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Antitrust Law: A Restricted Application of the Noerr-Pennington Sham Exception

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ANTITRUST LAW: A RESTRICTED APPLICATION OF THE NOERR-PENNINGTON "SHAM" EXCEPTION—*City of Cleveland v. Cleveland Electric Illuminating Co.*, 734 F.2d 1157 (6th Cir.), *cert. denied*, 105 S. Ct. 253 (1984).

I. INTRODUCTION

The *Noerr-Pennington* doctrine[1] was created to protect certain activities[2] that are designed to influence the passage and enforcement of laws[3] from antitrust liability under the Sherman Act.[4] By providing such safeguards, the doctrine is intended to protect the first amendment right to petition the government[5]—even though such activities may involve anticompetitive consequences.[6] The protection offered by the *Noerr-Pennington* doctrine, however, is not absolute. Indeed, as is true of most legal doctrines, an exception has been carved out. The so-called "sham" exception[7] to the *Noerr-Pennington* doctrine provides a means to lift the shield of immunity in cases involving meritless petitioning activities.[8] Petitioning activities of this sort interfere with, and may often create heavy burdens for, the party targeted for such action.[9]

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1. *See* United Mineworkers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). *See generally* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); Balmer, *Sham Litigation and the Antitrust Laws*, 29 BUFFALO L. REV. 39 (1980); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. CHI. L. REV. 80 (1977); Oppenheim, *Antitrust Immunity for Joint Efforts to Influence Adjudication before Administrative Agencies and Courts—from* Noerr-Pennington *to* Trucking Unlimited, 29 WASH. & LEE L. REV. 209 (1972); Note, Noerr-Pennington *Immunity from Antitrust Liability under* Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.: *Replacing the Sham Exception with a Constitutional Analysis*, 69 CORNELL L. REV. 1305 (1984); 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 (1973).

2. The term activities is used to refer generally to any attempts to influence any branch of government. For example, a lobbying effort in a state legislature may be considered activity designed to influence the passage of a law. Similarly, the filing of a lawsuit seeking an injunction during a licensing procedure may also be considered activity designed to influence the enforcement of a law. *See* Balmer, *supra* note 1, at 39–40.

3. *Noerr*, 365 U.S. at 135.

4. 15 U.S.C. §§ 1–7 (1982). The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise" in restraint of trade and all attempts and conspiracies to monopolize. *Id.* §§ 1, 2.

5. The first amendment provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I.

6. *Pennington*, 381 U.S. at 669; *Noerr*, 365 U.S. at 139–40.

7. *See infra* text accompanying notes 39–44. *See also* Balmer, *supra* note 1, at 41.

8. *See infra* text accompanying notes 39–44.

9. As noted by one commentator:

Taken together, then, the *Noerr-Pennington* doctrine and the "sham" exception attempt to balance first amendment rights with the protections that the antitrust laws were designed to offer.[10]

Federal courts, when faced with allegations of antitrust violations based on a defendant's use of governmental processes, must attempt to balance the constitutional right to petition with the congressional mandate expressed in the antitrust laws.[11] The controversy generally centers on whether the defendant's conduct involved a genuine petitioning activity. When there is a legitimate effort to influence government action, the activity is protected by the guaranteed right to petition through the application of the *Noerr-Pennington* doctrine.[12] When the activity in question is not genuine petitioning activity, however, it falls within the "sham" exception, and the antitrust laws continue to prohibit the violative conduct.[13]

In *City of Cleveland v. Cleveland Electric Illuminating Co.*,[14] the United States Court of Appeals for the Sixth Circuit followed a different approach in defining the "sham" exception. The court interpreted the "sham" exception to require either repetitive, baseless claims or an abuse of process.[15] The court then focused its analysis on whether the conduct fell within this exception and found that there was neither a showing of clear abuse of process nor a repetitive and harassing filing

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This mode of predation is particularly insidious because of its relatively low antitrust visibility. The enforcement agencies have been preoccupied with the mythical dangers of mergers, vertical restraints, and price cutting. The fact that many battles fought before agencies like local zoning boards are designed to preclude market entry does not come to their attention. Since much of this predation occurs at local levels through misuse of state and municipal procedures, the victims are often small businessmen with no, or very little, idea of the possible protection afforded by antitrust laws.

R. BORK, *supra* note 1, at 348.

10. The objectives of the antitrust laws were well stated by Justice Black in Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958). He stated:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Id. at 4.

11. *See, e.g.*, MCI Communications Corp. v. AT & T Co., 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); Landmarks Holding Corp. v. Bermant, 664 F.2d 891 (2d Cir. 1981); *see also* Protect Our Mountain Environment, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984).

12. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510–11 (1972). *See* Balmer, *supra* note 1, at 39–40.

13. *See* Balmer, *supra* note 1, at 39–40.

14. 734 F.2d 1157 (6th Cir.), *cert. denied*, 105 S. Ct. 253 (1984).

15. *Id.* at 1162. *See infra* note 50 and accompanying text.

of claims.[16] In its analysis, the court made no attempt to determine whether the alleged conduct was genuine petitioning activity. Consequently, the decision does not properly balance the first amendment underpinnings of the *Noerr-Pennington* doctrine with the protection from antitrust activity offered by the "sham" exception. Furthermore, the circuit court's decision unnecessarily restricts the application of the "sham" exception both substantively and procedurally. This casenote will examine the court of appeal's decision in *City of Cleveland* by focusing primarily on the court's approach to the first amendment foundation of the *Noerr-Pennington* doctrine and the "sham" exception.

II. Facts and Holding

In 1972, Charles Miller, backed by the Cleveland Electric Illuminating Company (CEI), filed a taxpayer's lawsuit in the Court of Common Pleas for Cuyahoga County, Ohio.[17] Miller challenged a proposed interconnection between the Municipal Electric Light Plant (Muny Light, the city of Cleveland's utility company), and CEI.[18] The common pleas court granted a temporary restraining order to keep the city from making any payments on work in progress for the interconnection but did not enjoin the work itself.[19] Two weeks later, after hearings on the matter, the court dissolved the order and refused to issue a permanent injunction.[20]

Three years later, the city of Cleveland instituted an action against CEI alleging a violation of section 2 of the Sherman Act for monopolization and attempts to monopolize the Cleveland electric market.[21] The parties stipulated that CEI had induced Miller to file the taxpayer suit, had never revealed its sponsorship of the litigation, had paid Miller for his troubles, and had provided him with expert testimony to back his claim.[22] The first trial on the antitrust claim ended in a hung jury but the retrial resulted in a jury verdict for CEI.[23]

At the retrial, the city of Cleveland failed in its attempt to introduce the "Miller Stipulations" into evidence in order to demonstrate

16. *City of Cleveland*, 734 F.2d at 1162–63.

17. City of Cleveland v. Cleveland Elec. Illuminating Co., 734 F.2d 1157, 1161 (6th Cir. 1984).

18. *Id.* Muny Light was having problems with its generators which prevented it from supplying reliable service to its customers and sought CEI's cooperation to construct an interconnection enabling Muny to draw from CEI's generators. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1160.

22. *Id.* at 1161. The Sixth Circuit Court of Appeals referred to these stipulations as the "Miller Stipulations." *Id.*

23. *Id.* at 1160.

CEI's anticompetitive intent to exclude Muny Light from the retail electric power market.[24] Based on the rationale of the *Noerr-Pennington* doctrine, the trial court held the stipulations to be inadmissible.[25] The United States Court of Appeals for the Sixth Circuit affirmed the trial court's decision. The court of appeals held that in the absence of clear abuse of process or the repetitive and harassing filing of meritless claims, it could not find that the trial judge acted erroneously in holding the "Miller Stipulations" inadmissible.[26]

III. BACKGROUND

A. *The* Noerr-Pennington *Doctrine and the First Amendment*

The *Noerr-Pennington* doctrine evolved from a trilogy of United States Supreme Court cases.[27] The seminal case in this evolution is *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[28] There the Supreme Court established the position that the Sherman Act does not apply to those activities which comprise mere solicitation of governmental action with respect to the passage and enforcement of laws.[29] The Supreme Court determined that holding that the Sherman

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24. *Id.* at 1161–62. "The stipulations were admitted at the first trial, but only as rebuttal evidence after witnesses for Cleveland Electric had testified that Cleveland Electric had done nothing to interfere with the interconnection. At the second trial, defense counsel was wise enough not to make the same mistake twice." *Id.* at 1161 n.4.

25. *Id.* at 1161–62.

26. *Id.* at 1163. The court also held that it was in the broad discretion of the district court to hold that the collateral estoppel effect should not be applied to antitrust findings made by the Nuclear Regulatory Commission's licensing board in connection with CEI's applications to build nuclear power plants. The court of appeals based its decision on a finding that different procedures and burdens of proof were used in the administrative proceeding than were used in the district court, that irregular circumstances surrounded the Nuclear Regulatory Commission's decision, and that the Nuclear Regulatory Commission's decision was not a final judgment. *Id.* at 1165–66.

In his dissent, Judge Martin disagreed with each of the majority's conclusions and stated that "because I do not believe that giving collateral estoppel effect to the Commission's findings of fact would 'contravene public policy or result in manifest injustice,' I would give collateral estoppel effect to the Commission's findings of fact." *Id.* at 1172. The court also ruled on six other issues which were raised on appeal, but those issues are beyond the scope of this casenote.

27. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

28. 365 U.S. 127. In *Noerr*, a group of truck operators and its trade association sued under § 4 of the Clayton Act for treble damages and injunctive relief against a group of railroads, a public relations firm, and a railroad association, alleging that the defendants had conspired to restrain trade in, and monopolize, the long-distance freight business in violation of §§ 1 and 2 of the Sherman Act. *Id.* at 129. The truckers charged that the defendants conducted a publicity campaign aimed at influencing the passage of legislation which would benefit the railroads and eliminate the truckers as competitors. *Id.* at 129–30.

29. *Id.* at 137–38. While most courts addressing this decision agree that the *Noerr-Pennington* doctrine is intended to protect first amendment rights, some courts have stated that the *Noerr* decision was an exercise in statutory construction. "*Noerr* expressly refrains from deciding

Act forbids associations for the purpose of influencing the passage or enforcement of laws would substantially impair the power of government—through its legislature and executive—to take actions that operate to restrain trade.[30] The Court noted that it was at least equally significant that such a construction of the Sherman Act would raise important constitutional questions.[31] Indeed, the right of petition is protected by the Bill of Rights and the Court would not lightly impute to Congress an intent to evade such freedoms.[32]

In *United Mine Workers v. Pennington*,[33] the Supreme Court extended first amendment protection to efforts to influence the executive branch.[34] In reaching its decision the Court held that regardless of intent or purpose, concerted efforts to influence public officials are shielded from the Sherman Act under *Noerr*'s protective umbrella.[35] The Court stated that efforts to influence public officials, though intended to eliminate competition, do not violate the antitrust laws.[36]

Finally, in *California Motor Transport Co. v. Trucking Unlimited*,[37] the Supreme Court held that the right to petition the government includes all three branches of government.[38] The Court made it

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whether the activities complained of are protected under the first amendment." Suburban Restoration Co. v. ACMAT Corp., 700 F.2d 98, 100 (2d Cir. 1983). "The *Noerr* holding was, strictly speaking, a matter of statutory construction, but First Amendment concerns clearly informed the decision." Litton Systems, Inc. v. American AT & T Co., 700 F.2d 785, 805 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984).

30. *Noerr*, 365 U.S. at 137. Governmental bodies often enact legislation which serves to both regulate and, at times, restrain trade. Therefore, to act in this representative capacity the government needs to be freely informed by the people. *Id.*

31. *Id.* at 138.

32. *Id.* Justice Black, delivering the opinion for the Court, stated:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

Id.

33. 381 U.S. 657 (1965). The conduct challenged, inter alia, was efforts by the United Mine Workers and large operators who allegedly agreed to eliminate smaller companies by obtaining from the secretary of labor the establishment of a minimum wage (under the Walsh-Healey Act) higher than that established for other industries. *Id.*

34. *Id.* at 670.

35. *Id.*

36. *Id.*

37. 404 U.S. 508. A group of truck operators was charged with conspiring to monopolize trade and commerce by taking concerted actions to institute state and federal proceedings to resist and defeat applications by competitors to acquire operating rights or to transfer or register those rights. *Id.* at 509.

38. *Id.* at 510–11.

clear that the first amendment rights of petition and association underlie the *Noerr-Pennington* doctrine, and those rights extend to attempts to influence all three branches of government, including administrative agencies.[39] The Court concluded that it would be destructive of the rights of association and petition to hold that groups could not use the channels and procedures of administrative agencies and courts to advocate their causes without violating the antitrust laws.[40]

B. The "Sham" Exception

The "sham" exception, as enunciated in *Noerr*,[41] reflects a recognition that not all efforts to influence a branch of government are necessarily genuine efforts to petition the government.[42] In *California Motor Transport Co. v. Trucking Unlimited*,[43] the United States Supreme Court amplified the "sham" exception, making it clear that when first amendment rights are used as an integral part of conduct which violates a valid statute there is no guarantee of immunity.[44]

While not specifically addressing the "sham" exception, the Supreme Court, in *United Mine Workers v. Pennington*,[45] determined that under certain circumstances, evidence of conduct protected by the *Noerr-Pennington* doctrine may still be admitted at a trial.[46] These three cases make it clear that under the proper circumstances, certain petitioning activities falling within the "sham" exception to the *Noerr-*

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39. *Id.* at 510.

40. *Id.* at 510–11. In discussing its reasoning in *Noerr* and *Pennington* the Court stated that:

> The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to the courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition.

Id. at 510.

41. *Noerr*, 365 U.S. at 144. "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." *Id.*

42. *See* Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1255 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

43. 404 U.S. 508.

44. *Id.* at 514.

45. 381 U.S. 657.

46. *Id.* at 669–70. The Court stated:

> It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."

Id. at 670 n.3 (citations omitted).

Pennington doctrine may either be violative of the antitrust laws or be admissible at a trial to show the purpose and character of the particular transactions under scrutiny.

IV. ANALYSIS

A. An Unbalanced Approach

In *City of Cleveland v. Cleveland Electric Illuminating Co.*,[47] the United States Court of Appeals for the Sixth Circuit failed to consider CEI's conduct within the context of the underlying principle of the *Noerr-Pennington* doctrine. This failure is evidenced by the absence of any substantive discussion of the first amendment right to petition.[48] The right to petition[49] underlies the protections afforded by the *Noerr-Pennington* doctrine. Nevertheless, the court of appeals neglected to discuss how CEI's clandestine involvement in the Miller suit created a need for such protection. The court's avoidance of any attempt to describe CEI's unethical behavior as petitioning activity legitimately in need of first amendment protection is understandable. Justifying CEI's involvement in the Miller suit as legitimate petitioning activity would have been particularly difficult in light of the Supreme Court's discussion in *Bill Johnson's Restaurants, Inc. v. NLRB*[50] regarding the scope of the first amendment right to petition.

In *Bill Johnson's Restaurants,* the United States Supreme Court espoused one commentator's observation that:

> The first amendment interests involved in private litigation — compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts—are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims. Furthermore, since sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition.[51]

None of the first amendment interests suggested in *Bill Johnson's Restaurants* were advanced by CEI promoting the improper suit brought by Miller. There was no attempt by CEI to pursue compensation for

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47. 734 F.2d 1157 (6th Cir.), *cert. denied,* 105 S. Ct. 253 (1984).

48. It is interesting to note that the majority opinion only twice mentions first amendment rights. First amendment rights were mentioned once in a sentence briefly explaining *Noerr-Pennington* and once in a quote from another court. *Id.* at 1162–63. In California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (relied on heavily by the Sixth Circuit Court of Appeals in *City of Cleveland*) the opinion is replete with references to the first amendment and the right to petition. *Id.*

49. *See supra* note 5.

50. 103 S. Ct. 2161 (1983).

51. *Id.* at 2170 (quoting Balmer, *supra* note 1, at 60).

violated rights and interests. Rather, CEI was attempting to interfere with the city's right to the interconnection as ordered by the Federal Power Commission. If any psychological benefits were to be had they were the psychological benefits derived from harassing a competitor, not benefits derived from vindication. Moreover, the concealment of CEI's involvement in the suit can hardly be considered an interest in a public airing of disputed facts. Finally, there was never a bona fide grievance on the part of CEI.

In short, based upon what the Supreme Court believes to be legitimate first amendment interests in the right to petition, the Miller suit did not directly or vicariously present any interests of CEI which could legitimately claim first amendment protection under *Noerr-Pennington.* Thus, the Sixth Circuit Court of Appeals takes an unbalanced approach to its analysis of the Miller suit (under *Noerr-Pennington*) by leaving unsubstantiated the premise that CEI's involvement was legitimate petitioning activity. Rather, the court adopted a restrictive interpretation of the "sham" exception to legitimize the premise that the Miller suit was not "sham" litigation.

B. A Restrictive Interpretation of Sham Litigation

The characterization of "sham" litigation espoused by the Sixth Circuit Court of Appeals was extracted from the United States Supreme Court's opinion in *California Motor Transport Co. v. Trucking Unlimited.*[52] The court of appeals failed, however, to consider other, less restrictive language found in the same opinion.[53] In so doing, the court narrowed the application of the "sham" exception to two situations—when there is a showing of baseless, repetitive claims or when there is a showing of abuse of process.[54]

By requiring repetitive claims, a single lawsuit, no matter how meritless or fraudulent, can never be found to be a "sham" unless it results in an abuse of process. The Sixth Circuit fashioned this requirement from a narrow reading of dictum found in the *California Motor* opinion.[55] The Supreme Court, in *California Motor,* described forms of illegal and reprehensible practices that may corrupt the administrative or judicial processes.[56] Nevertheless, the Sixth Circuit restricted the concept of "sham" litigation to a showing of abuse of process or repeti-

52. 404 U.S. 508.

53. *See infra* notes 57 & 58 and accompanying text.

54. *See supra* note 11 and accompanying text.

55. *California Motor,* 404 U.S. at 512–13.

56. *Id.* Examples were perjury of witnesses, use of a patent obtained by fraud to exclude a competitor from the market, conspiracy with a licensing authority to eliminate a competitor, and bribery of a public purchasing agent. *Id.*

tive, meritless claims.

Furthermore, the Sixth Circuit questioned whether a single lawsuit, even if found meritless, may be considered to be within the "sham" exception.[57] Notwithstanding the court's reluctance to answer this question, a growing number of courts are recognizing that, in some instances, one lawsuit can be sufficient to come within the *Noerr-Pennington*'s "sham" exception.[58] As Judge Kane so aptly stated in *Colorado Petroleum Marketers Association v. Southland Corp.*:[59] "I am not convinced that the court intended to give every dog one free bite, thus making it an irrebutable presumption that the first lawsuit was not a sham regardless of overwhelming evidence indicating otherwise."[60]

It is fair to suggest that the Sixth Circuit did not intend to give every dog one free bite. Nevertheless, the court offered little protection from a Miller-style attack through its requirement of a showing of clear abuse of process, absent evidence of repetitive, baseless claims. This obviously is a critical issue (as it was to the city of Cleveland) where only one lawsuit is involved. Since the city of Cleveland could not show evidence of more than one suit, its only opportunity to prove a "sham" was to prove an abuse of process by Cleveland Electric.

The Sixth Circuit stated that there was no indication of a finding by the state court that initiation of the Miller suit was an abuse of process.[61] This remark must be considered *obiter dictum*. If the Sixth Circuit is requiring a finding by a state court of abuse of process, then activities which would otherwise be an abuse of process will not be considered as such if undiscovered by the state tribunal. Such a position would be untenable.[62] It would be tantamount to requiring that an antitrust plaintiff first successfully prosecute an abuse of process claim in the state court, before that plaintiff may bring an antitrust action in federal court, where a single act of "sham" litigation is being alleged.

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57. *City of Cleveland*, 734 F.2d at 1162–63.

58. *E.g.*, Energy Conservation, Inc. v. Heliodyne, Inc., 698 F.2d 386, 388 (9th Cir. 1983) (quoting Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1255 (9th Cir. 1982) (" '[I]t is unnecessary to allege and prove more than the institution of a single suit or protest to invoke the sham exception.' "), *cert. denied*, 459 U.S. 1227 (1983)); MCI Communications Corp. v. AT & T Co., 708 F.2d 1081, 1155 (7th Cir. 1983) ("We therefore find that the bringing of baseless claims—even the undertaking of a single sham state court lawsuit—is devoid of the constitutional significance that warrants immunity from the antitrust laws."); Feminists Women's Health Center v. Mohammad, 586 F.2d 530, 543 n.6 (5th Cir. 1978) ("Absent clear direction from the Supreme Court, we see no reason for erecting a special, high burden of proof on this issue."), *cert. denied*, 444 U.S. 924 (1979).

59. 476 F. Supp. 373 (D. Colo. 1979).

60. *Id.* at 378.

61. *City of Cleveland*, 734 F.2d at 1162.

62. One commentator suggests that the analogy of sham litigation to abuse of process should be applied cautiously. *See* Balmer, *supra* note 1, at 68–69.

Certainly it is within the purview of a federal district court to find that an abuse of process has occurred without a prior ruling by a state tribunal.

Nonetheless, the Sixth Circuit ruled that the Miller suit was not an abuse of process. Showing an abuse of process from facts such as that of the Miller suit would be difficult, if not impossible. The two elements generally considered to be essential to a finding of abuse of process are "first, an ulterior purpose and second, a willful act in the use of the process not proper in the regular conduct of the proceeding."[63] As applied to Miller's activities in promoting the taxpayer suit, it is speculative whether Miller fulfilled both of the requisite elements of the tort. Charles Miller may have had an ulterior purpose, namely that of cooperating with CEI and collecting a fee, having little or no interest in the outcome of the suit. However, Miller did nothing in the use of the process which was improper in the regular conduct of the proceeding. In other words, the suit may have been brought with an ulterior purpose, but Miller did nothing improper as the action proceeded to its final disposition. Therefore, the second element required for a showing of abuse of process is not present.

Ultimately, this failure to show an abuse of process on the part of Charles Miller also serves to protect CEI. CEI receives this protection from the Sixth Circuit's position that to show "sham" litigation in a single lawsuit, an abuse of process must be shown. With this position, however, the court loses sight of the fact that since CEI itself could not have properly brought the suit, its involvement with Miller did not involve legitimate petitioning activity. In brief, the court's requirement of a showing of repetitive, meritless suits, or a showing of clear abuse of process, creates a situation in which unethical conduct, such as that of CEI, receives unwarranted immunity from antitrust liability under the *Noerr-Pennington* doctrine.

C. *The Evidentiary Restriction*

The Sixth Circuit in *City of Cleveland* refused to allow the city to introduce evidence of the Miller suit. The city wanted to show the anticompetitive character and nature of CEI's conduct as a part of the alleged broader pattern of conduct condemned by the Sherman Act.[64] The court believed that the trial judge was acting within his discretion when he excluded the evidence because of the danger of unfair

63. W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 121, at 898 (5th ed. 1984).

64. *City of Cleveland*, 734 F.2d at 1163.

prejudice and of confusing or misleading the jury.[65] Moreover, the court believed the evidence was cumulative and its impact insubstantial.[66] The court also stated that the admission of evidence pertaining to the Miller suit, even for the limited purpose of rebutting testimony of one of CEI's witnesses, would expose the jury to the danger of considering that proof for improper purposes—"that of an anti-competitive act when it was not admissible for that purpose."[67]

In his dissent, Judge Martin argued vigorously that the district court erred in excluding the Miller stipulations from evidence.[68] Martin relied on the proposition, stated in *Pennington,* that acts which are not in themselves actionable under the antitrust laws nonetheless can be admitted into evidence if "probative and not unduly prejudicial."[69] He pointed out that the Miller stipulations went to the heart of the issue of whether CEI's means were unfair or unreasonable.[70] Judge Martin believed that was of heightened importance because the jury was being told that CEI was trying its best to comply with the Federal Power Commission's order to interconnect with the city.[71]

Furthermore, Judge Martin charged that the trial judge failed to weigh prejudice as it is normally considered in an evidentiary setting.[72] He asserted that the question was whether admission of the evidence would inflame the jury's passions against the defendant or otherwise cause the jury to decide the case on a basis unrelated to the merits; the issue was not whether the admission of the evidence would prejudice CEI's first amendment rights.[73]

The applicable rule of evidence providing for exclusion of relevant evidence,[74] and the weight of authority, both clearly support Judge Martin's position. Federal Rule of Evidence 403 provides that relevant evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice.[75] Rule 403, by requiring the

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65. *Id.*

66. *Id.* at 1164.

67. *Id.*

68. *Id.* at 1170–71 (Martin, J., dissenting).

69. *Id.* at 1170 (quoting United Mine Workers v. Pennington, 381 U.S. 657, 670 n.3 (1965)).

70. *City of Cleveland,* 734 F.2d at 1171.

71. *Id.*

72. *Id.*

73. *Id.*

74. The applicable rule provides "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. *See also* Carter v. Hewitt, 617 F.2d 961 (3d Cir. 1980).

75. FED. R. EVID. 403.

danger of unfair prejudice to *substantially* outweigh the probative value of the evidence, supports the well settled presupposition of admissibility of relevant evidence.[76] The trial court inverted the rule by requiring the probative value of the evidence to outweigh the likely prejudicial effect. Consequently, the requirement that the probative value be *substantially* outweighed by the danger of unfair prejudice is effectively eliminated. Therefore, in addition to taking an unbalanced approach to its analysis of the *Noerr-Pennington* doctrine and restricting the substantive application of the "sham" exception, the court has also restricted the evidentiary application of the exception provided for in *Pennington.*

V. CONCLUSION

In *City of Cleveland v. Cleveland Electric Illuminating Co.*,[77] the United States Court of Appeals for the Sixth Circuit emasculated the application of the "sham" exception to the *Noerr-Pennington* doctrine. Through its unbalanced approach, the court failed to consider whether CEI's conduct was genuine petitioning activity. By requiring either repetitive claims or a showing of abuse of process, the court adopted a restrictive interpretation of "sham" litigation. Finally, through its evidentiary restriction, the court effectively negated the evidentiary provision of *Pennington.* As suggested by the dissent, considering the long history of the proceedings, there is room to sympathize with the court in its decision to uphold the trial judge's rulings and dispose of the case once and for all.[78] However, the perceived attitude of the court towards "sham" litigation will have possible consequences beyond the immediate impact of the decision on the parties involved.

Within the context of large corporate entities, the filing of one meritless lawsuit may not result in any great harm to the defendant. Within the context of a smaller business, however, litigation expenses can become particularly burdensome. While it is impossible to determine the overall effect of abuse of governmental processes on competition, the rising number of lawsuits in this area of litigation suggests that this form of predation may be more common than is suspected.[79]

While first amendment rights are at the pinnacle of constitutional values, predation through the governmental processes should not be immunized from antitrust liability when no legitimate petitioning activity is found. Defendants in such cases should not be permitted to wrap

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76. FED. R. EVID. 402.
77. 734 F.2d 1157 (6th Cir.), *cert. denied,* 105 S. Ct. 253 (1984).
78. *Id.* at 1170 (Martin, J., dissenting).
79. *See* R. BORK, *supra* note 1, at 348–49.

themselves in the blanket of protection offered by *Noerr-Pennington* to legitimate attempts to petition the government. Therefore, the Sixth Circuit in *City of Cleveland,* must be criticized to the extent its decision suggests that unscrupulous tactics, such as CEI's, which are undeserving of first amendment protection, may be protected from antitrust liability.

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