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Litigation as an Overt Act in Furtherance of an Attempt to Monopolize

DON T. HIBNER, JR.*

I. INTRODUCTION—THE RELATIONSHIP BETWEEN OVERT CONDUCT AND EXCLUSIONARY INTENT

Although the elements of the substantive crime of attempt to monopolize under section 2 of the Sherman Act[1] have been many times articulated, courts and legal scholars are still at odds concerning what is actually required.[2] Some of this confusion may be due to the fact that until recently the elements of attempt have been subject to a lack of analysis by both courts and legal scholars. Section 2 counts in complaints have generally been afterthoughts in cases based primarily on allegations of section 1 combinations and conspiracies.[3] As such, any resolution of the section 2 count was in the nature of an alternative holding.[4]

The remaining controversy derives from the excessively ambiguous definition of the crime of attempt to monopolize, set forth by Justice Holmes in the seminal case of *Swift & Co. v. United States*:[5]

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* Member, California Bar. Mr. Hibner is a member of the firm of Sheppard, Mullin, Richter & Hampton, Los Angeles, California.

1. 15 U.S.C. § 2 (1974) 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 several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court.

2. *Compare, e.g.*, Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2977 (1977) *with* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974); Kraeger v. General Elec. Co., 497 F.2d 468, 471 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974); Rea v. Ford Motor Co., 497 F.2d 577, 590 n.28 (3d Cir.), *cert. denied*, 419 U.S. 861 (1974); White Bag Co. v. Int'l Paper Co., [1974-2] TRADE REG. REP. (CCH) ¶ 75,188 (4th Cir. 1974); *and* Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969). *See generally*, Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373 (1974); Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine*, 58 CORNELL L. REV. 1121 (1973); Hibner, *Attempts to Monopolize—A Concept In Search of Analysis*, 34 ABA ANTITRUST L. J. 165 (1967); Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 COLUM. L. REV. 1451 (1973).

3. Hibner, *supra* note 2, at 165.

4. *Compare* Lessig v. Tidewater Oil Co., 327 F.2d 459, 474, (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) *with* Cornwell Quality Tools Co. v. C.T.S. Co., 446 F.2d 825, 832 (9th Cir. 1971), *cert. denied*, 404 U.S. 1045 (1972). *Compare* Hibner, *supra* note 2, *with* Blecher, *Attempts to Monopolize Under Section 2 of the Sherman Act*, 38 GEO. WASH. L. REV. 552 (1969). *See generally* Cooper, *supra* note 2, at 378; ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 62 (1975)

5. 196 U.S. 375 (1905).

> The statute [section 2] gives this proceeding against combinations in restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee*, 177 Massachusetts 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.[6]

Justice Holmes spoke of "intent" as being "essential to such an attempt." Under his classic definition, when the defendant's act plus "mere forces of nature" are not enough to bring about a proscribed result, "an intent to bring it to pass [is] necessary in order to produce a dangerous probability that it will happen." This requisite intent to prove a prima facie case is the specific intent to achieve the status of a monopolist. As defined by one court in charging the jury, "[s]pecific intent means that the defendants must have done certain things with monopoly as their objective, which, if successfully performed, could result in actual monopolization."[7] Such a definition does little to further the analysis. How must specific intent be shown under this instruction? Provided that substantial evidence of specific intent is present, should the character or type of the "further acts" matter? Because of the difficulties in evaluating the subjective intent of a single actor in a unilateral—as distinct from a concerted—attempt to monopolize, should a certain threshold of proof be required?

It is perhaps not too surprising that neither the courts nor the commentators have been helpful. If direct evidence exists, the inquiry is simple enough. But antitrust defendants seldom provide explicit or at least totally unambiguous evidence of specific intent.[8] Accordingly, juries are instructed that "specific intent" may be inferred from contemporaneous documents and from the history of the defendant's business conduct.[9] As stated more recently by the Ninth Circuit, "all of the acts should be viewed together in determining whether there was an attempt to monopolize."[10]

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6. *Id.* at 396.

7. United States v. Kansas City Star Co., No. 18444 (W.D. Mo. 1953), *reprinted in* ABA SECTION OF ANTITRUST LAW, JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES 346 (1965).

8. *See* Blecher, *Plaintiff's Viewpoint, Trial of an Antitrust Treble Damage Suit*, 38 ABA ANTITRUST L.J. 50, 54 (1968); Cooper, *supra* note 2, at 396.

9. *See, e.g.*, Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2977 (1977); Morning Pioneer, Inc. v. Bismark Tribune Co., 493 F.2d 383, 387 (8th Cir. 1974); United States v. Jerrald Elec. Corp., 187 F. Supp. 545, 567 (E.D. Pa. 1960); Smith, *Attempt to Monopolize: Its Elements and Their Definitions*, 27 GEO. WASH. L. REV. 227, 231-32 (1959).

10. Knutson v. Daily Review, Inc., 548 F.2d 795, 814 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2977 (1977).

It may be that attempting to infer specific intent from business conduct is an exercise of questionable value. In many instances "specific intent" may be simply the label placed upon the conclusion that the conduct under examination is sufficiently "wrong" to warrant punishment.[11] What the courts seem to be doing is condemning conduct that is sufficiently predatory. Once this is determined, the conclusion of "specific intent" is sure to follow. Another way of describing the same analysis is that if the conduct is sufficiently "bad," we should not concern ourselves with the defendant's intent at all. We will punish, by awarding damages to the plaintiff, any defendant who did what this defendant did.[12] Under this analysis "specific intent" and "dangerous probability," the classic elements of attempt, are mirror images of each other. In *Lessig v. Tidewater Oil Co.*,[13] the Ninth Circuit held that a finding of "dangerous probability" could be based solely on proof of specific intent to monopolize and did not require an analysis of market power. This analysis has been rejected by most courts and commentators.[14] Nevertheless, if a specific intent is the dangerous probability, and if the specific intent is inferable from anticompetitive acts, as stated by the Ninth Circuit in *Lessig*,[15] we would only be concerned with the conduct itself. If the anticompetitive acts are sufficiently disruptive of competition in the market, the specific intent and the dangerous probability will be found. Even in the other judicial circuits, in which a finding of dangerous probability requires an analysis of market power, courts can be expected to find section 2 liability in cases in which specific intent plainly exists through application of the unstated rule that "the scope of the relevant market contracts and expands in direct proportion to the viciousness of the overt acts alleged."[16]

The purpose of this paper is to assess the history, development, and prognosis for a peculiar type of "overt act," namely the use of litigation

11. Cooper, *supra* note 2, at 397. *See* Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125, 140 (D. Mass. 1959), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

12. *See* United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32, 39-41 (D. Minn. 1946).

13. 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

14. *See* cases cited note 2 *supra*, with exception of Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2977 (1977).

15. 327 F.2d at 474-75. *See also* Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2977 (1977). *Lessig* has been severely and universally criticized by courts and commentators alike. *See, e.g.*, Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir. 1977); Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc., 531 F.2d 910, 919 (8th Cir. 1976); Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1348 (3d Cir. 1975); E.J. Delany Corp. v. Bonne Bell, Inc., 525 F.2d 296, 305-06 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc. 508 F.2d 547, 550 (1st Cir. 1974); Advance Business Systems & Supply Co. v. SCM Corp., 425 F.2d 55 (4th Cir. 1969); United States v. IBM Corp., 66 F.R.D. 154, 184 (S.D.N.Y. 1974); Credit Bureau Reports, Inc. v. Retail Co., 358 F. Supp. 780, 789 (S.D. Texas 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973); Huron Valley Publishing Co. v. Booth Newspapers, Inc., 336 F. Supp. 659, 662 (E.D. Mich. 1972).

16. Hibner, *supra* note 2, at 168.

in furtherance of a specific intent to monopolize. An analysis of the stormy history of this type of case graphically illustrates the inherent problems in reaching any single act or conduct under the attempts provision of section 2. Section 2 is less concerned with the quality of the overt conduct than it is with the intent that may be inferred from that conduct. Because evaluation of circumstantial evidence of intent usually involves a Gestalt valuing of the totality of the business conduct of a number of actors over perhaps a period of years, it is difficult to analyse any particular act in isolation.

An exception to this difficult problem of proof in attempt cases is when evidence exists of hard core violations of section 1 of the Sherman Act.[17] A number of cases have held that it is proper to infer a specific intent to monopolize from section 1 violations, even if they are deemed "technical."[18] Stated another way, when a combination or conspiracy is involved, proof of specific intent "merges" with proof of the conspiracy or "concerted action" to drive competitors out of busness.[19] Courts may deem it unimportant in cases in which section 1 liability is present that additional "predatory" acts are present from which specific intent may be inferred.[20] An equally plausible analysis, however, is that if the overt acts give rise to per se illegality, it would be incongruous for a court to then determine that the acts that are per se exclusionary were not intended, in the attempt to monopolize sense, to be exclusionary.

Because intent is inferable from the totality of the actor's business conduct, and because virtually all cases involve a series of actions, frequently of mixed character,[21] the problem of positing the presence or absence of specific intent to monopolize from individual overt acts is difficult, for policy as well as practical or evidentiary reasons. Every competitive act is exclusionary by its very nature;[22] since if it were not exclusionary it would be of doubtful competitive worth. Accordingly, not every "exclusionary" act directed toward one's rivals should rise to

17. Considering the holding as grounded on a finding of section 1 violations is one way to harmonize *Lessig v. Tidewater Oil Co.* with adverse authority from the other circuits. *See* Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2977 (1977). *Knutson* goes further, however, and states that predatory conduct, as opposed to section 1 illegality, coupled with specific intent, will suffice. *Id.* at 814.

18. *See e.g.*, Knutson v. Daily Review, Inc. 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2977 (1977). The trial court found that while the defendant was guilty of price fixing, there was no evidence of "predatory or knowingly unlawful activity." The Ninth Circuit rejected this approach, noting that price fixing has been illegal since the Sherman Act was enacted.

19. United States v. Consolidated Laundries Corp., 291 F.2d 563, 572-73 (2d Cir. 1961); ABA SECTION OF ANTITRUST LAW, ANTITRUST DEVELOPMENTS 1955-1968 at 37 (1968).

20. Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2977 (1977).

21. *See* Cooper, *supra* note 2, at 446.

22. *Id.* at 435. *See also* Union Leader Corp. v. Newspapers of New England Inc., 180 F. Supp. 125, 140 (D. Mass. 1959), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

the level of an antitrust violation. Businessmen must be encouraged to compete, and should not be deterred from doing so because the legal standards by which their conduct is to be judged are so loosely defined.[23]

Perhaps an appropriate analogy is to prize fighting. While punching skills and agile footwork are much admired, a boxer will also be encouraged to knock out his opponent. This end has been built into the sport as a desirable one—one to be rewarded by victory. But kicking, gouging, or hitting below the belt may result in the loss of a round, or even the fight. In the market place we should not penalize a competitor who through superior skill or even luck beats his rival into submission—so long as he plays by the rules.[24]

It is the inherent vagueness of the rules that causes concern. Little is added to the business lawyer's ability to predict the legal consequences of his client's business practices when courts conclude that courses of conduct are proscribed because "predatory," "immoral," or "not honestly industrial."[25] Nevertheless, the courts have come forward with little else that is more helpful. Mindful that specific intent may be likened to hard-core pornography—that we will recognize it on sight—the Ninth Circuit tells us that in determining guidelines for future conduct, "Part III [Attempts to Monopolize] is to be read with the remainder, and in light of the anticompetitive purposes and conduct to which the case relates."[26]

If the overt acts themselves support a finding of a section 1 violation, or if the "predatory" acts are numerous and sufficiently "dirty" or "unfair," or even "not industrially honest," little damage probably results from such generality. Most cases will fit one of these categories. Analogizing to Judge Learned Hand's famous tautology—"no monopolist monopolizes unconscious of what he is doing"[27]—no attempted monopolist attempts to monopolize specifically unconscious of what he is doing. An analysis of the use of litigation as an overt act in furtherance of an attempt to monopolize should impose liability if the overt acts are carried out with design and are sufficiently predatory. In the "clear" case of overwhelming evidence of the use of litigation as an anticompetitive instrument of destruction, section 2 should be applicable.[28] If litigation is used as but one act in a series of clearly

23. *Cf.* United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.").

24. Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir. 1977).

25. *See* Union Leader Corp. v. Newspapers of New England Inc., 180 F. Supp. 125, 140 (D. Mass. 1959), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

26. Lessig v. Tidewater Oil Co., 327 F.2d 459, 478 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

27. United States v. Aluminum Co. of America, 148 F.2d 416, 432 (1945).

28. *See* Blecher, *Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market"*, 38 GEO. WASH. L. REV. 215, 221 (1969); Cooper, *supra* note 2, at 377, 396.

anticompetitive or "predatory" acts, section 2 may be applicable, particularly where the conduct of the litigation is unrelated to a legitimate purpose of securing legal redress for a demonstrable wrong. In less than clear cases, however, additional forces of public policy come into play. These forces manifest themselves in the engrafting of additional requirements as prerequisites to the maintenance of an action.[29] Here, our analysis must begin.

II. THE THEORY OF LITIGATION AS A VIOLATION OF THE SHERMAN ACT

A. *Common Law Remedies for Abuse of Judicial or Administrative Process*

The development of legal theories to combat the use of litigation as a means to injure another far predates the Sherman Act. Two tort theories, malicious prosecution and abuse of process, evolved to allow recovery when judicial or administrative process had been misused. It must be recognized that these theories constitute exceptions to the basic public policy encouraging the resolution of disputes through judicial and administrative tribunals.[30] To impose liability for the improper use of litigation tends to undermine this policy and have a chilling effect on the peaceful disposition of claims through litigation,[31] particularly if the litigant's subjective intent is inferred from circumstantial evidence. When litigation is the alleged wrongful act, the courts have erected barriers to minimize any possible chilling effect.[32] These barriers range from outright immunity to higher degrees of required proof. Nevertheless, in clear cases of predatory conduct, recovery will be allowed, because if the litigation is clearly improper, there can be no public policy in encouraging such conduct.[33] Accordingly, the policy favoring access to the courts to resolve disputes in an orderly peaceful manner is far from absolute.[34]

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29. *See* Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1571 (1977).

30. Note, *Limiting the Antitrust Immunity For Concerted Attempts to Influence Courts, and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715, 726 (1973). *See* Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 424 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952).

31. *See* Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 97 S.Ct 1571 (1977).

32. *See* Note, *supra* note 30, at 729-30.

33. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972); Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 228 (7th Cir. 1975); 6 CAL. JUR. 3d *Assault and Other Willful Torts* § 314 (1973). The current confused state of the law is well illustrated in Vendo Co. v. Lectro-Vend Corp., 97 S. Ct. 2881 (1977). Seven members of the Court are of the view that use of litigation may be actionable under the Sherman Act. Justice Blackmun and Chief Justice Burger would require a "pattern of baseless, repetitive claims" used as an anticompetition device. 97 S. Ct. 2894 (Blackmun, J., concurring).

34. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972).

The tort theories of malicious prosecution and abuse of process are instructive in evaluating the use of litigation as an overt act in furtherance of an attempt to monopolize.[35] If a person acts from malice and institutes a groundless action against another, either civilly or criminally, the injured person may bring an action for damages or malicious prosecution. The plaintiff in such an action has the burden of proving the favorable termination of the unjustifiable proceeding, malice, want of probable cause, and lack of good faith on the part of the defendant.[36] The element of malice adds little, since, like specific intent to monopolize, it is inferable from the defendant's total course of conduct.[37]

Abuse of process consists of the misuse or misapplication of legal process subsequent to its issuance to accomplish some ulterior purpose. The test of the tort of abuse is whether the process has been used to accomplish some unlawful end, or to compel the defendant to perform collateral undertakings not legally required. As distinguished from malicious prosecution, it is not required that the process be issued maliciously or without cause. It is immaterial whether the process abused resulted in a favorable termination, or even in a termination at all.[38] A typical example would be the use of litigation to collect a debt not subject to the complaint. In an antitrust context, it could consist of the use of litigation to enforce a threat that unless plaintiff agrees not to compete the defendant will sue for unfair competition.[39]

B. *Incorporation of Common Law Thought into National Antitrust Policy*

The rationale underlying both of these torts is illustrative of a national antitrust policy. The Supreme Court has stated on numerous occasions that acts that would otherwise be lawful will lose that character when they are committed as part of an illegal scheme.[40] Common principles of the law of conspiracy teach that an overt act in furtherance of a conspiracy is necessary before the substantive crime is actionable.[41] The overt act itself, however, may be otherwise lawful.

35. *See* Associated Radio Serv. Co. v. Page Airways, Inc., 414 F. Supp. 1088 (N.D. Tex. 1976); Note, *supra* note 30.

36. Stallings v. Foster, 119 Cal. App. 2d 614, 259 P.2d 1006 (1953). *See* 6 CAL. JUR. 3d *Assault and Other Willful Torts* § 311 (1976).

37. *See* W. PROSSER, THE LAW OF TORTS § 119 at 841-47 (4th ed. 1971); Note, *supra* note 30, at 728; 32 CAL. JUR. 2d *Malicious Prosecution* § 36 (1956).

38. W. PROSSER, THE LAW OF TORTS § 121 at 856 (4th ed. 1971); Note, *supra* note 30, at 732; 6 CAL. JUR. 3d *Assault and Other Willful Torts* §§ 8-19 (1976).

39. *See* Associated Radio Serv. Co. v. Page Airways, Inc., 414 F. Supp. 1088 (N.D. Tex. 1976); Lektro-Vend Corp. v. Vendo Co., 403 F. Supp. 527 (N.D. Ill. 1975), *aff'd* 545 F.2d 1050 (7th Cir. 1976), *rev'd on procedural grounds*, 97 S. Ct. 2881 (1977).

40. *See, e.g.*, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962); American Tobacco Co. v. United States, 328 U.S. 781 (1946); Swift & Co. v. United States, 196 U.S. 375, 396 (1905).

41. Hyde v. United States, 225 U.S. 347, 387 (1912); United States v. Chas. Pfizer & Co., 425

These ideas are well recognized in antitrust cases. In *American Tobacco Co. v. United States*, Mr. Justice Burton stated:

> It is not the form of the combination of the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition.[42]

It is clear that this analysis is equally applicable to single actor conduct as well, such as schemes designed to violate section 2. In the classic case of *United States v. Aluminum Co. of America*,[43] the court held unlawful a series of otherwise permissible acts, that were used to maintain monopoly power in the virgin aluminum ingot market. As stated by the district court in *Otter Tail Power Co. v. United States*: "While every person has the right to resort to the courts to redress claimed wrongs, the right is not without limitation. One who enjoys a monopoly may not resort to litigation for the purpose of illegally maintaining the monopoly."[44]

Thus, in theory, the use of litigation will be unlawful as an overt act in furtherance of a scheme if the other elements of a section 2 crime are present.[45] As the legality of the otherwise lawful act will depend on the presence of the other elements, the analogy of a section 2 offense involving litigation to the tort of abuse of process is probably closer than to that of malicious prosecution.[46] If the litigation is unlawfully motivated, it may not be dispositive that it is well founded, or even meritorious.[47] However, as the facts underlying claims of abuse of process and malicious prosecution often overlap,[48] it would be unusual in the real world to find many section 2 violations in which the sole overt act is the use of meritorious litigation. Unless the evidence of intent is independent of the course of conduct of the business—such as a statement by an executive that he filed the action to put his competi-

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F. Supp. 737, 738 (E.D.N.Y. 1965); Smith, *Attempt to Monopolize: Its Elements and Their Definitions*, 27 GEO. WASH. L. REV. 227, 240 (1959).

42. American Tobacco Co. v. United States, 328 U.S. 781, 309 (1946). *See also* United States v. Aluminum Co. of America, 148 F.2d 416, 431-32 (2d Cir. 1945).

43. 148 F.2d 416 (2d Cir. 1945).

44. 331 F. Supp. 54, 62 (D. Minn. 1971), *aff'd in part, vacated in part and remanded*, 410 U.S. 366 (1973).

45. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174 (1965).

46. *See* Associated Radio Serv. Co. v. Page Airways, Inc., 414 F. Supp. 1088 (N.D. Tex. 1976).

47. *See* Rex Chainbelt, Inc. v. Harco Prods., Inc., 512 F.2d 993, 1005 (9th Cir. 1975); Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952); Handgards, Inc. v. Johnson & Johnson, 69 F.R.D. 451 (N.D. Cal. 1976).

48. *See* Associated Radio Serv. Co. v. Page Airways, Inc., 414 F. Supp. 1088, 1096 (N.D. Tex. 1976).

tor out of business[49]—the mere use of litigation would be unlikely to compel an inference of specific intent. Almost all of the actions in which plaintiffs have been successful have involved an integrated course of conduct in which a series of predatory acts point in one direction—the exclusion of the plaintiff from the market.[50] As we will see, the presence of a series of overt acts, of which litigation was but one, may be more than evidentiary.[51]

C. *Judicial Recognition of Litigation as an Overt Act in Violation of the Sherman Act*

The Ninth Circuit has been one of the most active in recognizing the use of litigation as an overt act in furtherance of an antitrust violation. In *Lynch v. Magnavox Co.*,[52] the Ninth Circuit reversed the district court, which had sustained a demurrer to a complaint alleging violations of sections 1 and 2 of the Sherman Act. Plaintiff alleged that the defendants conspired to monopolize the manufacture, sale, and distribution of radio loudspeakers. The conspiracy was to be achieved by a pooling and cross-licensing of patents. The defendants threatened to institute patent infringement actions to force radio receiving set manufacturers to discontinue the purchase of radio loudspeakers from others, and to force the purchases of patent licenses, thus allowing the defendants to control the prices for loudspeakers. Defendants also allegedly engaged in a "ruinous commercial campaign" to intimidate customers of nonmembers by instituting infringment actions against key accounts. Finally, plaintiff alleged that the infringement suits were not filed in good faith, "or in the honest belief . . . as to the validity of" certain of the patents, "but were overt acts committed by the defendants 'to effect the purposes of said plan, scheme and conspiracy.' "[53]

Noting the "existing confusion as to the distinction between Sections 1 and 2 of the [Sherman] act, and what the elements under each section are," the court held that the complaint stated a claim for an attempt to monopolize by means of a conspiracy. Defendants' argument that the acts involved were all lawful—pooling patents, cross-licensing, and threatening and bringing infringement suits—was rejected by the court:

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49. *See* Cooper, *supra* note 2, at 377.

50. *See, e.g.*, Mach-Tronics Inc. v. Zirpoli, 316 F.2d 820 (9th Cir. 1963); Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952); Lynch v. Magnavox Co., 94 F.2d 883 (9th Cir. 1938); Marnell v. United Parcel Serv. of America, 260 F.Supp. 391 (N.D. Cal. 1971).

51. *See* Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 1571 (1977).

52. 94 F.2d 883 (9th Cir. 1938).

53. *Id.* at 887.

> We may assume that each of those acts would be lawful, and still a conspiracy might be shown. If the agreement has an unlawful purpose, it is a conspiracy, notwithstanding that the means used to carry it out were lawful. Thus in Swift & Co. v. United States, 196 U.S. 375, 396, 25 S. Ct. 276, 279, 49 L.Ed. 518, it is said "It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."[54]

In *Stewart-Warner Corp. v. Staley*,[55] the plaintiff moved to dismiss an amended counterclaim that alleged a large number of patent violations of sections 1 and 2 of the Sherman Act. The counterclaim alleged that plaintiff had acquired a large number of patents in the lubricating equipment field, asserted the patents beyond their scope, paid defendants in infringement actions not to defend themselves, falsely marked its equipment under patents that were not applicable, and instituted unwarranted suits for alleged infringement. In denying the motions to dismiss, the court stated:

> As to the charge against plaintiff of bringing unwarranted patent suits, it is true that the plaintiff had a legal right to bring suits on patents owned by it for alleged infringement. But where, as alleged in the amended counterclaim, such suits were brought without probable cause, that is an element to consider in connection with the charges made by the defendant of violation by plaintiff of the antitrust laws.
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> The same thing is true with reference to the circularization of court decisions. The doing of that is not unlawful in itself, but may be considered in connection with the general plan charged against the plaintiff. The same thing is true as to the alleged false marking of lubricating equipment with inapplicable patent numbers. That is not of itself a violation of the antitrust laws, but may be considered in connection with the alleged conspiracy to violate those laws.[56]

The cases support the proposition that if the purpose is unlawful, it is immaterial that each of the individual acts, if viewed in isolation, would be lawful. The character of each of the acts will be evaluated in light of the whole.[57] Although the court in *Stewart-Warner* did not articulate how the bringing of a suit without probable cause is to be evaluated as "an element to consider," it is relatively clear that each of the acts, including the use of litigation, is circumstantial evidence bearing on the presence or absence of the elements of the substantive crime.

While *Stewart-Warner* may contain a hint of the tort of malicious

54. *Id.* at 889.

55. 42 F. Supp. 140 (W.D. Pa. 1941).

56. *Id.* at 146.

57. Knutson v Daily Review, Inc., 548 F.2d 795, 814 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2977 (1977); Morning Pioneer, Inc. v. Bismark Tribune Co., 493 F.2d 383, 387 (8th Cir. 1974).

prosecution, *Kobe, Inc. v. Dempsey Pump Co.*[58] is more analogous to abuse of process. In *Kobe*, the plaintiff was the owner of a number of patents relating to hydraulic oil well pumps. Defendant Dempsey developed a competing pump. Without having any information about the Dempsey pump other than seeing it at a trade exposition, Kobe sued for infringement. Dempsey had offered to disclose the detailed structure of the pump, but no examination was made. Dempsey filed a counterclaim alleging abuse of the patent monopoly in violation of the Sherman Act. The trial court found that certain of the patents sued on were valid and infringed, and that Kobe had *not* instituted the suit in bad faith. It believed its patents were infringed and intended to secure a judgment that would eliminate Dempsey as a competitor.[59] Nevertheless, the court held that Kobe was in violation of section 2 of the Sherman Act, and that the use of litigation was in furtherance of its monopolistic practices.

The court of appeals affirmed noting that Kobe had no evidence of infringement when the suit was brought, and had not availed itself of an opportunity to examine the Dempsey pump.[60] Kobe argued that any damages suffered by Dempsey resulted only from the infringement action, and that allowing damages to be recovered would be a denial of free access to the courts. The court rejected the argument and stated:

> We fully recognize that free and unrestricted access to the courts should not be denied or imperiled in any manner. At the same time we must not permit the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition. . . .
>
> We have no doubt that if there was nothing more than the bringing of the infringement action, resulting damages could not be recovered, but that is not the case. The facts hereinbefore detailed are sufficient to support a finding that although Kobe believed some of its patents were infringed, the real purpose of the infringement action and the incidental activities of Kobe's representatives was to further the existing monopoly and to eliminate Dempsey as a competitor. The infringement action and the related activities, of course, in themselves were not unlawful, and standing alone would not be sufficient to sustain a claim for damages which they may have caused, but when considered with the entire monopolistic scheme which preceded them we think, as the trial court did, that they may be considered as having been done to give effect to the unlawful scheme. . . . To hold that there was no liability for damages caused by this conduct, though lawful in itself, would permit a monopolizer to smother every potential competitor with litigation before it had the opportunity to be otherwise caught in its tenacles and leave the competitor without a remedy.[61]

58. 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952).

59. *Id.* at 424.

60. *Id.*

61. *Id.* at 424-25.

The *Kobe* analysis is similar to the tort of abuse of process in that even where probable cause existed, the purpose of the suit—to eliminate a competitor—was improper.[62]

A similar case is *Mach-Tronics, Inc. v. Zirpoli*.[63] There, the defendant initiated a state court action alleging theft of trade secrets. Plaintiff filed a federal antitrust action alleging that defendant had conspired to monopolize the video-tape recorder industry. Among the acts alleged were the filing of the trade secret lawsuit and representations to potential customers and suppliers that the litigation had already been concluded in favor of defendant. Defendant moved to stay all proceedings in the antitrust action pending a determination of the state court trade secret action. The order was granted, and the plaintiff petitioned for mandamus. In ordering that the writ issue, the Court of Appeals for the Ninth Circuit stated:

> We do not see any way in which the respondent could avoid coming to grips with the contentions made in the treble damage complaint that the action was brought in the state court for the purpose of giving effect to Ampex's unlawful monopolistic scheme. Even if it were to be found that Mach-Tronics and its employees have been guilty of stealing the secrets and processes of Ampex, that would not avoid or otherwise dispose of Mach-Tronics' treble damage case if the latter succeeds in establishing these allegations of its complaint.
>
> In this respect the case is very similar to Kobe, Inc. v. Dempsey Pump Co., 10 Cir. 198 F.2d 416.[64]

According to the court, whether the state court action was meritorious was not dispositive. Judge Duniway in dissent questioned whether it could be determined that the state court action was "baseless" without first trying the state case.[65] Not considered by either the majority or the minority was the now famous *Noerr*[66] issue. Although it was unclear until *California Motor Transport Co. v. Trucking Unlimited*[67] whether the policy of encouraging access to the courts was pro-

62. While theory may dictate that acts legal in themselves will become unlawful if taken to maintain monopoly power, the courts have been troubled when no "unfair" or predatory conduct is present. The courts have held that lawfully acquired monopoly power maintained by active under-pricing and dynamic but lawful business acumen does not constitute unlawful monopolization. *See* Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); American Football League v. National Football League, 323 F.2d 124, 131 (4th Cir. 1963). *See also* Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). In light of *Telex* and Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir. 1977), it is questionable how much vitality remains in *Kobe*.

63. 316 F.2d 820 (9th Cir. 1963).

64. *Id.* at 830.

65. *Id.* at 836. Judge Duniway, who dissented in *Mach-Tronics*, wrote the majority decision in Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1571 (1977).

66. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). The *Noerr* doctrine is fully discussed in section IIIA *infra*.

67. 404 U.S. 508 (1972). The Ninth Circuit, relying on Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965), had held that *Noerr* immunity was not appli-

tected by the first amendment, it is surprising that the issue was not raised in *Mach-Tronics*. As we will see, the subsequent history of the use of litigation as an act in furtherance of an attempt to monopolize is totally enmeshed in what *Noerr* and its progeny may mean, through balancing of the interests of access to the courts, the resolution of disputes by peaceful means, and national antitrust policy. When the conduct in question moves away from political activity and approaches adjudicative activity the interests to be accommodated will also shift.

III. Antitrust Policy and The First Amendment

There is without question a degree of natural tension between the right of the people to petition the government and national antitrust policy.[68] While antitrust policy is a creature of the Congress, the right to petition is constitutionally mandated.[69] Until recently, however, the right to petition was not considered applicable to the use of litigation in furtherance of an antitrust violation.[70]

A. *The Development of the* Noerr *Doctrine*

Perhaps one of the most widely discussed and most perplexing antitrust cases of recent memory is *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[71] *Noerr* involved a suit by forty-one truck operators against twenty-four railroads, an association of railroad presidents, and a public relations firm for conspiracy to restrain trade in and monopolize the long-distance freight business in violation of sections 1 and 2 of the Sherman Act. The railroads had hired the public relations firm to conduct a publicity campaign against long-haul truckers that would encourage the adoption and retention of laws that would injure and restrict the truckers. The complaint alleged that the sole motivation was to destroy truckers as competitors in the long-haul freight business and that the railroads had attempted to influence legislation by means of the publicity campaign, including persuading the Governor of Pennsylvania to veto the "Fair Trucking Bill." The defendants counterclaimed, alleging that the truckers had violated the Sherman Act by their own publicity campaign. The trial court held that the railroads' publicity campaign violated the Sherman Act while that of

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cable to judicial and administrative proceedings. *See* Trucking Unlimited v. California Motor Transp. Co., 432 F.2d 755 (9th Cir. 1970), *aff'd*, 404 U S. 508 (1972).

68. *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); Note, *supra* note 30, at 723-24.

69. "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

70. *See* Trucking Unlimited v. California Motor Transp. Co., 432 F.2d 755 (9th Cir. 1970), *aff'd*, 404 U.S. 508 (1972).

71. 365 U.S. 127 (1961).

the truckers did not.[72] The court disclaimed any purpose to condemn as illegal mere efforts to influence legislation or law enforcement. The Court of Appeals for the Third Circuit upheld the judgment of the district court, stating that there was sufficient evidence to support the findings.[73]

A unanimous Supreme Court reversed. Justice Black, writing for the Court, expressed concern over the impairment of the power of government to take action through its "legislature and executive."[74] He stated that the viability of the whole concept of representation in a democracy depended on the ability of the people to make their wishes known to their representatives, and that the Sherman Act was designed to regulate business activity, not political activity. Finding the constitutional right to petition to be of equal significance to the Sherman Act, the Court held that the Sherman Act does not apply to activities that comprise mere solicitation of governmental action with respect to the passage and enforcement of laws. The "publicity campaign," although conducted with the sole purpose to destroy the truckers, was insufficient to transform conduct otherwise lawful into a violation of the Sherman Act. Justice Black stated that "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so."[75]

Of critical importance in understanding the implications of *Noerr* is the fact that no activities were alleged that were unrelated to the attempts to induce governmental action. The Court made it clear that intent was irrelevant if the only activity complained of was seeking to damage the truckers through influencing the legislation. Justice Black noted: "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, all of the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws."[76] Thus, unlike *Kobe*[77] and *Mach-Tronics*,[78] there was no evidence of overt acts external to the complained-of activity. *Noerr* is consistent with the *Kobe* court's statement: "[W]e have no doubt that if there was nothing more than the bringing of the infringement action, resulting damages could not be recovered, but that is not the case."[79]

72. 155 F. Supp. 768 (E.D. Pa. 1957) *and* 166 F. Supp. 163 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3rd Cir. 1959), *rev'd*, 365 U.S. 127 (1961).

73. 273 F.2d 218 (3d Cir. 1959), *rev'd*, 365 U.S. 127 (1961).

74. 365 U.S. 127, 137 (1961).

75. *Id.* at 139.

76. *Id.* at 142.

77. Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952).

78. Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820 (9th Cir. 1963).

79. 198 F.2d at 425.

In addition to requiring external acts before the total conduct would be subject to the Sherman Act, the Supreme Court in *Noerr* expressed a significant caveat that has become known as the "sham exception":

> 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. But this certainly is not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices.[80]

It is unclear whether the "sham exception" includes the "external acts" exceptions, or whether they are analytically different. Certainly, evidence of attempting to injure a competitor by securing refusals to deal, or by disparagement, would be probative in determining whether resort to government action was "nothing more than an attempt to interfere directly with the business relationships of a competitor."[81] But if acts are involved, in addition to governmental action, that bear greater "resemblance to the combinations normally held violative of the Sherman Act,"[82] the conduct should not be *Noerr*-protected because we would be dealing with business activity rather than "mere" political activity.[83] We should not need to consider whether the "sham exception" is applicable. Again we are in an area where conduct and the intent inferable from conduct are almost analytically indistinguishable.

Two years later, another case involving litigation as part of an overall scheme to monopolize was before the Supreme Court. In *United States v. Singer Manufacturing Co.*,[84] Singer and two foreign competitors utilized patent infringement actions and proceedings before the United States Tariff Commission as part of an overall scheme to eliminate Japanese competition. No mention was made of *Noerr*; therefore it would seem to have been reasonable to assume that *Noerr* immunity did not relate to other than legislative activity.

In 1965 the *Noerr* exemption from antitrust liability was significantly expanded in *United Mine Workers v. Pennington*.[85] In *Pennington*, a trustee of a union welfare and retirement fund sued a coal

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80. 365 U.S. at 144. According to the Ninth Circuit, the "sham exception" does not pertain to attempts to lobby and petition a governmental body. Such activities are absolutely immune. The "sham exception" is limited to publicity campaigns. *See* Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 1571 (1977).

81. 365 U.S. at 144.

82. *Id.* at 136.

83. *Id.* at 138.

84. 374 U.S. 174 (1963).

85. 381 U.S. 657 (1965).

company for failure to make royalty payments. The defendant cross-claimed against the union for violations of the Sherman Act. The cross-claim alleged that the United Mine Workers and several large coal operators had conspired to eliminate small operators by various means, including approaching the Secretary of Labor to set a higher minimum wage for employees of contractors selling coal to the TVA. This would make it more difficult for small companies to compete in the TVA term-contract market. Plaintiff was successful in a jury trial, and the verdict was affirmed on appeal.[86] The Supreme Court reversed and remanded, stating that the lower courts had not taken proper account of *Noerr*. Again the Court held that concerted attempts to influence public officials were lawful regardless of purpose, overturning the approval by the court of appeals of an instruction conditioning legality on proof of illegal purpose. The Supreme Court stated: "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 part of a broader scheme itself violative of the Sherman Act.*"[87] At least in the political arena after *Pennington*, it was reasonable to believe that attempts to influence public officials could not be actionable under the Sherman Act even when the attempt was part of an integrated scheme to eliminate competition. *Pennington*, however, did not address itself to the "sham exception."

Within six months after deciding *Pennington* the Court decided *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*,[88] in which a defendant in a patent infringement suit filed a counterclaim alleging that the plaintiff had violated section 2 of the Sherman Act by suing on a patent obtained by fraud on the Patent Office. The trial court granted a motion to dismiss, and the Court of Appeals for the Seventh Circuit affirmed on the ground that fraud on the Patent Office could not be raised in an affirmative original action, but was limited to use as an equitable defense.[89] The Supreme Court reversed, holding that the enforcement of a patent procured by fraud on the Patent Office may be violative of section 2 of the Sherman Act, provided the other elements are present. The alleged fraud was in testifying before the Patent Office that it had no knowledge of prior public use. Neither *Noerr* nor *Pennington* was mentioned, and no acts other than the obtaining and enforcement of the patent were alleged. While it cannot be stated whether *Noerr* was ever considered, it is likely, from later

86. Pennington v. United Mine Workers, 325 F.2d 804 (6th Cir. 1963), *rev'd*, 381 U.S. 657 (1965).

87. 381 U.S. at 670 (emphasis added).

88. 382 U.S. 172 (1965).

89. Food Mach. & Chem. Corp. v. Walker Process Equip. Inc., 335 F.2d 315 (7th Cir. 1964), *rev'd*, 382 U.S. 172 (1965).

cases, that patent fraud through the use of false affidavits or testimony would be within the "sham exception."[90]

B. *The Retreat from* Noerr-Pennington*: The Decision in* Trucking Unlimited.

The seeming inconsistency between *Walker Process* and *Pennington*, decided only six months apart, caused the Ninth Circuit in *Trucking Unlimited v. California Motor Transport Co.*[91] to hold that the *Noerr-Pennington* immunity was inapplicable to judicial proceedings. Although affirming the Ninth Circuit opinion, the Supreme Court held that *Noerr* was applicable to conduct before administrative and judicial bodies. In so doing, however, the Court either severely limited *Pennington*, or greatly expanded the "sham exception" of *Noerr*. By its citations to *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[92] *Walker Process*,[93] and *Harman v. Valley National Bank*,[94] considerable insight concerning the intended breadth of the "sham exception" was provided. It articulated a different standard for evaluating and balancing first amendment standards, depending on the type of government action that is induced.

The complaint in *Trucking Unlimited* charged that various trucking companies conspired to put the plaintiffs out of business by financing, carrying out, and publicizing a joint program of opposing, with or without probable cause and regardless of the merits, virtually every application for operating rights sought by the plaintiffs before the California Public Utilities Commission, the Interstate Commerce Commission, and the courts. In addition to the direct abuse of the judicial and adjudicative processes of the commissions and the courts, the complaint also alleged a series of external overt acts which, when combined with adjudicative abuses, evidenced a broad-sweeping scheme to restrain interstate trade. The additional external competitive acts included, among other things, publicizing defendants' strategy to the trade in order to cause others to cease dealing with the plaintiffs.

The district court dismissed the complaint,[95] and the court of appeals reversed.[96] The Ninth Circuit held that the use of judicial and administrative adjudicative processes *as an integral part of a scheme to restrain trade* is not immunized under *Noerr*. The court concluded that "litigation can be an *integral part* of a scheme prohibited by the Sher-

90. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512 (1972).

91. 432 F.2d 755 (9th Cir. 1970), *aff'd*, 404 U.S. 508 (1972).

92. 370 U.S. 690 (1962).

93. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

94. 339 F.2d 564 (9th Cir. 1964).

95. Trucking Unlimited v. California Motor Transp. Co., [1967] TRADE CAS. (CCH) ¶ 72,298 (N.D. Cal. 1967), *rev'd*, 432 F.2d 755 (9th Cir. 1970), *aff'd*, 404 U.S. 508 (1972).

96. 432 F.2d 755 (9th Cir. 1970), *aff'd*, 404 U.S. 508 (1972).

man Act . . . and . . . that the *Noerr-Pennington* defense does not bar relief when a conspracy to employ judicial and adjudicative processes in a scheme to restrain trade is alleged."[97]

The Supreme Court agreed, holding that the *Trucking Unlimited* complaint fell within the intended ambit of *Noerr*'s "sham exception." Although the activities of the defendants were "ostensibly directed toward influencing governmental action,"[98] the Court concluded that there was a denial of "free and unlimited access" to the adjudicative agencies as a result of defendants' use of vexatious litigation. It is not clear whether its finding of "a pattern of baseless, repetitive claims"[99] is an essential ingredient to the Court's reasoning, or simply an expression of its holding as applied to the facts of the case.[100] Because of its citation of *Walker Process* as an example of an abuse of the adjudicative process, it is submitted that the "repetitive claims" language is simply evidentiary. If the evidence is present from which the finder of fact may conclude that the administrative and judicial processes have been abused, liability may result, and *Noerr* is inapplicable.

The Court recognized that difficult problems of proof may arise by stating "[t]hat may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result."[101] In making it clear that *Noerr* is applicable to administrative and judicial action, the Court drew a sharp distinction between the legislative and adjudicatory process. While unethical legislative activity is within the *Noerr* immunity, adjudicatory conduct is clearly subject to antitrust scrutiny. If the conduct is sufficiently "unethical" or "reprehensible," it may constitute a sham, and not be immune. In giving examples, the Court stated:

> [U]nethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws . . . [citing *Walker Process*]. Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707; *Harman v. Valley National Bank*, 339 F.2d 564 (CA9 1964). . . .
>
> There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.[102]

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97. *Id.* at 760 (emphasis added).

98. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961).

99. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

100. *See* the discussion of Vendo Co. v. Lectro-Vend Corp., 97 S. Ct., 2881 (1977) in note 33 *supra.*

101. 404 U.S. at 513.

102. *Id.* at 512-13.

The Supreme Court's citation to *Continental Ore* and *Harman* in the above-quoted language may be an important key to understanding the holding of *Trucking Unlimited.* The precise page cited from *Continental Ore* contains the following statement of law: "[I]t is well settled that acts which are in themselves legal lose that character when they become *constituent elements* of an unlawful scheme."[103] The Court of Appeals for the Ninth Circuit held in *Harman* that joint activity to influence governmental action is not immunized under *Noerr* if the conduct is "but one element in a larger, long-continued scheme to restrain and monopolize" trade.[104] By reading *Continental Ore* and *Harman* together with *Trucking Unlimited*, the proposition of law may be stated as follows: Joint activity to influence adjudicative and judicial bodies is not immunized under *Noerr* if the conduct is but one element in a larger scheme to restrain trade and unethical conduct is used to abuse the adjudicatory process.

The exact reason why, however, is less than clear. The combined activity is either outside the scope of *Noerr*, or subject to the "sham exception." The overt acts external to the litigation may be probative evidence of the "sham." Nevertheless, acts external to the litigation should be completely unnecessary if the overall scheme or plan to eliminate competition is present, and if misrepresentations, perjury, and withholding of material evidence are present in the litigation itself. It is difficult to argue that first amendment rights exist to commit frauds upon the judicial system in order to injure a competitor.

The problem may be similar to that experienced in the development of the tort of abuse of process itself. Because of the possibility that antitrust litigation may be used to discourage access to the courts —on the theory that the prior litigation is a part of a scheme to violate the antitrust laws—the action will tend to be disfavored. When external acts abound from which illegal motivation may[105] be inferred, however, it is more likely that the antitrust suit is the sham, and the action may be entertained as any other. As stated earlier, most fact situations will involve independent anticompetitive acts external to the litigation. It is not too likely therefore that meritorious claims of abuse of the judicial process, without external acts as evidence of illegally exclusionary intent, will be sent to early graves.[106]

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103. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962) (emphasis added).

104. Harman v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964).

105. If litigation is the principal overt act alleged, a motion to dismiss may be proper. Otherwise the "chilling effect" feared in *Noerr* will be effectuated by careful pleading. Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 1571 (1977); Central Bank of Clayton v. Clayton Bank, 424 F. Supp. 163 (E.D. Mo. 1976); Ernest W. Hahn, Inc. v. Codding, 423 F. Supp. 913 (N.D. Cal. 1976).

106. The types of fears that may tend to engraft additional substantive elements into the theory of recovery under the Sherman Act for the abuse of the judicial process to eliminate

A year after *Trucking Unlimited*, the Supreme Court once again had before it a monopolization case in which the use of litigation was one of the overt acts alleged.[107] As in *Trucking Unlimited*, it was repetitive lawsuits that provided the factual basis for the conclusion that the use of litigation was within the sham exception.

The Otter Tail Power Company had engaged in a broad-sweeping anticompetitive scheme involving, among other things, the use of litigation in state courts. The lawsuits had the effect of destroying potential competition from municipal power companies who needed a "no-litigation certificate" in order to successfully raise capital through the sale of revenue bonds. The district court found that Otter Tail had violated section 2 of the Sherman Act by engaging in a series of anticompetitive acts including, in part, the institution of state court litigation. The district court also held that *Noerr* immunity did not apply to abuses of judicial processes.[108] On direct appeal, the Supreme Court remanded the case for reconsideration in light of its intervening *Trucking Unlimited* decision, but reaffirmed its position that, "[the sham exception] may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus is within the 'mere sham' exception announced in *Noerr*."[109]

The Court relied on *Noerr* without citation to *Pennington*. On remand, the district court found that the litigation engaged in by Otter Tail was within the sham exception of *Noerr*,[110] and the Supreme Court affirmed without opinion.[111] *Otter Tail* is the last pronouncement by the Supreme Court in this field.[112] It is noteworthy that *Otter Tail* also involved "access barring" conduct, thus strengthening the argument that the *Trucking Unlimited*[113] "sham exception" should be narrowly

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competition are exemplified in Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 1571 (1977). Consistent with his dissent in *Mach-Tronics*, Judge Duniway expresses the view that the case of pleading an antitrust claim may cause it to be used as a sword and not a shield. *Compare* 542 F.2d 1076, 1083 *with* Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 836 (9th Cir. 1963) (Duniway, J., dissenting). In Ernest W. Hahn, Inc. v. Codding, 423 F. Supp. 913 (N.D. Cal. 1976), the court held that to state a claim under the *Trucking Unlimited* exception, the complaint must allege specific activities not protected under the *Noerr-Pennington* doctrine which have barred access to a governmental agency. If the defendant is seeking official action, the activity is protected.

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

108 United States v. Otter Tail Power Co., 331 F. Supp. 54 (D. Minn. 1971), *aff'd in part, vacated in part, and remanded*, 410 U.S. 366 (1973).

109 410 U.S. at 380.

110. 360 F. Supp. 451, 452 (D. Minn. 1973), *aff'd*, 417 U.S. 901 (1974).

111. 417 U.S. 901 (1974).

112. Since Vendo Co. v. Lectro-Vend Corp., 97 S. Ct. 2881 (1977), involved a reversal on procedural grounds by a plurality opinion, the three opinions are dicta concerning the use of litigation. Seven members of the Court did not require repetitive suits as a prerequisite. No mention was made of the term "access barring."

113. *See* Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1571 (1977); Central

construed. The series of lawsuits involved in *Otter Tail* was designed to produce the collateral result of preventing the marketing of the municipalities' revenue bonds. In this sense, meaningful access to the courts was made futile, as the damage was already done by the filing of the actions. From *Otter Tail*, as in *Trucking Unlimited*, it is clear that the repetitive nature of the conduct is probative evidence of the abuse of the judicial process. However, while a series of baseless lawsuits may be evidence of monopolistic intent, it is not necessarily more probative of that intent than any number of acts related but external to litigation. This has been the trend of a number of lower court decisions subsequent to *Trucking Unlimited*[114] that have not required that the conduct involved be access barring. Illustrative of this trend is *Associated Radio Service Co. v. Page Airways, Inc.*[115] In *Page*, plaintiffs alleged a conspiracy to eliminate them as competitors in the market for avionic equipment in corporate and private aircraft. In furtherance of the conspiracy defendants allegedly enticed employees away, destroyed plaintiffs' records and documents, refused to pay a debt, sought an ex parte injunction in a mechanic's lien action, and filed a spurious interpleader action that slandered plaintiffs' credit. Defendants moved to dismiss on a number of grounds including the *Noerr-Pennington* doctrine. In denying the motion the court noted:

> The critical distinction drawn by the Court in *California Transport* is between the concerted effort to influence public officials regardless of intent and purpose and the concerted effort to abuse the judicial or administrative process. . . . Those efforts to influence public officials are granted immunity while those efforts to abuse the process are not. . . . The Court concludes that the line between intent to influence and intent to abuse is a difficult one to draw. . . . It is however, the drawing of that line which must be done in this case.[116]

Defendants argued that there can be no abuse of process within *Trucking Unlimited* unless the state court action was maliciously prosecuted. The court rejected this approach and stated that the gist of the *Noerr* exception is abuse of process, not malicious prosecution. As such, the

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Bank of Clayton v. Clayton Bank, 424 F. Supp. 163 (E.D. Mo. 1976); Ernest W. Hahn, Inc. v. Codding, 423 F. Supp. 913 (N.D. Cal. 1976).

114. *See, e.g.*, Metro Cable Co. v. CATV of Rockford, Inc. 516 F.2d 220, 228 (7th Cir. 1975); Woods Exploration & Producing Co. v. Aluminum Co. of America, 509 F.2d 784 (5th Cir.), *cert. denied*, 423 U.S. 833 (1975); B.A.M. Liquors, Inc. v. Satenstein, 1976-2 TRADE CAS. ¶ 60,997 at 69,411-13 (S.D. Ill. 1976); Lektro-Vend Corp. v. Vendo Co., 403 F. Supp. 527 (N.D. Ill.), *aff'd*, 545 F.2d 1050 (7th Cir. 1975), *rev'd on procedural grounds*, 97 S. Ct. 2881 (1977); Handgards, Inc. v. Johnson & Johnson, 69 F.R.D. 451 (N.D. Cal. 1975); United States Dental Inst. v. American Ass'n of Orthodontists, 396 F. Supp. 565, 581-83 (N.D. Ill. 1975); Adolph Coors Co. v. A&S Wholesalers, Inc., 1975-1 TRADE CAS. ¶ 60,187 at 65,633-34 (D. Colo. 1975); Cow Palace, Ltd. v. Associated Milk Prod., Inc., 390 F. Supp. 696, 704 (D. Colo. 1975); Aloha Airlines v. Hawaiian Airlines, Inc., 349 F. Supp. 1064, 1068 (D. Hawaii 1972), *aff'd*, 489 F.2d 203 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974).

115. 414 F. Supp. 1088 (N.D. Tex. 1976).

116. Id. at 1096.

court reasoned, the baselessness of the claim in the prior proceeding was only one aspect of the various possible abuses of the legal process. Accordingly, it was the purpose of achieving a collateral objective by the prior litigation that was dispositive. The abuse of judicial process, as discussed in *Trucking Unlimited* may take different forms. A series of baseless lawsuits is only one of these forms. A single lawsuit, coupled with perjury and collateral purpose, should also be sufficient. But unless coupled with anticompetitive acts external to the litigation, the courts are likely to dismiss the action no matter how careful the pleader. Terms such as "sham" and "predatory," are at best conclusions, and should be disregarded for this purpose.[117]

The applicability of *Noerr* to certain types of privately induced actions, however, has been placed in doubt in *Cantor v. Detroit Edison Co.*[118] The defendant, a private utility, furnished light bulbs without charge to its residential customers. They were furnished under a long-standing practice which antedated state regulation, although the practice was currently approved by the state. Plaintiff brought an action claiming violation of the Sherman Act. The district court granted summary judgment,[119] citing *Parker v. Brown*[120] for the proposition that the free light bulb program was exempt from state action. The court of appeals affirmed.[121] The Supreme Court reversed, holding that the doctrine of *Parker v. Brown* was inapplicable when a program with anticompetitive effects was not central to the purposes of enabling legislation. It also held, however, that *Noerr* was inapplicable. The defendant had argued that the program was also *Noerr*-protected because it induced the state to approve its tariff. Mr. Justice Stevens in the majority opinion stated:

> The holding in *Noerr* was that the concerted activities of the railroad defendants in opposing legislation favorable to the plaintiff motor carriers was not prohibited by the Sherman Act. The case did not involve any question of either liability or exemption for private action taken in compliance with state law.[122]

Mr. Justice Stewart, dissenting, noted: "The plurality's contrary view would effectively overrule not only *Parker* but the entire body of post-*Parker* case law in this area, including *Noerr*."[123]

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117. Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 973 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969).

118. 428 U.S. 579 (1976).

119. 392 F. Supp. 1110 (E.D. Mich. 1974), *aff'd*, 513 F.2d 630 (6th Cir. 1975), *rev'd*, 428 U.S. 579 (1976).

120. 317 U.S. 341 (1943).

121. 513 F.2d 630 (6th Cir. 1975), *rev'd*, 428 U.S. 579 (1976).

122. 428 U.S. at 601.

123. *Id.* at 625, (Stewart, J., dissenting).

IV. CONCLUSION

Whatever the future holds for *Noerr*, the use of litigation as an overt act in furtherance of an attempt to monopolize is likely to remain as a viable theory of recovery when the judicial process is clearly abused, and when anticompetitive external acts are present. This is as it should be; in proper cases the Sherman Act is not likely to have an in terrorum effect itself on access to courts or administrative bodies. If anticompetitive overt acts in addition to litigation are present, and particularly if per se section 1 allegations are involved, the balancing of competing interests may even favor the maintenance of the action. If the other elements of a section 2 case are present there is no theoretical or policy impediment favoring the exemption of litigation which in essence is an abuse of the judicial process, and which is bound up as an integral part of a series of predatory acts.

Whatever *Cantor* may mean, it appears that *Noerr* is inapplicable to privately induced legislative or adjudicatory action that would itself be anticompetitive, and which is beyond the clear mandate of the legislature or adjudicative body. Thus, it may be read as a narrow exception to *Noerr*, as is the "sham exception" itself.