 1890,<sup>6</sup> the permissibility of this purpose would be doubtful.<sup>7</sup> Third, the *Noerr* Court inferred a contrary legislative intent. Congress did not want to extend the antitrust laws to reach conduct of

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In a representative democracy such as this, these branches of government 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. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

*Noerr*, 365 U.S. at 137 (footnote omitted).

<sup>6</sup> Sherman Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209.

<sup>7</sup> "[S]uch a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Noerr*, 365 U.S. at 138.

The *Noerr* Court, however, expressly declined to rest its decision on the first amendment; instead, its conclusion was based solely on construction of the Sherman Act. *Id.* at 132 n.6. Recent cases have suggested a more substantial constitutional imperative in the *Noerr-Pennington* doctrine. See, e.g., *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 S. Ct. 2161, 2169 (1983) ("the right of access to the courts is an aspect of the First Amendment right to petition the Government"); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 399 n.17 (1978). Whether the exemption is statutorily or constitutionally based is of some significance. If the basis is constitutional, courts construing *Noerr-Pennington* would look to the underlying policies of the first amendment and the many decisions interpreting it. If, on the other hand, the basis is statutory, several conclusions would flow. First, the exemption could be broader than (although presumably not narrower than) the limits compelled by the first amendment. Second, one of the sources in reaching a decision would be the intention of the drafters of the Sherman and Clayton Acts. Thus, courts would look to the goals and the policies of the antitrust laws in reconciling the conflicting interests.

a distinctly *political* nature.<sup>8</sup>

On the other hand, reconciliation of these potentially conflicting values — freedom to compete versus freedom of association and freedom to petition the government<sup>9</sup> — does not require that all prayers for governmental action be immunized. Implicit in the notion that persons must be free to seek governmental action is the understanding that improper means will not be used to deny that same right to others. Furthermore, when appeals for government action are based on falsehoods or assert frivolous claims, the petitioner is not truly attempting to exercise the “right of petition.”<sup>10</sup> Therefore, the Court has recognized that the antitrust laws will not be displaced when persons are merely using their right to petition as a subterfuge to prevent others from having access to government officials or to prevent the government from taking any action. Similarly, certain forms of obtaining governmental action, such as bribery of a public official, perjury of witnesses, or active fraud, are so far removed from accepted channels as to fall outside the described immunity.

Having sketched the broad contours of these competing sets of values,

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<sup>8</sup> Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

*Noerr*, 365 U.S. at 141 (footnote omitted).

The Court also pointed to the essential dissimilarity between conspiracies to seek legislation or law enforcement and such traditional conspiracies as price-fixing agreements, group boycotts, or market division agreements. While the latter are characterized by an understanding that the parties will give up their trade freedom or will help one another take away the trade freedom of third parties, the former are not agreements in the traditional Sherman Act meaning of that term. *See also* *Missouri v. National Org. for Women*, 620 F.2d 1301, 1312 (8th Cir.) (Sherman Act particularly inapplicable when defendants sought social rather than commercial legislation), *cert. denied*, 449 U.S. 842 (1980); *Smith v. McDonald*, 562 F. Supp. 829, 838 (M.D.N.C. 1983) (*Noerr-Pennington* elevates right of petition over Sherman Act regulation of business activities).

<sup>9</sup> *Cf. Costello Publishing Co. v. Rotelle*, 670 F.2d 1035, 1048-50 (D.C. Cir. 1981) (in action challenging alleged anticompetitive activities of religious organization, conflict between values of competition and protection of first amendment freedom of religion held to raise considerations similar to those in *Noerr*), *noted in* 57 NOTRE DAME LAW. 828 (1982).

<sup>10</sup> *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 S. Ct. 2161, 2170 (1983) (“Just as false statements are not immunized by the First Amendment right of freedom of speech, . . . baseless litigation is not immunized by the First Amendment right to petition.”).

however, certain problems in application of these principles arise. The first problem is a practical one, which involves difficult factual determinations. When is the defendant's conduct a mere sham of true governmental petitioning? When is the activity so far beyond the pale of accepted methods of seeking official relief that the antitrust laws ought to continue to apply? The second problem involves the articulated reconciliation of these values, and the conceptual inconsistencies that arise. As will be discussed below, the *Noerr* Court suggested that the defendant's intent was irrelevant. It held that the antitrust laws would not apply even if the defendant could reasonably anticipate that its conduct would injure competitors; the right to petition prevailed over the adverse competitive impact. Given this statement, it is difficult to understand why this right would not also prevail in the sham petition situation. Therefore, subsequent decisions have looked to the defendant's intent in determining the availability of this immunity. Additionally, although the individual right to petition deserves protection, it is not equally clear that the first amendment and its associated values require that persons be allowed to act jointly in a "combination or conspiracy" to seek such relief, nor why the immunity should extend to activities ancillary to the basic petitioning process. The first amendment yields to antitrust norms in other areas. For example, price fixing is unlawful per se, even if it is the result of "speech" between the parties to the agreement. The Court need not have concluded that concerted political speech, even of an anticompetitive nature, is entitled to broad immunity.

This Article will assess the present state of the law in this area, focusing on judicial attempts to resolve these thorny questions. Part I summarizes the development of the *Noerr-Pennington* doctrine and subsequent judicial limitations. Part II considers the applicability of the *Noerr-Pennington* doctrine to various agencies. Part III discusses whether certain methods of petitioning the government fall outside the exemption and the extent to which that exemption is dependent on the type of governmental body being petitioned. Part IV focuses on the most frequently litigated exception, the sham petition. Part V analyzes the special problems posed by these cases and proposes suggestions for resolution.

# I. JUDICIAL ORIGIN OF THE EXEMPTION: THE *Noerr* AND *Pennington* DECISIONS

Prior to the Court's seminal decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>11</sup> application of the antitrust laws to political activity had been raised in a number of decisions.<sup>12</sup> Yet in *Noerr*, the Court recognized that the particular issue of immunity from antitrust liability for private requests for governmental action, either individual or concerted, presented "a new and unusual application of the Sherman Act."<sup>13</sup>

The *Noerr* decision arose out of a struggle between the trucking and railroad industries for a greater share of the long-distance freight business. An association of railroads had engaged in a successful publicity campaign designed to foster legislative and executive action to block passage of state legislation favorable to the truckers, and to enforce existing statutes applicable to the trucking industry. In the principal lawsuit, the truckers alleged that the defendant railroads, in an effort to monopolize the long-haul freight business, had violated sections 1 and 2 of the Sherman Act by conspiring to lessen the plaintiffs' ability to compete fairly. Two grounds of illegality were alleged: that the campaign was characterized by the railroads' anticompetitive intent to injure the truckers and diminish public goodwill toward the truckers as significant competitors, and that the defendants' conduct was fraudulent and deceptive.<sup>14</sup>

The Court's opinion first identified the conflict between the goals of

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<sup>11</sup> 365 U.S. 127 (1961).

<sup>12</sup> The *Noerr* Court cited *United States v. Rock Royal Co-op.*, 307 U.S. 533 (1939), and *Parker v. Brown*, 317 U.S. 341 (1943), for the proposition that when "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." *Noerr*, 365 U.S. at 136.

<sup>13</sup> 365 U.S. at 135. Since the current law in this area is based solely on *Noerr* and its progeny, this Article will not discuss its judicial antecedents.

<sup>14</sup> The principal deceptive practice was the use of the "third party technique." "[T]he publicity matter circulated in the campaign was made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared and produced by [defendants' public relations firm] and paid for by the railroads." *Id.* at 130.

[T]he third-party technique, which was aptly characterized by the District Court as involving "deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information," depends upon giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups. *Id.* at 140.

the antitrust laws and the values inherent in political and constitutional activity. The decision enumerated the political considerations that militated against application of the antitrust laws to private requests for governmental action.<sup>15</sup> The Court concluded that the antitrust laws do not make most of these political activities unlawful, including those of a concerted nature in which the result may be a significant lessening of competition or injury to competitors.

The Court then addressed the two grounds that might have led to illegality. First, the Court held that the defendants' anticompetitive motive or intent in seeking passage of new legislation and enforcement of existing laws was irrelevant.<sup>16</sup> Individuals seek governmental action or intervention most frequently in situations involving financial benefit to them. It is not unexpected that in the course of such importuning they will seek some advantage, and concomitantly will seek to disadvantage their competitors.<sup>17</sup> Second, mere resort to unethical tactics in the course of a publicity campaign designed to inform and influence public officials does not make otherwise sheltered activity unlawful. The Sherman Act regulates business activities and trade restraints, not political activity; it would be inappropriate to use the antitrust laws to attempt to control political behavior.<sup>18</sup> The Court also observed that even if the defendants' conduct did in fact injure the plaintiffs by weakening their competitive standing, the antitrust laws still would not apply. Such injury is the necessary but unavoidable result of legitimate political activity.<sup>19</sup>

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<sup>15</sup> See *supra* notes 5-8 and accompanying text.

<sup>16</sup> "[T]he fact . . . that the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business . . . could [not] transform conduct otherwise lawful into a violation of the Sherman Act." 365 U.S. at 138-39 (footnotes omitted).

<sup>17</sup> *Id.* at 139.

<sup>18</sup> Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena.

*Id.* at 140-41.

<sup>19</sup> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to out-

The Court did suggest, however, that the right to seek governmental action might be subject to some exception. Had the publicity campaign been a mere sham to cover anticompetitive activities, the antitrust laws would apply.<sup>20</sup> But in *Noerr*, the defendants' acts did not fall outside the basic immunity principle. The fleshing out of this exception, as well as the identification of other exceptions, had to await subsequent case law.

The next Supreme Court decision to treat this area, *United Mine Workers of America v. Pennington*,<sup>21</sup> put a slight gloss on the *Noerr* doctrine. Labor union officials and the operators of certain large firms in the coal industry jointly approached the Secretary of Labor and officials of the Tennessee Valley Authority, an autonomous federal agency. They successfully obtained establishment of a minimum wage in the industry and the curtailing of certain purchases in the market. Evidence revealed that these decisions had an adverse effect on many of the smaller companies in the industry, which as a result of these governmental decisions were unable to compete successfully. The operator of one smaller company alleged that these approaches to government officials resulted in a restraint of trade and injury to competition in violation of section 1 of the Sherman Act. The Court held, however, that the defendants' motive or purpose was irrelevant in determining whether the antitrust laws applied. Regardless of either anticompetitive intent or effect, this conduct was absolutely immune from Sherman Act scrutiny.<sup>22</sup>

The *Pennington* decision seemed to harden the Court's preference for first amendment values. By suggesting that the defendants' purpose or intent never mattered, it seemed to limit dramatically exceptions to the primacy of the right to petition over the proscriptions of the antitrust laws. Subsequent decisions, however, reveal some weakening of

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lawing all such campaigns. We have already discussed the reasons which have led us to the conclusion that this has not been done by anything in the Sherman Act.

*Id.* at 143-44.

<sup>20</sup> "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." *Id.* at 144.

<sup>21</sup> 381 U.S. 657 (1965).

<sup>22</sup> "Nothing could be clearer from the Court's opinion [in *Noerr*] than that anticompetitive purpose did not illegalize the conduct there involved. . . . *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Id.* at 669-70.



the basic *Noerr-Pennington* doctrine.

Subsequent to its articulation of the basic doctrine in the *Noerr* and *Pennington* decisions, the Supreme Court has had several occasions to give further consideration to the reconciliation of antitrust and political-constitutional concerns. In addition, the lower federal courts have had many opportunities to grapple with the various nuances of these problems.

The most significant Supreme Court decision in this area is *California Motor Transport Co. v. Trucking Unlimited*.<sup>23</sup> The Court had already suggested in *Noerr* that certain attempts to obtain governmental intervention would continue to be subject to antitrust scrutiny if they were a "mere sham" for attempts to "interfere directly with the business relationships of a competitor."<sup>24</sup> In *Noerr*, the facts belied application of the sham exception. In *California Motor Transport*, however, the Court not only gave extended consideration to this exception, but found that the facts alleged stated a claim under the Sherman Act. Additionally, the Court recognized that attempts to influence the legislature or the executive branch differed in kind from attempts to influence the judiciary or administrative agencies.

In *California Motor Transport*, the parties were competing groups of trucking companies, subject to regulation by federal and state agencies. The defendants were principally established carriers; the plaintiffs were attempting to enter some of the defendants' markets. The plaintiffs alleged that the defendants instituted frequent, groundless actions before administrative agencies and in the courts, in an attempt to frustrate the adjudicative process, harass the plaintiffs, and deny them "free and unlimited access" to those tribunals.<sup>25</sup>

The first significant aspect of the Court's decision was a slight retreat from its earlier statement in *Pennington* that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials *regardless of intent or purpose*."<sup>26</sup> In *California Motor Transport*, the Court held:

The nature of the views pressed . . . may bear upon a purpose to deprive the competitors of meaningful access to the agencies and courts . . . . [S]uch a purpose or intent, if shown, would be "to discourage and ulti-

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<sup>23</sup> 404 U.S. 508 (1972).

<sup>24</sup> *Noerr*, 365 U.S. at 144; see *supra* note 20.

<sup>25</sup> The plaintiffs alleged that "the power, strategy, and resources of the [defendants] were used to harass and deter [plaintiffs] in their use of administrative and judicial proceedings so as to deny them 'free and unlimited access' to those tribunals." *California Motor Transp.*, 404 U.S. at 511.

<sup>26</sup> *Pennington*, 381 U.S. at 670 (emphasis added).

mately to prevent the respondents from invoking" the processes of the administrative agencies and courts and thus fall within the exception to *Noerr*.<sup>27</sup>

Therefore, an appeal to these adjudicatory tribunals which was not only anticompetitive, but also mounted in bad faith, would be within the reach of the antitrust laws.

The *California Motor Transport* decision also makes the nature of the governmental body being solicited relevant to the scope of the *Noerr* exception. *Noerr* itself involved appeals for legislative enactments and executive enforcement of existing law and vetoes of proposed legislation. *California Motor Transport* involved appeals to administrative agencies and the courts. The Court began by noting that the same philosophy governs citizen approaches to all these bodies, and "[c]ertainly the right to petition extends to all departments of the Government."<sup>28</sup> Having said this, however, the Court then stated that certain methods of influencing decisionmaking, which were sanctioned in the political arena of legislative and executive activity, would not be immunized from antitrust scrutiny when undertaken in the adjudicatory setting of administrative or judicial proceedings.<sup>29</sup>

The Court suggested another potential limitation on the *Noerr* doctrine in *Continental Ore Co. v. Union Carbide & Carbon Corp.*<sup>30</sup> The plaintiff and defendant were competitors in the production and sale of vanadium, a metal which is mined and processed principally in the United States. A subsidiary of the defendant was appointed as the exclusive agent of the Canadian government for the purchase and allocation of vanadium in Canada. The plaintiff alleged that the defendant and its subsidiary, acting on behalf of the Canadian government, had violated the Sherman Act by conspiring to deny the plaintiff the right to export and sell vanadium in Canada. The Court rejected the suggestion that this conduct was immunized by *Noerr* as part of an attempt to influence a governmental decision. Rather, the Court characterized this conduct as a "private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws."<sup>31</sup>

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<sup>27</sup> *California Motor Transp.*, 404 U.S. at 512 (quoting concurrence of Justice Stewart, *id.* at 518).

<sup>28</sup> *Id.* at 510.

<sup>29</sup> "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. . . . Insofar as the administrative or judicial processes are involved, [certain] actions . . . cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" *Id.* at 513.

<sup>30</sup> 370 U.S. 690 (1962).

<sup>31</sup> *Id.* at 707.

This political-commercial distinction is a difficult one to apply, however. As the Court recognized in *Noerr*, persons often undertake political activity for purely commercial purposes.<sup>32</sup> The extent of this exception from the *Noerr* doctrine for "commercial activity," even when directed at influencing governmental decisionmaking, has become another area of controversy.<sup>33</sup>

Finally, in *Cantor v. Detroit Edison Co.*,<sup>34</sup> the Court dealt with one of the issues raised by the interface of the *Parker v. Brown*<sup>35</sup> state action immunity doctrine and the *Noerr-Pennington* rule. In *Cantor*, the defendant electric utility had submitted proposed tariffs to the state regulatory commission, which were eventually approved and which required the utility to replace burned-out light bulbs with new bulbs. In response to a challenge that the light bulb program violated the Sherman Act, the utility argued that it was acting pursuant to state command and hence the state action doctrine<sup>36</sup> shielded its conduct. In the course of rejecting this argument, a plurality of the Court,<sup>37</sup> in an opinion by Justice Stevens, examined the relevance of *Noerr*. Presumably *Noerr* would make lawful the defendant's act of petitioning the state administrative agency to create and impose the tariff. The defendant argued that a fortiori it could not be unlawful if, after this petitioning proved successful, the utility adhered to the tariff's requirements as it was required to do. Yet Justice Stevens concluded that the *Noerr* and *Parker* issues were distinct. Although each step leading to the utility's

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<sup>32</sup> See *supra* note 17 and accompanying text.

<sup>33</sup> See *infra* notes 122-58 and accompanying text.

<sup>34</sup> 428 U.S. 579 (1976).

<sup>35</sup> 317 U.S. 341 (1941).

<sup>36</sup> See generally Dorman, *State Action Immunity: A Problem Under Cantor v. Detroit Edison*, 27 CASE W. RES. L. REV. 503 (1977); Holzer, *An Analysis for Reconciling the Antitrust Laws with the Right to Petition: Noerr-Pennington in Light of Cantor v. Detroit Edison*, 27 EMORY L.J. 673 (1978); Kennedy, *Of Lawyers, Lightbulbs and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Law*, 74 NW. U.L. REV. 31 (1979); Shores, *The State Action Doctrine After Goldfarb and Cantor*, 63 IOWA L. REV. 367 (1977); 18 B.C. INDUS. & COM. L. REV. 370 (1977); 77 COLUM. L. REV. 898 (1977); 62 CORNELL L. REV. 628 (1977); 1977 DUKE L.J. 871.

<sup>37</sup> Four members of the Court joined in the entire opinion. See *Cantor*, 428 U.S. at 581 n.†. Chief Justice Burger concurred in part, but expressly declined to concur in that portion of the decision which included the *Noerr* discussion. See *id.* at 603. Justice Blackmun concurred only in the judgment and wrote a separate opinion. See *id.* at 605. Neither the Burger nor Blackmun opinions discussed the *Noerr* issue. See *id.* at 603-05 (Burger, C.J.), 605-14 (Blackmun, J.). Justice Stewart wrote a dissenting opinion for three members of the Court, which disagreed with Justice Stevens' *Noerr* analysis; see *id.* at 601-02; *infra* note 40.

adherence to the suggested program might be lawful, this did not mean that the entire anticompetitive program, once adopted, was also lawful.<sup>38</sup> Since the basic *Parker* rule is that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it,"<sup>39</sup> *Noerr* cannot confer immunity for the otherwise anticompetitive and unlawful conduct<sup>40</sup> merely because the defendant has actively petitioned for the particular state action.<sup>41</sup>

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<sup>38</sup> "[The dissent's] analysis rests largely on the dubious assumption that if each of several steps in the implementation of an anticompetitive program is lawful, the entire program must be equally lawful." *Cantor*, 428 U.S. at 602 n.45.

<sup>39</sup> *Parker*, 317 U.S. at 351.

<sup>40</sup> [N]othing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct.

*Cantor*, 428 U.S. at 601-02.

The dissent accepted the defendant's argument about the implications of *Noerr* for the *Parker* doctrine:

Surely, if a rule permitting Sherman Act liability to arise from lobbying by private parties for state rules restricting competition would impair the power of state governments to impose restraints, then *a fortiori* a rule permitting Sherman Act liability to arise from private parties' compliance with such rules would impair the exercise of the States' power.

*Id.* at 623 (Stewart, J., dissenting).

<sup>41</sup> Discussion of the *Noerr-Pennington* doctrine can be found in a number of other Supreme Court decisions. The only significant substantive addition to the basic rules described above is in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977). *A* had sued *B* in state court, alleging breach of a contract containing covenants not to compete. After *A* obtained a judgment, *B* sued *A* in federal court, alleging that the underlying contract violated the antitrust laws. *B* also sought a federal order enjoining *A* from collecting upon the state court judgment. At issue was whether the Anti-Injunction Act, 28 U.S.C. § 2283 (1976), precluded a federal court from issuing an injunction of a state court proceeding under § 16 of the Clayton Act, 15 U.S.C. § 26 (1982), which generally authorizes injunctive relief to private parties in an antitrust action. In a split decision, the Court held that the federal district court was barred from issuing the injunction.

An opinion by Justice Rehnquist for three members of the Court concluded that the Anti-Injunction Act always bars such injunctions. Then, discussing the *Noerr* doctrine, Justice Rehnquist noted that repetitious lawsuits might well be sham and thus unlawful under the antitrust laws. However, once a lawsuit commences in a state court, the Anti-Injunction Act prohibits enjoining that lawsuit, even if it is frivolous or repetitive. *Vendo*, 433 U.S. at 640-41. On the other hand, Justice Rehnquist asserted that, notwithstanding the Act, future additional repetitious actions could be enjoined. *Id.* at 635 n.6.

Justice Blackmun, joined by Chief Justice Burger, wrote the other opinion making up the majority. *Id.* at 643. He disagreed with Justice Rehnquist's conclusion that the

The various Supreme Court decisions described above suggest some of the limitations on the basic *Noerr-Pennington* doctrine. Among them are potential differences in the exemption based on the nature of the governmental body solicited<sup>42</sup> and whether the exemption is lost because of the means used to obtain government relief or the motive underlying the attempt. In addition, special problems have been raised by these cases.<sup>43</sup>

## II. WHAT GOVERNMENTAL BODIES MAY BE SOLICITED?

In 1961, the *Noerr* Court held that the antitrust laws do not apply to concerted attempts to obtain relief from the legislative or executive branches of the government, even when such conduct has anticompetitive effects. Until 1972, it was not clear whether this immunity also applied to attempts to obtain action from the adjudicatory branches of the government, the courts, and administrative agencies.<sup>44</sup> In *California*

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Anti-Injunction Act could never be used in aid of an action brought under Clayton Act § 16 to enjoin a state court proceeding. However, Justice Blackmun would have carved out a narrow exception to the Anti-Injunction Act only when the state proceedings sought to be enjoined would give rise to an antitrust violation under the test stated in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), which he found inapplicable to the facts at bar. Justice Blackmun would require that the state court proceedings must “themselves [be] part of a ‘pattern of baseless, repetitive claims’ that are being used as an anticompetitive device.” 433 U.S. at 643-44 (Blackmun, J., concurring in result) (quoting *California Motor Transp.*, 404 U.S. at 513). This opinion raises doubts whether Justice Blackmun believed that a single action, no matter how frivolous, could ever be the basis of a sham proceeding claim.

Finally, Justice Stevens’ dissent, joined by three other members of the Court, concluded that the Anti-Injunction Act does not deprive the federal courts of jurisdiction to enjoin state court proceedings which violate the goals of the antitrust laws. *Id.* at 647 (Stevens, J., dissenting). In the course of that opinion, Justice Stevens asserted that even a single frivolous or groundless lawsuit might be used to violate the antitrust laws. Rejecting Justice Blackmun’s approach, he concluded that the reference in *California Motor Transp.* to “a pattern of baseless, repetitive claims” was illustrative but not exhaustive. If the single proceeding was clearly unjustified, illegal, or fraudulent, Stevens asserted that it could form the basis of a federal antitrust claim. *Id.* at 661-62.

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 399 & n.17 (1978), the Court reiterated and explained the holdings and policies of *Noerr* and *Pennington*. The Court reiterated the sham exception in *New Vehicle Motor Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 110 & n.15 (1978), and in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 379-80 (1973).

<sup>42</sup> See *infra* notes 44-65 and accompanying text.

<sup>43</sup> See *infra* notes 122-58 and accompanying text.

<sup>44</sup> See *Trucking Unlimited v. California Motor Transp. Co.*, 432 F.2d 755, 759-60 (9th Cir. 1970) (citing other authorities), *aff’d on other grounds*, 404 U.S. 508 (1972).

*Motor Transport*,<sup>45</sup> however, the Court held that the same policy reasons which dictated the inapplicability of the Sherman Act in *Noerr* required antitrust immunity for citizen petitions to these adjudicatory bodies.<sup>46</sup> Yet, the Court also suggested that in the face of an antitrust challenge, the same kinds of conduct might not be treated equally, depending on the particular governmental entity being approached.<sup>47</sup>

The Supreme Court's suggestion that different forms of petitioning activity might be treated differently based on the type of governmental body being approached<sup>48</sup> is borne out by cases applying the sham exception.<sup>49</sup> Evidence of intent to exclude competitors may indeed be irrelevant in approaches to the legislative or executive branches of government,<sup>50</sup> thus the exception will be almost impossible to make out in the context of these forms of political petitioning. However, intent has frequently been examined in the context of assertedly sham litigation or sham requests for administrative relief.<sup>51</sup>

Protection of the right to petition should logically extend to all policymaking levels of government that influence the political and economic lives of citizens. As might be expected, the *Noerr* rule has been held applicable to approaches to local as well as state or federal governmental agencies.<sup>52</sup>

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<sup>45</sup> 404 U.S. 508 (1972).

<sup>46</sup> *Id.* at 509-11; see *supra* note 28 and accompanying text. *California Motor Transp.* involved immunity for applications to the state Public Utilities Commission and the Interstate Commerce Commission, state and federal administrative agencies regulating motor trucking. 432 F.2d at 757. Since then, *Noerr-Pennington* has been applied to a variety of administrative agencies. See, e.g., *Transkentucky Transp. R.R. v. Louisville & N.R.R.*, 1983-2 Trade Cas. ¶ 65,476 (E.D. Ky. 1983) (ICC and state railroad commission); *Llewellyn v. Crothers*, 1983-1 Trade Cas. ¶ 65,358 (D. Or. 1983) (state workers' compensation department); *Miller & Son Paving v. Wrightstown Township Civic Ass'n*, 443 F. Supp. 1268 (E.D. Pa. 1978) (state department of environmental resources), *aff'd*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979); see also *Ernest W. Hahn, Inc. v. Coddling*, 615 F.2d 830, 840 (9th Cir. 1980) (*Noerr-Pennington* clearly applies to judicial proceedings).

<sup>47</sup> See *Metro Cable Co. v. CATV*, 516 F.2d 220, 228 (7th Cir. 1975) (unethical conduct tolerated in approach to city council, a legislative body, since activity took place in a "political setting").

<sup>48</sup> See *supra* note 47 and accompanying text.

<sup>49</sup> See generally *infra* notes 85-121 and accompanying text.

<sup>50</sup> See *supra* notes 16, 19, 22 and accompanying text.

<sup>51</sup> See *infra* notes 95-99 and accompanying text.

<sup>52</sup> See, e.g., *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226, 237 (5th Cir. 1983), *adopting lower court decision in* 519 F. Supp. 991 (S.D. Tex. 1981) (city council and mayor); *Westborough Mall, Inc. v. City of Cape Girardeau, Mo.*, 693 F.2d 733, 746 (8th Cir. 1982) (city council, city manager, and city attorney), *cert. denied*,

Problems have arisen because of difficulties in evaluating approaches to three kinds of groups. The first area of concern is the application of petitioning immunity to enforcement agencies. This petitioning would hardly be thought of as typically political, a quality *Noerr* deemed at the core of those activities which the antitrust laws did not reach.<sup>53</sup> Lower courts have held, however, that *Noerr* applies to citizen requests for police department intervention<sup>54</sup> and to petitions to a state attorney general.<sup>55</sup> These decisions are consistent with the actual holding of *Noerr*, which involved, among other things, requests to the Governor of Pennsylvania to enforce laws applicable to the weight and length of trucks on state highways. Furthermore, it is probably as important to preserve citizen access to these enforcement agencies, in order not to chill the provision of information about possible violations of the law, as it is to preserve petitioning regarding changes in the underlying law itself.<sup>56</sup>

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103 S. Ct. 2122 (1983); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1080 (9th Cir. 1976) (municipal board of permit appeals), *cert. denied*, 430 U.S. 940 (1977); *Metro Cable Co. v. CATV*, 516 F.2d 220, 229 (7th Cir. 1975) (mayor and city council); *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341, 342-43 (9th Cir. 1969) (county commission); *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543, 546-47 (W.D. Ky. 1982) (mayor, city council, city attorney); *Bustop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F. Supp. 989, 994-96 (S.D.N.Y. 1981) (municipal legislative/executive body).

<sup>53</sup> See *supra* note 8.

<sup>54</sup> *Forro Precision, Inc. v. International Business Machs. Corp.*, 673 F.2d 1045, 1059-61 (9th Cir. 1982); see also *United States v. Hylton*, 558 F. Supp. 872, 874-75 (S.D. Tex. 1982) (filing of criminal complaint with local law enforcement officials protected by first amendment), *aff'd*, 710 F.2d 1106 (5th Cir. 1983).

<sup>55</sup> *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964); see also *Federal Prescription Serv., Inc. v. American Pharm. Ass'n*, 663 F.2d 253, 262 (D.C. Cir. 1981) (exemption applies to lobbying of state boards of pharmacy), *cert. denied*, 455 U.S. 928 (1982); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 542-43 (5th Cir. 1978) (exemption applies to communications to state board of medical examiners), *cert. denied*, 444 U.S. 924 (1979).

<sup>56</sup> A related problem is whether *Noerr-Pennington* applies when the government action sought is the implementation of a policy rather than its formulation; while input into the making of a decision is clearly political, it is arguable that merely carrying it out in nondiscretionary ways is not, and hence is unprotected. Compare *Woods Explor. & Prod. Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1297-98 (5th Cir. 1971) (no immunity), *cert. denied*, 404 U.S. 1047 (1972); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders*, 424 F.2d 25, 31-33 (1st Cir.) (same), *cert. denied*, 400 U.S. 850 (1970) with *Semke v. Enid Auto. Dealers Ass'n*, 456 F.2d 1361, 1366 (10th Cir. 1972) (immunity applies to requests to state administrative agency to enforce laws) and *infra* notes 140-43 and accompanying text.

The *Noerr-Pennington* doctrine also applies to attempts to secure legislation through the initiative process, including soliciting public support therefor, as well as lobbying directed to a legislative body.<sup>57</sup> In addition, immunity has been extended to petitions to private, quasi-governmental groups which adopt standards or codes which are then enacted by municipal and state governments.<sup>58</sup>

A second area of uncertainty is the applicability of the *Noerr-Pennington* doctrine to approaches to a branch of the government operating a commercial enterprise, or acting in a private, proprietary capacity. Some courts have held that petitioning immunity continues even when the government is engaged in a money-making operation, for example, as the lessor of space at an airport.<sup>59</sup> Separating the government's regulatory role from its commercial undertaking may be impractical and improper. On the other hand, if the government is merely acting as a consumer, and persons violate the antitrust laws in the course of persuading the government to make purchases from it, then *Noerr-Pennington* should no more be a shield than if similar acts were undertaken in making sales to a private person.<sup>60</sup> Similarly, the *Noerr-Pennington* doctrine does not apply when the challenged conduct does not involve petitioning at all, but rather a contractual agreement between two parties, one of whom happens to be a municipality.<sup>61</sup>

The third area of uncertainty in the application of *Noerr-Pennington* concerns petitions to branches of foreign governments. On the one hand, many of the policies underlying the basic doctrine, including the desirability of public input on decisionmaking and the value to the gov-

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<sup>57</sup> *Subscription Television, Inc. v. Southern Cal. Theatre Owners Ass'n*, 576 F.2d 230, 232 (9th Cir. 1978).

<sup>58</sup> *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 1983-2 Trade Cas. ¶ 65,525, at 68,605-09 (N.D. Ill. 1983) (lobbying of National Fire Protection Association and Underwriters Laboratories to adopt standards favorable to defendant is protected); *see also* *Federal Prescription Serv. v. American Pharm. Ass'n*, 471 F. Supp. 126, 128 (D.D.C. 1979) (lobbying of governmental body composed of both public officials and private, interested citizens protected), *aff'd in part, rev'd on other grounds*, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); *Rush-Hampton Indus. v. Home Ventilating Inst.*, 419 F. Supp. 19, 25 (M.D. Fla. 1976) (same).

<sup>59</sup> *In re Airport Car Rental Antitrust Litig.*, 693 F.2d 84, 87-88 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3114 (1983); *Hill Aircraft & Leasing Corp. v. Fulton County, Ga.*, 561 F. Supp. 667, 674-76 (N.D. Ga. 1982).

<sup>60</sup> *George R. Whitten, Jr., Inc. v. Paddock Pool Builders*, 424 F.2d 25, 31-33 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); *see also* *infra* notes 138-43 and accompanying text.

<sup>61</sup> *Cincinnati Riverfront Coliseum, Inc. v. City of Cincinnati*, 556 F. Supp. 664, 669 (S.D. Ohio 1983).



ernment of the information received, apply with equal force to petitions to foreign and domestic government branches. Yet if the *Noerr-Pennington* doctrine is in part constitutionally based,<sup>62</sup> there is no first amendment imperative that individuals have unimpaired access to foreign governments and their branches. As a result, the decisions on this question are divided: one finding *Noerr-Pennington* applicable to petitions to foreign governments,<sup>63</sup> another finding it inapplicable,<sup>64</sup> and the majority of decisions noting but not deciding the question.<sup>65</sup>

### III. WHAT MEANS MAY BE USED TO SEEK GOVERNMENTAL INTERVENTION?

In *Noerr*, the trial court had predicated the applicability of the anti-trust laws to the defendants' attempts to obtain legislative and executive action on two key findings: the defendants' intent to injure the plaintiffs' competitive posture, and the use of deceptive and fraudulent techniques.<sup>66</sup> The Supreme Court found both of these irrelevant in determining potential antitrust liability. While the defendants' activities fell "far short of the ethical standards generally approved in this coun-

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<sup>62</sup> See *supra* note 7.

<sup>63</sup> *Coastal States Mktg. v. Hunt*, 694 F.2d 1358, 1364-67 (5th Cir. 1983); see also *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-08 (1962) (discussed *supra* notes 30-31 and accompanying text); U.S. DEP'T OF JUSTICE, ANTI-TRUST GUIDE FOR INTERNATIONAL OPERATIONS 62 (Jan. 26, 1977) (Case N: accepting position that immunity also applies to petitions to foreign governments).

<sup>64</sup> *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 107-08 (C.D. Cal. 1971), *aff'd on other grounds*, 461 F.2d 1261 (9th Cir.) (per curiam), *cert. denied*, 409 U.S. 950 (1972); see also *Australia/Eastern U.S.A. Shipping Conf. v. United States*, 537 F. Supp. 807, 812-13 (D.D.C. 1982) (first amendment does not apply to petitions to foreign governments; *Noerr* protection therefore weaker when government seeks disclosure, pursuant to Civil Investigative Demands, of such communications); *infra* note 156.

<sup>65</sup> *Associated Container Transp. (Australia) v. United States*, 705 F.2d 53, 60 n.10 (2d Cir. 1983); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 882 n.6 (5th Cir. 1982), *vacated*, 103 S. Ct. 1244-45, *cert. denied*, 104 S. Ct. 393 (1983); *Bulkferts Inc. v. Salatin Inc.*, 574 F. Supp. 6, 9 (S.D.N.Y. 1983); *Dominicus Americana Bohio v. Gulf & W. Indus.*, 473 F. Supp. 680, 690 n.3 (S.D.N.Y. 1979); see also Davis, *Solicitation of Anticompetitive Action From Foreign Governments: Should the Noerr-Pennington Doctrine Apply to Communications with Foreign Sovereigns?*, 11 GA. J. INT'L & COMP. L. 395 (1981); Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100, 132 (1967); Comment, *Corporate Lobbyists Abroad: The Extraterritorial Application of Noerr-Pennington Antitrust Immunity*, 61 CALIF. L. REV. 1254 (1973).

<sup>66</sup> *Noerr*, 365 U.S. at 133 (discussed *supra* notes 4-20 and accompanying text).

try,"<sup>67</sup> they were essentially of a political nature, and hence not subject to antitrust scrutiny. The Court indicated that, with the exception of activities which were a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor,"<sup>68</sup> neither the motives nor the particular techniques of a defendant seeking governmental relief could form the basis of an antitrust action.

In *California Motor Transport*,<sup>69</sup> however, the Court not only found the sham exception sufficiently alleged to withstand a motion to dismiss the complaint, but also indicated other methods of seeking governmental action which were sufficiently beyond the realm of accepted political activity to form the basis of an antitrust claim.

The key distinction between the sham exception and these other limitations is the difference between improper ends and improper means. If the defendant's goal in seeking governmental action is not the action at all, but rather to injure its competitor or to obtain a competitive advantage, then the defendant's petitioning may properly be characterized as a sham. On the other hand, even if the defendant truly wants the governmental action sought, certain means of attempting to obtain that relief are so improper that they are beyond the realm of political activity for antitrust purposes.

In *California Motor Transport*, the Court identified four forms of unethical conduct which might result in antitrust violations: perjury of witnesses, "use of a patent obtained by fraud to exclude a competitor from the market,"<sup>70</sup> "[c]onspiracy with a licensing authority to elimi-

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<sup>67</sup> *Id.* at 140.

<sup>68</sup> *Id.* at 144.

<sup>69</sup> 404 U.S. at 508 (1972) (discussed *supra* notes 23-29 and accompanying text).

<sup>70</sup> *Id.* at 512. The Court cited *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174-77 (1965), for this proposition. The *Walker* Court had held that a person sued for patent infringement could assert a counterclaim that the patentee engaged in monopolization, in violation of § 2 of the Sherman Act, 15 U.S.C. § 2 (1982), through the attempted enforcement of a patent which was obtained by intentional fraud on the Patent Office. The Court made no mention of the possibility that the predicate enforcement action might be immunized as a petition for governmental relief under *Noerr. California Motor Transp.*, 404 U.S. at 512; *see also* *United States v. Singer Mfg. Co.*, 374 U.S. 174, 189 (1963); *Kearney & Trecker Corp. v. Cincinnati Milacron Inc.*, 562 F.2d 365, 372-73 (6th Cir. 1977) (enforcement of fraudulently obtained patent is basis of attempt to monopolize claim; no mention of *Noerr* issue); *cf. Woods Explor. & Prod. Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1298 (5th Cir. 1971) (knowingly filing false information with state regulatory commission), *cert. denied*, 404 U.S. 1047 (1972). The improper use of patent enforcement proceedings as grounds for the sham exception is discussed *infra* note 114.

nate a competitor,"<sup>71</sup> and "bribery of a public purchasing agent."<sup>72</sup> The Court noted there are many other forms of illegal and reprehensible practices "which may corrupt the administrative or judicial processes and which may result in antitrust violations."<sup>73</sup>

As is true with respect to the sham exception, a higher ethical standard should be imposed on petitioners for adjudicatory branch relief than for approaches to the political branches.<sup>74</sup> Thus, *Noerr* protected the challenged approaches to the state legislature and to the governor's office even though the railroads engaged in certain "unethical tactics,"<sup>75</sup> but it is doubtful whether *Noerr-Pennington* would immunize bribery of a legislator or perjury before a congressional hearing from antitrust scrutiny.

Some courts have held that unlawful conduct between the defendants and the governmental agents from whom they seek official action results in loss of *Noerr-Pennington* protection.<sup>76</sup> Additionally, intention-

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<sup>71</sup> *California Motor Transp.*, 404 U.S. at 513. The Court cited *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962) (discussed *supra* notes 30-33 and accompanying text), and *Harman v. Valley Nat'l Bank*, 339 F.2d 564 (9th Cir. 1964).

<sup>72</sup> *California Motor Transp.*, 404 U.S. at 513. The Court cited *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965). There, the Ninth Circuit held that the bribery of a public official stated an action under § 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13 (1982). See III E. KINTNER & J. BAUER, *FEDERAL ANTITRUST LAW* § 26.10 (1983). On the other hand, at least one district court has held that although bribery and illegal campaign contributions may be abuses of the administrative process, they cannot be the basis of antitrust liability if they do not suggest an ulterior purpose of harming competition. *Cow Palace, Ltd. v. Associated Milk Producers*, 390 F. Supp. 696, 704-05 (D. Colo. 1975). The court held that since foreclosure of the plaintiff was not the object of these activities, the conduct did not fall within the sham exception. *Id.* at 704 n.6. Yet, the court was probably taking too narrow a view of *California Motor Transp.*; that case suggested several illegal or unethical acts in addition to the sham exception which would take the case out of the *Noerr* doctrine.

<sup>73</sup> *California Motor Transp.*, 404 U.S. at 513.

<sup>74</sup> See *infra* notes 91-94 and accompanying text.

<sup>75</sup> See *supra* note 18 and accompanying text.

<sup>76</sup> *Westborough Mall, Inc. v. City of Cape Girardeau, Mo.*, 693 F.2d 733, 746 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 2122 (1983); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters and Helpers Local No. 150*, 440 F.2d 1096, 1099 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971). But cf. *First Am. Title Co. v. South Dakota Land Title Ass'n*, 714 F.2d 1439, 1446-47 (8th Cir. 1983) (misrepresentations and false statements in the context of legislative lobbying protected by *Noerr* doctrine), *cert. denied*, 104 S. Ct. 709 (1984); *Cow Palace, Ltd. v. Associated Milk Producers*, 390 F. Supp. 696, 700-05 (D. Colo. 1975) (even bribery of public officials and illegal campaign contributions will not result in loss of petitioning immunity); *Schenley Indus. v.*

ally furnishing false information to an administrative agency for use in its decisionmaking process constitutes fraud and may be the basis of an antitrust claim.<sup>77</sup> The use of threats, intimidation, or other coercive measures is also not within the scope of petitioning immunity.<sup>78</sup> Other courts, however, have held that even obviously improper forms of attempted persuasion, while reprehensible and deserving of condemnation under other statutes, did not justify denying *Noerr-Pennington* immunity.<sup>79</sup>

Furthermore, the exemption does not extend to conduct preliminary to the immunized joint approach to the government. Thus, if the defendants engaged in discussion among themselves to set common prices for their goods or services, and then agreed to solicit governmental approval for this pricing program, *Noerr-Pennington* does not exempt the otherwise unlawful price-fixing.<sup>80</sup> Similarly, a defendant's refusal to deal with the plaintiff is not immunized from antitrust scrutiny simply because the conduct then provoked the plaintiff's appeal to an administrative agency protesting the refusal, even though the defendant's refusal

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New Jersey Wine & Spirit Wholesalers Ass'n, 272 F. Supp. 872, 883-86 (D.N.J. 1967) (even acts unlawful under state law protected during course of legislative lobbying).

<sup>77</sup> *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259-63 (9th Cir. 1982) (bringing this type of fraud within reach of antitrust laws a natural expansion of Court's holding in *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965); see *supra* note 70 and accompanying text), *cert. denied*, 103 S. Ct. 1234 (1983); *Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 274-80 (D.C. Cir. 1972) (misrepresentation and suppression of information during administrative agency proceedings); *Woods Explor. & Prod. Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1298 (5th Cir. 1971) (filing false information reports with state administrative agency), *cert. denied*, 404 U.S. 1047 (1972); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 176-79 (D. Del. 1979) (filing false information with U.S. Treasury Department and U.S. Customs Service, in connection with assessment of dumping duties); see also *General Aircraft Corp. v. Air Am., Inc.*, 482 F. Supp. 3, 8 (D.D.C. 1979) (filing of misleading and falsely disparaging information with government procurement agency).

<sup>78</sup> *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Local No. 150*, 440 F.2d 1096, 1099 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971).

<sup>79</sup> See, e.g., *Bustop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F. Supp. 989, 995-96 (S.D.N.Y. 1981). The *Bustop* court also held that such conduct did not bring the defendants within the sham exception. For other decisions taking this latter approach, see *infra* notes 82, 108 and accompanying text.

<sup>80</sup> *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1263-65 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1234 (1983); *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469, 477 (5th Cir. 1982); see also *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 594 (1976) (discussed *supra* notes 34-41 and accompanying text).

was a necessary prerequisite for obtaining agency review.<sup>81</sup> All that is sanctioned by petitioning immunity is the actual request for governmental relief; if the preliminaries are themselves unlawful, governmental involvement in subsequent steps in the scheme will not protect them.

On the other hand, certain undesirable or unethical conduct does not result in a loss of petitioning immunity. In addition to the third-party techniques upheld in *Noerr* itself,<sup>82</sup> the *Noerr-Pennington* doctrine applies when the conduct results in group boycotts of third parties. This occurs in two situations: first, when the defendants request persons not to do business with someone else as a means of putting pressure on governmental officials in an attempt to obtain the enactment or enforcement of certain legislation,<sup>83</sup> and second, when the defendants' boycott is simply an attempt to influence public opinion and general governmental policy rather than an attempt to obtain particular governmental action.<sup>84</sup>

#### IV. SHAM PETITIONS<sup>85</sup>

In *Noerr*, the Supreme Court stated in dictum that conduct which was a mere sham of true attempts to engage in political activities, and

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<sup>81</sup> *Mid-Texas Communications Sys. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1383 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980); *see also* *Virginia Academy of Clinical Psychologists v. Blue Shield*, 624 F.2d 476, 482 & n.9 (4th Cir. 1980) (*Noerr* inapplicable to concerted decision to refuse to follow state statute, which eventually provoked enforcement action by state agency), *cert. denied*, 450 U.S. 916 (1981).

<sup>82</sup> *See supra* note 14; *see also* *Metro Cable Co. v. CATV*, 516 F.2d 220, 231 (7th Cir. 1975) (misrepresentation to city council entitled to petitioning immunity).

<sup>83</sup> *Coastal States Mktg. v. Hunt*, 694 F.2d 1358, 1364 (5th Cir. 1983); *Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612, 620-21 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 2108 (1983); *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1200-03 (8th Cir. 1982); *Federal Prescription Serv., Inc. v. American Pharm. Ass'n*, 663 F.2d 253, 262-65 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301, 1312 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 542-43 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979). *But see* *Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n*, 499 F. Supp. 553, 556-58 (D. Del. 1980) (boycott by competitors, designed to persuade federal government to change regulatory policy, not speech deserving *Noerr* protection).

<sup>84</sup> *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 492 F. Supp. 334, 338-39 (D. Mass. 1980) (refusal by labor union to unload ships engaged in trade with Soviet Union protected political activity), *cert. denied*, 458 U.S. 1120 (1982).

<sup>85</sup> A number of articles have specifically addressed the sham exception. *See, e.g.*, Balmer, *Sham Litigation and the Antitrust Laws*, 29 BUFFALO L. REV. 39 (1980); Kaler, *The Sham Exception to the Noerr-Pennington Antitrust Immunity: Its Potential for Minimizing Anticompetitive Abuse of the Administrative Regulatory Process*, 12 U.

which was designed simply to exclude competitors or injure competition, would not be protected from antitrust scrutiny.<sup>86</sup> Subsequently, in *California Motor Transport*,<sup>87</sup> the Court held that allegations of the use of the political process solely to deny competitors "free and unlimited access" to administrative agencies and the courts were sufficient to take the conduct outside the scope of *Noerr-Pennington* immunity.<sup>88</sup> However, the plaintiffs' allegations were so general that the contours of the sham exception were left vague. Lower court decisions of the past decade have attempted to delineate its limitations. As might be expected, these decisions, which involve significant questions of fact,<sup>89</sup> have been neither uniform nor consistent in scope and analysis.<sup>90</sup> However, the trend appears to be toward an expansion of the sham exception and some limitation on the scope of *Noerr-Pennington* immunity.

Sham petitions for governmental action will result in loss of immunity, regardless of the body or agency being petitioned. However, the Court in *California Motor Transport* indicated that certain methods of influencing decisionmaking which would be sanctioned in the political arena would not be immunized from antitrust scrutiny when undertaken in an adjudicatory setting.<sup>91</sup> Petitioning immunity has since been

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TOL. L. REV. 63 (1980); 49 BROOKLYN L. REV. 573 (1983); 48 MISS. L.J. 634 (1977); 72 NW. U.L. REV. 407 (1977); 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, 104-10 (1977) (suggesting that sham exception be coextensive with first amendment protection of petitioning).

<sup>86</sup> See *supra* notes 20, 68 and accompanying text.

<sup>87</sup> 404 U.S. 508 (1972).

<sup>88</sup> See *supra* notes 23-29 and accompanying text.

<sup>89</sup> "Whether something is a genuine effort to influence governmental action, or a mere sham, is a question of fact." *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1234 (1983); see also *United States v. Central State Bank*, 564 F. Supp. 1478, 1482 (W.D. Mich. 1982).

<sup>90</sup> There is some uncertainty whether the plaintiff has a higher burden of pleading the elements of a claim coming within the sham exception. Although Federal Rule of Civil Procedure 8(a)(2) contemplates merely "notice pleading," a "short and plain statement of the [plaintiff's] claim," the potential chilling effect of ongoing litigation might counsel placing higher burdens on the plaintiff before permitting an antitrust action to continue. *Cf. Sage Int'l, Ltd. v. Cadillac Gage Co.*, 507 F. Supp. 939, 943-44 (E.D. Mich. 1981) (no higher burden on plaintiff; citing other cases); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 172-73 (D. Del. 1979) (dismissing defendant's counterclaim as vague, but refusing to adopt higher standard of pleading).

<sup>91</sup> See *supra* note 29 and accompanying text; accord *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 842 (9th Cir. 1980); *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 1983-2 Trade Cas. ¶ 65,525, at 68,609 (N.D. Ill. 1983).

held applicable to lobbying for legislative or executive relief, regardless of the methods used or the defendants' intent.<sup>92</sup> Thus, application of the sham doctrine to other than spurious litigation or resort to administrative agency relief will be quite infrequent, if it is available at all.<sup>93</sup> On the other hand, petitions to these latter enforcement branches may well fall within the sham exception, and be subject to antitrust scrutiny, if there are allegations of abusive or unethical conduct or an absence of genuine intent to obtain governmental relief.<sup>94</sup>

The sham exception can apply either when the defendant has no real desire to prevail in the proceedings, but is using them to injure competitors, or when the defendant has engaged in certain prohibited conduct. Two kinds of analysis are useful in determining the applicability of the exception. One involves subjective criteria of motivation or intent, and the other, various objective factors. Although the *Noerr* Court held the defendants' intent irrelevant in determining the existence of petitioning immunity,<sup>95</sup> this assertion was substantially qualified in *California Motor Transport*.<sup>96</sup> Since then, courts have held that the defendants' intent is the principal criterion in determining whether attempts to obtain governmental relief are a sham.<sup>97</sup> As a corollary, petitioning immunity

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<sup>92</sup> See *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1080 (9th Cir. 1976) ("attempts to lobby and petition a governmental body . . . are absolutely immune from antitrust liability") (footnote omitted), *cert. denied*, 430 U.S. 940 (1977); *id.* at 1081 n.4 (sham exception applies only to "activities external to or abusive of the legislative, administrative or judicial process").

Although some sources reject any application of the sham exception to petitions to the legislature or executive branches, it must be remembered that *Noerr* itself, which involved requests for relief from these two political branches, first articulated the sham exception.

<sup>93</sup> See *supra* notes 48-51 and accompanying text; see also *Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546, 557 n.8 (S.D.N.Y. 1980) (*Noerr* governs sham exception in legislative setting; *California Motor Transp.* governs judicial or administrative petitioning).

<sup>94</sup> The actual costs of litigation and agency proceedings can be high, and the delays inherent in judicial or administrative resolution substantial. Thus, were there no sham exception, it might be a wise competitive strategy for a company to engage its competitors in expensive and protracted litigation, not because of any hope of success or intent to enforce the law, but merely to disadvantage and even destroy the competitor. The policies underlying *Noerr-Pennington* clearly do not require extending petitioning immunity to cover such conduct.

<sup>95</sup> See *supra* note 16 and accompanying text.

<sup>96</sup> See *supra* notes 26-27 and accompanying text.

<sup>97</sup> See, e.g., *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678, 687 (4th Cir. 1982) ("misrepresentations, to fall within the sham exception . . . , must be made

will usually continue when the defendant's attempt to obtain governmental action is taken in good faith,<sup>98</sup> or when the defendant is actually seeking some form of "official action" rather than merely attempting "to interfere with the business relationship of a competitor."<sup>99</sup>

Although one court has held that the plaintiff, in order to make out a sham case, need not show that the defendant acted "maliciously,"<sup>100</sup> another court has held that it is insufficient to show that the defendant's action was brought "without probable cause." Rather, the plaintiff must show that the claim was "abusive of the judicial process."<sup>101</sup> The

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with the requisite intent"), *cert. denied*, 104 S. Ct. 231, 259 (1983); *Mark Aero, Inc. v. Trans World Airlines*, 580 F.2d 288, 297 (8th Cir. 1978) ("[t]he fundamental question presented in each case involving the 'sham' exception . . . is the question of intent"); *Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 279 (D.C. Cir. 1972).

In determining whether the petitioning is entitled to immunity, the court must focus on the conduct of the defendants engaging in that petitioning, not on the conduct of the government officials. *Federal Prescription Serv., Inc. v. American Pharm. Ass'n*, 663 F.2d 253, 266 (D.C. Cir.), *cert. denied*, 455 U.S. 928 (1981).

<sup>98</sup> See, e.g., *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 903 (9th Cir. 1983); *Coastal States Mktg. v. Hunt*, 694 F.2d 1358, 1372 (5th Cir. 1983) ("A litigant should enjoy petitioning immunity from the antitrust laws so long as a genuine desire for judicial relief is a significant motivating factor underlying the suit."); *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1257 (9th Cir. 1982); *Forro Precision, Inc. v. International Business Machs. Corp.*, 673 F.2d 1045, 1060-61 (9th Cir. 1982); *Semke v. Enid Auto. Dealers Ass'n*, 456 F.2d 1361, 1365-66 (10th Cir. 1972).

On the other hand, the plaintiff's allegations have sufficiently suggested an absence of good faith and come within the sham exception in a number of cases. See, e.g., *Energy Conservation, Inc. v. Heliodyne, Inc.*, 698 F.2d 386 (9th Cir. 1982); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678 (4th Cir. 1982), *cert. denied*, 104 S. Ct. 231, 259 (1983); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1234 (1983); *Israel v. Baxter Labs., Inc.*, 466 F.2d 272 (D.C. Cir. 1972); *Transkentucky Transp. R.R. v. Louisville & N.R.R.*, 1983-2 Trade Cas. ¶ 65,476 (E.D. Ky. 1983); *United States Audio & Copy Corp. v. Phillips Business Sys.*, 1983-1 Trade Cas. ¶ 65,364 (N.D. Cal. 1983); *United States Dental Inst. v. American Ass'n of Orthodontists*, 396 F. Supp. 565, 581-83 (N.D. Ill. 1975); see also *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 542-43 & n.6 (5th Cir. 1978) (existence of sham exception is question of fact; no special burden of proof on plaintiff), *cert. denied*, 444 U.S. 924 (1979). But see *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1155 (7th Cir.) (in view of first amendment considerations, appropriate to place heavier burden of proof of sham litigation on plaintiff), *cert. denied*, 104 S. Ct. 234 (1983).

<sup>99</sup> *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1081 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); see also *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 174-75 (D. Del. 1979) (prior litigation not rendered sham because defendants there were impecunious).

<sup>100</sup> *Grip-Pak, Inc. v. Illinois Tool Works*, 694 F.2d 466, 472-73 (7th Cir. 1982).

<sup>101</sup> *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1175-77 (10th Cir.



Seventh Circuit has recently provided what may be the soundest test for evaluating the defendant's intent in bringing the prior action, although the court itself recognized that application of the test was not without difficulty: "The line is crossed when [the defendant's] purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself — regardless of outcome — of litigating."<sup>102</sup>

More useful than these subjective criteria are certain identifiable factors which show that the defendant's attempt to obtain governmental relief was a sham. The defendant's use of improper or illegal conduct is certainly evidence of bad faith in the course of the litigation or agency proceeding.<sup>103</sup> Thus, the sham exception has been applied when the defendant acted fraudulently by filing false information with, or knowingly making groundless objections before, a court or administrative agency,<sup>104</sup> when the defendant's attorney engaged in unethical conduct

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1982); *see also* Federal Prescription Serv., Inc. v. American Pharm. Ass'n, 663 F.2d 253, 262 (D.C. Cir. 1981) ("Anticompetitive intent alone is not enough. Nor is it sufficient that the persons engaged in lobbying activity also engaged in 'a pattern of actions' . . . . [Plaintiffs must show] that the lobbyists subverted the integrity of the governmental process . . . ."), *cert. denied*, 455 U.S. 928 (1982).

<sup>102</sup> Grip-Pak, Inc. v. Illinois Tool Works, 694 F.2d 466, 472 (7th Cir. 1982). In another formulation of the test, the court stated that the litigation is sham when "the plaintiff wants to hurt a competitor not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome." *Id.*; *see also* Wilk v. American Medical Ass'n, 719 F.2d 207, 229-30 (7th Cir. 1983); Litton Sys. v. American Tel. & Tel. Co., 700 F.2d 785, 810 (2d Cir. 1983) (test is "whether a defendant 'truly sought to influence the governmental decision' and whether there was a 'reasonable expectation' of doing so"), *cert. denied*, 104 S. Ct. 984 (1984).

<sup>103</sup> *See* Litton Sys. v. American Tel. & Tel. Co., 700 F.2d 785, 811 (2d Cir. 1983) (intentional efforts by monopolist to "delay and obfuscate" administrative agency decisionmaking), *cert. denied*, 104 S. Ct. 984 (1984); Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 593-94 (7th Cir. 1977) (submission of outrageously high bid to governmental body acting as lessor, resulting in loss of concessions by plaintiff, might be sham), *cert. denied*, 439 U.S. 1090 (1979); *see also* Associated Radio Serv. Co. v. Page Airways, 624 F.2d 1342, 1358 (5th Cir. 1980) ("specific acts, other than those incidental to the normal use of the courts," justify sham exemption conclusion), *cert. denied*, 450 U.S. 1030 (1981); Dominicus Americana Bohio v. Gulf & W. Indus., 473 F. Supp. 680, 690 n.3 (S.D.N.Y. 1979) (various "corrupt and coercive practices").

<sup>104</sup> *See, e.g.*, Forro Precision, Inc. v. International Business Machs. Corp., 673 F.2d 1045, 1060 (9th Cir. 1982) (dictum); Transkentucky Transp. R.R. v. Louisville & N.R.R., 1983-2 Trade Cas. ¶ 65,476, at 68,307-09 (E.D. Ky. 1983); United States v. American Tel. & Tel. Co., 524 F. Supp. 1336, 1364 (D.D.C. 1981) (knowingly taking baseless positions before agency); *see also supra* note 77 and accompanying text; *cf.* Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culi-

during the challenged judicial proceedings,<sup>105</sup> when the defendant threatened litigation against or otherwise harassed the customers of its competitor,<sup>106</sup> or when the defendant instituted proceedings before agencies which it knew lacked jurisdiction to adjudicate the claim.<sup>107</sup> Similar conclusions may be drawn from the filing of false affidavits in a court proceeding, or using litigation principally to generate and disseminate adverse publicity about the plaintiff.<sup>108</sup>

A second objective criterion for the sham exception is the number of proceedings initiated by the defendant. It is easy to infer an intent to abuse the judicial or administrative process if the defendant has brought a number of prior actions.<sup>109</sup> Although the cases are divided, there is substantial authority for the proposition that even a single claim may be grounds for application of the sham exception.<sup>110</sup>

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nary Workers, 542 F.2d 1076, 1081 (9th Cir. 1976) (sham exception inapplicable when defendants did not engage in publicity campaign or threaten plaintiff), *cert. denied*, 430 U.S. 940 (1977).

<sup>105</sup> Landmarks Holding Corp. v. Bermant, 664 F.2d 891, 896 (2d Cir. 1981).

<sup>106</sup> Alexander v. National Farmers Org., 687 F.2d 1173, 1200-03 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 2108 (1983); Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 460 F. Supp. 1359, 1386 (D. Hawaii 1978).

<sup>107</sup> MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1156 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); *see also* Borough of Lansdale v. Philadelphia Elec. Co., 517 F. Supp. 218, 222 (E.D. Pa. 1981) (filings by electric utility with regulatory agency which had "no economic justification").

<sup>108</sup> *See, e.g.*, Energy Conservation, Inc. v. Heliodyne, Inc., 698 F.2d 386, 389 (9th Cir. 1983); United States Audio & Copy Corp. v. Phillips Business Sys., 1983-1 Trade Cas. ¶ 65,364, at 70,174 (N.D. Cal. 1983). *But see* Metro Cable Co. v. CATV, 516 F.2d 220, 230-31 (7th Cir. 1975) (campaign contributions and misrepresentations); Wilmorite, Inc. v. Eagan Real Estate, Inc., 454 F. Supp. 1124, 1132-36 (N.D.N.Y. 1977) ("illegal actions" before town board and "unlawfully contesting" litigation), *aff'd mem.*, 578 F.2d 1372 (2d Cir.), *cert. denied*, 439 U.S. 983 (1978); Central Bank v. Clayton Bank, 424 F. Supp. 163, 166-67 (E.D. Mo. 1976) (defendant's assertion of "sham and spurious grounds" for denial of plaintiff's application to state administrative agency insufficient to fall within sham exception), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977); Cow Palace, Ltd. v. Associated Milk Producers, 390 F. Supp. 696, 704 (D. Colo. 1975) (bribery and illegal campaign contributions in the course of administrative agency proceedings not sufficient to make out sham exception).

<sup>109</sup> *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 372, 379-80 (1973) (four lawsuits which had effect of delaying or impeding competition might satisfy sham exception); Ernest W. Hahn, Inc. v. Coddling, 615 F.2d 830, 840 (9th Cir. 1980) (13 repetitive and baseless lawsuits); *cf.* Ad Visor, Inc. v. Pacific Tel. & Tel. Co., 640 F.2d 1107, 1109 (9th Cir. 1981) (filing of 63 state court collection actions not sham when claims were well-grounded); Wilmorite, Inc. v. Eagan Real Estate, 454 F. Supp. 1124, 1135 (N.D.N.Y. 1977) (three unsuccessful actions not necessarily sham), *aff'd mem.*, 578 F.2d 1372 (2d Cir.), *cert. denied*, 439 U.S. 983 (1978).

<sup>110</sup> The origin of the dispute is language in the *California Motor Transp.* decision:

A third kind of evidence that a party is proceeding in bad faith is the fact that the claims or attempts to obtain governmental action proved

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"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." *California Motor Transp.*, 404 U.S. at 513. The significance of this passage was then discussed by Justices Blackmun and Stevens in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977). Justice Blackmun suggested the unlikelihood that a single claim could satisfy the sham exception test, *id.* at 645, while Justice Stevens concluded for the dissent that the language in *California Motor Transp.* was illustrative rather than limiting, *id.* at 661-62. See *supra* note 41.

A number of courts have concluded that a single baseless claim may be sham, to which petitioning immunity does not apply. See, e.g., *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 903 (9th Cir. 1983); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1154-55 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); *Energy Conservation, Inc. v. Heliodyne, Inc.*, 698 F.2d 386, 389 (9th Cir. 1983); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1254-57 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1234 (1983); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 543 n.6 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); *United States Audio & Copy Corp. v. Phillips Business Sys.*, 1983-1 Trade Cas. ¶ 65,364, at 70,174 (N.D. Cal. 1983); *National Cash Register Corp. v. Arnett*, 554 F. Supp. 1176, 1177-78 (D. Colo. 1983); *First Am. Title Co. v. South Dakota Land Title Ass'n*, 541 F. Supp. 1147, 1158-59 (D.S.D. 1982), *aff'd*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984); *Baxter Travenol Labs., Inc. v. LeMay*, 536 F. Supp. 247, 253 n.4 (S.D. Ohio 1982); *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 507 F. Supp. 939, 944-46 (E.D. Mich. 1981); *First Nat'l Bank v. Marquette Nat'l Bank*, 482 F. Supp. 514, 519-21 (D. Minn. 1979), *aff'd mem.*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981); *Technicon Medical Information Sys. v. Green Bay Packaging*, 480 F. Supp. 124, 126-28 (E.D. Wis. 1979); *Colorado Petroleum Marketers Ass'n v. Southland Corp.*, 476 F. Supp. 373, 378-79 (D. Colo. 1979); *Cyborg Sys. v. Management Science Am., Inc.*, 1978-1 Trade Cas. ¶ 61,927, at 73,918 (N.D. Ill. 1978); *Associated Radio Serv. v. Page Airways*, 414 F. Supp. 1088, 1096 (N.D. Tex. 1976), *aff'd*, 624 F.2d 1342 (5th Cir. 1980).

Other cases suggest that the plaintiff must show multiple baseless lawsuits. See, e.g., *Huron Valley Hosp., Inc. v. City of Pontiac*, 466 F. Supp. 1301, 1314 (E.D. Mich. 1979), *vacated*, 666 F.2d 1029 (6th Cir. 1981); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 462 F. Supp. 1072, 1103 (N.D. Ill. 1978) (dictum), *aff'd*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); *Mountain Grove Cemetery Ass'n v. Norwalk Vault Co.*, 428 F. Supp. 951, 955 (D. Conn. 1977); *Central Bank v. Clayton Bank*, 424 F. Supp. 163, 167 (E.D. Mo. 1976), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977); *Bethlehem Plaza v. Campbell*, 403 F. Supp. 966, 970-71 (E.D. Pa. 1975); see also *Litton Sys. v. American Tel. & Tel. Co.*, 700 F.2d 785, 811 n.38 (2d Cir. 1983) (division of opinion noted), *cert. denied*, 104 S. Ct. 984 (1984); *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1176-77 (10th Cir. 1982) (applicability of sham exception to single lawsuit open question; no need to resolve); *Invictus Records, Inc. v. American Broadcasting Cos.*, 98 F.R.D. 419, 430 (E.D. Mich. 1982) (same).

groundless or unsuccessful.<sup>111</sup> Similarly, proof that the antitrust defendant was successful in the prior proceeding is strong evidence that it was not a sham, since the acceptance of the defendant's position by the legislature, court or other governmental body is persuasive that the arguments were not baseless.<sup>112</sup> However, even a claim on which the defendant prevailed may be the basis for loss of petitioning immunity through application of the sham exception.<sup>113</sup> By the same token, the mere fact that litigation or lobbying eventually proves unsuccessful does not make it sham.<sup>114</sup> The critical element is a showing that the defen-

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<sup>111</sup> *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896 (2d Cir. 1981) (multiple groundless lawsuits, which defendants sought to delay); *Ernest W. Hahn, Inc. v. Coddling*, 615 F.2d 830, 841 & n.13 (9th Cir. 1980); *Transkentucky Transp. R.R. v. Louisville & N.R.R.*, 1983-2 Trade Cas. ¶ 65,476, at 68,309 (E.D. Ky. 1983).

<sup>112</sup> *Federal Prescription Serv., Inc. v. American Pharm. Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); *Mid-Texas Communications Sys. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1383-84 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980); *Taylor Drug Stores v. Associated Dry Goods Corp.*, 560 F.2d 211, 213 (6th Cir. 1977) (*per curiam*); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1079 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); *Columbia Pictures Indus. v. Redd Horne Inc.*, 568 F. Supp. 494, 501 (W.D. Pa. 1983); *First Am. Title Co. v. South Dakota Land Title Ass'n*, 541 F. Supp. 1147, 1157 (D.S.D. 1982), *aff'd*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984); *Central Bank v. Clayton Bank*, 424 F. Supp. 163, 167 (E.D. Mo. 1976), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977); *see Baxter Travenol Labs., Inc. v. LeMay*, 536 F. Supp. 247, 251-53 (S.D. Ohio 1982) (defendant's counterclaim asserted that plaintiff's action was baseless; court stayed counterclaim until principal claim was litigated, since outcome would prove whether plaintiff's claim was sham); *see also Llewellyn v. Crothers*, 1983-1 Trade Cas. ¶ 65,358, at 70,139-40 (D. Or. 1983).

<sup>113</sup> *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 662 (1977) (Stevens, J., dissenting) ("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."); *Sunergy Communities, Inc. v. Aristek Properties*, 535 F. Supp. 1327, 1331 (D. Colo. 1982); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 179 (D. Del. 1979) (prior proceeding may have been successful because of defendant's improper conduct; success not dispositive).

*But cf. Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1257 & n.17 (9th Cir. 1982) ("We need not decide whether the bringing of meritorious trademark-infringement suits can ever constitute sham suits violative of the antitrust laws.") (footnote omitted); *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964) (immunity not lost even if executive action sought by defendant later proved without substantial merit); *Invictus Records, Inc. v. American Broadcasting Cos.*, 98 F.R.D. 419, 430 (E.D. Mich. 1982) ("a necessary element . . . is termination of the lawsuit in [plaintiffs'] favor"); *WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1032 (N.D.N.Y. 1980) ("by definition a successful claim cannot be 'sham'").

<sup>114</sup> *See, e.g., Alexander v. National Farmers Org.*, 687 F.2d 1173, 1200 (8th Cir.

dant proceeded with the judicial or administrative action automatically, without any concern for the merits of the action or the probability of success.<sup>115</sup>

A fourth factor is whether the plaintiff was barred from access to the adjudicatory process as a result of the defendant's conduct.<sup>116</sup> The better rule is that even if the plaintiff were not denied access completely to the courts or agencies,<sup>117</sup> the sham exception applies when the defendant

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1982), *cert. denied*, 103 S. Ct. 2108 (1983); *First Am. Title Co. v. South Dakota Land Title Co.*, 541 F. Supp. 1147, 1157-58 (D.S.D. 1982), *aff'd*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984); *Classic Film Museum, Inc. v. Warner Bros.*, 523 F. Supp. 1230, 1234 (D. Me. 1981).

Particular problems arise when the plaintiff asserts that the defendant's previous patent infringement actions were motivated by an anticompetitive or exclusionary animus. As the Ninth Circuit recognized in *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 992-93 (9th Cir. 1979), the goals of patent and antitrust protection may at times conflict. The patentee must be allowed to assert that others are infringing its patent, even when the violation is not clear-cut; imposing potential antitrust liability on every unsuccessful patentee would significantly diminish the value of the patent protection. On the other hand, the sham exception to *Noerr* is based on the premise that persons should not be permitted to use the courts to further anticompetitive activities when their judicial claims have little or no merit. The Ninth Court reconciled these interests by establishing a presumption that the patent infringement suit was in good faith, and requiring the antitrust plaintiff to overcome this presumption by clear and convincing evidence. *Id.* at 996; *see also supra* note 70 and accompanying text; *cf. Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir.) (multiple baseless patent infringement actions, coupled with threats to others in industry and publicity of lawsuits, evidence of monopolization; pre-*Noerr* decision), *cert. denied*, 344 U.S. 837 (1952); *see also Rex Chainbelt, Inc. v. Harco Prods.*, 512 F.2d 993, 1004-07 (9th Cir.), *cert. denied*, 423 U.S. 831 (1975); *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 830-33 (9th Cir. 1963); *Prelin Indus. v. G & G Crafts, Inc.*, 357 F. Supp. 52, 70-71 (W.D. Okla. 1972); *cf. Subscription Television Co. v. Southern Cal. Theatre Owners Ass'n*, 576 F.2d 230, 233-34 (9th Cir. 1978) (defendants successfully obtained passage of legislation through initiative process; statute later declared unconstitutional); *First Nat'l Bank v. Marquette Nat'l Bank*, 482 F. Supp. 514, 519 (D. Minn. 1979) (lobbying for legislation protected even if it results in adoption of statute later deemed unconstitutional), *aff'd mem.*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981).

<sup>115</sup> *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1254 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1234 (1983).

<sup>116</sup> *See, e.g., id.* at 1257-59 (access barring is evidentiary of sham exception, but not necessary in every case); *Transkentucky Transp. R.R. v. Louisville & N.R.R.*, 1983-2 Trade Cas. ¶ 65,476, at 68,308-10 (E.D. Ky. 1983); *WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1032-34 (N.D.N.Y. 1980); *Wilmorite, Inc. v. Eagan Real Estate, Inc.*, 454 F. Supp. 1124, 1131, 1133-36 (N.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1372 (2d Cir.), *cert. denied*, 439 U.S. 983 (1978).

<sup>117</sup> Access barring does not make much sense in the judicial context. The antitrust plaintiff's claim is not that the defendant prevented it from having full access to the court, but rather that the defendant forced it to undergo baseless or frivolous litigation.

denies the plaintiff "meaningful or complete access."<sup>118</sup>

If the defendant's litigation or petitioning is genuine, the immunity extends not only to the actual proceeding<sup>119</sup> but also to related activities. Thus, good faith threats of litigation, or publicity of good faith litigation, are also beyond the reach of antitrust liability.<sup>120</sup> On the other

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<sup>118</sup> *Litton Sys. v. American Tel. & Tel. Co.*, 700 F.2d 785, 809 n.36 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984); *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 507 F. Supp. 939, 946-48 (E.D. Mich. 1981); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 176-77 & n.14 (D. Del. 1979); *cf. Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1081-82 (9th Cir. 1976) (sham exception did not apply when defendant did not deny plaintiff access to administrative agencies or courts), *cert. denied*, 430 U.S. 940 (1977). The Ninth Circuit later limited its *Franchise Realty* holding in *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1258-59 (1982), *cert. denied*, 103 S. Ct. 1234 (1983). In *Clipper Express*, the Ninth Circuit cited *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511-13 (1972), for the proposition that "the concepts of access barring and abuse of the judicial process were treated interchangeably." 690 F.2d at 1257; *see also Ernest W. Hahn, Inc. v. Coddling*, 615 F.2d 830, 841 n.14 (9th Cir. 1980); *Metro Cable Co. v. CATV*, 516 F.2d 220, 232 (7th Cir. 1975) (access barring theory does not apply when municipal legislature declines to hold hearing prior to decisionmaking); *Colorado Petroleum Marketers Ass'n v. Southland Corp.* 476 F. Supp. 373, 380 (D. Colo. 1979).

<sup>119</sup> Petitioning immunity has been held applicable, and the sham exception has been rejected under the particular facts, in a number of cases. *See, e.g., Coastal States Mktg. v. Hunt*, 694 F.2d 1358, 1368-73 (5th Cir. 1983); *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18 (2d Cir. 1980); *Mark Aero, Inc. v. Trans World Airlines*, 580 F.2d 288 (8th Cir. 1978); *Adolph Coors Co. v. A & S Wholesalers*, 561 F.2d 807, 812 (10th Cir. 1977); *Taylor Drug Stores v. Associated Dry Goods Corp.*, 560 F.2d 211 (6th Cir. 1977) (*per curiam*); *International Tel. & Tel. Corp. v. United Tel. Co.*, 550 F.2d 287 (5th Cir. 1977); *Semke v. Enid Auto. Dealers Ass'n*, 456 F.2d 1361, 1366-67 (10th Cir. 1972); *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 1983-2 Trade Cas. ¶ 65,525, at 68,609-11 (N.D. Ill. 1983); *Rohm & Haas Co. v. Dawson Chem. Co.*, 557 F. Supp. 739, 840-42 (S.D. Tex. 1983); *United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1362-64 (D.D.C. 1981); *WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1030-35 (N.D.N.Y. 1980); *Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546, 555-57 (S.D.N.Y. 1980); *First Nat'l Bank v. Marquette Nat'l Bank*, 482 F. Supp. 514, 517-21 (D. Minn. 1979), *aff'd mem.*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 172-76 (D. Del. 1979); *Mountain Grove Cemetery Ass'n v. Norwalk Vault Co.*, 428 F. Supp. 951 (D. Conn. 1977); *Bethlehem Plaza v. Campbell*, 403 F. Supp. 966, 968-71 (E.D. Pa. 1975); *Cow Palace, Ltd. v. Associated Milk Producers*, 390 F. Supp. 696, 703-04 (D. Colo. 1975); *see also Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649-51 (7th Cir. 1983) (adopting district court opinion).

<sup>120</sup> *See, e.g., Coastal States Mktg. v. Hunt*, 694 F.2d 1358, 1367-68 (5th Cir. 1983); *Consortium, Inc. v. Dorner*, 1983-2 Trade Cas. ¶ 65,568, at 68,826 (E.D. Tenn. 1983); *Rohm & Haas Co. v. Dawson Chem. Co.*, 557 F. Supp. 739, 842 (S.D. Tex.

hand, if the litigation is sham, then related activities such as collusive settlements with third parties may also become the basis for an anti-trust claim.<sup>121</sup>

## V. SPECIAL PROBLEMS UNDER THE *Noerr-Pennington* DOCTRINE

A number of special problems have arisen under the *Noerr-Pennington* doctrine. Among these are the following: (1) How broadly does the immunity extend to other activities which are distinct from but related to the basic petitioning process? (2) To what extent is the immunity qualified by the essentially commercial nature of the defendant's activities and the government's role in controlling it? Does the immunity exist even if the government is acting in a private or proprietary capacity? (3) To what extent might the immunity be lost if government officials are deemed co-conspirators in the defendant's anticompetitive conduct? (4) Are there other limitations on the scope of *Noerr-Pennington* immunity?

### A. *Breadth of Immunity*

*Noerr-Pennington* immunity extends principally to the actual process of soliciting relief from a governmental body. The doctrine does not normally extend to steps which are preliminary to or ancillary to the act of petitioning. It does not apply to independent conduct taken after the solicitation of the government is concluded, even if the subsequent conduct is the end result of prior petitioning.<sup>122</sup>

The limited scope of petitioning immunity is illustrated by an analysis of two decisions, *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*<sup>123</sup> and *Cantor v. Detroit Edison Co.*<sup>124</sup> In *Clipper Express*, the defendants, who operated in a regulated industry, first dis-

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1983); *First Am. Title Co. v. South Dakota Land Title Ass'n*, 541 F. Supp. 1147, 1158 (D.S.D. 1982), *aff'd*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984); *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 174 (D. Del. 1979); *Pennwalt Corp. v. Zenith Labs.*, 472 F. Supp. 413, 424 (E.D. Mich. 1979), *appeal dismissed mem.*, 615 F.2d 1362 (6th Cir. 1980); *Clairol, Inc. v. Boston Discount Center*, 1976-2 Trade Cas. ¶ 61,108, at 70,020 (E.D. Mich. 1976), *aff'd on other grounds*, 608 F.2d 1114 (6th Cir. 1979). *But see* *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 460 F. Supp. 1359, 1386 (D. Hawaii 1978) (threats of litigation directed to competitors' customers unprotected by *Noerr-Pennington*).

<sup>121</sup> See, e.g., *Victor Beauty Supply Co. v. Lus-Ter-Oil Beauty Prods. Co.*, 1983-1 Trade Cas. ¶ 65,417, at 70,478 (N.D. Ill. 1983).

<sup>122</sup> *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964).

<sup>123</sup> 690 F.2d 1240, 1263-65 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1234 (1983).

<sup>124</sup> 428 U.S. 579 (1976).

cussed among themselves the rates they would charge their customers. They then jointly petitioned the regulatory bodies for administrative orders preventing their competitors from charging lower rates. The Ninth Circuit held that even if the petitioning itself was immunized by *Noerr-Pennington*, the defendants' preliminary steps of discussing and agreeing upon higher prices was outside the scope of the doctrine.<sup>125</sup> Thus, a defendant's overall scheme may be unlawful, even though part of it is immunized activity.<sup>126</sup>

This is a sound result. Otherwise, many activities or agreements in restraint of trade would be followed by the conspirators petitioning for government action or approval, thereby seeking to bring the prior un-

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<sup>125</sup> "An antitrust violation does not enjoy immunity simply because an element of that violation involves an action which itself is not illegal." *Clipper Express*, 690 F.2d at 1263; see also *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513-15 (1972).

The exchange of information among competitors may substantially diminish competition, particularly when the information concerns prices. Such exchanges have been held to violate § 1 of the Sherman Act. See, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *United States v. Container Corp.*, 393 U.S. 333 (1969). These information exchanges may have anticompetitive effects regardless of whether they are preliminary to joint attempts to obtain governmental action.

<sup>126</sup> "[W]hen there is a conspiracy prohibited by the antitrust laws, and the otherwise legal litigation is nothing but an act in furtherance of that conspiracy, general antitrust principles apply, notwithstanding the existence of *Noerr* immunity." *Clipper Express*, 690 F.2d at 1263; see also *Webb v. Utah Tour Brokers Ass'n*, 568 F.2d 670, 674 (10th Cir. 1977) (other activities of defendants may violate antitrust laws although petitioning is exempt); *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956, 969 (W.D. Mo. 1982) (allegedly illegal merger, contemporaneous with but unrelated to protected petitioning activity, unprotected by *Noerr*), *aff'd*, 705 F.2d 1005 (8th Cir. 1983); *Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n*, 499 F. Supp. 553 (D. Del. 1980) (boycott by competitors to persuade government to change policy not protected by *Noerr*; cf. *supra* text accompanying notes 83-84). But cf. *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678, 688 (4th Cir. 1982) ("We . . . hesitate . . . to rule that any act accompanying a larger conspiracy in restraint of trade, which also may be fairly characterized as 'abuse of process,' falls within the sham exception."), *cert. denied*, 104 S. Ct. 231, 259 (1983); *Schenley Indus. v. New Jersey Wine & Spirit Wholesalers Ass'n*, 272 F. Supp. 872, 885-86 (D.N.J. 1967) (allegation that defendants' illegal legislative lobbying was part of larger overall scheme does not state antitrust claim).

One commentator has argued that when unethical conduct in the course of petitioning is an integral part of a larger anticompetitive scheme, the defendant's activities will be brought within the sham exception. Bien, *Litigation as an Antitrust Violation: Conflict Between the First Amendment and the Sherman Act*, 16 U.S.F.L. REV. 41, 83-86 (1981). It seems preferable to assert that while the petitioning itself may be protected, the overall scheme is subject to the antitrust laws and is not immunized because protected activity is only one, albeit essential, component part.



lawful conduct under the umbrella of *Noerr-Pennington* immunity.<sup>127</sup>

Similarly, in *Cantor*, the defendant had petitioned the state regulatory agency to adopt a tariff. After the tariff was adopted, the defendant was of course required to adhere to its terms. The act of soliciting the new tariff was protected by *Noerr-Pennington*.<sup>128</sup> But after concluding that the tariff was not state action and hence was unprotected by the *Parker v. Brown*<sup>129</sup> doctrine, the Supreme Court held<sup>130</sup> that the defendant's subsequent conduct in conformance with the tariff was beyond the scope of the petitioning immunity.<sup>131</sup>

This principle can cause substantial problems for a defendant. If the conduct ordered is deemed state action, the defendant's conformity will be immunized by *Parker v. Brown*.<sup>132</sup> If, on the other hand, the conduct

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<sup>127</sup> In *Litton Sys. v. American Tel. & Tel. Co.*, 700 F.2d 785, 806-09 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984), plaintiff complained that AT & T, the existing monopolist in the telecommunications industry, had sought to forestall competition by filing tariffs with the FCC which would have delayed and made more expensive the plaintiff's market entry. The court held *Noerr-Pennington* inapplicable, because AT & T's tariff filing was a "mere incident of regulation," and was not tantamount to a request for governmental action. *Id.* at 807 (emphasis in original). The allegedly unlawful conduct was really the preliminary decision by AT & T to impose the tariff and then to seek FCC approval; thus, AT & T was "engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." *Id.*; accord *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1159-60 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); *United States v. Title Ins. Rating Bureau*, 517 F. Supp. 1053, 1060 (D. Ariz. 1981); see also *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469, 476-77 (5th Cir. 1982); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 882 n.6 (5th Cir. 1982), *vacated*, 103 S. Ct. 1244, *cert. denied*, 104 S. Ct. 393 (1983); *Mid-Texas Communications Sys. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1383 (5th Cir. 1980); *Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 793, 800 (2d Cir. 1977), *cert. denied*, 434 U.S. 923 (1977); *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964); *United States Audio & Copy Corp. v. Phillips Business Sys.*, 1983-1 Trade Cas. ¶ 65,364, at 70,174 (N.D. Cal. 1983); *Citicorp v. Interbank Card Ass'n*, 478 F. Supp. 756, 762 (S.D.N.Y. 1979). *But cf.* *Horsemen's Benevolent & Protection Ass'n v. Pennsylvania Horse Racing Comm'n*, 530 F. Supp. 1098, 1110 (E.D. Pa.) ("Since the law permits [the defendants to petition for an increase in their fees], it follows that they must be permitted to confer and to agree upon the fees they wish to propose."), *aff'd mem.*, 688 F.2d 821 (3d Cir. 1982).

<sup>128</sup> See *Metro Cable Co. v. CATV*, 516 F.2d 220, 229 (7th Cir. 1975).

<sup>129</sup> 317 U.S. 341 (1941).

<sup>130</sup> See *supra* note 40.

<sup>131</sup> In many situations, petitioning activities need not lead to any subsequent conforming acts by the petitioner. For example, in *Noerr* itself, the railroads sought legislation and executive enforcement of existing laws. While both of the requests were successful, they only required conforming conduct by the truckers.

<sup>132</sup> Cf. *Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991, 1023-29 (S.D.

does not rise to that level — and the standards for determining state action are admittedly confusing — then adherence to conduct required of the defendant may subject it to liability under the antitrust laws. Furthermore, the defendant's conformity is not protected by *Noerr-Pennington* immunity for the prior petitioning for the state action. Arguably the incentive to petition may be lessened, and first amendment protections chilled, if successful prayers for government relief and subsequent conformity to government orders may result in potential antitrust liability. Yet this result is necessary, if the *Parker* immunity is not to be unwittingly expanded by the defendant's exercise of a first amendment right in an unsuccessful attempt to obtain true state action.<sup>133</sup> Particularly when, as in *Cantor*, the state is merely rubber-stamping essentially private decisionmaking, the mere addition of private petitioning for government ratification should not alter the reach of the antitrust laws.<sup>134</sup>

### B. Commercial Exceptions

It has been held that the *Noerr* doctrine does not apply when the government is engaged in a purely commercial enterprise, or when the government is acting in a private or proprietary capacity. This exception is illustrated by *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*<sup>135</sup> The parties were competitors in the swimming pool business. The plaintiff alleged that the defendant had influenced architects and city officials, who were drafting details for competitive bidding on municipal pools, to adopt specifications which would favor the

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Tex. 1981) (when privately sought governmental actions are tainted by participation of officials in scheme as co-conspirators, conduct of government itself will be deemed illegal, and in action against both private parties and government, neither defendant is shielded by either *Parker* or *Noerr* doctrine) (dictum), *rev'd on other grounds*, 700 F.2d 226, 237 (5th Cir. 1983). *But see* *Ladue Local Lines v. Bi-State Dev. Agency*, 433 F.2d 131, 135 (8th Cir. 1970) ("the antitrust laws do not apply to state government or activities undertaken pursuant to legislative mandate"; citing, *inter alia*, *Noerr*).

<sup>133</sup> See also *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1181 (8th Cir. 1982) (following *Cantor*); *Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991, 1021-29 (S.D. Tex. 1981), *aff'd*, 700 F.2d 226, 237 (5th Cir. 1983); *United States v. Title Ins. Rating Bureau*, 517 F. Supp. 1053, 1060 (D. Ariz. 1981).

<sup>134</sup> A confusing treatment of the relationship between the *Noerr* and *Parker* doctrines is found in *Brown v. Carr*, 1980-1 Trade Cas. ¶ 63,033 (D.D.C. 1979). *Brown* implied that *Noerr* protection, as well as *Parker* protection, might be lost if the government's decision for which the defendant had petitioned was not pursuant to a policy of substituting regulation for competition.

<sup>135</sup> 424 F.2d 25, 31-34 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

defendant or even preclude bidding by competitors. In response to the assertion that its conduct violated the Sherman Act, the defendant argued that its solicitation of governmental officials was protected by petitioning immunity. Examining the values implicated by the *Noerr-Pennington* doctrine, the First Circuit concluded that it was designed to allow input on political issues or government policy decisionmaking.<sup>136</sup> When the government is acting in a proprietary capacity, these concerns are not raised. Furthermore, the modern expansion of the government into commercial areas makes it as important to foster competition here as when the buyers of products are private parties.<sup>137</sup> A similar limitation on *Noerr* would apply when the government is acting as the operator of a commercial venture. Thus, it has been held that the petitioning immunity is not available when an alleged antitrust violation takes place in connection with the government's leasing of rights at an airport<sup>138</sup> or a sports stadium.<sup>139</sup>

Other cases, however, have rejected a commercial exception. In an-

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<sup>136</sup> *Whitten*, 424 F.2d at 32 (exemption applies principally to "an effort to influence the passage or enforcement of laws"). *But cf.* *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 1983-2 Trade Cas. ¶ 65,525, at 68,607 (N.D. Ill. 1983) (*Noerr* applicable to governmental adoption of product standards and building code specifications); *United States v. Johns-Manville Corp.*, 259 F. Supp. 440, 453 (E.D. Pa. 1966) (activities influencing decisions of public procurement officials constitutionally protected).

<sup>137</sup> *See City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 Trade Cas. ¶ 64,527 (N.D. Ga. 1981) (immunity unavailable when conspiracy is in connection with city's purchase of concrete for its own use); *General Aircraft Corp. v. Air Am. Inc.*, 482 F. Supp. 3, 7 (D.D.C. 1979) (*Noerr* does not apply to "attempts to influence government bodies acting in purely commercial matters such as procurement").

<sup>138</sup> *Hill Aircraft & Leasing Corp. v. Fulton County, Ga.*, 561 F. Supp. 667, 674-76 (N.D. Ga. 1982).

<sup>139</sup> *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 940-42 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Cincinnati Riverfront Coliseum, Inc. v. City of Cincinnati*, 556 F. Supp. 664, 668-69 (S.D. Ohio 1983); *see also Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 594 (7th Cir. 1977) (applicability of exemption doubtful when government is mere lessor of concession rights at municipal golf course), *cert. denied*, 439 U.S. 1090 (1979); *Vest v. Waring*, 565 F. Supp. 674, 687 n.21 (N.D. Ga. 1983) (immunity inapplicable to conspiracy to deny plaintiffs funding by federal National Eye Institute; Institute decision "to financially underwrite the [defendants'] study hardly constitutes the type of governmental decision making and policymaking that the *Noerr-Pennington* doctrine was designed to protect"); *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 Trade Cas. ¶ 64,527 (N.D. Ga. 1981) (doctrine unavailable when city officials act in commercial rather than policy-making capacity; *see supra* note 137). *But see Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 1983-2 Trade Cas. ¶ 65,525, at 68,607 (N.D. Ill. 1983) (*Kurek* distinguished; inapplicable to governmental adoption of product standards and specifications).

other decision involving alleged antitrust violations in petitioning the government regarding its operation of a commercial airport, the Ninth Circuit held that the *Noerr-Pennington* objectives of fostering "first amendment rights and the importance of free-flowing communications to government decisionmaking [made no distinction between] decisions implementing rather than formulating policy (sometimes called 'non-political activity')." <sup>140</sup> Thus, the court concluded that no exception even for purely commercial concerns was justified.

The balance ought to be struck in favor of some commercial exception. On the one hand, in *Noerr* itself, some of the conduct sought by the defendants was the implementation of conduct — the enforcement by the executive branch of the laws affecting the trucking industry — rather than formulation of policy. <sup>141</sup> Furthermore, in *Noerr* it was clear that the railroads were motivated by economic and financial, rather than political, concerns. <sup>142</sup> The Court nonetheless explicitly recognized this as a legitimate interest, not susceptible to antitrust scrutiny. <sup>143</sup> On the other hand, when the government is acting like a private person by buying a swimming pool or leasing real estate, concerns for enhanced competition are raised, and political interests are relatively minimal. Unless there is some public interest to the contrary, application of the

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<sup>140</sup> *In re Airport Car Rental Antitrust Litigation*, 693 F.2d 84, 88 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3114 (1983); *see also* *Bustop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F. Supp. 989, 996 n.9 (S.D.N.Y. 1981) (questioning commercial exception).

<sup>141</sup> This distinction between formulating and implementing policy was probably incorrectly applied in *Woods Explor. & Prod. Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). The defendants allegedly supplied false information to a state regulatory agency responsible for making decisions respecting gas and oil drilling rights. As a result, the plaintiff received lower production allocations than it should have. Although the denial of *Noerr-Pennington* immunity might have been appropriate because of the defendants' improper or fraudulent conduct before an administrative agency, *see supra* notes 77, 104 and accompanying text, the implementation of the policy is not entirely apolitical. Unless the agency was acting in a purely mechanical fashion, administrative decisions enforcing and implementing laws involve discretion and policymaking. To limit petitioning immunity to rulemaking or adjudication by administrative agencies, but not to implementation of existing laws or regulations, is to give *California Motor Transp.* too narrow a reading. *See also* note 56 and accompanying text.

<sup>142</sup> *See* *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980) (exemption also applies when defendant city invokes judicial and administrative processes to protect its own, and its citizens', economic interests); *Huron Valley Hosp., Inc. v. City of Pontiac*, 466 F. Supp. 1301, 1312-15 (E.D. Mich. 1979) (same), *vacated*, 666 F.2d 1029 (6th Cir. 1981).

<sup>143</sup> *See supra* notes 16-19 and accompanying text.

antitrust laws is appropriate.

C. *Government Officials as Co-conspirators*<sup>144</sup>

Typically, the government officials whose action is sought have little personal interest in the decision to be made. But if the government officials have such an interest, and if they take an active part in the defendant's activities or organization, different policy concerns are implicated. The *Noerr-Pennington* doctrine is then no longer simply shielding private citizens who legitimately attempt to inform the government and participate in the political process; it is also shielding interested government officials and the private individuals or corporations attempting to co-opt their objectivity.<sup>145</sup> In these circumstances, there is another exception to the *Noerr-Pennington* immunity.

The Supreme Court has given little guidance on the extent of this exception to *Noerr-Pennington*, merely alluding to its existence in two opinions.<sup>146</sup> Some lower court decisions, however, have indicated that *Noerr-Pennington* does not apply if the government officials have an interest in the outcome of the decision sought by the private parties or profit from it, or take an active role in directing the "conspiracy."<sup>147</sup> Thus, in a case<sup>148</sup> in which the plaintiff, an unsuccessful applicant for a municipal cable television franchise, alleged that its successful competitors had conspired with city officials who helped carve up territories and who led the negotiations among the other applicants, the court

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<sup>144</sup> It is not clear whether this exception is merely a subspecies of the sham exception, *see generally supra* notes 85-121 and accompanying text, or is an entirely separate exception. *See* *Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991, 1013 n.22 (S.D. Tex. 1981), *rev'd on other grounds*, 700 F.2d 226, 237 (5th Cir. 1983) (citing cases for both approaches).

<sup>145</sup> *See* *Duke & Co. v. Foerster*, 521 F.2d 1277, 1282 (3d Cir. 1975) (if *Noerr-Pennington* is inapplicable because government officials are co-conspirators, government itself may also be defendant on antitrust claim).

<sup>146</sup> In *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972), the Court said that "[c]onspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression." In *United Mine Workers v. Pennington*, 381 U.S. 657, 671 (1965), the Court noted in passing that "the [complained-of] action . . . was the act of a public official who is not claimed to be a co-conspirator."

<sup>147</sup> *But see* *Westborough Mall, Inc. v. City of Cape Girardeau, Mo.*, 693 F.2d 733, 746 (8th Cir. 1982) (criticizing and questioning co-conspirator exception); *Metro Cable Co. v. CATV*, 516 F.2d 220, 229-31 (7th Cir. 1975) (same); *Cow Palace, Ltd. v. Associated Milk Producers*, 390 F. Supp. 696, 704-05 (D. Colo. 1975) (same).

<sup>148</sup> *Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991, 1012-23 (S.D. Tex. 1981), *aff'd*, 700 F.2d 226, 237 (5th Cir. 1983) (dictum).

found "more than mere acquiescence in private conspirators' plans or mere support of private parties' efforts to induce favorable legislative results."<sup>149</sup> This conclusion resulted in a loss of *Noerr-Pennington* immunity. Similarly, in other cases in which government officials have taken an active role in setting up or implementing the allegedly unlawful anticompetitive combination, full application of the antitrust laws has been held appropriate.<sup>150</sup>

On the other hand, the mere interest of the government officials in the outcome of the decisionmaking process, whether that interest is political or economic, is not enough to cause loss of petitioning immunity.<sup>151</sup> It is not improper for government officials to have a policy bias, and thus to be affirmatively interested in seeing certain private proposals enacted or implemented as government policy. In fact, *Noerr-Pennington* will apply even if the officials receive campaign contributions or certain other benefits from the private citizens requesting relief.<sup>152</sup>

Immunity is lost only when the officials actively participate in the underlying conspiracy, yet the line certainly is not a clear one. In one sense, by adopting the policy or undertaking the conduct sought by the

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<sup>149</sup> 519 F. Supp. at 1016.

<sup>150</sup> See, e.g., *Duke & Co. v. Foerster*, 521 F.2d 1277, 1282 (3d Cir. 1975); *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964), *questioned and limited in* *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341, 342-43 (9th Cir. 1969); *Federal Prescription Serv., Inc. v. American Pharm. Ass'n*, 484 F. Supp. 1195, 1202-04, 1209 (D.D.C. 1980), *aff'd in part, rev'd in part*, 663 F.2d 253, 267 (D.C. Cir.), *cert. denied*, 455 U.S. 928 (1982); *Mason City Center Assocs. v. City of Mason City*, 468 F. Supp. 737, 745 (N.D. Iowa 1979) (question of fact); see also *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978), *reinstated*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 274-80 & n.1a (D.C. Cir. 1972); *Campbell v. City of Chicago*, 577 F. Supp. 1166 (N.D. Ill. 1983).

<sup>151</sup> *Federal Prescription Serv., Inc. v. American Pharm. Ass'n*, 663 F.2d 253, 264 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543, 547 (W.D. Ky. 1982); *Huron Valley Hosp., Inc. v. City of Pontiac*, 466 F. Supp. 1301, 1314-15 (E.D. Mich. 1979), *vacated*, 666 F.2d 1029 (6th Cir. 1981); *Sims v. Tinney*, 482 F. Supp. 794, 801 (D.S.C. 1977); *Cow Palace, Ltd. v. Associated Milk Producers*, 390 F. Supp. 696, 704-05 (D. Colo. 1975); *Independent Taxicab Operators' Ass'n v. Yellow Cab Co.*, 278 F. Supp. 979, 985 (N.D. Cal. 1968); see also *First Am. Title Co. v. South Dakota Land Title Ass'n*, 714 F.2d 1439, 1445-46 (8th Cir. 1983) (participation of state agency, with private parties, in lobbying for new legislation not actionable conspiracy), *cert. denied*, 104 S. Ct. 709 (1984).

<sup>152</sup> *Metro Cable Co. v. CATV*, 516 F.2d 220, 230-31 (7th Cir. 1975); *Cow Palace, Ltd. v. Associated Milk Producers*, 390 F. Supp. 696, 704-05 (D. Colo. 1975).

private party, the officials participate in every conspiracy.<sup>153</sup> Thus, the appropriate criteria in determining whether *Noerr-Pennington* applies would be whether the government officials also take part in the preliminary steps prior to the implementation of the conspiracy, and whether the officials act in an essentially private capacity while wearing a "government hat."<sup>154</sup>

#### D. Miscellaneous Issues Under Noerr-Pennington

The *Noerr-Pennington* doctrine has spawned a number of decisions on peripheral issues. For example, although petitions for legislative relief cannot form the basis of antitrust liability, may documents surrounding requests for proposed legislation be obtained during pre-trial discovery in connection with litigation based on other substantive theories? Rejecting the argument that allowing such discovery would have an additional chilling effect on political activities, one court has held that *Noerr-Pennington* states a defense to an antitrust claim, but that the petitioning process does not involve privileged conduct within the meaning of the Federal Rules of Civil Procedure<sup>155</sup> and hence is discoverable.<sup>156</sup> The *Noerr-Pennington* doctrine has been held to be constitu-

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<sup>153</sup> *Metro Cable Co. v. CATV*, 516 F.2d 220, 230 (7th Cir. 1975); see also *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678, 687-88 (4th Cir. 1982) (mere participation as part of duties by government official not enough to make her contributor to illegal conspiracy), *cert. denied*, 104 S. Ct. 259 (1983); *Miller & Son Paving v. Wrightstown Township Civic Ass'n*, 443 F. Supp. 1268, 1272 (E.D. Pa. 1978) (allegation that government is part of conspiracy insufficient to state antitrust cause of action when defendant's political activities are essentially noncommercial), *cert. denied*, 444 U.S. 843 (1979).

<sup>154</sup> *Cf. Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 543-46 (5th Cir. 1978) (exemption buttressed when petitioning defendants are acting as agents of state or are following state commands), *cert. denied*, 444 U.S. 924 (1979).

The application of the co-conspirator exception, except perhaps in very rare situations, is criticized in Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 114-15 (1977).

<sup>155</sup> See FED. R. CIV. P. 26.

<sup>156</sup> *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50 (4th Cir. 1981). The genesis of this treatment of evidence of communications as admissible for limited purposes is a footnote in *Pennington*:

It would of course still 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 or subsequent transactions, which for some reason are [sic] 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 transactions under

tionally grounded, so that petitioning immunity would extend to a claim brought under a state antitrust law, as well as a claim under the federal Sherman or Clayton Acts.<sup>157</sup>

Finally, it should be emphasized that the possibility of petitioning immunity under *Noerr-Pennington* is a separate and distinct issue from the underlying antitrust liability. Although a combination of persons might lose the immunity for any of the reasons described above, the plaintiff must prove separately all the elements of the substantive antitrust violation. The absence of petitioning immunity merely allows the court to proceed to the merits of the action.<sup>158</sup>

### CONCLUSION

The *Noerr-Pennington* doctrine attempts to reconcile the sometimes conflicting goals of the antitrust laws, which seek to stimulate competition, with political and constitutional norms, which seek to protect free-

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scrutiny."

*Pennington*, 381 U.S. at 670 n.3 (quoting *Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 705 (1948) (citations omitted)); see also *Associated Container Transp. (Australia) Ltd. v. United States*, 705 F.2d 53, 59-60 (2d Cir. 1983) (*Noerr* doctrine does not preclude enforcement of Antitrust Division Civil Investigative Demand respecting communications with federal administrative agency). But see *Australia/Eastern U.S.A. Shipping Conference v. United States*, 537 F. Supp. 807 (D.D.C. 1982) (first amendment interests protected by *Noerr* justify quashing of Antitrust Division Civil Investigative Demand when government made only limited showing of need); cf. *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1196 (8th Cir. 1982) (evidence of communications with government not basis of antitrust liability but evidence of "purpose and character" of defendant's activities in other transactions), *cert. denied*, 103 S. Ct. 2108 (1983); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 543 n.7 (5th Cir. 1978) (evidence of protected petitioning admissible only when defendant's first amendment interests not prejudiced), *cert. denied*, 444 U.S. 924 (1979); *Lamb Enter. v. Toledo Blade Co.*, 461 F.2d 506, 515-16 (6th Cir.) (same), *cert. denied*, 409 U.S. 1001 (1972); *Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152, 158, 161 (5th Cir. 1971) (same); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1257, 1274-79 (N.D. Ohio 1981) (evidence of communications between defendant and municipal officials inadmissible as substantially prejudicial and nonprobative); *Schenley Indus. v. New Jersey Wine & Spirit Wholesalers Ass'n*, 272 F. Supp. 872, 886-87 (D.N.J. 1967).

<sup>157</sup> *Suburban Restoration Co. v. Acmat Corp.*, 700 F.2d 98 (2d Cir. 1983); *Pennwalt Corp. v. Zenith Labs., Inc.* 472 F. Supp. 413, 423-24 (E.D. Mich. 1979), *appeal dismissed*, 615 F.2d 1362 (6th Cir. 1980); *Sierra Club v. Butz*, 349 F. Supp. 934, 936-39 (N.D. Cal. 1972).

<sup>158</sup> *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1234 (1983); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders*, 424 F.2d 25, 34 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).



dom of speech, press, and assembly and to guarantee public access to governmental officials. The two United States Supreme Court decisions which created the *Noerr-Pennington* doctrine articulated a strong bias toward the latter constitutional values. Because of the broad strokes typical of Supreme Court decisions, many issues were raised but left unresolved.

Subsequent lower court decisions have sought to fill in the gaps and to tip the balance in favor of the objectives of the antitrust laws. This Article has identified some open areas of inquiry, and suggested why many of these questions should be resolved by emphasizing pro-competitive objectives. It is to be hoped that the Supreme Court will deal with these issues in the near future, availing itself of the opportunity to encourage vigorous enforcement of the antitrust laws, even when political concerns are involved.

