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THE NINTH CIRCUIT CLARIFIES THE *NOERR-PENNINGTON* DOCTRINE

A. INTRODUCTION

In *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*,[1] the Ninth Circuit limited the extent to which efforts to influence the findings of administrative agencies are immune from the antitrust laws under the *Noerr-Pennington*[2] doctrine and its concomitant sham exception.[3]

The plaintiff was a freight forwarder,[4] subject to regulation under the Interstate Commerce Act (ICA) and regulated by the Interstate Commerce Commission (ICC). The defendants were trucking companies regulated by the ICC and the Rocky Mountain Motor Tariff Bureau (RMMTB), a rate bureau formed under the ICA.[5]

ICC rate regulations[6] provide that a freight forwarder seeking a rate change publish the amended schedule. In the absence of protest, the rate will automatically take effect. Plaintiff, seeking a lower rate, published the desired rate change.[7] RMMTB

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1. 674 F.2d 1252 (9th Cir. 1982) (per Alarcon, J.; the other panel members were Wallace, J. and von der Heydt, D.J., sitting by designation), *cert. denied*, ___ U.S. ___, 103 S. Ct. 1234 (1983).

2. The term Noerr-Pennington comes from two Supreme Court cases. *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965), Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

3. *See generally*, 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).

4. A freight forwarder assembles and consolidates small shipments into single lots for carrier companies to then ship. 674 F.2d at 1257.

5. A rate bureau is an organization formed by carriers to set rates and fares for members within an ICC-approved agreement. RMMTB's membership services 80 percent of the transcontinental surface transportation market. *Id.*

6. ICC rate regulation of freight forwarders such as Clipper is provided in 49 U.S.C. § 1005 (recodified at 49 U.S.C. §§ 10725, 10762 (1976)).

7. In 1970, plaintiff published a lowered rate of $1056, but hoped eventually to lower

protested the lower rate to the ICC.[8] Thereafter, plaintiff filed several amendments to the new rate, progressively lowering it.[9] RMMTB protested each amendment. During this administrative process,[10] the ICC consistently ruled for the plaintiff, and the defendants exhausted all ICC procedures to prevent implementation of the lower rate.[11]

In 1972, plaintiff filed a complaint in district court against RMMTB and various trucking companies,[12] alleging antitrust violations.[13] Plaintiff contended (1) defendants' protests of the rate were sham protests filed for the purpose of directly interfering with competitive activity; (2) in protesting to the ICC, defendants furnished false information.[14]

The district court, in granting defendants' motion for summary judgment,[15] held that defendants' protests were immune as a matter of law under the *Noerr-Pennington* doctrine. In reversing, the Court of Appeals held that (1) factual issues existed concerning whether defendants' activities came within the sham exception to the *Noerr-Pennington* doctrine;[16] (2) a single suit or protest is sufficient to invoke the sham exception;[17] (3) in order to invoke the sham exception, plaintiff is not required to prove that access to a governmental body is foreclosed;[18] (4) furnishing false information to an administrative agency in connec-

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its rate to $842. Plaintiff expected defendants to protest to the ICC any lowered rate it published. Plaintiff felt RMMTB had always tried to maintain the rates of freight forwarders and carriers to an equal level and would take action to maintain that parity. 674 F.2d at 1257.

8. *Id.*

9. *Id.*

10. If there is a protest, the ICC can suspend effectiveness of the rate while it investigates the protest. The ICC did not suspend the $1,056 rate, but did investigate the rate over the next two years. *Id.*

11. *Id.*

12. *Id.* at 1257-58.

13. Plaintiff claimed damages for: (1) the loss incurred in delaying institution of its final rate; (2) the costs of responding to the protests; and (3) business loss because of the uncertainty surrounding plaintiff's rates. Plaintiff claimed that shippers will not use a rate if it is under ICC investigation. *Id.* at 1258.

14. *Id.* at 1257-58. Clipper also contended that the protests were part of a larger antitrust violation. *Id.*

15. The district court denied the defendants' two previous motions for summary judgment. *Id.*

16. *Id.* at 1264.

17. *Id.* at 1267.

18. *Id.* at 1269.

tion with an adjudicatory proceeding can be the basis for antitrust liability if accompanied by predatory intent and other elements of an antitrust claim.[19] This note will explore the basis for the court's decision and discuss its significance in terms of clarifying an important area of antitrust law.

B. Background

The Noerr-Pennington Doctrine

The proliferation of government regulation in industry and business has forced the courts to consider whether attempts to gain competitive advantages through the exercise of the right to petition are in some cases a misuse of government processes in violation of the Sherman Act.[20]

Under the judicially created *Noerr-Pennington* doctrine, bona fide efforts to obtain or influence legislative, executive, judicial or administrative actions are immune from antitrust liability.[21] However, if the purported effort to influence or obtain government action is in reality merely an attempt to interfere with the business relationships of a competitor, the activity may not enjoy antitrust immunity.[22]

The *Noerr-Pennington* doctrine and its sham exception were first enunciated in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[23] In *Noerr*, the Supreme

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19. *Id.* at 1271.

20. Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . . " 15 U.S.C. § 1 (1982). Section 2 of the Sherman Act proscribes all attempts and conspiracies to monopolize. "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty . . . . " 15 U.S.C. § 2 (1982). *See infra* notes 24-55 & accompanying text.

21. *See generally* 7 von Kalinowski, Antitrust Laws and Trade Regulation, § 46.04 (1980).

22. 365 U.S. at 144.

23. *Id. Noerr* involved a battle between the railroad industry and the trucking industry over long-haul freight business. A group of truck operations sued twenty-four railroads and a public relations firm, claiming the defendants conspired to restrain trade in violation of sections 1 and 2 of the Sherman Act by concertedly engaging in a massive publicity campaign designed to promote laws and law enforcement practices destructive to the trucking industry. Plaintiff alleged that the sole purpose of the campaign was to undermine its competitiveness with respect to the railroad. *Id.* at 129-130. For a detailed analysis of the facts in *Noerr, see Waldon, More About Noerr-Lobbying, Antitrust and the Right to Petition*, 14 U.C.L.A. L. Rev. 1211, 1214-20 (1967).

Court held that no violation of the Sherman Act can be predicated on mere attempts to influence the passage or enforcement of laws, even if the conduct is for an anticompetitive purpose and is accomplished by deliberate deception of public officials.[24]

The Court advanced four arguments in support of their ruling.[25] First, the Court stated that there was an "essential dissimilarity" between agreements to seek government actions and agreements traditionally constituting violations of the antitrust laws, such as price-fixing agreements and boycotts.[26] Second, to subject attempts to influence the passage of legislation to antitrust sanctions impaired the functioning of a representative government by reducing the flow of information on which government agencies are dependent.[27] Third, the court recognized the differences between conduct which is political activity, not regulated by the Sherman Act, and business activity, which is the focus of the Act.[28] Fourth, construing the Sherman Act to include attempts to influence government would raise constitutional questions, since the right to petition the government is protected by the first amendment.[29]

The Court in *Noerr* also announced a "sham" exception to its newly created antitrust immunity. The Court stated that antitrust immunity may not extend to activities ostensibly directed toward influencing government action, but which were in reality a mere sham to disguise an attempt to interfere with a competitor's business relationships.[30]

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24. 365 U.S. at 135-36.

25. *See* Fishel, *supra* note 3 at 82-83.

26. 365 U.S. at 136.

27. *Id.* at 137. *See* Note, *Antitrust-Supreme Court Extends Noerr Immunity From Sherman Act to Attempts to Influence Adjudication*, 76 DICK L. REV. 593, 594-95 (1972), for a more complete discussion of this point.

28. 365 U.S. at 137.

29. *Id.* at 138; the plaintiff in *Noerr* contended that even if attempts to influence government were exempt from antitrust liability, the defendants had forfeited that exemption because, one, their sole purpose was to destroy competition; and two, the publicity campaign involved deliberate deception of the public and public officials. The Court held, however, that the right of people to inform their government representatives and the legality of conduct directed toward obtaining government action cannot be made to depend on an anti-competitive intent or purpose that may advantage one group and disadvantage another. The Court further reasoned that even though the publicity campaign was not ethical, it fell within the range of political activity and therefore was not subject to regulation by the Sherman Act. *Id.* at 138-41.

30. *Id.* at 144.

The antitrust immunity for attempts to influence legislative decisions established in *Noerr* was reaffirmed and extended to include attempts to influence executive action in *United Mine Workers of America v. Pennington.*[31] The Court in *Pennington* held that joint efforts to influence public officials, even if intended to eliminate competition, did not violate the antitrust laws.[32]

Expansion of the Sham Exception

In *California Motor Transport v. Trucking Unlimited,*[33] the Supreme Court extended *Noerr-Pennington* immunity to attempts to influence administrative and judicial (adjudicatory) bodies.[34] The Court held, however, that if the petitioning of activities deprived a rival of access to the administrative and judicial process, or if a pattern of baseless, repetitive claims was involved the, sham exception enunciated in *Noerr* would apply.[35]

Two recent cases have further expanded the sham exception.[36] In *Otter Tail Power Co. v. United States,*[37] the Supreme Court held that litigation intended to delay and prevent the establishment of rival competition constituted a sham.[38] In deter-

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31. 381 U.S. 657. In *Pennington*, a small mine company brought an action under §§ 1 and 2 of the Sherman Act against the United Mine Workers and certain large coal companies. Plaintiff alleged that defendants engaged in anticompetitive efforts to influence the Secretary of Labor to obtain a minimum wage requirement for employees of contractors selling coal to the Tennessee Valley Authority, making it difficult for small companies to compete in TVA contracts. *Id.* at 659-60.

32. *Id.* at 670.

33. 404 U.S. 508 (1972).

34. In *Trucking*, the Supreme Court held that a complaint should not be dismissed which alleged that defendants, nineteen large California trucking firms, instituted groundless proceedings before state agencies and courts to prevent plaintiffs, a group of interstate trucking firms, from obtaining necessary administrative approvals. *Id.* at 509. For a more detailed analysis of the facts in *Trucking*, see, Note, *Antitrust: The Brakes Fail on the Noerr-Doctrine*, 57 CALIF. L. REV. 518, 520-24 (1969).

35. 404 U.S. at 512; the Court stated that the very fact such suits were baseless would be evidence that they were instituted primarily in order to drive a competitor out of business rather than to assert a legitimate legal right. *Id.* The *Trucking* Court based its decision on the first amendment rights to petition. *Id.* at 512.

36. *See generally*, Crawford & Tschoepe, *The Erosion of the Noerr Pennington Immunity*, 13 ST. MARY'S L.J. 291, 302-04 (1981).

37. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

38. Otter Tail, an electric power company serving three states, had franchises in several towns. The towns decided to establish municipal electricity distribution systems when Otter Tail's franchises expired. One condition of sale for bonds to finance these systems was that there be no pending litigation which might affect the bonds. By insti-

mining the existence of a sham, the Court considered the multiplicity of lawsuits and whether such suits carried the "hallmark of insubstantial claims."[39]

Vendo Co. v. Lektro-Vend Corp.,[40] dealt with the single sham suit issue, but not within the *Noerr-Pennington* context.[41] During an analysis of the Anti-Injunction Act,[42] the court made reference to the *Trucking* language of "a pattern of baseless, repetitive claims."[43] This discussion of repetitive suits dealt only with whether litigation can be enjoined and not with the requirements for an antitrust violation. However, lower courts[44] have relied on *Lektro-Vend* as authority for the proposition that a single baseless suit can be the basis for an antitrust claim.[45]

Ninth Circuit

The Ninth Circuit considered the sham exception in *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers.*[46] In *Franchise Realty*, the

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tuting suits challenging the bonds, Otter Tail prevented the towns from establishing their own systems. *Id.* at 369-72.

39. *Id.* at 380.

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

41. In *Lektro-Vend*, the plaintiffs, in response to a state court suit against them for breach of non-competition agreements, brought suit in federal court claiming that the agreements violated antitrust laws under 15 U.S.C. § 26 (1982), and that the purpose of the defendant's state-court lawsuit was to harass and eliminate competition. After judgment was entered in the state proceeding, the plaintiffs were granted a federal injunction against collection. 433 U.S. at 623. The Supreme Court reversed, finding that the federal district court should not have intervened in the state court proceedings by enjoining enforcement of the judgment. The result in *Lektro-Vend* is the narrow holding that a federal judge can enjoin the commencement of additional state court suits, not because several suits constitute an antitrust violation while one does not, but rather because the anti-injunction statute only prohibits the enjoining of existing state suits. *Id.* at 636; *see id.* at 637 n.8.

42. 28 U.S.C. § 2283 (1976).

43. 433 U.S. at 635 n.6, 636, 639 n.9.

44. *See, e.g.*, 674 F.2d at 1266 n.24; Colorado Petroleum Marketers Assn. v. Southland Corp. 467 F. Supp. 373 (D. Colo. 1979), Cyborg Systems Inc. v. Management Science Am., Inc., 78-1 Trade Cas. ¶ 61,927 (N.D. Ill. 1978).

45. Justice Stevens, writing for four dissenters, concluded that under the anti-injunction statute federal courts can enjoin a state court proceeding which is itself an antitrust violation. Further, a single abuse of the adjudicatory process could constitute an antitrust violation. 433 U.S. at 654-61.

46. 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977). In *Franchise*, the court affirmed the dismissal of a complaint which alleged that two associations of restaurant and hotel employers and a labor union had combined and conspired to repeatedly, baselessly, and in bad faith, oppose the granting of building permits by the

defendants opposed applications for building permits. The administrative agency which acted on permits was found by the court to be "as much a political as an adjudicatory body."[47] The court stated that the sham exception does not apply to direct lobbying efforts, but only to situations where defendants are not seeking official action by a governmental body.[48] Furthermore, a complaint must include allegations of specific activities which barred access to a governmental body.[49] Recently, in *Ernest W. Hahn, Inc. v. Codding*,[50] involving threats of multiple lawsuits, the Ninth Circuit distinguished the facts at issue from those in *Franchise Realty*.[51] The court held that a claim for relief is possible under the sham exception when the threat of litigation is used to retain a monopoly and thereby bar a competitor from the market.[52]

Other Circuits

The other circuit courts are divided on the issue of whether a single sham suit can constitute an antitrust violation. Some courts maintain that repetitive, baseless suits must be shown to establish a violation.[53] Another line of precedent concludes that a single sham suit is sufficient.[54]

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local Board of Permit Appeals to a competitor. *Id.* at 1078.

47. *Id.* at 1079.

48. *Id.* at 1080-81.

49. *Id.* at 1082.

50. 615 F.2d 830 (9th Cir. 1980). In *Codding*, a real estate developer alleged that a rival developer filed or underwrote thirteen overlapping, repetitive and baseless lawsuits for purposes of maintaining a monopoly and eliminating the plaintiff as a competitor. *Id.* at 833-34.

51. *See supra* notes 46-49 & accompanying text.

52. 615 F.2d at 840-42.

53. *See, e.g.*, Taylor Drug Stores, Inc. v. Associated Dry Goods Corp., 560 F.2d 211, 213 (6th Cir. 1977) (per curiam) (a single successful lawsuit is not a sham); First Nat'l Bank of Omaha v. Marquette Nat'l Bank, 482 F. Supp. 514, 520-21 (D. Minn. 1979) (single lawsuit with no unethical conduct accompanying its institution, insufficient to fall within mere sham exception) *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981); Mountain Grove Cemetery Assn. v. Norwalk Vault Co., 428 F. Supp. 951, 955-56 (D. Conn. 1977) (to permit institution of sham claims on the basis of one suit would be an undue deterrent to legitimate petition of courts); Central Bank of Clayton v. Clayton Bank, 424 F. Supp. 163, 167 (E.D. Mo. 1976) (single intervention in administrative and judicial proceedings not a sham) *aff'd*. 553 F.2d 102 (8th Cir. 1977), *cert. denied*, 433 U.S. 910 (1977).

54. *See, e.g.*, Feminist Women's Health Center v. Mohammad, 586 F.2d 530, 543 (5th Cir. 1978) (a showing of a pattern of repetitive, baseless, claims is strong evidence of a sham petitioning, but such evidence is not essential to proof of sham) *cert. denied*, Palmer v. Feminist Women's Health Center, 444 U.S. 924 (1979); Sage Int'l, Ltd. v. Cad-

A second area of disagreement among the circuits is whether access to the agencies and courts must be foreclosed in order to state a valid antitrust claim under the sham exception. A majority of the circuits hold that the essential element of a valid sham exception claim is the allegation of an absence of a genuine effort to influence government with the intent to injure a competitor directly, rather than an allegation that access was barred.[55]

A minority of circuits focus on whether plaintiffs were denied free and unlimited access to the tribunals.[56] These courts have held that in order to constitute violation, sham litigation involving an administrative agency must bar potential competitors from access to the decision making process.[57]

C. The Ninth Circuit's Decision

In remanding to the district court, the Ninth Circuit found as a factual question the issue of whether conduct was a genuine effort to influence government action, thereby entitled to immunity under the *Noerr-Pennington* doctrine, or a mere sham.[58] Since the defendants admitted *arguendo* that their protests were filed automatically and without regard to their merit, the protests were baseless for purposes of a summary judgment motion. The fact that defendants lost all protests further underscored that the protests were baseless, thereby establishing a sufficient showing to present a triable issue of fact.[59] Thus, for purposes of

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illac Gage Co., 507 F. Supp. 939, 946 (E.D. Mich. 1981) (no per se requirement that more than one claim underlie cause of action based upon "sham" litigation, nor must plaintiff allege denial of access); Technicon Medical Information Sys. Corp. v. Green Bay Packaging Inc., 480 F. Supp. 124, 127-28 (E.D. Wis. 1979) (one lawsuit brought to prevent alleged trade secrets violations can constitute antitrust violation when brought in bad faith or without probable cause); Colorado Petroleum Marketers Ass'n v. Southland Corp., 476 F. Supp. 373, 378 (D. Colo. 1979) (Supreme Court did not intend to give "every dog one free bite, thus making it an irrebuttable presumption that the first law suit was not a sham regardless of overwhelming evidence indicating otherwise.").

55. *E.g.*, Mark Aero, Inc. v. Trans World Air Lines, Inc., 580 F.2d 288, 295 (8th Cir. 1978); United States v. Braniff Airways, Inc., 453 F. Supp. 724 (W.D. Tex. 1978).

56. *E.g.*, Mountain Grove Cemetery Ass'n v. Norfolk Vault Co., 428 F. Supp. 951 (D. Conn. 1977); Central Bank of Clayton v. Clayton Bank, 424 F. Supp. 163 (E.D. Mi., 1976), *aff'd*, 553 F.2d 102 (8th Cir. 1977), *cert. denied*, 433 U.S. 910 (1977); Bethlehem Plaza v. Campbell, 493 F. Supp. 966 (E.D. Pa. 1975).

57. As one court has stated, "[a]ccess-barring is the cornerstone of the sham exception." Wilmorite, Inc. v. Eagan Real Estate, Inc., 454 F. Supp. 1124, 1134-35 (N.D.N.Y. 1977), *aff'd*, 578 F.2d 1372 (2nd Cir. 1978), *cert. denied*, 439 U.S. 983 (1978).

58. 674 F.2d at 1264.

59. *Id.* at 1267.

summary judgment, plaintiffs showed sufficiently that the defendants' protests were baseless and prosecuted without regard to their merit, intended rather to delay competitive conduct and not to influence governmental action.[60]

The Ninth Circuit concluded that a single suit or single protest was sufficient to invoke the sham exception.[61] The court based its conclusion on the first amendment theory governing the *Noerr-Pennington* doctrine. Not all activity that appears as an effort to influence the government is actually an exercise of the first amendment right to petition. It simply may be an effort to interfere directly with a competitor. In that case, the "sham" petitioning is not entitled to immunity under the *Noerr-Pennington* doctrine, regardless of whether it is a single suit or multiple suits.[62]

The court next stated that, despite the holdings of *Otter Tail*[63] and *Trucking*,[64] harassment of a rival through an administrative proceeding may have the same effect as harassment through the judicial system.[65] The court saw no reason to distinguish cases on the basis of the specific petitioning activity involved.[66]

The court further found that its decision was not inconsistent with *Franchise Realty*, where the Ninth Circuit held that access barring was a necessary element of a sham claim.[67] The court noted that the recent Ninth Circuit decision of *Codding* found a cause of action under the sham exception despite the absence of access barring and the decision in *Franchise Realty*.[68]

The defendants contended that if proof of access barring

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60. *Id.* at 1264. On remand plaintiffs will need to establish facts to invoke the sham exception. *Id.* Defendants' contended that to fall within the sham exception, *Trucking* required that the alleged misconduct (1) consist of a pattern of repetitive claims; (2) be baseless; and (3) bar access to the governmental body. *Id.* at 1265.

61. *Id.* at 1267.

62. *Id.* at 1266.

63. In *Otter Tail*, the litigation used to suppress competition actually gave the plaintiffs greater access to the courts. *Id.*

64. *Id.* at 1268.

65. *Id.*

66. *Id.*

67. 674 F.2d at 1268.

68. 615 F.2d at 841 n.4.

was not required, every competitor who was adversely effected by the filing of a protest would bring an antitrust action against the protesting party. Such increased litigation would deter the exercise of first amendment rights.[69] In response to this contention, the court stated that a plaintiff must prove the usual elements of an antitrust violation in addition to showing that a defendant's petitioning activity was an attempt to interfere with the business relationships of a competitor.[70] The court found this burden of proof sufficient to protect the exercise of first amendment rights. Accordingly, invoking the sham exception requires an allegation of some abuse of process, but not necessarily access barring.[71]

In adopting a new rule for the Ninth Circuit, the court stated that if the requisite predatory intent is present and the other elements of an antitrust claim are proven, fraudulently furnishing false information to an agency conducting an adjudicatory proceeding can be the basis for antitrust liability.[72]

The court pointed out that the adjudicatory sphere in *Clipper* was different from the political sphere involved in *Noerr* and *Pennington*. In the political sphere the falsity of statements can be detected more readily, whereas in the adjudicatory sphere information supplied by the parties is necessarily relied upon for decision making. If the information furnished is fraudulent, the functioning of these agencies is thwarted. Therefore, immunity from either antitrust laws or first amendment protection can never be granted to a party who with predatory intent furnishes

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69. 674 F.2d at 1269.

70. *Id.* This necessarily includes showing there was also not a genuine effort to influence government action.

71. *Id.*

72. *Id.* at 1271. This holding extends the *Walker Process* doctrine to cases not arising in the patent context. Walker Process Equip., Inc. v. Food Mach. and Chem. Corp., 382 U.S. 172 (1965), posed the question of whether maintenance and enforcement of a patent obtained by fraud on the Patent Office may be the basis of an action under § 2 of the Sherman Act, and therefore subject to a treble damage claim by an injured party under § 4 of the Clayton Act. The Supreme Court held that "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 . . . provided the other elements necessary to a § 2 case are present." *Id.* at 174. The fact that *Walker Process* provides a rule of general applicability was intimated by the statement in *Trucking* concerning misrepresentations which are condoned in the political arena, but which are not condoned when used in the judicial process. 404 U.S. at 513.

false information to an adjudicatory body.[73]

D. Analysis

The central problem surrounding claims based on the *Noerr-Pennington* doctrine and its sham exception rule has been the definition of evidentiary requirements necessary to state a cause of action. In *Clipper*, the Ninth Circuit finally provides clear guidelines for interpreting the doctrine and clarifies the basis for and limitations of three key criteria in stating a cause of action.[74]

Pattern of Repetitive Claims

Under *Clipper*, the first amendment is deemed the basis for immunity from antitrust laws,[75] that is, the conduct being scrutinized must be evaluated by applying first amendment criteria. The first amendment does not protect intentional falsehoods.[76] By analogy, litigation or protests that a competitor knows to be without legitimate foundation are unprotected.[77] Therefore, regardless of whether a single claim or a pattern of claims is involved, fraudulent activity should not be protected. As the court in *Clipper* correctly reasons, under the *Noerr-Pennington* doctrine, a single claim can invoke the sham exception.[78]

The "pattern of baseless repetitive claims"[79] language of *Trucking* is treated by some circuits as requiring that there be a

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73. 674 F.2d at 1271. The court applies the statement of the Supreme Court, "there is no constitutional value in false statements of fact." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

74. As two commentators state, "[D]uring the twenty years since *Noerr* was decided, the Supreme Court and the lower federal courts have struggled to . . . establish the true scope of the *Noerr-Pennington* doctrine." Crawford & Tschoepe, *supra* note 36, at 292.

75. 674 F.2d at 1265.

76. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

77. *See* Balmer, *Sham Litigation And The Antitrust Laws*, 29 Buffalo L. Rev. 39, 61 (1980).

78. *Id.* at 71 n.7. *See* 1 P. Areeda & D. Turner, Antitrust Law § 203b (1978):

> It is true, of course, that a repetitious pattern of clearly unmeritorious litigation makes proof of bad faith and abuse of the judicial processes much easier. There is however, nothing inherently illogical in the possibility that a single lawsuit may be filed with the purpose of directly interfering with another's business so that the antitrust laws would be violated as a result.

Id. at 71 n.7.

79. 404 U.S. at 513.

cause of action for antitrust liability.[80] This reflects a narrow interpretation of *Trucking*. A better analysis would be to view the "pattern" requirement as an illustration of an antitrust violation and not as a minimum standard.[81] Although repetitious lawsuits are an indication that activity is a sham, they are not a prerequisite for the imposition of liability. The prosecution of a single sham suit can be a significant restraint of trade in furtherance of monopolization, and therefore should be punished under the Sherman Act.

Access Denial

It remains unclear whether the harm caused by baseless litigation can constitute an antitrust violation even though access to the agencies and the courts is not actually restricted.[82] The confusion stems from the language of *Trucking*, where the Court not only spoke of "a purpose to deprive competitors of meaningful access to the agencies and the courts," but also noted that the judicial process had been abused.[83] Although a minority of circuit courts have drawn the implication that any abuse of judicial process is tantamount to barring effective access to the courts,[84] such a broad reading is unwarranted.

In *Trucking*, the concepts of access barring and abuse of the judicial process were treated as synonymous. There, the defendants intervened in every proceeding, and as a result both abused the agency processes and effectively foreclosed plaintiffs from access to the agency.[85] In *Otter Tail*, however, the abuse of process was a result of the maintenance of prolonged litigation.[86] The defendant's primary goal was to delay or halt competition rather than to discourage the use of the judicial process.[87] By focusing on the repetitive and insubstantial nature of the claims, *Otter Tail* indicates that access barring refers only to one type of abuse which may constitute an antitrust violation. Therefore,

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80. *See supra* note 54 for cases where a pattern of baseless claims was held to be a prerequisite for antitrust liability.

81. *See Lektro-Vend*, 433 U.S. at 662 (Stevens, J., dissenting).

82. *See* Balmer, *supra* note 77, at 42.

83. 404 U.S. at 512.

84. *See supra* note 56 for cases which find access barring conduct by the defendants.

85. 404 U.S. at 511.

86. 410 U.S. at 380.

87. *See*, R. BORK, THE ANTITRUST PARADOX at 355 (1978).

the interpretation of *Trucking* by some courts that it requires access barring is too narrow. A better interpretation of *Otter Tail* and *Trucking* is that in *Trucking*, the defendant's conduct constituted a sham primarily because there was no genuine effort to influence governmental action and also because access to governmental action was denied.[88]

The Ninth Circuit in *Clipper* properly applies first amendment principles as a basis for analyzing access denial in the context of the *Noerr-Pennington* doctrine. Baseless litigation through abuse of process can force a competitor out of business or prevent expansion even though the litigation does not literally bar the competitor from access to the courts. Such action constitutes an antitrust violation despite the fact that the competitor's redress to violation of its first amendment rights was not foreclosed.[89] Hence, the court correctly views baseless litigation in the administrative agency context as an abuse which is not required to rise to the level of access barring to constitute an antitrust violation. Filing a suit without merit which intentionally harms a competitor is in itself a violation that is undeserving of protection.

Fraud

The *Noerr-Pennington* doctrine protects the rights of the business community to employ governmental processes for the resolution of legal, economic and social problems. If, however, in asserting these rights for private gain the governmental processes are abused, the issue arises as to whether the conduct involved is immune.[90]

Trucking suggests that when considering misrepresentations made to governmental bodies, a distinction should be drawn between those bodies whose functions are essentially legislative or political, and those whose functions are essentially adjudicative.[91] In *Noerr*, the court stressed that deceptive statements made to legislators in an attempt to influence legislation are po-

88. *See generally*, Fischel, *supra* note 3, at 105-10, for a general discussion of the sham exception.

89. *See* BORK, *supra* note 87, at 347-49.

90. *See id.* at 355-56.

91. "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." 404 U.S. at 513.

litical activity traditionally accorded wide latitude by the courts.[92] Therefore, absent proof that the defendants lacked the intention to influence governmental action, attempts to influence the legislative or executive branches in connection with the formation of governmental policy are not condemned as a sham. In contrast, furnishing fraudulent information in the adjudicative setting is not protected under the guise of political expression. Such activity, seen both as evidence of bad faith and as an attempt to impede governmental operations, subjects the initiating party to antitrust attack.

Regulatory agencies, such as the ICC, conduct quasi-judicial administrative proceedings. The same degree of protection afforded judicial proceedings should be extended to regulatory agencies, as both often depend on highly technical factual data supplied by the regulated industry. Regulatory agencies necessarily rely on the honesty of the parties before them as they lack the time and resources to conduct investigations and scrutinize information provided to them.[93] Accordingly, even though the tactics used to influence the legislative or executive branches do not affect antitrust immunity, the penalty for knowingly providing false information to a court or to an adjudicating regulatory agency is loss of the *Noerr-Pennington* exemption.

Yet, it is necessary to protect some false statements and baseless claims in order to avoid a "chilling effect" on the right to petition.[94] Statements made which invoke the sham exception are analogous to speech that is unprotected by the first amendment. This constitutional analysis, properly adopted by *Clipper*, signifies that the first amendment protects litigation from antitrust liability to the same extent that it protects speech from government restriction. Litigation that a plaintiff knows to be based on fraudulent information, like known falsehoods in the free speech area, is unprotected.

Building on the analogy to the first amendment cases, deci-

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92. 365 U.S. at 140-41.

93. In an amicus brief submitted in *Clipper*, the ICC urged the court to find that deliberate misrepresentations of material facts to the ICC will make out an antitrust claim. *Amicus Curiae* Brief at p.11, *Clipper*.

94. *See* Hibner, *Litigation As An Overt Act - Development And Prognosis*, 46 A.B.A. ANTITRUST L. J. 718, 720 (1978).

sions dealing with free speech require a showing that the speaker knowingly lied or recklessly disregarded the truth or falsity of his statement.[95] This is a high standard. Therefore, to protect first amendment values, the standard for challenging sham suits as antitrust violations should be comparable to the standards applied in first amendment decisions. The party claiming that *Noerr-Pennington* immunity is not applicable must prove that defendants knew the falsity of their statements and made those statements deliberately to mislead a regulatory body.[96]

E. Conclusion

Previously, the *Noerr-Pennington* doctrine has been applied inconsistently by the courts. The Ninth Circuit in *Clipper* was presented with an opportunity to articulate the principles governing the scope of antitrust immunity granted to those who attempted to influence administrative agencies. From the court's analysis it is clear that the central inquiry regarding the conduct of defendants asserting the *Noerr-Pennington* doctrine is whether their actions merit first amendment protection.[97] It follows that the sham exception should encompass only activity without constitutional protection.

Our highly technological society has made government more dependent upon private industry for information. With this dependency comes a greater duty for industry to be fair and open in dealings with government. The antitrust laws can serve an essential role in insuring the integrity of this relationship[98] by providing clear guidance for permissible competitive behavior in business-governmental interaction. The Ninth Circuit has taken a significant step toward this goal by clarifying an important area of antitrust law.

*Phyllis Mariam Cantor**

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95. 376 U.S. 254; 418 U.S. at 347-50.

96. *See* Balmer, *supra* note 77, at 56-61. *See generally*, J.G. Van Cise & W.T. Lifland, Understanding The Antitrust Laws (1980).

97. *See* Fischel, *supra* note 3, at 122.

98. *See* Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 Mich. L. Rev., 333, 356 (1967).

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