STUDENT COMMENTS

ANTITRUST IMMUNITY: RECENT EXCEPTIONS TO THE NOERR-PENNINGTON DEFENSE

In 1961, the Supreme Court, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[1] held that concerted attempts to influence legislative or executive governmental action are immune from the prohibitions of the antitrust laws despite the fact that such governmental action would result in a restraint of trade.[2] In 1965, in *United Mine Workers of America v. Pennington*,[3] the Supreme Court arguably broadened this judicially fashioned immunity to include efforts aimed at persuading "public officials" to take action detrimental to competition even though these efforts were inspired by anti-competitive motives.[4] Two recent decisions in the Ninth and Fifth Circuits, *Trucking Unlimited v. California Motor Transport Co.*[5] and *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America*,[6] have narrowed the applicability of this antitrust immunity enunciated in *Noerr* and enlarged by *Pennington*. *Trucking Unlimited* held that attempts to use administrative proceedings which are essentially adjudicative in nature to further a group's anti-competitive purposes, are not immune.[7] *Woods* held that submission of false gas production forecasts to a regulatory agency is not immune when these forecasts are used to determine production allowables for competitors because this determination is an "apolitical" process.[8] These two cases[9] have raised important questions regarding the manner and scope in which business groups can concertedly seek to use the administrative functions of government to further anti-competitive objectives.

I. The Recent Decisions

In *Trucking Unlimited*, the complainant, seeking treble damages and injunctive relief for one group of truckers, alleged a conspiracy among the defendants, another group of truckers, to restrain and monopolize the highway common carrier business in California.[10] The

1 365 U.S. 127 (1961).

2 Id. at 136.

3 381 U.S. 657 (1965).

4 Id. at 670.

5 432 F.2d 755 (9th Cir. 1970).

6 5 Trade Reg. Rep. (1971 Trade Cas.) ¶ 73,422 (5th Cir. 1971).

7 432 F.2d at 759.

8 5 Trade Reg. Rep. (1971 Trade Cas.) ¶ 73,442 at 89,725 (5th Cir. 1971).

9 In both *Trucking Unlimited* and *Woods*, the courts of appeals reversed the district courts' decisions which had held the *Noerr-Pennington* immunity applicable. Trucking Unlimited v. California Motor Transp. Co., 1967 Trade Cas. ¶ 72,298 (N.D. Cal. 1967) and Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 304 F. Supp. 845 (S.D. Tex. 1969). These reversals indicate that the scope of this antitrust immunity is not well defined.

10 432 F.2d at 757.

defendants conducted a jointly financed, well publicized program of opposing, before the California Public Utilities Commission (PUC), the Interstate Commerce Commission (ICC), and the courts, all applications by actual or potential competitors for the granting of licenses for operating rights.[11] As a result of the defendants' activities, the financial resources of the plaintiffs and other competitors were depleted,[12] applications for operating rights were defeated, and, consequently, the plaintiffs were discouraged from instituting and pursuing license applications.[13]

The court of appeals held that attempts to influence judicial proceedings or administrative proceedings which are essentially adjudicatory in nature are not immune under the *Noerr-Pennington* doctrines.[14] The court found that the administrative licensing procedure in *Trucking Unlimited* was adjudicative, rather than legislative, in nature, primarily because the PUC applied a standard of "public convenience and necessity" to various fact situations when it reviewed license applications.[15] The court reasoned that it was not necessary to protect access to judicial and administrative-adjudicatory proceedings because the public interest in maintaining open access to legislators and law enforcement officials, which justifies the antitrust immunity granted to efforts aimed at influencing those officials, is not present in adjudicatory determinations.[16] This public interest is not present because judicial and administrative adjudicators do not act in a representative capacity and hence, information and opinions provided by protecting access to them would not be relevant to the determinations they make.[17]

The court held that the defendants' activities were not immune for an additional reason, one independent from its finding that joint approaches to adjudicatory bodies were not immune. The court found that the primary purpose of the defendants' activities was to interfere

[11] Id. The defendants agreed to and did establish a joint trust fund with monthly contributions made to the fund on the basis of each defendant's gross income. This fund was used to finance their opposition to all applications filed by their competitors before the PUC and the ICC. In addition, it was used to pursue applications through the various stages of administrative and judicial review. Id. at 762.

[12] Id. at 762. Evidently, to pursue even an initially successful determination through the review process was quite costly.

[13] Id. The district noted in its opinion that an exhibit of the plaintiffs' showed that 21 out of 40 matters which had reached the decision stage "resulted in action favorable to defendants either because the opposed application was denied by the agency in whole or in part or substantially reduced in scope or because the application was dismissed by the applicant after defendants appeared in opposition." Trucking Unlimited v. California Motor Transp. Co., 1967 Trade Cas. ¶ 72,298 at 84,744 (N.D. Cal. 1967).

[14] 432 F.2d at 758.

[15] Id. at 758 n.4. The court further stated that even if the agency determinations were "quasi-legislative" in nature, and thus within the *Noerr-Pennington* immunity, the defendants' appeal of adverse determinations to the courts would be subject to the antitrust laws. Id.

[16] Id. at 759 n.6.

[17] Id.

directly with the plaintiffs' business operations by discouraging the filing of license applications.[18] The court determined that any injury incurred by adverse determinations of the PUC was an "incidental" result of the method employed by the defendants to procure the primary result, the discouragement and subsequent failure to file license applications.[19] The finding that the defendants' primary purpose was to injure competitors directly allowed the court to apply the "sham" exception, articulated but not employed by the Supreme Court in *Noerr*, to the antitrust immunity granted to activity designed to influence governmental action.[20]

The Fifth Circuit, in *Woods*, cited *Trucking Unlimited* to establish that activities not directed at policy-making functions of government are not immune from the antitrust laws.[21] The defendants in *Woods* were two large-tract gas producers who had allegedly filed false production forecasts with the Texas Railroad Commission.[22] The Commission used those production forecasts in a formula to set the production allowables for the plaintiffs' wells.[23] The defendants were required to submit their production forecasts and the Commission had no means of verifying these submissions.[24]

The court of appeals did not attempt to classify the rate-setting process of the Commission as either administrative-legislative or administrative-adjudicative, but rather, chose to separate the Commission's actions into "political" and "apolitical" categories.[25] The court stated that the establishment of the formula by which the production allowables would be determined was basically a political act in the *Noerr* sense since proceedings to decide the composition of the formula would be "rule-making" proceedings.[26] However, the implementation of the formula, the court felt, was an "apolitical" act because once the makeup of the formula had been decided upon, the rate determination process did not involve any policy decisions.[27] Consequently, the filing of false forecasts by the defendants for anticompetitive purposes could not be protected by the *Noerr-Pennington*

[18] Id. at 763.

[19] Id.

[20] In *Noerr*, the Supreme Court stated:

> 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.

365 U.S. at 144.

[21] 5 Trade Reg. Rep. (1971 Trade Cas.) ¶ 73,442 at 89,724 (5th Cir. 1971).

[22] Id. at 89,718.

[23] Id. at 89,720.

[24] Id. at 89,722.

[25] Id. at 89,724.

[26] Id. The court apparently felt that the establishment of the formula involved policy decisions and was, therefore, a political governmental act, access to which *Noerr* sought to protect.

[27] Id.

immunity.[28] In reaching this decision, the court deemphasized the broad language in *Pennington* granting immunity to all attempts at influencing "public officials."[29] The court observed that the Supreme Court, in using such broad language, was not attempting to define the scope of governmental action that might give rise to the antitrust immunity, but rather, was articulating the principle that anti-competitive motive is irrelevant to the granting of immunity to efforts aimed at influencing certain "public officials."[30] The *Woods*' court felt the Supreme Court was concerned with the intent issue when it referred to "public officials" in *Pennington*.

The effect of these recent decisions on the *Noerr-Pennington* immunity has been to limit its application to concerted attempts to influence those acts of governmental agencies involving policy considerations of a quasi-political nature.[31] Under these decisions, antitrust immunity does not extend to (1) administrative proceedings essentially adjudicative in nature, and (2) administrative determinations implementive of, but not involving, policy decisions. In addition, these decisions demonstrate a lack of tolerance on the part of the courts for the use of governmental regulatory bodies to further anti-competitive objectives. These effects may have important ramifications for regulated industries and businesses which are in continued contact with, and often seek action from, regulatory agencies. This interaction between administrative bodies and their regulated businesses is often characterized by governmental reliance upon the businesses being regulated for knowledge and information necessary for effective regulation.[32] *Trucking Unlimited* and *Woods* point out this interdependency and also demonstrate the vulnerability of regulatory action to parties seeking to carry out an anti-competitive scheme. These two decisions narrow the broad sweep of the *Noerr-Pennington* immunity in an attempt to insure the integrity of the regulatory process. Whether this narrowing is warranted will be determined by examining the *Noerr* and *Pennington* decisions to determine what the primary concerns of the Supreme Court were when it developed this immunity from the antitrust laws.

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[28] Id. at 89,725.

[29] Id. In *Pennington*, the Supreme Court stated: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670.

[30] Id.

[31] Cf. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970). In that case, used by the court in *Woods* to show that all attempts to influence governmental action are not immune, the court stated:

> By "enforcement of laws" we understand some significant policy determination in the application of a statute, not a technical decision. . . . We doubt whether the [*Pennington*] Court, without expressing additional rationale, would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings when the case turned on other issues.

Id. at 32-33.

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

After examining the reasoning of the Supreme Court in *Noerr* and *Pennington*, this comment will analyze the specific limitations placed upon antitrust immunity in *Trucking Unlimited* and *Woods* to determine if these are consistent with *Noerr* and *Pennington*. Finally, the courts' concern, in both cases, for protecting the integrity of the regulatory process will be discussed.

II. The Rationale of the Noerr-Pennington Immunity

In *Noerr*, the Supreme Court set out an immunity from the antitrust laws for activity primarily directed at influencing legislative or executive decisions. That case involved an alleged conspiracy by a group of railroads in hiring a public relations firm to conduct a publicity campaign aimed at the enactment of laws that would restrict the trucking business.[33] It was alleged that the purpose of this publicity campaign was to impair the public image of the truckers and to facilitate the passage and enforcement of laws designed to regulate the trucking industry.[34] Despite the fact that the defendants' motive in seeking governmental action was to reduce competition from the trucking industry, the Supreme Court held that "at least insofar as the railroads' campaign was directed toward obtaining governmental action,"[35] the defendants did not violate the Sherman Act.[36] The Court based its decision upon two lines of reasoning. First, the Court had held previously[37] that when a restraint of trade results from valid governmental action, there is no violation of the Sherman Act.[38] The Court observed that it follows from those decisions that attempts "to persuade the legislature or the executive to take particular action with respect to a law" that would result in a restraint of trade, should also be free from antitrust sanction because a prohibition of these activities

[33] 365 U.S. at 129.

[34] Id. In their answer to the complaint, the railroads admitted that the publicity campaign was designed to influence the passage and enforcement of laws, but denied that it was motivated by a desire to interfere with the truckers' business. The Court found that the primary purpose of the publicity campaign was to influence the passage and enforcement of laws. Id. at 131, 142-43.

[35] Id. at 139-40.

[36] In *Noerr*, the complaint alleged violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1964).

[37] United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939); Parker v. Brown, 317 U.S. 341 (1943).

[38] In *Parker*, the Supreme Court held that a state-adopted marketing program in California under the California Agricultural Prorate Act for the 1940 raisin crop was not invalidated by the Sherman Act even though the program would have violated "the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." 317 U.S. at 350-52. In *Rock Royal*, the Supreme Court upheld the constitutionality of the Agricultural Marketing Agreement Act of 1937 under which the Secretary of Agriculture was authorized to issue an order fixing and equalizing minimum prices to be paid producers selling milk to dealers. The Court also stated that "[i]f the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act. . . ." 307 U.S. at 560.

would seriously impair the power of government to regulate trade.[39] As a corollary to this proposition, the Court noted that the right of the people to inform their representatives in government about any matter cannot depend either upon their intent in doing so, or upon their financial interest in the matter.[40] Secondly, the Court stated that the application of the Sherman Act to the activities of the defendants would violate their First Amendment right to petition the government.[41] The Court held that it could not impute a congressional intent into the Sherman Act to infringe upon the right to petition because there was no indication in the Act's legislative history that it was intended to regulate "political activity."[42] *Noerr*, then, can be said to stand for the proposition that restraints of trade which result from valid governmental action cannot be the basis of an antitrust suit against parties who have influenced the government to take that action. This is so, even though these parties have anti-competitive motives and act in an unethical manner[43] to bring about the governmental action.

While *Noerr* held that activities aimed at influencing governmental action are immune from the antitrust laws, *Pennington* held that not only are these activities alone immune, but also that such acts are immune even if they are part of a broader scheme, itself violative of the Sherman Act.[44] *Pennington* involved joint action by coal producers and a union which sought to reduce competition by procuring (1) the establishment by the Secretary of Labor under the Walsh-Healey Act[45] of a minimum wage for the employees of contractors selling coal to the Tennessee Valley Authority (TVA), and (2) a change in the TVA's coal-purchasing program so that more of its purchases would be made from producers covered by the Walsh-Healey Act.[46]

The Supreme Court reversed the court of appeals which had in-

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[39] 365 U.S. at 136-37. In addition, the Court observed that an association organized to induce governmental action that would produce a monopoly or a restraint on trade is essentially dissimilar from those combinations that through the use of price-fixing agreements, boycotts, market-division agreements, etc., take away the trade freedom of others in violation of the Sherman Act. Id. at 136.

The Court also expressed concern about preserving the concept of representation upon which our government operates. Freedom of access to the government, the Court felt, was essential to effective representation because otherwise, the government would not be informed of the people's views. Id. at 137.

[40] Id. at 139.

[41] Id. at 138. To avoid the First Amendment question, the Court construed the Sherman Act as not contemplating the prohibition of the type of activity engaged in by the defendant railroads. In effect, then, the Court was protecting the right to petition without specifically defining or delimiting the scope of that right.

[42] Id. at 137.

[43] In *Noerr*, the defendants employed a third party public relations firm to conduct the publicity campaign. The Court stated that this technique was "one which falls far short of the ethical standards generally approved in this country." Id. at 140.

[44] 381 U.S. at 670.

[45] 41 U.S.C. §§ 35-45 (1964).

[46] 381 U.S. at 660-61. A substantial portion of the "spot market purchases" made by the TVA were from producers which were exempt from the Walsh-Healey Act.

terpreted *Noerr* as granting antitrust immunity only to conduct "unaccompanied by a purpose or intent to further a conspiracy to violate a statute. . . ."[47] The Court reaffirmed the proposition that intent is irrelevant in determining whether the *Noerr* immunity applies, and also made clear that joint efforts to influence "public officials," as part of a scheme violative of the Sherman Act, are not proscribed.[48]

Pennington is consistent with the rationale in *Noerr*. The joint conduct of the defendants was an attempt to procure valid governmental action that would restrain trade, and not an attempt to restrain trade directly. Urging the Secretary of Labor to exercise his discretion under the Walsh-Healey Act was activity aimed at the "enforcement of laws,"[49] and was similar to some of the activities of the defendants in *Noerr*.[50] The attempt to persuade the TVA to change its coal-purchasing program, so that more producers selling coal to the TVA would be encompassed by the Walsh-Healey Act, and, consequently, would be required to pay the minimum wage, was conduct aimed at changing a policy of an administrative agency. The Court had several rationales available to it in holding this latter activity immune. The Court might have classified it as "political activity" since it was aimed at changing a policy of a governmental agency. Or, the Court might have considered the agency action sought as essentially "rule making" since it would have prescribed a policy of general or particular applicability and future effect.[51] On either of these grounds the Court could have granted immunity under the *Noerr* doctrine. Instead, the Court interpreted *Noerr* as applying to conduct aimed at influencing all "public officials,"[52] and thereby included within the *Noerr* immunity

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[47] Pennington v. United Mine Workers of America, 325 F.2d 804, 817 (6th Cir. 1963).

[48] 381 U.S. at 670. The Court held that it was error to instruct the jury "that the approach to the Secretary of Labor was legal unless part of a conspiracy to drive small operators out of business. . . ." It held that the jury was not free to attribute illegality to this act as part of a general plan to eliminate competition. In a footnote, the Court did say that it would be within the province of the trial judge to admit evidence of activities aimed at influencing a governmental official and agency "to show the purpose and character of the particular transactions under scrutiny." Id. at 670-71 n.3.

[49] The court in *Trucking Unlimited*, found that if the approaches to the Secretary of Labor were attempts to induce him to initiate proceedings under the Walsh-Healey Act in order to set a minimum wage for a given industry, then these approaches would be attempts to influence a policy decision and would thereby be protected by *Noerr*. The court also observed that if the wage determination itself was sought to be influenced by the defendants in *Pennington*, then, since that proceeding was quasi-legislative in nature, the defendants' activities would also be protected by *Noerr*. 432 F.2d at 759 n.5.

[50] In *Noerr*, the defendant railroads admitted that one purpose of their publicity campaign was to encourage a more rigid enforcement of state laws penalizing truckers for overweight loads and traffic violations. 365 U.S. at 131.

[51] Section 2(c) of the Administrative Procedure Act defines a rule as "the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 1001 (1964).

[52] 381 U.S. at 669-71. The Court continually refers to the *Noerr* immunity in reference to conduct aimed at influencing "public officials." *Pennington* has been criticized for its use of broad language in defining the *Noerr* immunity. See Note, The Brakes Fail on

defendants' attempts to influence the TVA officials. *Pennington*, then, seems to indicate that the Supreme Court wanted to extend *Noerr* to action taken by administrative officials.

The *Noerr* and *Pennington* decisions indicate that the Supreme Court was primarily concerned with two factors when it formulated the antitrust immunity. First, the Court sought to insure the viability of governmental regulation of business which might involve restraints on trade.[53] To do this, private activity to procure such governmental action, regardless of the purposes of the private parties, must be protected because this activity insures government access to information and opinion essential for informed and responsive regulation. Secondly, the Court wanted to safeguard the First Amendment right of petition, a right essential to our form of representative government.

Because of these considerations, the Court in *Noerr* held that Congress only sought to regulate business activities under the Sherman Act. The Court relied upon *Parker v. Brown*[54] to demonstrate that political action, including state regulatory action, had been held exempt from the Sherman Act.[55] After *Noerr*, all aspects of a state regulatory scheme are immune from antitrust proscriptions. Governmental action is immune under *Parker*, and private attempts to procure and influence this action are immune under *Noerr*. It is in light of the foregoing factors that an examination of the limitations placed upon the *Noerr-Pennington* immunity by *Trucking Unlimited* and *Woods* can best be made.

III. Trucking Unlimited v. California Motor Transport Co.

A. *Administrative-Adjudicative Action*

In holding that agreements to utilize judicial and administrative-adjudicative proceedings in an anti-competitive scheme are not immune under the *Noerr-Pennington* doctrine, the court in *Trucking Unlimited* reasoned that the fundamental rationale for the *Noerr-*

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the *Noerr* Doctrine, 57 Calif. L. Rev. 518 (1969). The author, in criticizing the district court decision in *Trucking Unlimited*, contends that since *Noerr* and *Pennington* were concerned only with joint efforts to influence the legislative and executive functions of government, the use of the term "public officials" in *Pennington* does not extend the *Noerr* doctrine to officials performing adjudicative functions. Id. at 520 n.19. Cf. Note, Application of the Sherman Act to Attempts to Influence Government Action, 81 Harv. L. Rev. 847 (1968), where the author thinks that *Pennington* extended *Noerr*'s protection to efforts aimed at influencing "government decisions," and criticizes this extension as being too complete an immunity, not required by the facts of the case. He also contends that extension of the immunity should depend upon whether the governmental decision is to be made in a political or economic framework and not upon the classification of a decision as legislative, executive or adjudicative. Id. at 852-53.

[53] The *Noerr* Court stated that "such a holding [that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws] would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." 365 U.S. at 137.

[54] 317 U.S. 341 (1943).

[55] 365 U.S. at 137.

Pennington immunity did not apply because it is not the function of courts or administrative agencies engaged in adjudication to determine whether laws restraining trade will be enacted or enforced.[56] In so reasoning, the court assumed that the controlling rationale of *Noerr* was to insure that governmental regulation of trade was not impaired by preventing access to those branches of government that enact and enforce laws restraining trade. The court largely ignored the right to petition which also was an important factor in the Court's decision in *Noerr*. The court did cite, however, several patent cases[57] to show that the use of litigation to restrain trade can be prohibited by the Sherman Act. By doing so, the court in effect was implying that prior case law indicates that free and unrestricted access to the courts, which might involve an exercise of the right to petition,[58] an important concern of the *Noerr* Court, may be constitutionally curtailed when this access is used to further anti-competitive objectives.

Noerr examined the right to petition in the context of activities comprising the solicitation of governmental action with respect to the passage and enforcement of laws. The publicity campaign conducted by the defendant railroads was admittedly designed to influence the passage and enforcement of state laws restraining the trucking business.[59] In *Noerr*, the Court did not state that the right to petition could not be limited, but rather, that in light of the possible impairment of effective government regulation of trade that might result, and in light of its finding that the Sherman Act was not intended to regulate "political activity," it could not allow the Sherman Act to limit the defendants' activity in petitioning the government for laws restraining the trucking business.[60] The implication of this holding is that when these two factors are not present, it may be constitutionally permissible to limit a concerted effort to influence governmental action.

The court in *Trucking Unlimited* found that there was no possibility of an impairment of governmental action restraining trade.[61] It stated that it would be fruitless to protect access to courts and agencies engaged in adjudicatory determinations, because the information and opinions so provided would not be relevant to these determinations.[62] Consequently, limiting such access could not possibly impair govern-

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56 432 F.2d at 758.

57 Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965); United States v. Singer Mfg. Co., 374 U.S. 174 (1963); Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952); Lynch v. Magnavox Co., 94 F.2d 883 (9th Cir. 1938).

58 In a footnote the court stated:

> They [the patent cases] also support the proposition that, on balance, the public interest in free competition served by the condemnation of agreements to use judicial and administrative adjudicative processes for the purpose of restraining trade outweighs the resulting restraint upon First Amendment rights.

432 F.2d at 759 n.6.

59 365 U.S. at 131.

60 Id. at 138.

61 432 F.2d at 758-59.

62 Id.

mental action. In addition, the court did not consider the activity of the defendants in opposing all applications before the agencies and the courts as "political activity" in the *Noerr* sense. The court stated that the political activity referred to by the Supreme Court in *Noerr* was activity engaged in by people desiring to make known their wishes to their representatives in government, either legislative or executive.[63] Considering the possibility of impairment of governmental action as the controlling rationale in *Noerr*, the court in *Trucking Unlimited* placed little emphasis upon the political activity issue.[64]

The court's theory that information provided by protecting access to adjudicatory proceedings would be irrelevant to adjudicatory determinations is belied by the success of the defendants in their opposition to all license applications.[65] Apparently, the information the defendant truckers provided was, to some extent, employed by the agencies in making their determinations.[66] In addition, the defendants had a statutory right to appear in opposition.[67] This statutory right does not compel the PUC to use any information the defendants provide, but it does indicate that the PUC had an interest in having opposition presented and that procedures were established for the presentation of opposing arguments. These factors indicate that limiting access to regulatory agencies might impair effective governmental action in regulating trade despite the fact that the agency is making an adjudicatory determination. Given the possibility of an impairment in effective governmental action, limiting access to regulatory agencies by Sherman Act sanction runs counter to *Noerr*. In *Noerr*, the Court was especially concerned with not limiting the First Amendment right of access to government when such limitation would impair the government's ability to regulate trade. However, in prohibiting access by the defendants to the adjudicatory processes, the court in *Trucking Unlimited* actually was, in effect, opening up access to those processes for their competitors, and in that respect the decision was consistent with *Noerr*. In other words, the impairment in government regulation of trade resulting from the defendant's concerted opposition was more severe than any impairment that would result by limiting the defendants' access to adjudicatory proceedings.

While there is arguably a basis in *Noerr* for limiting access which results in the impairment of effective government regulation of trade, the distinction made by the court in *Trucking Unlimited* for activities

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[63] Id. at 758 n.3.

[64] Id. at 758.

[65] See note 13 supra with respect to the degree of the defendants' success.

[66] In discussing the foreclosure of the plaintiffs from access to the PUC, the ICC and the courts, the court stated that one of the effects of this foreclosure was that "it denied those agencies and the courts the benefit of facts and information required for the making of competent decisions. . . ." 432 F.2d at 762. If this was one effect of the plaintiffs foreclosure, it appears that denying *defendants* access would have the same result.

[67] Cal. Admin. Code tit. 20 (1967), Rules 53, 54; Interstate Commerce Act, 49 U.S.C. § 305(e) (1964).

aimed at influencing adjudicatory proceedings does not seem warranted in light of *Noerr* and *Pennington*. Although *Noerr* clearly contemplated the legislative and executive branches of government when it granted immunity to attempts to influence governmental action, *Pennington* can be interpreted to include activities designed to influence administrative action.[68] The court in *Trucking Unlimited*, however, distinguished *Pennington* by pointing out that the administrative action sought to be influenced in that case did not appear to be adjudicatory in nature.[69] But by singling out the adjudicatory processes of government, *Trucking Unlimited* prohibits access to agencies making adjudicatory determinations when the party seeking access has anticompetitive motives despite the fact that the party has a statutory right, and possibly a constitutional right,[70] to participate in the proceedings. This is not consistent with *Noerr's* holding that anticompetitive motives are irrelevant when one is seeking governmental action. Further, the decision sweeps too broadly in holding that antitrust immunity does not extend to adjudicatory proceedings. The success of the defendants in *Trucking Unlimited* itself indicates that, at least in some adjudicatory proceedings, the information made available through access to the governmental body is appropriate to the determinations of that body.

Maintaining free access to all regulatory agency functions is important for another reason. Government regulatory schemes are becoming increasingly dependent upon the business they are regulating for the information and knowledge essential for proper and effective regulation. While it is important to prohibit activity that undermines the regulatory process, such prohibition should be accomplished in a manner that does not limit the agencies' access to information necessary for effective regulation. Only when the access of groups to a regulatory agency's processes becomes counter-productive, in that it either limits another group's access, as it did in *Trucking Unlimited*, or undermines the agency function in some other manner, should it be limited. Such limitations would be consistent with both the constitutional safeguards and the desire to prevent impairment in governmental regulation of trade expressed in *Noerr*.

B. *The Sham Exception*

In *Noerr*, the Supreme Court explicitly made reference to an exception to the grant of immunity for activity directed toward influencing governmental action.[71] The Court observed that there might be

[68] See note 52 supra with respect to the effect of the *Pennington* decision on antitrust immunity.

[69] See note 49 supra.

[70] *Pennington's* interpretation of the *Noerr* immunity as extending to all "public officials" could possibly be an indication that the right to petition includes a right to petition the whole government. Cf. Brown, The Right to Petition: Political or Legal Freedom?, 8 U.C.L.A. L. Rev. 729 (1961).

[71] 365 U.S. at 144.

situations when a publicity campaign is "ostensibly directed toward influencing governmental action," yet, in reality, is an attempt to injure competitors directly and that, therefore, such conduct would not be immune.[72] The court in *Trucking Unlimited* applied this exception to the defendants' activities. The court found both direct injury resulting from the defendants' opposition, and a primary purpose on the defendants' part to injure their competitors directly.[73] Both findings were necessary since in *Noerr* there was apparently direct injury yet no primary purpose to injure the truckers directly, and the Court consequently termed the injury "incidental."[74]

In *Trucking Unlimited*, the court determined that the primary purpose of the defendants' activity was to deter the filing of applications for licenses and thereby preclude governmental action.[75] The court stated that the vigorous campaign to oppose all applications for licenses had "effectively foreclosed" plaintiffs and other competitors from access to the PUC, the ICC and the courts in review proceedings.[76] Since small trucking companies, prior to the defendants' joint enterprise, had relatively free access to the PUC and the ICC, the court found that the concerted opposition of the defendants, the largest truckers in California and the western states, limited the small truckers' access to these bodies, thereby directly injuring them.[77]

This direct injury is somewhat different from that envisioned by the Court in *Noerr*. In that case, the Court contemplated a publicity campaign primarily designed to damage the good will and the business of competitors while ostensibly directed toward the enactment or enforcement of laws. The resulting injury would be a business injury not related to governmental action. In *Trucking Unlimited*, the injury is not a business injury in that there is no interference with the relationship between the truckers and their customers. The injury is also less direct in that it results from the successful attempts by the defendants to procure governmental action, and from the defendants' financial ability to undertake such opposition. Without governmental action adverse to the plaintiff's interests there would have been less injury, that is, less discouragement in the filing of applications. However, for a small trucker to pursue, because of the defendants' opposition, even an initially favorable determination of his application through all the stages of administrative and judicial review proved expensive. The expense involved in pursuing an application combined with the probability of

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[72] Id.

[73] 432 F.2d at 762-63.

[74] 365 U.S. at 142-43.

[75] 432 F.2d at 762.

[76] The court indicated that the plaintiffs were effectively foreclosed because the defendants' opposition had depleted their financial resources, and defeated, delayed and restricted their applications for operating rights, and deterred plaintiffs from instituting and pursuing other applications. Id.

[77] Id.

being defeated evidently had a considerable deterrent effect upon the plaintiffs.[78]

Despite these differences in the nature of this injury from that contemplated in *Noerr*, it is submitted that the denial of access to the regulatory agency effected in *Trucking Unlimited* conflicts even more fundamentally with the rationale of *Noerr*. Deterring competitors from seeking governmental action runs counter to the concern of the *Noerr* court that all groups have access to the government in order to promote the most effective regulation of trade. The use of the "sham" exception by the court in *Trucking Unlimited* is a means of making access to the PUC and the ICC available to both the large and small truckers, thereby restoring balance to the regulatory scheme—an objective the Court in *Noerr* hoped to accomplish by immunity.

The application of the sham exception to the grant of antitrust immunity was an independent ground upon which the court in *Trucking Unlimited* found that the Sherman Act applied to the defendants' activities. However, the use of the sham exception in this case, because of the type of direct injury involved, makes immunity depend, to a degree, upon the success or failure of a group's efforts at obtaining favorable regulatory action. The fact that the defendants in opposing all applications were extremely successful—in that a large number of final determinations were made in their favor—caused some of the direct injury that resulted, that is, some of the discouragement in filing other applications. Combined with a primary purpose to injure competitors directly, this direct injury might result in the removal of immunity. If the defendants had been less successful in procuring favorable governmental action, less discouragement would have resulted. If there remained sufficient discouragement, resulting from the financial hardships involved in pursuing an application, to produce injury, then immunity would not be removed. However, in those instances where discouragement can be attributed to the possibility of being defeated, the sham exception to immunity depends upon success because without success in obtaining favorable governmental action, there would be no injury. In light of the reasons provided by the Court in *Noerr* for the antitrust immunity, success or failure should play no part in its application. Indeed, success in an attempt to influence governmental action may bring into operation the *Parker* immunity because such success is dependent upon valid state action.[79] The *Noerr-Pennington* immunity is grounded in the right to petition and the right of access to government and should not be dependent upon either the degree of success or the result of an attempt to procure governmental action. If the direct injury is due to successful attempts at influencing governmental action, and the sham exception is used to remove immunity, in effect, the primary purpose to injure competitors

[78] See note 76 supra.

[79] Cf. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 29 n.4 (1st Cir. 1970).

directly would be controlling in the determination of immunity. This would be inconsistent with the *Noerr* and *Pennington* reasoning that anti-competitive motive is irrelevant. It appears, then, that the use of the sham exception by the court in *Trucking Unlimited*, as an independent ground for holding that the Sherman Act applied, would not have been warranted if the direct injury to the plaintiffs appeared to have resulted primarily from an otherwise lawful attempt to influence governmental action. As a means of restoring balance to the regulatory scheme, however, the use of the sham exception when there is discouragement in access resulting from both successful attempts to procure governmental action, and the financial hardships imposed in pursuing opposed applications, appears to be consistent with the rationale of *Noerr* because in this situation, there is some direct injury other than that inflicted by valid governmental action.[80]

IV. Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America

In *Woods*, the court limited the *Noerr-Pennington* immunity to activity aimed at influencing policy-making decisions.[81] In doing so, the court interpreted *Noerr's* grant of immunity to conduct seeking the "enforcement of laws" as constituting a grant of immunity to conduct seeking to influence some significant policy determination in the application of a statute, and not a technical decision implementing a statute.[82] The court first focused upon the governmental act involved in setting the production allowables and determined that it was not a policy decision because the false forecasts were applied to a predetermined formula in a mechanical fashion to calculate the allowables.[83] The court then classified the defendants' attempts to influence that governmental act as joint business behavior, not political activity.[84] If the governmental act had been a policy decision, then the defendants' conduct, despite its deceitful nature, would have been considered political activity and consequently immune under *Noerr-Pennington*.

The limitation imposed upon the *Noerr-Pennington* immunity by the *Woods* court is somewhat broader than the courts' interpretation of political activity in *Trucking Unlimited*. That court defined the political activity referred to in *Noerr* as those efforts by people seeking to make their wishes known to their representatives in the legislative and executive branches of government.[85] The *Woods* interpretation of political activity leaves room for classifying participation in a regulatory scheme as political activity. In fact, the *Woods* court stated that

[80] The court held that the defendants' own jointly financed, well publicized program of opposing all applications had a significant deterrent effect, in and of itself, without procuring governmental action. 432 F.2d at 762-63.

[81] 5 Trade Reg. Rep. (1971 Trade Cas.) ¶ 73,422 at 89,724 (5th Cir. 1971).

[82] Id.

[83] Id.

[84] Id.

[85] 432 F.2d at 758 n.3.

the formulation of the allowables formula was political in nature in the *Noerr* sense, and that participation in that formulation would have been protected by *Noerr*.[86] *Woods*, then, holds that the *Noerr-Pennington* doctrine protects participation in the regulatory process, but limits that protection to participation in policy-making decisions. In effect, then, it is the type of governmental decision that determines whether conduct aimed at influencing that decision will be considered political activity, and consequently whether immunity will be granted.[87]

The court in *Trucking Unlimited* also focused upon the governmental decision sought to be influenced in its attempt to limit the sweep of the *Noerr-Pennington* immunity. It singled out governmental adjudicatory processes and held that attempts to influence those processes will not be immune. However, the *Trucking Unlimited* court did not classify the defendants' activity as political or apolitical, but rather, chose to distinguish adjudicatory processes by showing that no impairment in governmental regulation of trade would result if antitrust immunity were not extended to these processes. *Woods* justified application of the Sherman Act by reasoning that only apolitical activity could be proscribed, while *Trucking Unlimited* justified the antitrust proscription by reasoning that no resulting impairment in governmental regulation of trade would ensue. Each court placed primary emphasis on a different underlying rationale of *Noerr*. If the defendants' activity in *Woods* is examined in light of the reasoning in *Trucking Unlimited*, the result would be the same as that reached by the *Woods* court. Because of the nature of the defendants' activity in *Woods*, it is obvious that no impairment of government regulation of trade would result from application of the Sherman Act. If *Trucking Unlimited*, on the other hand, is examined in light of the *Woods'* reasoning, application of the Sherman Act would arguably curtail political activity in that the government decision of whether to grant an operating license appears to be a "policy" issue. But if the adjudicatory decision in *Trucking Unlimited* was not a policy decision,[88] *Trucking Unlimited* is consistent with *Woods*.

The obvious impairment of government regulation of trade in *Woods*, and the apolitical nature of the defendants' activities, present a situation in which it is relatively easy to determine that the *Noerr-Pennington* immunity should not be granted. In *Trucking Unlimited*, on the other hand, the defendants' actions involve, in part, not only activity that would arguably enhance government regulation of trade, but also attempts to influence governmental action which is quasi-political in nature.

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[86] 5 Trade Reg. Rep. (1971 Trade Cas.) ¶ 73,422 at 89,724 (5th Cir. 1971).

[87] Id.

[88] The court in *Trucking Unlimited* did not *state* that the adjudicatory decisions sought to be influenced by the defendants were not policy determinations; however, the court did *imply* that such determinations were not policy decisions. 432 F.2d at 762.

V. The Integrity of the Regulatory Process

There was another aspect of the defendants' conduct in *Woods* which the court considered important in determining whether immunity under the *Noerr-Pennington* doctrine should be extended. The court looked upon the defendants' conduct as undermining the efficacy of the state administrative body's function.[89] The court compared this conduct to the defendants' activities in *Trucking Unlimited* in discouraging and blocking access to government agencies.[90] The court seemed concerned that activities which fundamentally detract from the proper functioning of government regulatory bodies should not themselves be given antitrust immunity.[91] This consideration lends itself to a balancing test in which the right of access to the regulatory processes is weighed against the abuse of those same processes to which the defendants are seeking access. By allowing Sherman Act sanction when there is an abuse of a government regulatory process causing injury to competitors, the court helps maintain the integrity of the regulatory scheme while curtailing anti-competitive activity.

If one group's access to a regulatory agency is blocking the access of another group, as the defendants' activity in *Trucking Unlimited* was, then, despite the lack of any direct business injury to those that cannot obtain access, the Sherman Act should apply. This would be in keeping with the rationale of *United States v. Harriss*,[92] in which the Supreme Court upheld the Federal Regulation of Lobbying Act.[93] In that case, the plaintiff alleged that that Act infringed upon the First Amendment freedoms of speech, press and petition.[94] The Court observed that the Act was designed to prevent the "drowning out" of the voice of the people by the voice of special interest groups.[95] In holding that the Act did not infringe upon the First Amendment, the Court distinguished between congressional prohibition of lobbying pressures and the identification of them in order to maintain the integrity of a basic governmental process.[96] For this same reason, when the activities of one business group effectively "drown out" the voice of other businesses before regulatory agencies, as happened in *Truck-*

[89] The *Woods* court stated: "In light of this determination we hold that the abuse of the administrative process here alleged does not justify antitrust immunity." 5 Trade Reg. Rep. (1971 Trade Cas.) ¶ 73,422 at 89,725 (5th Cir. 1971).

[90] Id. at 89,724.

[91] The *Woods* court considered the defendants' filing of false production forecasts as an "attempt to undermine [the formula's] efficacy for anti-competitive purposes," and compared this with the defendants' attempt in *Trucking Unlimited* to "undermine a well defined policy with regard to licensing operators by blocking and discouraging access to the governmental agencies." Id.

[92] 347 U.S. 612 (1954).

[93] 2 U.S.C. §§ 261-70 (1964). This act requires designated reports to Congress from the persons receiving or expending money for lobbying purposes, and also requires professional lobbyists to register with Congress and make specific disclosures.

[94] 347 U.S. at 625.

[95] Id.

[96] Id.

ing Unlimited and to some extent in *Woods*, the Sherman Act might be applied and still not endanger the First Amendment right to petition.[97] In effect then, the Sherman Act would be used to prevent abuses of the regulatory process when private groups use that process to further anti-competitive objectives in such a manner that either the regulatory agency is unable to control these anti-competitive activities or the agency is precluded from more effective regulation of trade by their activities.

In *Woods*, there is no "drowning out" of competitors as in *Trucking Unlimited*, but rather, an undermining of the regulatory scheme when the agency is in such a position that it cannot protect other competitors by verification of the submitted forecasts. When this happens, the scrutiny and approval of business activities by a governmental body is missing from the regulatory scheme and the Sherman Act should be applied. Sherman Act proscription to maintain the proper functioning of the regulatory scheme would be consistent with the broader concern in *Noerr* that government regulation remain viable and responsive to all groups seeking it. In fact, both of these recent decisions indicate that abuse of the regulatory process will not be tolerated, and that the *Noerr-Pennington* defense will not be applied where this abuse exists. While the *Woods* court had little difficulty in determining if the *Noerr-Pennington* immunity should apply, the court in *Trucking Unlimited* had to strain the rationale of *Noerr* to limit the antitrust immunity in a situation where there was a clear abuse of the regulatory process.

Conclusion

These recent decisions have applied limitations to the *Noerr-Pennington* immunity that have greatly reduced its applicability. Yet, these limitations appear, for the most part, consistent with the Supreme Court's reasoning in *Noerr*. *Trucking Unlimited* strained the rationale of *Noerr* to prevent the application of antitrust immunity primarily because it appeared that the adjudicatory processes could and did use the information and opinions provided by the defendants. Its overall effect, however, in eliminating the discouragement to filing applications, and, consequently, providing freer access to smaller truckers is in keeping with *Noerr's* rationale. *Woods* was clearly consistent with *Noerr* and built upon its rationale to develop a new limitation to antitrust immunity. But the main concern of both courts was to prevent abuse of the regulatory process. These courts decided that despite a right of access to or participation in a regulatory process, the Sherman Act will be applied when that right is exercised in a manner that interferes with the business of competitors and at the same time hinders the regulatory process.

As government regulation of trade relies more heavily upon the

[97] Cf. Note, Application of the Sherman Act to Attempts to Influence Governmental Action, 81 Harv. L. Rev. 847, 857 (1968).

industry being regulated to assist in its own regulation, the courts apparently will be very careful not to allow abuses to arise within this close relationship. The new limits of antitrust immunity set out in these recent cases will be helpful in insuring that regulatory agencies are not used to further a group's anti-competitive objectives when those objectives undermine the regulatory process itself.

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