California Motor Transport Co. v. Trucking Unlimited: A New Route for Noerr-Pennington and the Sham Exception

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employee status has a recurring annual nature. In the subtle area of motivation, the nature of the status must be taken into account. In the final analysis, it should be the taxpayer's choice of which status gave rise to the bad debt. Corroborating testimony certainly must be present, but when circumstances surrounding the creation of the debt indicate that the dominant and primary motivation for the debt was the interest of the taxpayer in his trade or business, then the business bad debt deduction must be allowed, even when secondary considerations of an investment nature also exist.

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California Motor Transport Co. v. Trucking Unlimited: A New Route for *Noerr-Pennington* and the Sham Exception

Plaintiffs filed an antitrust class action on behalf of fourteen common carriers operating in California and other states against nineteen other trucking firms with similar operations. The complaint alleged that the defendants had conspired to restrain trade, monopolize the common carrier business,[1] and put their competitors out of business, in violation of the Sherman Act.[2] Plaintiffs sought injunctive relief and treble damages under the Clayton Act.[3] Both parties to the suit were regulated by the California Public Utility Commission and the Interstate Commerce Commission.[4] Plaintiffs alleged that the defendants formed a special trust fund for the purpose of instituting a program of continuous and systematic opposition to all requests and applications for operating rights submitted to these regulatory agencies by the plaintiffs. When a ruling unfavorable to defendants was rendered, it was contended that they continued their opposition by judicial appeal. The scheme of opposition was alleged to have been carried out regardless of the merits of the application or the competitive interest of the defendants. The plaintiffs contended that as a result of this scheme they were deterred from filing and pursuing applications with the regulatory agencies and the courts because of the expense involved in answering the challenges of defendants, and thus competition was decreased. The complaint was dismissed by the district court[5] for failure to state a claim upon which relief could be granted.[6] The court held that the activities of the defendants fell within the exception to the Sherman Act enunciated in *Eastern*

[1] 1967 Trade Cas. ¶ 72,298, at 84,739 (N.D. Cal. 1967).

[2] 15 U.S.C. §§ 1-2 (1970). Section 1 provides: "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 . . . ." Section 2 provides: "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 . . . ."

[3] 15 U.S.C. § 15 (1970).

[4] Carriers operating in interstate commerce must obtain a certificate of convenience and necessity from the ICC in addition to any required by the state regulatory agency. The routes and rates are regulated by both agencies.

[5] 1967 Trade Cas. ¶ 72,298, at 84,739 (N.D. Cal. 1967).

[6] FED. R. CIV. P. 12(b)(6).

Railroad Presidents Conference v. Noerr Motor Freight, Inc.[7] The Ninth Circuit reversed,[8] holding the *Noerr* doctrine inapplicable; and, in the alternative, if it were applicable the defendant's actions were not immune as they constituted a direct restraint of trade, rather than an indirect restraint through influencing governmental action. The United States Supreme Court granted certiorari.[9] *Held, affirmed*: The right of free and unlimited access to regulatory agencies and the courts may be invoked for the purpose of eliminating competition, but this right is not immune from regulation by the antitrust laws when it is used in the furtherance of a conspiracy to deter others from exercising that same right of access. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

I. THE NOERR-PENNINGTON DOCTRINE: AN EXTENSION OF ANTITRUST IMMUNITY

The Antitrust Act. The Sherman Act seeks to promote "free and unfettered competition as the rule of trade."[10] It was intended to prevent all contracts, combinations, and conspiracies which restrain or monopolize trade.[11] The Clayton Act provides a private remedy for violation of the proscriptions of the Sherman Act by allowing recovery of treble damages.[12] It has been held that the intent of the Congress was "to go to the utmost extent of its constitutional power in restraining trusts and monopoly agreements."[13] The Act, however, has been construed and applied using the standard of reasonableness.[14] The scope of the Act has further been limited by statutory exemptions[15] and judicially implied exceptions.[16]

Development of the Noerr-Pennington Doctrine. The major exception to the proscriptions of the Sherman Act originated in *United States v. Rock-Royal*

[7] 365 U.S. 127 (1961). "No violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Id.* at 135.

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

[9] California Motor Transport Co. v. Trucking Unlimited, 402 U.S. 1008 (1970).

[10] Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

[11] 15 U.S.C. §§ 1-2 (1970); *see* note 2 *supra.*

[12] 15 U.S.C. § 15 (1970).

[13] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 538 (1944). *See also* United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 298 (1945); Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940).

The broad scope of the Sherman Act as set forth in §§ 1 and 2 is said to "embrace every conceivable act which could possibly come within the spirit or purpose of the law, without regard to the garb in which such acts are clothed." American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946). The Court further held that it is irrelevant that the means used to accomplish an unlawful objective are in themselves wholly innocent, as they come within the prohibitions of the Act when used to further a conspiracy which it forbids. Nor is it necessary that the power to restrain trade which is derived from the unlawful conspiracy actually be exercised in order for them to be in violation of the Sherman Act, *Id.* at 809-10.

[14] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); *see* Standard Oil Co. v. United States, 221 U.S. 1, 59-62 (1911), for discussion by the Court of the "rule of reason" as the standard that is used to apply §§ 1 and 2 of the Sherman Act.

[15] *See generally* Pogue, *The Rationale of Exemptions from Antitrust*, 19 ABA ANTITRUST SECTION 313 (1961); *see also id.* at 330-54 for a list of the exemptions.

[16] Note, *The Brakes Fail on the Noerr Doctrine*, 57 CALIF. L. REV. 518, 519 n.13 (1969).

Co-operative, Inc.[17] and *Parker v. Brown.*[18] In these two cases the Supreme Court held that governmental action pursuant to valid legislation which results in a restraint of trade or the creation of a monopoly is immune from the prohibitions of the Act, as it is not within the purpose of the Act to regulate the acts of government.

The Supreme Court, from the premise of *Rock-Royal* and *Parker*, carved out a yet broader exception to the Sherman Act in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[19] *Noerr* granted antitrust immunity to combinations of individuals who were seeking to influence the legislature or executive to take action similar in nature to that protected by *Rock-Royal* and *Parker*. The holding of *Noerr* was a logical extension of the *Rock-Royal* and *Parker* principle.

In *Noerr* a group of railroads conspired to restrain and monopolize trade in the long-distance heavy-haul business by carrying out an intensive campaign of publicity intended to harm the image and customer relations of the plaintiff trucking lines. Through lobbying, the railroads sought to secure passage of legislation favorable to themselves and unfavorable to the trucking industry.[20] The *Noerr* Court initially considered the applicability of the Sherman Act on the premise that "where a restraint upon trade is the result of valid governmental action, as opposed to private action, no violation of the Sherman Act can be made out."[21] The Court concluded that there was an "essential dissimilarity between an agreement to jointly seek legislation or law enforcement and the agreements traditionally condemned by Section 1 of the Sherman Act."[22] In addition to "essential dissimilarity," the Court based its conclusion on two other propositions: (1) As the government does have within its authority the power to enact and enforce legislation which restrains trade or creates a monopoly, to hold that the people represented by the government cannot, because they have a financial interest in its actions, "inform the government of their desires 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."[23] (2) To impute such a

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[17] 307 U.S. 533 (1939).

[18] 317 U.S. 341 (1943). The court concluded:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 350-51.

[19] 365 U.S. 127 (1961).

[20] The railroads persuaded the Governor of Pennsylvania to veto legislation known as the Fair Truck Bill, which would have permitted the truckers to carry heavier loads. *Id.* at 130. In addition, they sought to procure the passage of state laws regulating the taxes imposed upon heavy trucks, and to encourage the strict enforcement of such laws. *Id.* at 131.

[21] *Id.* at 135. The Court cited *Parker v. Brown* for this proposition.

[22] *Id.* at 136. The Court noted that combinations violative of the Sherman Act are "ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market division agreements and other similar arrangements." *Id.*

[23] *Id.* at 137.

purpose to the Sherman Act would raise the question of invasion of the first amendment right to petition the government.[24]

The Court in *Noerr* did, however, note that situations could arise in which attempts to interfere directly with a competitor might be cloaked in the guise of mere solicitation of governmental action. In such a situation the Sherman Act would be applicable.[25]

In 1965 the Supreme Court applied and extended the *Noerr* principle in *United Mine Workers v. Pennington.*[26] The defendants in *Pennington* were alleged to have violated the Sherman Act by conspiring to seek the imposition by the Secretary of Labor of a minimum wage for employees of companies selling coal to the TVA,[27] and conspiring to persuade the TVA not to purchase coal from companies which were exempt from the wage. The Court reiterated the holding of *Noerr* and broadened its scope:

> (1) Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. *Such conduct is not illegal either standing alone or as a part of a broader scheme itself violative of the Sherman Act.*
> (2) *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.[28]

The *Noerr-Pennington* doctrine, as developed in its parent cases, is a broad grant of antitrust immunity for lobbying designed to influence the passage and enforcement of legislation. The broad language of the Court in *Noerr* and *Pennington* has led to varied results as the lower courts have granted the immunity to activities which bear little similarity to those of *Noerr* and *Pennington.*[29] The reach of the doctrine is a question not clearly answered by *Noerr* or *Pennington.*

II. THE "SHAM EXCEPTION"

While holding in *Noerr* that lobbying was immune from the proscriptions of the Sherman Act, the Supreme Court recognized the possibility of abuse of this immunity:

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[24] *Id.* at 138. "The right to petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course lightly impute to Congress an intent to invade those freedoms." *Id.*

[25] *Id.* at 144. *See* text accompanying note 32 *infra. See also* Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333, 352 (1967); Comment, *Lobbying Before Licensing Agencies: Noerr-Pennington Re-assessed*, 51 B.U.L. REV. 90, 104-05 (1970).

[26] 381 U.S. 657 (1965).

[27] *Id.* at 660. The defendants in the UMW and the large coal companies felt that there was over-production at this time and that the situation could be corrected by placing control of the market in the hands of a few large companies. Toward this end of market control, they persuaded the Secretary of Labor to set a minimum wage which would make "it difficult for small companies to compete in the TVA term contract market." *Id.* The Secretary of Labor is empowered to set a minimum wage in industries contracting with the Government by the Walsh-Healey Act, 41 U.S.C. § 35 (1970). The defendants then met with the TVA to persuade it to eliminate its spot market purchases of coal, as many of the companies from whom these purchases were made were exempt from the minimum wage set by the Secretary of Labor. *Id.* at 660-61. *See* Comment, *Labor's Antitrust Exemptions After Pennington and Jewel Tea*, 66 COLUM. L. REV. 742 (1966); Comment, *Labor's Antitrust Exemption*, 55 CALIF. L. REV. 254 (1967), for antitrust implications concerning organized labor.

[28] *Id.* at 670 (emphasis added).

[29] *See* Comment, *Whitten v. Paddock: The Sherman Act and the "Government Action" Immunity Reconsidered*, 71 COLUM. L. REV. 140, 150-56 (1971).

> 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.[30]

The Court thus established the test for applicability of the "sham exception" as being whether the interference was direct or indirect. The campaign of lobbying and publicity conducted in *Noerr* was not such a sham.[31] The railroad's campaign did not, however, measure up to "the ethical standards generally approved in this country,"[32] but as the Court pointed out: "Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity . . . ."[33] The truckers in *Noerr* were injured directly by this campaign, but there was a lack of evidence indicating that "the railroads had attempted directly to persuade anyone not to deal with the truckers."[34] Whatever injury they suffered was "an incidental effect of the railroads' campaign to influence governmental action."[35] The *Noerr* Court concluded that so long as the lobbying campaign was a genuine effort to influence governmental action the basis for the grant of immunity was present, and would not be affected by the incidental injury of a competitor.[36] The factor which the Court considered to be determinative in applying the direct-indirect interference test was whether there was a genuine effort to influence legislation. The fact that the railroads intended the incidental injury to be inflicted was not relevant. This is entirely consistent with the holding in *Pennington* that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."[37]

The "sham exception" as enunciated by the Supreme Court in *Noerr* utilizing the direct-indirect interference test has generally not been applied by the lower courts. Although one case did apply the direct-indirect interference test, it concluded the conduct was genuinely aimed at influencing governmental action, thus it was not a "mere sham."[38]

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[30] 365 U.S. at 144.

[31] *Id.* The Court said that "each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system . . . ." *Id.* at 145.

[32] *Id.* at 140. The campaign utilized the "third party technique," whereby propaganda actually circulated by a party in interest is made to appear to be the reaction of an independent source. *Id.*

[33] *Id.*

[34] *Id.* at 142.

[35] *Id.* at 143. The injuries sustained by the truckers were to their "relationships with the public and with customers." The net result was the overall weakening of the truckers' competitive position.

[36] The Court noted that it is inevitable that such injuries would occur in a lobbying campaign and that the party conducting the campaign would know of and probably be pleased by the injury. "To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns . . . and this has not been done by anything in the Sherman Act." *Id.* at 143-44.

[37] 381 U.S. at 670.

[38] Schenley Indus., Inc. v. N.J. Wine & Spirit Wholesalers Ass'n, 272 F. Supp. 872, 883-86 (D.N.J. 1967). The plaintiffs contended that conduct violative of state law rendered the defendants actions a sham, but the Court rejected this contention; and after applying the direct-indirect interference test concluded that the "sham exception" was inapplicable. *Id.*

III. CALIFORNIA MOTOR TRANSPORT CO. V. TRUCKING UNLIMITED

The United States Supreme Court resolved two issues in *Trucking Unlimited.* First, did the *Noerr-Pennington* doctrine apply when an effort was made to influence a court or an administrative agency which was functioning in an adjudicative capacity? Second, if the *Noerr-Pennington* doctrine applied to judicial and administrative proceedings, what was to be the role of the "sham exception"? The Court quickly disposed of the first question by answering in the affirmative:

> [I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors.[39]

The Court used the same two-pronged rationale applied in *Noerr* in reaching this conclusion.[40]

The holding settled the controversy that arose from the language used in *Noerr* which indicated that the doctrine applied only when legislative or executive action was sought.[41] The Court held that the right to petition extended to all branches of government. The Court, by so holding, avoided the complex problem of determining when an agency is acting in a policy-making capacity (legislative) and when it is acting in an adjudicative capacity (quasi-judicial).[42]

Having resolved the first issue, the Court turned to the plaintiff's allegations to determine if, taken at face value, they stated a claim upon which relief could be granted. In making this determination, the Court evaluated the applicability of the "sham exception" to activities otherwise immune from the proscriptions of the Sherman Act in light of their extension of *Noerr-Pennington.* The Court considered critical the allegations "that the power, strategy, and resources of the defendants were used to harass and deter the plaintiffs in their use of administrative and judicial proceedings so as to deny them 'free and unlimited access' to those tribunals."[43]

The defendants relied upon the holding of *Pennington* that "*Noerr* shields

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[39] 404 U.S. at 510-11.

[40] *Id.* at 510. *See* notes 23 and 24 *supra,* and accompanying text.

[41] "[T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action . . . ." 365 U.S. at 136. It has been suggested that NAACP v. Button, 371 U.S. 415 (1963), stands for the proposition that the right to petition extends to all branches of the government. Note, *Use of the Judicial or Administrative Adjudicatory Process Should be Exempt from the Antitrust Laws,* 31 MD. L. REV. 174, 180 (1971).

[42] *See* the opinion of the Ninth Circuit, 432 F.2d at 758, *noted in* 22 SYRACUSE L. REV. 1151 (1971). The Ninth Circuit held *Noerr-Pennington* immunity to be inapplicable to agency and judicial proceedings. The court reasoned that the defense was inapplicable because the fundamental reason for the defense, the need to insure access to information and private opinion, is not relevant in the adjudicatory process. The courts and agencies act in an adjudicatory capacity. They do not enact or enforce laws restraining trade, as do the legislature and executive. Thus, there is no valid reason to "limit the reach of the Sherman Act in order to protect access of courts and agencies engaged in adjudicative functions to information and opinion relevant to determinations they have no power to make." 432 F.2d at 758-59.

[43] 404 U.S. at 511.

from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."[44] The Court found this holding inapplicable to the plaintiffs' allegations that the defendants sought to deny them access to the agencies and courts. In *Trucking Unlimited* the Court was actually looking at a different level of intent from that to which the language in *Noerr* was addressed. In *Noerr* the Court was referring to the intent to lessen competition, which was the purpose of the campaign. The Court in *Trucking Unlimited* was referring to the intent to interfere with the administrative and judicial processes, and thereby achieve a lessening of competition.[45] The "intent or purpose" of a party seeking *Noerr-Pennington* immunity is controlling only in a situation where it is alleged that there is a direct interference. Had the defendants, with the intent to lessen competition, sought to change the policy of the regulatory agencies of freely granting operating rights,[46] the "sham exception" would not have been applied. Such activities would have been indirect interference falling behind the protective shield of *Noerr-Pennington.*

After distinguishing the allegations of Trucking Unlimited, the Court attempted to establish guidelines for application of the "sham exception" to cases involving administrative and judicial processes. In adapting the *Noerr-Pennington* defense to these processes, the Court recognized that there were inherent differences between the legislative and executive processes which operate in the political arena, and the administrative and judicial processes. The Court further recognized that activities condoned in the political arena "may corrupt the administrative and judicial processes and . . . result in antitrust violations."[47] Thus, the holding that the ethics of conspirators in the political sphere is legally irrelevant to the application of *Noerr-Pennington* immunity[48] does not hold true for the application of that immunity in the administrative or judicial setting. The integrity of these processes is dependent upon the ethics of those who invoke them. Misrepresentation and puffing of claims which are accepted in the political system would constitute an abuse of the process in the judicial setting. As an example, the Court cited the persistent voicing of baseless claims.[49]

The Court recognized the difficulty facing the factfinder in deciding when a party's activities were an abuse of process because they denied competitors free and unlimited access to the administrative and judicial systems. However, the Court held that once this conclusion was drawn "the case is established

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[44] *Id.*

[45] *Id.* at 511-12.

[46] The state agency encouraged competition in the common carrier business by "freely granting, and approving the transfer of, certificates of public convenience and necessity. Until 1963 it was the policy of the Interstate Commerce Commission to register any certificate issued by the state agency automatically, without further hearing." 432 F.2d at 762.

[47] 404 U.S. at 513.

[48] 365 U.S. at 140-42. The lower courts in *Noerr* had in part based their application of the Sherman Act upon the unethical conduct of the railroads. The particular activities being the use of the so-called "third party technique." *See* note 32 *supra*, and accompanying text. The Supreme Court rejected for all purposes the consideration of the ethics of the parties, as their actions were political activity, which is not within the scope of the Sherman Act. *Id.*

[49] 404 U.S. at 513.

that the abuse of those processes produced an illegal result."[50] The result of denying access by abusing the agency and judicial processes, therefore, cannot acquire antitrust immunity in the guise of political expression. To do so would allow "First Amendment Rights . . . to be used . . . [to achieve] 'substantive evils' which the legislature has the power to control."[51]

Thus, in *Trucking Unlimited* the Court found that if the plaintiff's allegations are proved the antitrust laws will have been violated, as the allegations "[o]n their face come within the 'sham exception' . . . as adapted to the adjudicatory process."[52] The defendants would have gone beyond their first amendment right to use the processes of the agencies and courts to defeat acquisition of operating rights by the plaintiffs if it was proven that their real intention was to directly interfere with their competitors by denying them access to these processes.[53]

IV. CONCLUSION

The extension of *Noerr-Pennington* immunity to agency and judicial proceedings was fully in accord with the purposes of the doctrine set forth in *Noerr*. The Court in *Trucking Unlimited*, however, seems to have gone beyond both the purpose of the Sherman Act and the allegations of the plaintiffs in adapting the sham exception to the adjudicative process. The Court made the determination required by *Noerr* for application of the sham exception, *i.e.*, that there was not a genuine effort to influence governmental action, rather there was an attempt to directly interfere with a competitor. In addition to this test, the Court went on to find abuse of process; citing perjury, fraud, bribery, and misrepresentation as examples. Had the Court confined its inquiry to the allegations necessary to find a direct interference, rather than basing its decision in part upon abuse of process, which was not alleged in the complaint, nor included within the prohibitions of the Sherman Act, a more discernible line concerning the type of activities falling within the sham exception would have been drawn by this case. The type of abuses which the Court cites would better have been left to the agency and judicial remedies, *i.e.*, dismissal or charges of perjury or contempt. Despite its emphasis on protection of the judicial and administrative processes, however, the Court's decision would appear to be correct under the *Noerr* test, since the denial of access to the courts and agencies would be a direct interference, and thus fall within the sham exception.

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[50] *Id.* The Court, in discussing the abuse of process, referred to perjury, fraud, and misrepresentation, although none of these activities were alleged in the complaint.

[51] *Id.* at 514.

[52] *Id.* at 516.

[53] *Id.* at 515. The basis for the *Noerr-Pennington* protection would in this case not exist, as "[i]f the end result is unlawful, it matters not that the means used in violation may be lawful." *Id.*