Volume 76
Issue 3 *Dickinson Law Review - Volume 76, 1971-1972*

3-1-1972

Antitrust-Supreme Court Extends Noerr Immunity from Sherman Act to Attempts to Influence Adjudication

William H. Bell

ANTITRUST—SUPREME COURT EXTENDS NOERR IMMUNITY FROM SHERMAN ACT TO ATTEMPTS TO INFLUENCE ADJUDICATION

California Motor Transport Co. v. Trucking Unlimited, 92 S. Ct. 609 (1972).

In *California Motor Transport Co. v. Trucking Unlimited*[1] the Supreme Court held[2] that a conspiracy in restraint of trade which was carried out by a concerted program of litigation could be a violation of the Sherman Act.[3] The suit was brought under the Clayton Act[4] by Trucking Unlimited, an organization representing several trucking companies, against the petitioners, who were another group of truckers operating in California. Common carriers in California operate under licenses granted by the California Public Utilities Commission and the Interstate Commerce Commission. The complaint alleged that the defendants conspired to eliminate competing truckers by concertedly opposing license applications at agency licensing hearings. In order to carry out this scheme, the defendants pooled their resources to establish a fund to finance the litigation. They publicized their intent to oppose every application by competitors regardless of the merits of any case and to appeal adverse agency determinations to the courts. The

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1. 92 S. Ct. 609 (1972), *aff'g*, 432 F.2d 755 (9th Cir. 1970).

2. The appeal to the circuit court and then to the Supreme Court was taken from a dismissal of the complaint for failure to state a cause of action. 1967 Trade Cas. P. 72,298 (N.D. Cal.). Therefore, the allegations of the complaint were taken as true. Trucking Unlimited v. California Motor Transport Co., 432 F.2d 755, 757 (9th Cir. 1970).

3. 15 U.S.C. § 1 (1964).

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

15 U.S.C. § 2 (1964).

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

4. 15 U.S.C. § 15 (1964).

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

object was to make the process of obtaining a license prohibitively expensive and time-consuming, and thereby to deter applications.[5] The defendants contended that the rule of *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*,[6] which held that attempts to influence the passage or enforcement of laws were exempt from the antitrust laws, applied to attempts to influence adjudication in the courts and administrative agencies. The Court agreed, and could see no reason to distinguish attempts to influence adjudication in courts and administrative agencies from attempts to influence the legislative or executive branches of government. However, the Court went on to hold that in this case the conduct of the defendants came within the "sham" exception[7] of the *Noerr* decision, since there was no genuine intent to influence the government. The defendants' primary goal was to harm the petitioners directly, not to influence the government.

I. The Noerr Doctrine

Trucking Unlimited is the latest of a line of cases interpreting a doctrine which had its origin in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[8] decided by the Supreme Court in 1961. *Noerr* involved a complaint brought under the Clayton Act[9] by truckers in Pennsylvania alleging antitrust violations by the defendant, an association of twenty-four railroads operating in that state. The railroads had financed a publicity campaign in order to influence the passage of laws restricting permissible truckloads and increasing the tax assessment on truckers. It was alleged that the sole purpose of the campaign was to destroy the plaintiffs as competitors to the railroads. The Court held for the defendants, because "no violation of the Act can be predicated on mere attempts to influence the passage or enforcement of laws."[10] The Court gave two main reasons for this immunity.[11] The first reason was that to subject such activity to antitrust sanctions would impair the functioning of representative government. The legislative and executive branches cannot act on behalf of the people, if the people are not free to inform them of their wishes.

5. The scheme was successful in deterring applications. Before the defendants began massive intervention in 1961 many applications were made every year and most of them were granted. But after 1961 the number of applications dropped drastically. 57 Cal. L. Rev. 518, 528 (1969). The technique has been used before. *See* Oberst, *Parties to Administrative Proceedings*, 40 Mich. L. Rev. 378, 389 n.45 (1942).

6. 365 U.S. 127 (1961).

7. *See* text accompanying footnote 36, *infra.*

8. 365 U.S. 127 (1961).

9. 15 U.S.C. § 15 (1964).

10. 365 U.S. at 135.

11. In addition to the two reasons given, the court said that it was reluctant to consider solicitation of government action as a violation of the antitrust laws simply because such conduct was so dissimilar to the sort of combinations typically constituting violations (price-fixing agreements, boycotts, and market-division arrangements, for example). 365 U.S. at 136.

> To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.[12]

The second reason which the Court gave for exempting solicitation of the passage or enforcement of laws from the Sherman Act was that such conduct is protected by the first amendment right of petition, and that to construe the Sherman Act as applying to these activities would raise constitutional questions.[13]

The plaintiff in *Noerr*, however, contended that even if attempts to influence government were ordinarily exempt from the Sherman Act, the defendants had forfeited the exemption because their sole purpose in attempting to influence the passage and enforcement of laws was to destroy competition. This contention follows from a line of antitrust cases which established that an illegal (i.e. anticompetitive) purpose renders conduct which is of itself innocent violative of the Sherman Act.[14] This "illegal pur-

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12. *Id.* at 137.

13. *Id.* at 138. The purpose of the right to petition is to promote governmment responsiveness to the electorate and government access to information supplied by those seeking to influence lawmakers. 81 HARV. L. REV. 847, 849 (1968). Thus, eliminating redundancy, the two grounds for exempting attempts to influence government from the antitrust laws are: (1) The Sherman Act was not intended to regulate political activity. (2) Attempts to influence government are protected by the right to petition.

It seems inappropriate to invoke the right to petition to protect a right to intervene in adjudication. The right to petition has traditionally pertained to the legislative and executive branches and not to adjudication. *In re* Stolen, 193 Wis. 602, 216 N.W. 127, 55 A.L.R. 1355 (1927); Brown, *The Right to Petition: Political or Legal Freedom?*, 8 U.C.L,A. L. REV. 729, 732 n.10 (1961). The technique of political pressure (of which petition is a form) is offensive to the dignity of the court. Harper, *Lobbyists before the Court*, 101 U. PENN. L. REV. 1172, 1173 (1953).

The pertinent right would rather appear to be the right to intervene. However, the right of even interested parties to intervene in agency adjudication is not of constitutional stature. *See* Oberst, *Parties to Administrative Proceedings*, 40 MICH. L. REV. 378 (1942). Cases discuss the right of intervention from the standpoint of statutory interpretation rather than constitutional due process. *See, e.g.*, F.C.C. v. KOA, 319 U.S. 239 (1943); F.C.C. v. Sanders Bros., 309 U.S. 470 (1940); Bamberger v. Clark, 390 F.2d 485 (D.C. Cir. 1968); Clarksburg Pub. Co. v. F.C.C., 225 F.2d 511 (D.C. Cir. 1955). Anyway, *Trucking Unlimited* affects only the right of *groups* to intervene, not that of individuals. *Cf.* 57 CAL. L. REV. 518, 541 (1969).

14. United States v. Singer Manufacturing Co., 374 U.S. 174 (1963); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Giboney v. Empire Storage Co., 336 U.S. 490 (1948); American Tobacco Co. v. United States, 328 U.S. 781 (1946); Duplex Printing Press Co. v. Deering,

pose" doctrine applies even where the conduct is protected by first amendment guarantees:

> [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. . . . Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible to enforce laws against agreements in restraint of trade. . . .[15]

Thus, even though solicitation of legislation is protected by the right to petition, a conspiracy in restraint of trade should not be immune from the Sherman Act merely because its anticompetitive purpose is to be effected by a first amendment activity.

The *Noerr* decision in effect created a special exception to the "illegal purpose" doctrine where the illegal purpose is furthered by attempts to influence the passage or enforcement of laws.[16] Such political activity was held to be immune regardless of anticompetitive intent. This special exception was an outgrowth of the "representative government" argument.[17] The representative branches of the government largely depend upon information supplied by the people. Necessarily, those who make their wishes known to legislators will be personally interested in the outcome of legislation, and may hope by presenting their views to influence the passage of laws beneficial to themselves or harmful to competitors. Much of the information upon which lawmakers must act is supplied by persons with such motives.[18] Therefore, to subject solicitation of legislation to antitrust law whenever anticompetitive intent is shown would seriously impair the flow of needed information from the people to their representatives. Thus in this instance the "illegal purpose" doctrine was overshadowed by the need to protect the access of the representative branches to information supplied by the governed.

II. Between Noerr and Trucking Unlimited

The only Supreme Court decision in the line of cases leading from *Noerr* to *California* was *United Mine Workers of America v. Pennington*.[19] In that case, several large unionized coal companies

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254 U.S. 443 (1921); Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952); Lynch v. Magnavox Co., 94 F.2d 883 (9th Cir. 1938); Slick Airways, Inc. v. American Airlines, Inc., 107 F. Supp. 199 (N.J. 1951). *See* 57 Cal. L. Rev. 518 (1969).

15. Giboney v. Empire Storage Co., 336 U.S. 490, 502 (1948); *cf.* Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

16. Trucking Unlimited v. California Motor Transport Co., 432 F.2d 755, 757 (9th Cir. 1970).

17. *See* text accompanying footnote 12 *supra*.

18. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961).

19. 381 U.S. 657 (1965).

together with the U.M.W. approached the Secretary of Labor and influenced him to set a very high minimum wage for employees of contractors selling coal to the TVA, with the intent of driving the small non-union coal companies out of business. The defendants also influenced the TVA to curtail spot market purchases of coal, which were mostly exempt from the minimum wage law. The Court held that these activities were not subject to antitrust liability because they came within the *Noerr* exemption from the Sherman Act. The exemption in *Noerr* pertained to attempts to influence the "representative" branches—the legislature and the executive. Since the Secretary of Labor and the TVA are part of the executive and legislative branches, respectively, the actual disposition of *Pennington* by the Supreme Court did not enlarge the scope of the *Noerr* immunity. However, language in the *Pennington* opinion raised the question of whether the Court supposed the *Noerr* exemption to apply to attempts to influence *any* government official, whether or not he was a member of the executive or legislative branches: "*Noerr* shields from the Sherman Act a concerted effort to influence public officials. . .."[20] Considering that judges are government officials, this language in *Pennington* might be construed as impliedly including attempts to influence the *judiciary* as being within the scope of *Noerr*.

The post-*Pennington* cases and commentators whittled away at the exemption which *Noerr* and *Pennington* had set up. Later cases established that the *Noerr-Pennington* immunity did not extend to situations where the attempt to influence government officials was carried out by threat,[21] or by supplying deliberately false information to a regulatory agency,[22] or where the government official "influenced" was in fact a party to the conspiracy in restraint of trade.[23]

A. Interference with Administrative Application of Previously Made Rules Not Protected by Noerr Immunity.

In *George R. Whitten, Jr., Inc. v. Paddock Pool Builders,*

20. 381 U.S. at 670; *see* 12 B.C. IND. & COM. L. REV. 1133, 1143 (1971); 81 HARV. L. REV. 847 (1968).

21. Sacramento Coca-Cola Bottling Co. v Chauffeurs, 440 F2d 1096 (9th Cir. 1971).

22. Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971); see text accompanying footnotes 39-43 *infra.*

23. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Harman v. Valley Nat'l Bank of Arizona, 339 F.2d 564 (9th Cir. 1964); 81 HARV. L. REV. 847, 854-56 (1968).

Inc.,[24] decided by the First Circuit Court of Appeals in 1970, the defendant had attempted to influence a government official who set the specifications for swimming pool gutters in public pools to set specifications that would effectively eliminate the equipment of competitors from consideration. The defendant invoked the *Noerr-Pennington* exemption, which it contended protected attempts to influence any government official. The court held instead that the exemption applied only to attempts to influence government policy-makers, and did not insulate attempts to influence minor functionaries who did not make policies, but only carried them out.

> [T]he efforts of an industry leader to impose his product specifications . . . on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws. By "enforcement of laws" we understand some significant policy determination in the application of a statute, not a technical decision about the best kind of weld to use in a swimming pool gutter.
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> *Noerr* stressed the importance of free access to public officials vested with significant policy-making discretion. We doubt whether the court, without expressing additional rationale, would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings when the case turned on other issues.[25]

In *Woods Exploration & Producing Co., v. Aluminum Co. of America*[26] and *Hecht v. Pro-Football, Inc.*[27] the distinction for *Noerr* immunity purposes between attempts to influence policy-making and attempts to influence decisions which merely implement policy was reiterated. The *Woods Exploration* case involved an attempt to influence a regulatory administrative agency which had a formula for allocating allowable production of natural gas from a certain gas field. The defendant "influenced" the agency's allocations by supplying it with false information. The court remarked that while the process of initially arriving at a formula for allocations was "political" in the *Noerr* sense, the subsequent im-

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24. 424 F.2d 25 (1st Cir. 1970).

25. *Id.* at 33; *cf.* 81 HARV. L. REV. 847 (1968), which argued that the criterion for deciding when to apply the *Noerr-Pennington* immunity was whether the government decision sought to be influenced was made for political considerations or purely economic ones. For example, in *Pennington*, the decision of the Secretary of Labor to raise the minimum wage for coal miners was a policy decision made with political considerations, and therefore *Noerr* would immunize the attempt to influence this decision; on the other hand, the decision by TVA officials to curtail spot purchases of coal was not political, because the TVA is required by statute to award contracts on purely economic criteria, 16 U.S.C. § 831(h)(b) (1964), so the attempt to influence this decision would not be exempt from the antitrust laws. 81 HARV. L. REV. at 853.

26. 438 F.2d 1286 (5th Cir. 1971).

27. 444 F.2d 931 (D.C. Cir. 1971).

plementation of the formula was not.[28] Presumably, therefore, if the defendants had attempted to influence the original policy-making by submitting their views at the rule-making proceedings in which the formula was adopted, they would have been protected by *Noerr*. Thus, once an agency has promulgated a policy by rule-making, any subsequent attempt to influence the application of that rule would not be protected by *Noerr* immunity.[29]

B. Attempts to Influence Adjudication not Protected by Noerr Immunity

Both *Woods* and *Hecht*,[30] which held that the *Noerr* exemption did not apply to attempts to influence the implementation of policy, remarked that the attempt to influence agency adjudication in *Trucking Unlimited* was an instance of an attempt to influence the mere implementation of pre-existing policy. Instead of lobbying the Public Utilities Commission to change its liberal policy toward granting licenses, the *Trucking Unlimited* defendants attempted to thwart that policy by opposing license applicants at agency adjudications.[31] Indeed, adjudication under a rule or statute is by nature policy-implementation, not policy-making. Therefore, if policy-implementation is not protected by the *Noerr* immunity, attempts to influence adjudication under a rule or statute would necessarily be unaffected by *Noerr*.

The opinion of the Ninth Circuit Court of Appeals in *Trucking Unlimited v. California Motor Transport*[32] (from which this appeal was taken to the Supreme Court) stated that not only were attempts to influence adjudication under a rule or statute outside the scope of *Noerr*, but that attempts to influence *any* adjudication, in courts or administrative agencies, were not covered by the *Noerr* immunity. The court reasoned that the basic consideration which had led the Supreme Court in *Noerr* to grant an exemption from the antitrust laws was not present in *Trucking Unlimited*. *Noerr* had exempted attempts to influence the passage or enforcement of laws, which would otherwise have been in violation of the Sherman Act, in the interest of protecting the flow of information

28. 438 F.2d at 1297 (5th Cir. 1971).
29. *Id.*
30. 444 F.2d 931 (D.C. Cir. 1971). See text accompanying note 27 *supra*.
31. Hecht v. Pro-Football, Inc., 444 F.2d 931, 942 (D.C. Cir. 1971); Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286, 1297 (5th Cir. 1971); 57 CAL. L. REV. 518, 522 (1969).
32. 432 F.2d 755 (9th Cir. 1970).

between the people and their representatives in government.[33] But this "representative government" justification does not apply when the attempt to influence government officials is directed at the judiciary, which, unlike the executive and the legislature, is not a "representative" branch.

> The overwhelming public interest in uninhibited communication between the people and their legislators and law enforcement officials that justifies immunizing joint efforts to influence those authorities from antitrust liability despite either wrongful purpose or the use of distortion and deception, does not apply to presentations to judges and administrative officials in the course of adjudicative proceedings. Unlike legislators and law enforcement officials, judicial and administrative adjudicators do not act in a representative capacity. There is a marked difference between the processes by which they arrive at decisions, the materials upon which they may properly rely, and the atmosphere consistent with effective performance of their respective functions.[34]

Therefore the court of appeals in *Trucking Unlimited* excluded from the operation of *Noerr* any attempt to influence adjudication, whether in the courts or in administrative agencies.

III. The Effect of Trucking Unlimited; Expansion of the Sham Exception

Although the Supreme Court affirmed the decision of the court of appeals in *Trucking Unlimited*, the reasoning behind the disposition was altered considerably. The Supreme Court said that the *Noerr* exemption covered the activities of the defendants, thus refusing to distinguish between attempts to influence the passage or enforcement of laws and attempts to influence adjudication.[35] The Supreme Court thereby stood in direct opposition to the trend in post-*Noerr-Pennington* cases toward limitation of the scope of the antitrust immunity to attempts to influence policy decisions in nonadjudicative proceedings. However, the Court held that the

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33. *See* text accompanying notes 12, 16, 17, 18 *supra*.

34. Trucking Unlimited v. California Motor Transport Co., 432 F.2d 755, 759 n.6 (9th Cir. 1970). On the other hand, in the case of agency adjudication under a standard of public convenience and necessity, information provided by intervening third parties may often be useful. This is demonstrated by the fact that in *Trucking Unlimited* the P.U.C. and I.C.C. on many occasions changed their determination as a result of the defendants' interventions. California Motor Transport Co. v. Trucking Unlimited, 67 Trade Cas. ¶ 72,298 at 84,744. It has been put, therefore, that the interest in preserving access of interested third persons to adjudication of the public convenience and necessity supports an extension of *Noerr* immunity to attempts to influence such adjudication by intervention. *Id.*; 12 B.C. Ind. & Com. L. Rev. 1133, 1143; 42 Notre Dame Lawyer 71, 83 (1966).

35. 92 S. Ct. at 912. The concurring opinion of Mr. Justice Stewart seems to assume that the majority opinion had distinguished between attempts to influence administrative and judicial action as opposed to legislative or executive action.

defendants in the instant case forfeited their *Noerr* immunity because their conduct fell under the "sham" exception.

A. The "Sham" Exception

The Court in *Noerr* remarked that the exemption from prosecution of attempts to influence legislation would not apply where there was no genuine intent to influence the government, but where the intent was rather to harm competitors directly, instead of through procuring government action.

> 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.[36]

The Court said in *Trucking Unlimited* that the defendants' scheme fell under this "sham" exception.[37] The *Trucking Unlimited* defendants did not intend to prevent competitors from obtaining licenses by defeating their applications on the merits. Every application was opposed, regardless of the merits of the cases.[38] The object was to deter application; any success in the litigation itself was serendipity. The ostensible attempt to influence adjudicatory tribunals was therefore really only a form of direct interference. Therefore, although *Trucking Unlimited* held that conspiracies in restraint of trade which attempt to influence the courts or agency adjudication are protected from prosecution by the *Noerr* exemption, the defendants in this case were not immune because they were not genuinely trying to influence those tribunals and so were within the "sham" exception to *Noerr*.

B. Abuse of the Adjudicative Process

The *Trucking Unlimited* opinion suggested a second reason for taking the case out of the *Noerr* exemption. If illegal or unethical methods are used to influence adjudication, there can be no immunity from the antitrust laws.[39] Although the Court said in

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36. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961).
37. 92 S. Ct. at 612.
38. *Id.*
39. *See, e.g.*, Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965) (fraudulent misrepresentation to the Patent Office); Sacramento Coca-Cola Bottling Co. v. Chauffeurs, 440 F.2d 1096 (9th Cir. 1971) (coercion); Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971) (fraudulent mis-

Noerr that the defendants' use of an unethical and fraudulent advertising technique to influence the state legislature did not forfeit their exemption from the Sherman Act, because the Sherman Act was not intended to police political ethics,[40] their reasoning does not apply where the attempt is to influence adjudication rather than legislation. Adjudication is not a political process, and should not be permitted to suffer the indignities tolerated in the political arena, as the Court admonished in *Trucking Unlimited*.

> Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. . . . One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. . . . Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."[41]

Furthermore, regulating agencies are often dependent upon information supplied by the regulated industry, and rely upon the truthfulness of such information to a much greater degree than legislators rely upon the truthfulness of lobbyists.[42] Therefore, the consequence of lying to an adjudicating regulatory agency or to a court is loss of the *Noerr* exemption,[43] even though similar tactics when used to influence the legislative or executive branches do not affect antitrust immunity.

It is unclear, however, what conduct of the defendants the *Trucking Unlimited* opinion referred to by the word "misrepresentations." There was no allegation that the *Trucking Unlimited* defendants misrepresented facts to the agencies or courts. Apparently the Court had in mind merely that the defendants had intervened in hearings and taken appeals in bad faith, regardless

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representation to a regulating agency); Costilio, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333 (1967).

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

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

Id. at 141.

41. 92 S. Ct. at 613.

42. *See* Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971); 12 B.C. IND. & COM. L. REV. 1133, 1143 (1971); Costilio, *Antitrust Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333, 349 (1967).

43. California Motor Transport Co. v. Trucking Unlimited, 92 S. Ct. 609 (1972); Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971).

of the merits; when a party argues a cause which he knows has no merit, he is in a sense misrepresenting to the tribunal that there is a bona fide dispute of fact or law. Such conduct would be the antitrust equivalent of abuse of process, except the consequential loss of antitrust immunity occurs only after "a pattern of baseless claims emerge" rather than from an isolated instance.[44] Thus in *Trucking Unlimited* the concept of "abuse of the adjudicative process" as resulting in forfeit of *Noerr* immunity, which in previous cases had been applied only where there was positive misrepresentation or coercion,[45] was extended to cover large-scale institution of baseless claims, not involving any positive fraud or conduct illegal per se.[46]

C. *Expansion of the "Sham" Exception*

In the wake of *Trucking Unlimited* it seems that joint attempts to influence *any* government official for anticompetitive purposes are exempt from the Sherman Act, except where the influence is sought through falsification of facts to a regulatory agency or court, or where the attempt is only a "sham," hiding an intent to cause direct injury. As for the limitation of *Noerr* immunity to attempts to influence policy-formulation, as opposed to policy-implementation, *Trucking Unlimited* casts doubt upon the viability of this restriction since the licensing hearings at which the defendants intervened involved merely specific application of previously-formulated policy.[47]

In compensation, however, for this broad expansion of the *Noerr* immunity to cover non-political activity (intervention at

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44. California Motor Transport Co. v. Trucking Unlimited, 92 S. Ct. 609, 613 (1972).

45. Sacramento Coca-Cola Bottling Co. v. Chauffeurs, 440 F.2d 1096 (9th Cir. 1971); Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971). *Cf.* Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965). *See also* Costilio, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense,* 66 MICH. L. REV. 333 (1967).

46. The practical importance of this extension of the "abuse of adjudicative process" exception to *Noerr* immunity is reduced, however, by the consideration that whenever it is shown that the defendant had knowingly brought baseless claims on a wide scale, antitrust immunity would anyway almost certainly be stripped away by the "sham" exception to *Noerr.* The "baseless claim" rule is redundant as to the "sham" exception because the essence of "sham" conduct is lack of real intent to influence the government; where claims known to be worthless are pressed, obviously intent to influence the court or agency is absent. *See* text accompanying note 36 *supra.*

47. *See* text accompanying footnote 31 *supra.*

agency adjudication), *Trucking Unlimited* increased the effectiveness of the "sham" exception. As it appeared in *Noerr*, the "sham" exception was of limited applicability. The Court said in that case that although the plaintiffs had suffered direct injury (loss of good will) through the publicity campaign conducted by the defendants, the defendants' conduct did not fall under the "sham" exception—even if the defendants *intended* such direct injury to occur—unless the plaintiffs could also prove that the defendants had no genuine intent to influence the legislature.[48] But in *Trucking Unlimited* the Court held that the defendants' interventions were a "sham" because direct injury was intended, even though it was not alleged that the defendants did not also hope to influence the agency decisions.[49] Thus the *Trucking Unlimited* opinion eliminated the necessity of proving the absence of any expectation of influencing the government, a requirement which otherwise would be a great obstacle. It is apparently sufficient, therefore, in order to show a "sham," to prove that the primary intent of the attempt to influence government action is to cause direct injury, even though the conspirators may also really have had some hope of influencing the government.

IV. Conclusion

Trucking Unlimited purports to be an application of the reasoning of *Noerr*, but *Noerr* does not support the conclusions reached in *Trucking Unlimited*. *Noerr* created an exception to the doctrine that conduct innocent of itself is rendered violative of the Sherman Act by an anticompetitive intent, in the case where an anticompetitive purpose is to be achieved by influencing the representative branches of government. The exception was justified by the need to preserve unimpaired the flow of information between the people and their representatives in government. Since adjudication is not a representative process, however, this consideration did not exist in *Trucking Unlimited*. Therefore, the "illegal purpose" doctrine, it would be expected, should have governed the decision in *Trucking Unlimited*—the alleged anticompetitive purpose of the defendants rendering their otherwise legal intervention violative of the antitrust laws.[50]

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48. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961). Proving absence of any intent to influence government action would be difficult. 57 Cal. L. Rev. 518, 528 n.17 (1969).

49. The defendants' interventions in *Trucking Unlimited* were often successful, 12 B.C. Ind. & Com. L. Rev. 1133, 1143 (1971), so it is likely that they had hoped to win at least some of the time.

50. It is well established that utilizing litigation in a joint effort to restrain trade can be a violation of the Sherman Act. Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965); United States v. Singer Manufacturing 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).

Nevertheless, although the *Noerr* rationale does not support it, the *Trucking Unlimited* decision is not entirely unfelicitous. Agency adjudication is not a "representative" process, but where such adjudication is conducted under a standard of public convenience and necessity, protecting the access of the adjudicators to such relevant information as may be provided by interested third parties is in the public interest. Regulatory schemes are often dependent upon information supplied by the regulated industry, and it may be well to insulate the symbiosis existing between agency and industry from the operation of the antitrust laws.[51] On the other hand, there is no such reason for immunizing intervention in, or instigation of, ordinary litigation in the courts between private parties. Therefore, it is submitted that future cases should not attribute to *Trucking Unlimited* the broad interpretation of which its language is susceptible, but should confine its effect to an extension of *Noerr* immunity only to attempts to influence agency adjudication, and not to attempts to influence ordinary litigation in the courts.

WILLIAM H. BELL

51. See 12 B.C. IND. & COM. L. REV. 1133, 1143 (1971).