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DEVELOPMENTS IN ANTITRUST AND THE FIRST AMENDMENT: THE DISAGGREGATION OF NOERR

STEPHEN CALKINS*

A legal doctrine conceived in ambiguity seldom achieves clarity with the passage of time. Such had been the experience with the *Noerr-Pennington* doctrine,¹ the principal focus of this article.² In its first *Noerr-Pennington* decision in 16 years, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,³ the Supreme Court created new uncertainties. However, it also offered hope for resolution of some of the inconsistencies that have plagued the doctrine. It did this by distinguishing sharply between harm caused directly by petitioning activity (for which petitioners may be li-

* Professor of Law, Wayne State University Law School. The author thanks Joseph D. Grano, Richard E.V. Harris, George Hay, Maurice Kelman, Robert A. Sedler, and Paul J. Van de Graaf for helpful suggestions, Joseph Bauer, John F. Dolan, J. Mark Iwry, E. Thomas Sullivan, and Jonathan Weinberg for reviewing a draft, and several lawyers for providing copies of briefs. Of course, none of these individuals shares responsibility for errors or misjudgments.

¹ The doctrine takes its name from *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). These two cases, with *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), provide the basic framework of the doctrine. Unless otherwise indicated, all references herein to "*Noerr*" are to the doctrine, not the decision on which it is based in part.

² This is the second consecutive year in which the *Noerr-Pennington* doctrine has been a featured topic at the ABA Antitrust Section's annual "developments" program. See Sullivan, *Developments in the Noerr Doctrine*, 56 ANTITRUST L.J. 361 (1987); see also R. Harris, *The Noerr-Pennington Doctrine: The Right to Petition and Government Decision Making*, presented at the ABA Annual Meeting, Aug. 11, 1987. See generally Briggs & Calkins, *Antitrust 1986-87: Power and Access (Part II)*, 32 ANTITRUST BULL. 699, 720-28 (1988) (review of developments).

As did Professor Sullivan, I will assume familiarity with the basic contours of the *Noerr* doctrine. For more general overviews, see ABA Antitrust Section, ANTITRUST LAW DEVELOPMENTS 613-19 (2d ed. 1984 & Supp. 1988) [hereinafter ANTITRUST LAW DEVELOPMENTS]; I P. AREEDA & D. TURNER, ANTITRUST LAW ch. 2A (1978 & Supp. 1987); Kintner & Bauer, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the Noerr-Pennington Doctrine*, 17 U. CAL. DAVIS L. REV. 549 (1984). Summaries of many of the cases mentioned in this paper can be found in ABA Antitrust Section, *State Action and Noerr Gazette*, Vol. 1, Issue 1 (1988).

³ 108 S. Ct. 1931 (1988).

able), and harm caused by requested government action (for which petitioners may not), and by recasting the "sham exception" as being narrower and less important than some courts had held. Whether *Allied Tube* will eventually lead *Noerr-Pennington* out of its "quagmire"⁴ remains to be seen.

This article will discuss *Allied Tube*, most of the recent *Noerr-Pennington* developments, and, for the issues raised by these developments, the implications of the Supreme Court's opinion. In addition, the paper will briefly consider two recent cases that struggle with the tension between competition policy and the first amendment, even though their outcomes did not turn on *Noerr*. In *Superior Court Trial Lawyers Association v. Federal Trade Commission*,⁵ the D.C. Circuit rebuffed an FTC challenge to a publicized "strike" by the attorneys who regularly accept court appointments to represent indigent defendants. The court ruled that the first amendment might protect the challenged activity even though *Noerr* did not.⁶ The second case, *Michigan Citizens for an Independent Press v. Attorney General of the United States*,⁷ interprets the Newspaper Preservation Act.⁸ That Act embodies a congressional balancing of concerns about concentration and the preservation of diverse reportorial and editorial voices. On August 8, 1988,** Attorney General Meese issued a troubling decision applying that Act and approving a proposed Joint Operating Arrangement (JOA) between *The Detroit News* and the *Detroit Free Press*.⁹ A subsequent challenge to that opinion has been rejected by a district court and, as of this writing, is on appeal.¹⁰

⁴ See generally Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333 (1967).

⁵ 7 Trade Reg. Rep. (CCH) ¶ 68,196 (D.C. Cir. Aug. 26, 1988), *petition for rehearing and rehearing en banc filed*, No. 86-1465 (D.C. Cir. Oct. 7, 1988).

⁶ The court's discussions of *Noerr* are referenced where appropriate in the body of this paper.

⁷ 7 Trade Reg. Rep. (CCH) ¶ 68,219 (D.D.C. Sept. 14, 1988) (Revercomb, J.), *appeal docketed*, No. 88-5286 (D.C. Cir. argument scheduled for Oct. 28, 1988); see also *Michigan Citizens for an Independent Press v. United States Attorney*, Civ. No. 88-2322 (D.D.C. stay pending review ordered Aug. 17, 1988) (Green, J.).

⁸ 15 U.S.C. § 1801 *et seq.* (1982).

** *Editor's Note*: This article represents an updated and expanded version of the remarks presented by the author at the 1988 Annual Meeting of the Section of Antitrust Law in Toronto on August 10.

⁹ *In re Application by Detroit Free Press, Inc., and The Detroit News, Inc., for Approval of a Joint Newspaper Operating Arrangement Pursuant to the Newspaper Preservation Act*, Dkt. No. 44-03-24-8 (order entered Aug. 8, 1988).

¹⁰ *Michigan Citizens for an Independent Press v. Attorney General of the United States*, 7 Trade Reg. Rep. (CCH) ¶ 68,219 (D.D.C. Sept. 14, 1988) (Revercomb, J.), *appeal docketed*, No. 88-5286 (D.C. Cir. argument scheduled for Oct. 28, 1988).

I. NOERR-PENNINGTON

A. THE UNSETTLED NATURE OF NOERR

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,¹¹ the Supreme Court held that certain petitioning of the government would not result in antitrust liability. More than a quarter of a century later, the scope of what has come to be known as the *Noerr-Pennington* doctrine remains unsettled.¹²

The root of the uncertainty is the failure to decide whether the doctrine is founded on constitutional principles. The Court in *Noerr* said that its decision was based on statutory interpretation,¹³ although it noted that an alternative interpretation "would raise important constitutional questions."¹⁴ *United Mine Workers v. Pennington*¹⁵ is to the same effect. *California Motor Transport Co. v. Trucking Unlimited*,¹⁶ although not inconsistent, inched closer to a constitutional interpretation, referring to "First Amendment rights" and concluding that "it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes."¹⁷

¹¹ 365 U.S. 127 (1961).

¹² As Professor Sullivan observed in last year's talk, there is tension even among the various purposes of the doctrine. Sullivan, *supra* note 2, at 361-62. The doctrine's purpose is variously said to be the preservation of the right to petition, the guaranteeing of government access to important information, and the protection of the integrity of governmental decision-making. Compare *Noerr*, 365 U.S. at 137-38 (government need for information, and respect for the right to petition) with *California Motor Transport*, 404 U.S. at 513 ("There are many . . . forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations.").

¹³ 365 U.S. at 132 n.6 ("Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses."). Although the Court did not cite it, there is support in the legislative history of the Sherman Act for this interpretation. See Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243 n.1, 1250 n.33 (1984) [hereinafter *Stanford Note*]; see also *Missouri v. NOW*, 620 F.2d 1301, 1304-09 (8th Cir. 1980) (reviewing portions of legislative history addressing petitioning).

¹⁴ 365 U.S. at 138 (adding that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms").

¹⁵ 381 U.S. 657, 669 (1965) ("The Sherman Act, it was held [in *Noerr*], was not intended to bar concerted action of this kind . . .); *cf. id.* at 670 n.3 (noting that trial judge could nonetheless admit evidence of such action "if he deemed it probative and not unduly prejudicial").

¹⁶ 404 U.S. 508, 512, 514-15 (1972).

¹⁷ 404 U.S. at 510-11 (although the Court held that the activity at issue in the case was an unprotected "sham"); *cf.* 404 U.S. at 516 (Stewart, J., concurring) (doctrine "was required in order to preserve the informed operation of governmental processes and to protect the right of petition guaranteed by the First Amendment"); *Bill Johnson's Restaurants, Inc.*

Some commentators and courts have read this record and concluded that, whatever its origins, the *Noerr* doctrine is now a matter of constitutional law,¹⁸ yet others continue to insist that it is a creature of statutory interpretation.¹⁹

Whether the foundation of the doctrine is constitutional or statutory is important.²⁰ Those who espouse the former belief—Professor Fischel is perhaps the leading advocate—tend to interpret the doctrine narrowly, as limited to the extent of constitutional protections. Those who believe the latter, such as Professor Handler, tend to interpret the doctrine expansively, as sheltering a much broader range of activity.²¹ The basis of the doctrine also is important, moreover, in determining its reach: does it apply to state law?²² To the Federal Trade Commission Act?²³

v. NLRB, 461 U.S. 731, 741 (1983) ("In [*California Motor Transport*] we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances."); *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 399 n.17 (1978) ("Cases subsequent to *Pennington* have emphasized the possible constitutional infirmity in the antitrust laws that a contrary construction would entail in light of the serious threat to First Amendment freedoms that would have been presented.") (citing Justice Stewart's concurrence in *California Motor Transport*, and citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962), where the Court wrote that "imputing to the Sherman Act a purpose to regulate political activity . . . would have encountered serious constitutional barriers").

¹⁸ See, e.g., Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 81–84, 94–96 (1977); see also Balmer, *Sham Litigation and the Antitrust Laws*, 29 BUFF. L. REV. 39, 61 (1980); Bern, *The Noerr-Pennington Immunity for Petitioning in Light of City of Lafayette's Restriction on the State Action Immunity*, 1980 ARIZ. ST. L.J. 279, 282–85; Note, *Noerr-Pennington Immunity from Antitrust Liability under Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.: Replacing the Sham Exception with a Constitutional Analysis*, 69 CORNELL L. REV. 1305, 1306–12 (1984) [hereinafter *Cornell Note*].

¹⁹ E.g., Handler & De Sevo, *The Noerr Doctrine and its Sham Exception*, 6 CARDOZO L. REV. 1, 3–5 (1984); *Stanford Note*, *supra* note 13 (arguing that *Noerr's* broad immunity should not be extended to non-antitrust cases).

²⁰ Accord Crawford & Tschoepe, *The Erosion of the Noerr Pennington Immunity*, 13 ST. MARY'S L.J. 291 (1981); Fischel, *supra* note 18, at 94; Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 79 (1985).

²¹ It is intriguing that on *Noerr* issues antitrust "conservatives" and "liberals" tend to change stripes: those who customarily advocate a limited role for antitrust call for narrowing *Noerr's* protection (i.e., expanding antitrust coverage), and those who commonly urge "aggressive" antitrust policies call for broadening *Noerr's* protection. See L. SULLIVAN, *supra* note 2, at 364; cf. *Grip-Pak Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982) (Posner, J.), *cert. denied*, 461 U.S. 958 (1983); R. BORK, *THE ANTITRUST PARADOX* ch. 18 (1978); Handler & De Sevo, *supra* note 19.

²² See *G. Fruge Junk Co. v. City of Oakland*, 637 F. Supp. 422, 425 (N.D. Calif. 1986) (Schwarzer, J.) (since franchisee's complaints to city about violations of exclusivity provisions were protected by first amendment, they could not violate state unfair competition law); Kintner & Bauer, *supra* note 2, at 587-88 (doctrine is "constitutionally grounded" and extends to state antitrust law).

²³ Cf. *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 590 (1986) (*Noerr* is based on First Amendment principles; opinion assumes without discussion that it applies in FTC

To attempt the introduction of evidence?²⁴ To petitioning foreign governments?²⁵ To petitioning by governmental units?²⁶

As a corollary to the disagreement over the foundation of *Noerr*, the doctrine suffers from inconsistent characterizations. Some courts and commentators have insisted that *Noerr* refers simply to a category of conduct not condemned by the Sherman Act.²⁷ Others have described *Noerr* as an "exemption" from the antitrust laws, although it is not always clear whether this characterization is based on anything more than ease of reference.²⁸ The choice of characterization may have important con-

cases), *vacated on other grounds and remanded*, 7 Trade Reg. Rep. (CCH) ¶ 68,196 (D.C. Cir. Aug. 26, 1988), *petition for rehearing and rehearing en banc filed*, No. 86-1465 (D.C. Cir. Oct. 7, 1988).

²⁴ See *infra* at notes 216–19 and accompanying text.

²⁵ See Fischel, *supra* note 18, at 120–21 (since doctrine is constitutional, it has no foreign application). *Noerr's* applicability to petitioning of foreign governments is worthy of at least brief mention. See generally Note, *The Noerr-Pennington Doctrine and the Petitioning of Foreign Governments*, 84 COLUM. L. REV. 1343 (1984) (reviewing cases and arguing that all genuine petitioning of foreign governments should be exempt). In the Department of Justice's Antitrust Guide for International Operations (Jan. 26, 1977), the Department stated simply that it "does not consider it [the doctrine] to be limited to the domestic area." *Id.* at 63. The Department explained that although the doctrine "turns in part on U.S. domestic constitutional considerations," the Supreme Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), implied that *Noerr* extended to petitioning foreign governments. *Id.* In its proposed new Antitrust Guidelines for International Operations, the Antitrust Division quite deliberately noted that the doctrine "may not apply to the petitioning of foreign governments by U.S. and foreign firms," since the doctrine "rests on a construction of the Sherman Act that is derived at least in part by reference to the First Amendment right to petition." The draft Guidelines state that it is nonetheless Department policy "not to prosecute the legitimate petitioning of foreign governments by foreign or U.S. firms in circumstances in which the United States protects such activities by its own citizens." Trade Reg. Rep. (CCH) Extra Ed. No. 2, at 71 (June 8, 1988). There is thus a new chariness about the extent of any immunity.

²⁶ Some courts have reasoned that because *Noerr* "is intended to protect an individual's first amendment rights" it does not protect petitioning by government officials and units. *Vartan v. Harristown Dev. Corp.*, 655 F. Supp. 430, 438 n.5 (M.D. Pa. 1987) (no protection for a municipal development corporation and its chairman, acting in his official capacity); *accord* *Fischelli v. Town of Methuen*, 653 F. Supp. 1494, 1502–03 n.8 (D. Mass. 1987) (inapplicable to druggist/city council member's efforts to have city council deny industrial revenue bond to competing pharmacy); *J. Fred Creek v. Village of Westhaven*, 1987 U.S. Dist. LEXIS 191 (N.D. Ill. Jan. 15, 1987) (civil rights case applying *Noerr*) (villages do not have "a first amendment shield from liability for petitioning activities"). *But see, e.g.,* *Unity Ventures v. County of Lake*, 631 F. Supp. 181, 196–97 (N.D. Ill. 1986) *aff'd on other grounds*, 841 F.2d 770 (7th Cir. 1988) (lawsuit by government bodies protected; no discussion of *Noerr's* applicability to petitioning by governments).

²⁷ *E.g., In re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568, 575 (N.D. Cal. 1981) (Schwarzer, J.) ("*Noerr* holds that this kind of joint activity does not fall within the scope of the Sherman Act in the first place, not that it is removed from the act by an exemption"), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983); Crawford & Tschoepe, *supra* note 20, at 305 n.71; Handler & De Sevo, *supra* note 19, at 5; Sullivan, *supra* note 2, at 361.

²⁸ See, e.g., *Bright v. Moss Ambulance Serv., Inc.*, 824 F.2d 819, 821 & n.1 (10th Cir.

sequences, however. If the *Noerr* doctrine is an exemption from the antitrust laws, the doctrine may be subject to the usual rule that "exemptions from the antitrust laws must be construed narrowly,"²⁹ and thus should be read less expansively than it would be otherwise.

There is general agreement on one point: *Noerr* does not protect sham acts of petitioning.³⁰ Thereafter the consensus on the sham exception breaks down:

(1) Some commentators assert that sham litigation is "an independent variety of antitrust violation."³¹ Others emphasize that the sham exception is an exception to the doctrine's protection, and that sham petitioning by itself is not necessarily grounds for antitrust liability.³²

(2) Some authorities urge that *Noerr* protects all petitioning activity except "sham petitioning"—that the sham exception is the only "exception" to *Noerr*, so to speak.³³ Others argue that several categories of

1987); Note, *The Commercial Exception: A Necessary Limitation to the Noerr-Pennington Doctrine*, 63 IND. L.J. 401, 401-02 & n.5 (1988) [hereinafter *Indiana Note*] (doctrine "immunizes from antitrust liability acts of petitioning the government," but "immunizes" is defined as "conduct the Supreme Court never intended to proscribe by the antitrust laws"); see also Crawford & Tschoepe, *supra* note 20, at 305 n.71 (1981) (protesting the mischaracterization of the doctrine as an "exemption" and as conferring "immunity," but conceding that it also would use these terms, even "[a]t the risk of entrenching this misconception").

²⁹ Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1982); see *Indian Head*, 817 F.2d at 945 (quoting *Union Labor*). But see *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1155-56 (7th Cir.), cert. denied, 464 U.S. 891 (1983) (because of constitutional implications, read exceptions to *Noerr* narrowly); *Sherman College of Straight Chiropractic v. American Chiropractic Ass'n*, 654 F. Supp. 716 (N.D. Ga. 1986) (same), *aff'd per curiam*, 813 F.2d 349 (11th Cir.), cert. denied, 108 S. Ct. 160 (1987).

³⁰ Even this is an overstatement, since some regard the sham exception as limited in whole or in part to sham litigation. See, e.g., Bien, *Litigation as an Antitrust Violation: Conflict Between the First Amendment and the Sherman Act*, 16 U.S.F.L. Rev. 41, 70 (1981) (branch of exception concerned with unethical methods applies "solely to the adjudicatory process"); cf. AREEDA & TURNER, *supra* note 2, at ¶ 203a (presumption against sham in legislative context); Handler & De Sevo, *supra* note 19, at 18 (sham not found in any of the 20 cases involving petitioning the legislature decided under *Noerr*).

³¹ Balmer, *supra* note 18, at 39 nn. 2-3 (also noting that the usual elements of an antitrust violation must be proved); see also *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 722 (8th Cir. 1986) (upheld jury instruction saying "you may consider those [sham] acts to have been unlawful conduct"), cert. denied, 480 U.S. 910 (1987); *Rickards v. Canine Eye Registration Foundation*, 783 F.2d 1329 (9th Cir. 1986) (seemingly equating finding of sham with finding of antitrust violation), criticized, Briggs & Calkins, *supra* note 2, at 722-24.

³² E.g., P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 203.6 (Supp. 1987).

³³ E.g., *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (dictum) (*California Motor Transport* "construed the antitrust laws as not prohibiting the filing of a lawsuit . . . unless the suit was a 'mere sham'"); *Bright v. Moss Ambulance Serv., Inc.*, 824 F.2d 819, 822-23 (10th Cir. 1987); *Huron Valley Hospital, Inc. v. City of Pontiac*, 650 F. Supp. 1325, 1342 (E.D. Mi. 1986), *aff'd per curiam*, 849 F.2d 262 (6th Cir. 1988), petition for cert. filed, No. 88-465 (U.S. Sept. 16, 1988); *Stanford Note*, *supra* note 13, at 1253.

petitioning activity not qualifying as sham should not be subject to anti-trust challenge.³⁴

(3) These differences are compounded by fundamental disagreement over the test by which to identify sham petitioning.³⁵

B. ALLIED TUBE

It was against this backdrop of unsettled law that two courts of appeals recently rendered inconsistent opinions on the widespread practice of industry members helping to prepare and amend model codes intended for adoption by state and municipal governments. In *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*,³⁶ the Ninth Circuit held that *Noerr* "immunizes proper lobbying . . . of a private association engaged in promulgating an important model code to influence legislative and executive decisions."³⁷ The court reasoned that any excessively abusive activities could be addressed through a broad reading of the sham exception. The association at issue was the Western Fire Chiefs Association, a private, nonprofit organization whose voting membership is limited to public officials. The Association promulgates the "highly influential" Uniform Fire Code.³⁸ After a manufacturer of metal tanks, upset about loss of replacement sales to in-ground tank lining firms (and, perhaps, concerned about the safety of the process) persuaded the Association to

³⁴ *E.g.*, P. AREEDA & H. HOVENKAMP, *supra* note 32, at ¶ 203.1.

The root of the disagreement over whether the only exception to *Noerr* is for sham petitioning is Justice Douglas's strikingly casual opinion for the Court in *California Motor Transport*. After noting that *Noerr* had left open the sham exception, the Court's opinion mentioned a variety of "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations." 404 U.S. at 513. The Court failed to indicate precisely which such practices would violate the antitrust laws, under what circumstances, and according to what theory. The Court wrote, somewhat inconsistently, that (1) the right to petition prevents liability for advocating positions to the government, but "there may be instances where the alleged conspiracy 'is a mere sham,'" 404 U.S. at 510-11 (quoting *Noerr*, 365 U.S. at 144); and (2) petitioners' first amendment "right of access" to government "does not necessarily give them immunity from the antitrust laws," 404 U.S. at 513. Justice Stewart, concurring, protested that the latter statement was "totally at odds with *Noerr*," but concluded that "the real intent of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent the respondents from invoking those processes." *Id.* at 517-18 (Stewart, J., concurring) (emphasis in original). (Justice Stewart noted that defendants allegedly had conspired to oppose reflexively a long series of applications for operating rights.)

³⁵ See *infra* at Part C.5.

³⁶ 827 F.2d 458 (9th Cir. 1987), *vacated and remanded*, 108 S. Ct. 2862 (1988).

³⁷ 827 F.2d at 462; see also *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983) (same).

³⁸ 827 F.2d at 460.

amend the Code to discourage in-ground tank lining, the Ninth Circuit affirmed in most respects a grant of summary judgment in the manufacturer's favor.³⁹

The *Sessions* court rejected the Second Circuit's decision in *Indian Head, Inc. v. Allied Tube & Conduit Corp.*⁴⁰ *Indian Head* had ruled that *Noerr* does not protect the petitioning of "quasi-legislative bodies," such as the National Fire Protection Association (NFPA), which promulgates the National Electrical Code. The Second Circuit also ruled that a manufacturer's right to petition state and local governments directly does not extend to efforts to influence governments indirectly, by blocking an amendment of a model code. The court reinstated a \$3.8 million damage award (before trebling).

The Supreme Court agreed to hear *Sessions* and *Indian Head (Allied Tube)*. The Court affirmed *Allied Tube* and remanded *Sessions* for reconsideration in light of its opinion.⁴¹

In one sense *Allied Tube* was an easy case. An NFPA professional panel had recommended that polyvinyl chloride conduit be included in the National Electrical Code's list of approved types of conduit. The defendant, Allied Tube & Conduit Corp., the country's largest manufacturer of steel conduit, then resorted to shockingly inappropriate behavior to block the recommendation: in concert with other steel conduit interests, it recruited and financed the NFPA memberships of 230 persons, many with dubious credentials and little knowledge, and arranged for them to attend the critical NFPA meeting, which it worked like a political convention (complete with walkie-talkies) until it prevailed by a vote of 394–390.⁴² As Judge Lumbard wrote, for the Second Circuit, this was a clear "subversion of the NFPA code-making process."⁴³

In another respect, however, *Allied Tube* was a hard case. As the dissent emphasized, over 400 private organizations promulgate model codes.⁴⁴ The code at issue here—the National Electric Code—was "the most widely disseminated and adopted model code in the world today."⁴⁵ It

³⁹ For a description of the "narrow" cause of action left open to the plaintiff, 827 F.2d at 469, see *infra* at notes 104–06 and accompanying text.

⁴⁰ 817 F.2d 938 (2d Cir. 1987), *aff'd*, 108 S. Ct. 1931 (1988).

⁴¹ On remand, the Ninth Circuit noted that *Allied Tube* "explicitly rejected the approach this court adopted in its disposition of this case," and ordered the case remanded to the district court for further proceedings. 852 F.2d 484, 485 (9th Cir. 1988). As of this writing the Ninth Circuit's order is subject to a pending motion for reconsideration.

⁴² 108 S. Ct. at 1935.

⁴³ 817 F.2d at 943.

⁴⁴ 108 S. Ct. at 1944.

⁴⁵ *Id.*

had been adopted unchanged or with minor variations by hundreds of municipalities and by all but six states.⁴⁶ As Allied Tube vigorously contended, it would be "largely futile" to lobby state and local governments directly: "The road to Albany, Phoenix and Sacramento begins at the NFPA."⁴⁷ Allied Tube, amici,⁴⁸ and the dissent all argued that the important model code promulgating process was threatened by the Second Circuit's opinion.

Allied Tube presented an unusual opportunity to consider damages caused by petitioning itself, not by government action. The Second Circuit interpreted the complaint as not seeking redress for injuries suffered when various governments adopted that code, but rather solely for harm from the "stigma"⁴⁹ of code non-approval, and Allied Tube's advertising of that stigma. The Supreme Court accepted the Second Circuit's version of the damage theory,⁵⁰ and keyed its analysis to it, as follows:

"[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy *absolute immunity* from antitrust liability for the anticompetitive restraint. In addition, where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is "incidental" to a valid effort to influence governmental action.

⁴⁶ 817 F.2d at 939 n.1.

⁴⁷ Brief for the Petitioner at 25, *Allied Tube*.

⁴⁸ Brief of the Western Fire Chiefs Association, the International Conference of Building Officials, the Southern Building Code Congress International, Inc., and the Building Officials and Code Administrators International, Inc., Amici Curiae in Support of Petitioner, Allied Tube & Conduit Corp., *Allied Tube*; Brief of the State of Illinois as Amicus Curiae in Support of Petitioner at 2, *Allied Tube* ("The Second Circuit decision jeopardizes the system of governmental reliance on model codes, by denying those concerned parties with the greatest opportunity and motivation for valuable input, and which historically have raised significant public safety issues before the code-making bodies, protection from treble damage liability under the Sherman Act.").

⁴⁹ 108 S. Ct. at 1936 n.2 (quoting 817 F.2d at 941 n.3). The defendants unsuccessfully protested this interpretation of the jury's findings. Brief for the Petitioner at 39, *Allied Tube*.

("The complaint in this case . . . contains no intimation of the 'stigma' theory. Instead, it is based entirely on the theory that Carlon's antitrust injury was proximately caused by the NEC's adoption by state and local governments. . . . [T]his is the *only* theory of liability that was offered until the June 27, 1986, post-trial hearing, at which Carlon for the first time raised the 'stigma' argument The district judge rejected this new theory as a 'distortion' of what had been presented to the jury").

⁵⁰ 108 S. Ct. at 1936 ("The jury then awarded respondent damages, to be trebled, of \$3.8 million for lost profits resulting from the effect that excluding polyvinyl chloride conduit from the 1981 Code had of its own force in the marketplace. No damages were awarded for injuries stemming from the adoption of the 1981 Code by governmental entities.") (footnote omitted).

The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity.⁵¹

In other words, the Court held that where, as here, a restraint on competition results directly from petitioning (and not from governmental action), *Noerr* does not protect all petitioning, even if genuine. Rather, the test is whether a restraint "is 'incidental' to a valid effort to influence governmental action,"⁵² which in turn "depends not only on its [the effort's] impact, but also on the context and nature of the activity."⁵³ Applying this standard, the Court found that Allied's petitioning had been invalid and not deserving of *Noerr*'s protection. The Court stressed that "an economically interested party exercise[d] decision-making authority in formulating a product standard for a private association that comprises market participants."⁵⁴ The Court contrasted this activity with the lobbying campaign in *Noerr*, noting that only the latter was conducted in "the open political arena," resembled "activity that has traditionally been regulated with extreme caution," and bore "little if any resemblance to the combinations normally held violative of the Sherman Act."⁵⁵ "Although one could reason backwards from the legislative impact of the Code to the conclusion that the conduct at issue here is 'political,'

⁵¹ 108 S. Ct. at 1936 (quoting *Noerr* and citing it and *Pennington*) (emphasis added; brackets by Court).

⁵² 108 S. Ct. at 1936.

⁵³ 108 S. Ct. at 1939. The Court's restriction of protection to "valid petitioning" should not be confused with efforts to limit protection to the seeking of valid governmental action. For doubts about the utility of such a limitation, see P. AREEDA & H. HOVENKAMP, *supra* note 32 at ¶ 203.2. For an early discussion of this limitation, see Costilo, *supra* note 4, at 340-43 (no protection where governmental action was outside scope of authority).

One commentator has urged that "immunity not be granted when a group's petitioning produces unnecessary direct antitrust injury and the governmental action sought by the group is illegitimate." Note, *A Standard for Tailoring Noerr-Pennington Immunity More Closely to the First Amendment Mandate*, 95 YALE L.J. 832, 832 [hereinafter *Yale Note*]. The author cites the commercial exception and the co-conspirator exception as examples of illegitimate action. *Id.* at 843-45. The author also appears to suggest that *Noerr* immunity should turn on the availability of the state action exemption, *id.* at 842-43, which is a suggestion that has generally (and sensibly) been rejected, e.g., *In re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568, 583-85 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983); Bern, *supra* note 18. The difficulty posed by an "unnecessary injury" test should be clear to anyone who has suffered through the debates about the role of "less restrictive alternatives" in antitrust law. *Cf. Yale Note* at 838 & n.33 (complaining that current doctrine "does not inquire into the existence of alternative means of petitioning that would cause less injury," and noting that there are "often a range of petitioning methods" of varying harmfulness (and effectiveness)).

⁵⁴ 108 S. Ct. at 1942. Since Allied's activities were protectable, if at all, only as indirect efforts to influence state and local governments (the Court having rejected the "quasi-government" argument, see *infra* Part B.3), Allied's "petitioning" was regarded as including the NFPA's decision not to accept the proposed amendment to the Code. Of course, had Allied's orchestrating of that decision failed (as it almost did), there apparently would have been no injuries at all.

⁵⁵ 108 S. Ct. at 1940 (quoting *Noerr*, 365 U.S. at 136).

we think that, given the context and nature of the conduct, it can more aptly be characterized as commercial activity with a political impact.”⁵⁶

Justice White, joined by Justice O'Connor, issued a stinging rejoinder:

[C]onduct otherwise punishable under the antitrust laws either becomes immune from the operation of those laws when it is part of a larger design to influence the passage and enforcement of laws, or it does not. No workable boundaries to the *Noerr* doctrine are established by declaring, and then repeating at every turn, that everything depends on “the context and nature of” the activity, *ante*, at [1936], 1939 [twice], 1940, 1941, if we are unable to offer any further guidance about what this vague reference is supposed to mean, especially when the result here is so clearly wrong as long as *Noerr* itself is reputed to remain good law.⁵⁷

Indeed, repeating the words “context and nature” (five times, by my count) contributes little to the establishment of clear guidelines for determining the validity of petitioning. Nor is clarity achieved by the majority’s footnoted response to Justice White’s concerns. The Court wrote that its holding was “expressly limited to cases where an ‘economically interested party exercises *decisionmaking* authority in formulating a product standard for a private association that comprises market participants.’”⁵⁸ The Court added that its opinion did not remove *Noerr*’s protection from all private standard-setting organizations, many of which “are composed of members with expertise but no economic interest in suppressing competition.”⁵⁹ The Court provocatively supported this assertion with a reference to *Sessions*,⁶⁰ and, indeed, the identification of restraints “incidental” to “valid” petitioning, and the scope of *Noerr*’s protection for activities designed to influence model codes, will be unsettled at least until that case is finally resolved.

Without diminishing the significance of these questions, which are of considerable theoretical and practical importance,⁶¹ three other aspects

⁵⁶ *Id.* at 1941.

⁵⁷ 108 S. Ct. at 1944 (White, J., dissenting).

⁵⁸ 108 S. Ct. at 1942 n.13 (emphasis by Court) (quoting *id.* at 1942).

⁵⁹ *Id.* at 1942 n.13 (arguing that the dissent “mistakenly asserts that this [the Court’s] description encompasses all private standard setting associations”).

⁶⁰ 108 S. Ct. at 1942 n.13 (“*See, e.g., Sessions*, 827 F.2d, at 460, and n. 2 [where the Ninth Circuit noted that only WFCAs members, none of whom represented private industry, could vote in two key meetings].”). In contrast, the Justice Department and the FTC, as amici, argued more sharply that all harm caused by petitioning activity that directly restrained trade (i.e., independent of government action) should be subject to the antitrust laws. Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Respondent at 10, *Allied Tube*.

⁶¹ *See also infra*, note 73. For additional discussions of *Allied Tube* see *Malina, Antitrust in the Supreme Court—1988*, 57 ANTITRUST L.J. 287 (1988), and Sullivan, *supra* note 2, at 368

of *Allied Tube* deserve attention. First, as noted, the facts permitted the Court to distinguish sharply between a petitioner's liability for harm caused by the requested, governmentally-imposed restraint, and for harm caused directly by the petitioning activity itself. Second, the Court squarely rejected the suggestion of the *Sessions* court that the sham exception should encompass a variety of unethical conduct, even though the Court also indicated that certain unethical conduct may not be protected by *Noerr*. Third, the Court rejected the implicit view of the *Sessions* court and the suggestion of the petitioners⁶² that a private code-enacting body could qualify as "governmental" where the code is widely adopted by state and local governments.

Each aspect of the Court's opinion separates parts of the *Noerr* doctrine that all too frequently have been combined. In effect, the Court "disaggregated" *Noerr*. Even greater clarity could have been achieved had the Court identified that part of *Noerr* that is constitutionally compelled, not merely a matter of statutory construction.

The following discussion explores each of these aspects of *Allied*. The paper then reviews some common *Noerr* issues in light of recent cases and the potential impact of *Allied*. After the conclusion of the consideration of *Noerr*, the paper will briefly discuss *Superior Court Trial Lawyers* and the proposed Detroit JOA.

1. Reduction in Scope and Importance of Sham Exception

In *Allied Tube* the Supreme Court clarified the sham exception, rendering it narrower and less essential than some courts and commentators had thought. The rejected position was roughly as follows: All petitioning activity was exempt from the antitrust laws. The only exception was sham activity—but that was a broad, malleable concept. The sham exception was said to apply either for when a defendant's petitioning was not "genuine" or, in the words of the Ninth Circuit in *Sessions*, when "the defendant genuinely seeks to achieve his governmental result, but does

(discussing lower court opinion).

The importance of *Noerr-Pennington* to standard-setting organizations should not be exaggerated. Two recent cases illustrate that what could be considered *Noerr* issues more appropriately—and in ways equally satisfying to defendants—can be addressed as questions of substantive antitrust law. In both *Consolidated Metal Prods, Inc. v. American Petroleum Inst.*, 846 F.2d 284 (5th Cir. 1988), decided before *Allied Tube*, and in *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988), decided after *Allied Tube*, appellate courts approved awards of summary judgment to defendants in trade association products specification cases. In each instance the court ruled that competition had not been restrained. The cases demonstrate appreciation for the importance of certification activities and give trade associations considerable latitude as they engage in them—a result achieved without reference to *Noerr-Pennington*.

⁶² Brief for the Petitioner at 17, 21, *Allied Tube*; *infra* note 90.

so *through improper means*.”⁶³ (*Sessions* reasoned that unethical petitioning can be considered sham because “there is a pretense of seeking an independent, impartial decision.”⁶⁴)

This extension of the sham exception to two kinds of conduct—the second of which has nothing to do with the ordinary meaning of sham⁶⁵—has caused much mischief. The extension forced the square peg of unethical conduct into the round hole of the sham exception. At best the effort was inelegant; at worst it led to inconsistent decision-making. Since some judges believed that *Noerr* had no exceptions other than for sham petitioning,⁶⁶ prudent litigants would structure their arguments in terms of that exception. Attention was thus diverted from important issues to questions of definition.⁶⁷ Moreover, some judges would rely on the narrow meaning of sham to conclude that unethical petitioning was unprotected.⁶⁸ Who knows how such cases would have been decided had attention not been focused on the meaning of “sham”?

⁶³ *Sessions*, 827 F.2d at 465 n.5 (emphasis in the original); *accord* Kintner & Bauer, *supra* note 2, at 571 (“either when the defendant has no real desire to prevail in the proceedings, but is using them to injure competitors, or when the defendant has engaged in certain prohibited conduct,” such as unethical or illegal behavior, or conspiracy with a government official (sometimes), or the providing of false information to certain kinds of tribunals) (emphasis added); *see also, e.g.*, Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711, 722 (8th Cir. 1986) (jury instruction upheld:

The defendants are entitled . . . to use genuine efforts to influence public officials but if in fact defendant’s lobbying activities included threats, intimidation, coercion or other unlawful acts, then you may find that such activities were not genuine efforts to influence public officials and you may consider those acts to have been unlawful conduct.),

cert. denied. 480 U.S. 910 (1987); Draft Department of Justice Guidelines for International Operations (June 8, 1988), Trade Reg. Rep. (CCH) Extra Ed. No. 2, at 70 (“Examples of sham petitioning include . . . the deliberate misleading of the government during such administrative proceedings”); Crawford & Tschoepe, *supra* note 20 (review of broadening of “sham exception”); Gevurtz, *Commercial Bribery and the Sherman Act: The Case for Per Se Illegality*, 42 U. MIAMI L. REV. 365, 399 (1987) (commercial bribery falls within sham exception).

For a particularly thoughtful advocacy of an expansive reading of the sham exception, see Fischel, *supra* note 18, at 106 (“The sham exception should be reinterpreted to encompass all petitioning activity which is unprotected by the first amendment.”)

⁶⁴ *Sessions*, 827 F.2d at 465 n.5 (citing Hurwitz, *supra* note 20, at 109).

⁶⁵ WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1308 (2d college ed. 1982) (“1. formerly, a trick of fraud 2. a) an imitation that is meant to deceive; counterfeit b) hypocritical action, deceptive appearance, etc.”)

⁶⁶ *See supra* note 33.

⁶⁷ *See Cornell Note, supra* note 18, at 1311–12 (lamenting “the exception-to-the-exemption analysis”).

⁶⁸ There are numerous examples of the mischief caused by the over-glorifying of the sham exception. In Premier Elec. Construction Co. v. IBEW, 1986-1 Trade Cas. (CCH) ¶ 66,990 (N.D. Ill. 1985), *rev’d*, 814 F.2d 358 (7th Cir. 1987), for instance, the district court dismissed a suit challenging the enforcement of a per se illegal agreement between con-

The most salutary lesson of *Allied Tube* is that the sham exception should be limited to conduct that is "sham" in the conventional sense of the word: the exception applies "to cover activity that was not genuinely intended to influence governmental action."⁶⁹ In language that is unusually clear (although not essential to the Court's holding), the Court specifically rejected *Sessions's* dual-meaning view of the exception. The Court wrote that "[s]uch a use of the word 'sham' distorts its meaning and bears little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action."⁷⁰

The Supreme Court's opinion should redirect attention to the identification of activities not deserving of *Noerr's* protection. It seems reasonably clear that the sham exception normally should not extend to unethical conduct such as misrepresentation, bribery, and conspiracy. If anything, these are likely to be the product of particularly fervent interests in governmental action.⁷¹ Yet the *Allied* Court also indicated that *Noerr* does not protect all such unethical conduct.⁷² Since the sham exception does not apply, it must be that some kinds of activities never qualify for *Noerr's* protection in the first instance. Under the *Allied Tube* structure of analysis, this must mean that the restraint was the result of invalid governmental action or, more likely, of private action, where the restraint was not "incidental" to a "valid" petitioning effort.⁷³

tractors and a union establishing an industry-wide fund. The court reasoned that although the agreement was illegal, all litigation (including litigation enforcing illegal agreements) is immune unless "sham" (which this clearly was not). 1986-1 Trade Cas. at 62,074-75. Fortunately, the court of appeals was not similarly distracted by the attention to the sham exception, and ruled that the constitution "does not protect efforts to enforce private cartels." 814 F.2d at 376. Similarly, the Eleventh Circuit, in an opinion reversing a district court's dismissing a case challenging misrepresentations to government agency acting judicially, lamented the district court's "rather lengthy opinion focused almost entirely on the 'sham exception.'" *St. Joseph's Hospital, Inc. v. Hospital Corp. of Am.*, 795 F.2d 948, 955 (11th Cir. 1986).

⁶⁹ 108 S. Ct. at 1941 n.10.

⁷⁰ 108 S. Ct. at 1941 n.10 (quoting *Sessions's* "improper means" language); see also 108 S. Ct. at 1937 n.4 ("private action that is not genuinely aimed at procuring favorable governmental action is a mere sham that cannot be deemed a valid effort to influence government action"). The Court explicitly criticized those courts that had used the doctrine more expansively to include "activity they deem unworthy of antitrust immunity (probably based on unarticulated consideration of the nature and context of the activity)." *Id.*

⁷¹ *Cf. J. Fred Creek v. Village of Westhaven*, 1987 U.S. Dist. LEXIS 191 (N.D. Ill. Jan. 15, 1987) (civil rights case applying *Noerr*) (making false statements to government agency not sham; no facts "suggest that defendants did not desire to obtain a favorable decision").

⁷² *Allied Tube*, 108 S. Ct. at 1937 (certain "unethical and deceptive practices . . . may result in antitrust violations") (footnote referencing the sham exception omitted); *id.* at 1941 n.10 ("the dissent does not dispute that the types of activity we describe [including, e.g., bribery], could not be immune under *Noerr*") (citation omitted).

⁷³ See *supra* at text accompanying notes 49-56.

2. *Distinction between Direct and Indirect Harm*

From the beginning, some *Noerr-Pennington* cases have distinguished between harm caused by petitioned-for government action and harm caused directly by petitioning. The trial court in *Noerr* itself declined to award damages for harm inflicted by the gubernatorial veto that defendants' successfully sought, even while it awarded damages for the cost of "defensive" public relations.⁷⁴ The Supreme Court opinion in *Noerr*, which reversed the lower court's award of damages, noted that "where a restraint . . . is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out."⁷⁵ So also, in *Pennington*, the Court wrote that affected parties could not collect damages for a government official's decision to require suppliers of coal to pay minimum wages.⁷⁶ A number of more recent authorities also distinguish between direct harm and harm from requested action.⁷⁷

⁷⁴ The bulk of the damages awarded by the *Noerr* trial court went to the truckers' trade association, which recovered \$217,358, trebled, this being the amount the trade association had been forced to spend in a defensive public relations campaign. *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conf.*, 166 F. Supp. 163, 168, 173 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd*, 365 U.S. 127 (1961). Because the individual plaintiffs stipulated that damages could be limited to injuries flowing from a governor's veto of a bill that increased ceilings on truck weights, 365 U.S. at 130, they could not recover for reputational injuries. The trial court denied the request for damages recompensing injuries flowing from the veto, reasoning that a court "cannot award money damages for injuries proximately resulting from a duly promulgated executive act." 155 F. Supp. 768, 836 (E.D. Pa. 1957). The individual plaintiffs recovered only nominal damages (six cents each, trebled). *Id.*

⁷⁵ 365 U.S. at 136 (citing *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939); *Parker v. Brown*, 317 U.S. 341 (1943)).

⁷⁶ 381 U.S. at 671 ("the jury should have been instructed . . . to exclude any damages which [plaintiff] may have suffered as a result of the Secretary's Walsh-Healey determinations").

⁷⁷ *E.g.*, *Premier Elec. Construction Co. v. National Elec. Contractors Ass'n*, 814 F.2d 358, 376 (7th Cir. 1987)

("[I]t is important to identify the source of the injury to competition. If the injury is caused by persuading the government, then the antitrust laws do not apply to the squelching (*Parker v. Brown*) or the persuasion (*Noerr-Pennington*). If the injury flows directly from the "petitioning—if the injury occurs no matter how the government responds to the request for aid—then we have an antitrust case. When private parties help themselves to a reduction in competition, the antitrust laws apply.")

(denying immunity to enforcing of private cartel); *Midwest Construction Co. v. Illinois Dept. of Labor*, 684 F. Supp. 991 (N.D. Ill. May 15, 1988) (labor union's motion to dismiss granted where construction company's injury flowed from Labor Department's legitimate (albeit anticompetitive) enforcement of in-state-labor preference law at the request of defendant union); *Woolen v. Surtran Taxicabs, Inc.*, 615 F. Supp. 344, 354 (N.D. Tex. 1985) ("injuries were caused by the governmental action which the private defendants genuinely attempted to secure and succeeded in securing"), *aff'd per curiam on basis of lower court opinion*, 801 F.2d 159 (5th Cir. 1986), *cert. denied*, 480 U.S. 931 (1987); *In re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568, 574 (N.D. Cal. 1981) (judgment to defendants

However, numerous cases give little attention to the distinction.⁷⁸ This failure may be explained by the posture of the cases, which frequently arise on summary motions;⁷⁹ few courts have had to be specific about the damages claimed. Sometimes this ambiguity redounds to the benefit of plaintiffs: for example, when harm stems from government action triggered or encouraged by unpleasant petitioning.⁸⁰ Sometimes this ambiguity redounds to the benefit of defendants: for example, when plaintiffs are harmed directly by the defendant's petitioning but the court's decision slides quickly into consideration (and rejection) of the sham exception.⁸¹

As noted above, *Allied Tube* reemphasized and reaffirmed the distinction between harm caused by requested, valid governmental action and

where major car rental firms persuaded airport authority to adopt restrictions on access to terminal: any competitive restraint "flows, not from the joint action of defendants, but from the airport authorities' exercise of their statutory authority and duty to manage the facilities in their charge", *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983); *Superior Court Trial Lawyers*, 107 F.T.C. at 590, 596; P. AREEDA & H. HOVENKAMP, *supra* note 32, at 11-12 ("if the action requested by the antitrust defendant is undertaken by the government, there is no private restraint of trade") (but footnoting reference to later discussion of the likelihood that petitioning with "improper means" could result in liability).

For an early example of "direct" injuries, see *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1265-66 (9th Cir. 1982) (defendants' protests to ICC, although ultimately unsuccessful, delayed publication of plaintiff's desired rate, deterred business by casting a "cloud" on the rate plaintiff was using, and imposed litigation costs), *cert. denied*, 459 U.S. 1227 (1983).

⁷⁸ See, e.g., *Boone v. Redevelopment Agency of the City of San Jose*, 841 F.2d 886 (9th Cir. 1988) (affirming dismissal of suit challenging redevelopment agency's and city's decision not to build parking structure needed by plaintiff), *petition for cert. filed*, No. 87-2086 (U.S. May 31, 1988); cases cited *infra* notes 80-81; cf. *Airport Car Rental Litig.*, 521 F. Supp. at 575 (noting that this part of *Noerr* "perhaps has not received the attention it deserves").

⁷⁹ *Handler & De Sevo*, *supra* note 19, at 15 (of 198 reported court *Noerr* decisions between 1961 and 1980, 158 decided motions to dismiss or motions for summary judgment) (numbers said to be "approximate").

⁸⁰ E.g., *Instructional Sys. Development Corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639, 650 (10th Cir. 1987) (denying summary judgment where defendant may have influenced school driver education purchasing officials with "conduct unprotected by the *Noerr-Pennington* doctrine"); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 722 n.11 (8th Cir. 1986) (upheld jury award of damages where defendant used "heavy-handed tactics" to "frighten[]" a city into awarding it a franchise), *cert. denied*, 480 U.S. 910 (1987); *St. Joseph's Hospital, Inc. v. Hospital Corp. of Am.*, 795 F.2d 948 (11th Cir. 1986) (suit challenging misrepresentations leading to denial of hospital certificate of need should not have been dismissed); *Oberndorf v. City and County of Denver*, 653 F. Supp. 304 (D. Colo. 1987) (allegations of conspiracy precluded dismissal of suit challenging urban renewal authority's condemnation of plaintiff's building).

⁸¹ E.g., *Westmac, Inc. v. Smith*, 797 F.2d 313 (6th Cir. 1986) (defense summary judgment affirmed where lawsuit that allegedly was filed to prevent sale of industrial revenue bonds in part by creating financial insecurity was deemed not "sham"), *cert. denied*, 479 U.S. 1035 (1987); cf. *Potters Medical Center v. City Hospital Ass'n*, 800 F.2d 568 (6th Cir. 1986) (*Noerr* protected opposition to certification of rival hospital; opinion limited to sham exception).

harm caused directly by the requesting: the former cannot be the basis of antitrust liability, whereas the latter can.⁸² The *Allied Tube* inquiry into whether a restraint is "incidental" to "valid" petitioning arises only when harm has been caused directly by petitioning. *Allied Tube* is important because the plaintiff's theory of damages permitted the distinction to be presented with unusual crispness; it also is important because here, unlike in *Noerr*,⁸³ the distinction led to a victory for the plaintiff.

In the future, courts presumably will use this distinction between direct and indirect harm as the starting point for analysis.⁸⁴ If "absolute immunity" really is absolute,⁸⁵ the first step in any *Noerr* analysis, at least for a private damages action,⁸⁶ will be to determine whether the plaintiff

⁸² This distinction is a cousin to, but different from, the distinction between sham and other petitioning. See *infra* at Part C.5. The former distinction turns on the source of the harm to competition; the latter typically on whether the defendant's interest in instigating government action (as opposed to directly harming competition) was a significant motivating factor for the petitioning. Petitioning that directly harms competition may or (as in *Allied Tube*) may not be sham.

⁸³ Although the *Noerr* trial court had found that "[i]t was the [truckers'] purpose and intent . . . to hurt the truckers in every way possible even though they secured no legislation," 365 U.S. at 142 (quoting lower court; emphasis omitted), and although the trial court in fact found that "the more important [phase] of the campaign . . . [was] vilification designed to destroy the good will of the long-haul trucking industry," 155 F. Supp. at 814, the Supreme Court interpreted these findings as meaning "no more than that the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen." 365 U.S. at 143. The Court observed that some direct, incidental injury is the "inevitable" byproduct of a publicity campaign. Accordingly, letting liability turn on the existence of such injury, even where the petitioner was aware of or even pleased by its prospect, would be tantamount to barring all publicity campaigns. 365 U.S. at 143-44.

⁸⁴ See *Superior Court Trial Lawyers Ass'n v. FTC*, 7 Trade Reg. Rep. (CCH) ¶ 68, 196, at 59,309 (D.C. Cir. Aug. 26, 1988) (restraint resulted from private action, so immunity depended on "context and nature" of activity; immunity denied, but finding of liability reversed on other grounds), *petition for rehearing and rehearing en banc filed*, No. 86-1465 (D.C. Cir. Oct. 7, 1988); cf. *Smith v. Combustion Engineering Inc.*, 7 Trade Reg. Rep. (CCH) ¶ 68,224, at 59,447-48 (6th Cir. Aug. 24, 1988) (where defendant instigated a prosecutor's search of plaintiffs' residence that resulted in a criminal conviction, *Noerr* protected defendant because any harm resulted from the government action; summary judgment affirmed, although *Allied Tube* was said not "to speak to the present case, where the defendants resorted to the courts") (opinion not recommended for full-text publication).

⁸⁵ For a suggestion that *Noerr*'s declaration that "no violation" can result from "valid government action" is too sweeping, see, e.g., Costilo, *supra* note 4, at 348-53 (noting exceptions for misrepresentations and bribery).

⁸⁶ For a brief suggestion that *Noerr* conceivably might be less protective of a government criminal or injunctive suit than of a private treble damages suit, see Costilo, *supra* note 4, at 351-52 (noting that this distinction is "not completely satisfying"). See generally Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 70 GEO. L.J. 1065 (1986) (discussion of interrelationship of sanctions and substantive law). The discussion in this paper is limited to private damages actions, which is the context in which *Noerr* issues most frequently arise, although this does not mean that standards for government or private equitable actions would necessarily be different.

is seeking damages for harm caused by governmental action. If so, the inquiry should end, regardless of whether the defendant engaged in unethical conduct.⁸⁷

Where damages are sought for harm inflicted directly by petitioning or by some other anticompetitive conduct, however, *Noerr's* protection is limited to harm that is "incidental" to "valid" petitioning, which depends on "the context and nature of the activity." Focusing on harm caused directly by petitioning may make a court more willing to find liability for unethical conduct than has been the experience heretofore. All too often, consideration of whether petitioning should be protected has been infected by a concern that private parties should not be liable for governmental action.⁸⁸ Presumably some of the unethical conduct that led to liability under a broad sham exception would result in liability as "invalid" petitioning.

3. Distinction between "Governmental" and "Private"

The *Allied Tube* Court conceded that the "dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious."⁸⁹ However, it had little trouble drawing the distinction in *Allied Tube*: the NFPA was a private organi-

⁸⁷ That unethical conduct does not lead to antitrust liability in no way indicates that it will go unpunished. Numerous federal, state, and local statutes condemn improper petitioning of government. Handler & De Sevo, *supra* note 19, at 11 n.51 (citing statutes and judicial decisions). Some threaten penalties considerably more unpleasant than treble damages. See, e.g., *California Politicians Smart After FBI Employs a 'Sting' to Pursue Corruption*, *The Wall Street J.*, Sept. 10, 1988, at 10, col. 2 (describing undercover operation that traded financial assistance for legislative support for a bill, which was passed, aiding a fictitious firm). Many have argued that "use of the Sherman Act as a vehicle for regulation of lobbying whose object is anticompetitive would be an irrationally piecemeal way to deal with lobbying abuses." E.g., Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV. L. REV. 847, 851 (1968). Although Fischel claims this "misses the point" because the Sherman Act is a "separate statutory mechanism with different purposes and remedies," Fischel, *supra* note 18, at 95, in fact it is Fischel who misses the mark. If non-antitrust laws adequately deter lobbying abuses, the deterrence purpose of antitrust—which Fischel presumably believes is the predominate purpose—does not justify applying it here. If deterrence is inadequate, something more than occasional antitrust exposure is needed. As for antitrust's compensation purpose, it may justify liability for directly caused harms, but it has much less relevance where the harm is caused by governmental action.

⁸⁸ Cf. cases cited *supra* note 81; *Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*, at 12, *Union Pac. Ry. v. Energy Transp. Sys.*, 108 S. Ct. 701 (1988) (certiorari denied) (using concern about liability for governmental action to argue that successful litigation should never result in liability). Professors Areeda's and Turner's concern about the "causation problem" is the motivating force behind much of their analysis of the treatment of unethical conduct. See P. AREEDA & D. TURNER, *supra* note 2, at ¶ 204d.

⁸⁹ 108 S. Ct. at 1938; cf. *Sessions*, 827 F.2d at 462 ("The labels 'governmental' and 'private' are, however, of limited utility.").

zation. No official authority had been conferred on it, and its members were private individuals, unaccountable to the public. Many members had financial interests in the outcome. Government reliance on the organization's work product did not make the organization public.⁹⁰ And once the Court concluded that the NFPA was private, restraints flowing directly from its decisions and efforts to influence them could be protected under *Noerr* only if they were "incidental" to "valid" efforts to petition state and local governments. The Court found that they were not.

Not all cases will prove so easy. Intriguingly, the Court referenced its observation about the elusiveness of the distinction between restraints flowing from governmental and from private action with citations to cases discussing the "co-conspirator," "bribery," and "commercial" exceptions to *Noerr*.⁹¹ Although the point was not explicitly addressed as such, *Allied Tube* probably left intact the line of cases holding that an anticompetitive agreement subsequently ratified by a government body may not be protected by *Noerr*.⁹²

4. Foundation of *Noerr*

One aspect of *Noerr* that was not greatly clarified by *Allied Tube* was the foundation of the *Noerr* doctrine. Defendant *Allied Tube* opened its argument by protesting that *Noerr* is simply a creature of statutory interpretation, and not a constitutional doctrine creating an antitrust "exemption."⁹³ The plaintiff dismissed this concern as "semantic quibbling."⁹⁴

⁹⁰ In *Sessions*, in contrast, the Ninth Circuit had concluded that lobbying the private Fire Chiefs Association was protected, since the Association, "whether designated as 'public,' 'private,' or even 'quasi-governmental,' plays an important and generally accepted role in the legislative process of the western states." 827 F.2d at 463.

⁹¹ 108 S. Ct. at 1938 n.7.

⁹² See *Indian Head*, 817 F.2d at 945 ("several courts of appeals have drawn a distinction between the submission of a group's recommendations to the government and the antecedent conduct which generated those recommendations") (citing cases); see also Costilo, *supra* note 4, at 344-46 ("it is useful to determine whether the government merely adds its rubber stamp to the private anticompetitive scheme, or whether there is a more searching independent inquiry"). Hurwitz has argued that *Noerr* should not protect regulatory rate filings when governmental review is merely a formality, Hurwitz, *supra* note 20, at 88-90; Areeda and Hovenkamp argue that rate filings should be presumptively unprotected, for want of governmental "causation," P. AREEDA & H. HOVENKAMP, *supra* note 32, at ¶ 206.1 (reviewing cases). See generally R. BORK, *supra* note 21, at 352-53 (in *Walker Process Equipment, Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965), trade was restrained by the enforcement of an invalid patent, not by any decision of the patent office or of a court).

⁹³ Brief for the Petitioner at 17-18 (citing, most devilishly, an article co-authored by Richard De Sevo, one of the lawyers laboring on behalf of the respondent, see Handler & De Sevo, *supra* note 19, at 5).

⁹⁴ Brief for the Respondent at 22 n.33.

The Court rather self-consciously avoided discussing whether *Noerr*'s footings are constitutional or statutory, and thus missed an opportunity to clarify a fundamental issue. By freely referring to the doctrine as conferring "immunity,"⁹⁵ the *Allied Tube* opinion perhaps implies that the doctrine's constitutional roots are preeminent, but such an important issue should not be decided by implication.⁹⁶

C. REVIEW OF DEVELOPMENTS AND APPLICATION OF *ALLIED TUBE*

Allied Tube is not the only recent *Noerr* decision. This article will review these other cases and the likely effect of *Allied Tube* on each of the principal "exceptions" to *Noerr*—misrepresentation, co-conspirator, bribery, commercial activity, and sham petitioning. Finally, this discussion of *Noerr* considers what I call *Noerr*'s "penumbra."⁹⁷

I. *Misrepresentation*

Prior to *Allied Tube*, the "black letter" law on the misrepresentation exception was reasonably well settled.⁹⁸ It was reiterated most recently as dicta in *Allied* itself: "A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods. But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations."⁹⁹ The *Allied Tube* Court cited *Noerr*, which held that a deceptive publicity campaign designed to influence public legislators and government executives was protected activity,¹⁰⁰ and *California Motor*

⁹⁵ 108 S. Ct. at 1934, 1936–39, 1941–42. Compare *Allied Tube*, 108 S. Ct. at 1943 (White, J., dissenting) (*Noerr* "held that the Sherman Act should not be construed to forbid joint efforts by railway companies seeking legislation that would disadvantage the trucking industry") with *id.* at 1943–45 (several references to immunity).

⁹⁶ *Allied Tube* does not preclude my tentatively preferred approach, namely, to regard the doctrine as an exercise in statutory interpretation to be conducted with an appreciation that certain conceivable interpretations might be unconstitutional. This is the approach taken in *Noerr* itself. See *supra* notes 13–14 and accompanying text. As some have expressed it, *Noerr* is a statutory doctrine with a constitutional "core." Statutory interpretation while conscious of the Constitution is common, see *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 444 (1984); *Ashwander v. TVA*, 297 U.S. 288, 347 (Brandeis, J., concurring), and would be sensible here. Because of the constitutional "core," the decisions relying on the doctrine's perceived constitutional foundation would have to be rethought, not automatically rejected.

⁹⁷ See *infra* Part C.6.

⁹⁸ See generally P. AREEDA & H. HOVENKAMP, *supra* note 32, at ¶ 204.1

⁹⁹ 108 S. Ct. at 1936–37 (citations and footnote referring to the sham exception omitted).

¹⁰⁰ *Noerr*, 365 U.S. at 140 ("Insofar as that [Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and . . . a publicity campaign to influence governmental action falls clearly into the category of political activity.") The deception in *Noerr* involved use of "the so-called third-party technique." *Id.*; see *infra* notes 126–27 and accompanying text.

Transport. In the latter case, the Court explained that “[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.”¹⁰¹ In any *Noerr* misrepresentation case, therefore, the critical question has been whether the recipient of the communication was legislative or executive, on the one hand, or judicial, on the other.¹⁰²

Two recent illustrations come from the Ninth Circuit.¹⁰³ In *Sessions*, a manufacturer of metal tanks allegedly gave erroneous information to the Western Fire Chiefs Association as part of an effort to discourage use of in-ground tank-lining.¹⁰⁴ The Association used this information in amending a model code, but fire officials also may have relied on this information to deny work permits even before the code was amended. The court ruled that the Association was acting as a quasi-legislature when it amended the code, and thus any misrepresentations to it in that capacity were protected.¹⁰⁵ On the other hand, requests for fire chiefs to deny permits before the code was amended “involved more a matter of *administering* than of *making* law,” so misrepresentations in any such requests were *not* protected.¹⁰⁶

In *Boone v. Redevelopment Agency of the City of San Jose*,¹⁰⁷ the plaintiff was harmed when a redevelopment agency cancelled plans to build a parking garage, allegedly because a rival developer had deceived the agency about the availability of parking. The issue thus was whether the redevelopment agency had acted as a legislative or judicial body. The court chose the former, reasoning rather unsatisfactorily that the agency must have been legislative because its recommended decision was reviewed by the city council.¹⁰⁸

¹⁰¹ 404 U.S. at 513.

¹⁰² Most authorities regard administrative agencies as “judicial” for this purpose, at least when the agencies are using formal trial-like procedures. See P. AREEDA & D. TURNER, *supra* note 2, at ¶ 204c; Hurwitz, *supra* note 20, at 84–85; Kintner & Bauer, *supra* note 2, at 568 n.77. *But cf.*, e.g., W. FOX, UNDERSTANDING ADMINISTRATIVE LAW § 38 (reviewing range of informal, hybrid, and formal rulemaking procedures).

¹⁰³ See also *St. Joseph’s Hospital, Inc. v. Hospital Corp. of Am.*, 795 F.2d 948, 955 (11th Cir. 1986) (health planning agency deciding whether to issue hospital certificate of need is “acting judicially,” so misrepresentations to it are not protected); *Cipollone v. Liggett Group, Inc.*, 668 F. Supp. 408, 410 (D.N.J. 1987) (“furnishing false and misleading information to Congress . . . is entitled to protection as political speech”) (products liability case).

¹⁰⁴ For a fuller discussion of the case, see *supra* notes 36–39 and accompanying text.

¹⁰⁵ 827 F.2d at 468

¹⁰⁶ 827 F.2d at 468 (emphasis in original).

¹⁰⁷ 7 Trade Reg. Rep. (CCH) ¶ 67,911 (9th Cir. Mar. 1, 1988) (Wallace, J.), *petition for cert. filed*, No. 87-2086 (U.S. May 31, 1988).

¹⁰⁸ The flaws in this reasoning have been exposed by *Allied Tube*. If subsequent consideration by a governmental body does not make a decision governmental (*Allied Tube*), why

This distinction between misrepresentations to a legislature and misrepresentations to a judicial body is not without support.¹⁰⁹ There *are* differences between the verbal rough-and-tumble of a legislature and the more restrained, refined atmosphere of most litigation.¹¹⁰ Judges are expected to be impartial, and to base their decisions on a record; judicial decisions are thoroughly reviewable but then are final. In contrast, legislatures are perpetually mediating among interests, drawing on a galaxy of factors—some publicly disclosed, some not—in making decisions. The judiciary's relatively passive role may make it more dependent on the veracity of those appearing before it.

Nonetheless, the differences between the legislature (and executive) and the judiciary can be exaggerated.¹¹¹ More important, it is not clear that these differences inevitably should support different antitrust exposure for deliberate misrepresentations of facts.¹¹² Standards of conduct may differ, but do any standards countenance such behavior?¹¹³ Differences in record-keeping may make proof easier in one situation than another, but that does not justify different liability rules. To be sure, there will inevitably be severe problems causally connecting misrepresentations and government restraints—but that is true regardless of the decision-maker.¹¹⁴ Moreover, causation is not a concern for those lawsuits

should subsequent consideration by a legislative body make the initial decision-maker legislative?

¹⁰⁹ *E.g.*, *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) (political debate may reveal falsity, whereas adjudicators rely on the accuracy of information supplied by parties), *cert. denied*, 459 U.S. 1227 (1983); 1 P. AREEDA & D. TURNER, *supra* note 2, at 204c-204d (the more formal the proceeding, the higher the standards of expected conduct, the easier to identify violations of standards, and the easier to show causation); Bien, *supra* note 30, at 55 n.56 (arguing that misrepresentation and deception in political campaigns is to be expected); Holzer, *An Analysis for Reconciling the Antitrust Laws with the Right to Petition: Noerr-Pennington In Light of Cantor v. Detroit Edison*, 27 EMORY L.J. 673, 691 (1978) (arguing that the degree of protection should depend on the nature of the petitioned body, because lobbying the legislature, which is necessarily political, "deserves the highest First Amendment protection").

¹¹⁰ I am indebted to Richard Harris for forcefully emphasizing the differences.

¹¹¹ For instance, Costilo distinguishes between "clearly political activity," where puffing is expected, and "the filing of highly technical factual data" the accuracy of which cannot be appraised by government officials because of lack of data, expertise, incentives, or resources. Costilo, *supra* note 4, at 349. This distinction is striking, but it is not coextensive with the distinction traditionally drawn by the courts.

¹¹² *Accord Crawford & Tschoepe, supra* note 20, at 308 n.86; Fischel, *supra* note 18, at 96, 99.

¹¹³ To those who argue that our expectations are higher for participants in judicial proceedings, *e.g.*, Bien, *supra* note 30, the response is to ask whether our expectations for those petitioning the legislature are really this low, and, if so, why the law should be governed by such expectations.

¹¹⁴ Courts do not and should not lightly probe the secret thinking of government officials, even if—or perhaps especially if—they are judicial. Formal records may make causation

challenging restraints caused directly by petitioning. When a plaintiff is directly injured by a deliberate misrepresentation of fact, why should it be barred from recovery of damages merely because the misrepresentation occurred in publicity campaigns nominally concerning proposed legislation?¹¹⁵

Although perhaps inadvertently (the Court having restated the familiar legislative-judicial dichotomy¹¹⁶), *Allied Tube* intimates that misrepresentations might be considered differently in the future. As discussed above, restraints resulting from valid governmental action will enjoy "absolute immunity," but other restraints will be protected only if "incidental" to "valid" petitioning.¹¹⁷ At least in theory, this approach could protect some misrepresentations formerly subject to challenge (i.e., those made to the judiciary), and expose to challenge some misrepresentations formerly protected (i.e., those made to the legislature or executive).

Some might suggest that the first amendment prevents liability even for restraints directly caused by such deliberate misrepresentations, but this view exaggerates the first amendment's reach.¹¹⁸ The leading freedom of expression cases declare that "there is no constitutional value in false statements of fact."¹¹⁹ Although these cases protect the vigor of

easier to prove, P. AREEDA & D. TURNER, *supra* note 2, at ¶ 204c, although this will not always be true, *cf.* *Michigan Citizens for an Independent Press v. Attorney General of the United States*, 7 Trade Reg. Rep. (CCH) ¶ 68,219, at 59,424 (D.D.C. Sept. 14, 1988) (rejecting claim that decision was based on *ex parte* contacts), *appeal docketed*, No. 88-5286 (D.C. Cir. argument scheduled for Oct. 28, 1988).

¹¹⁵ Some defendants may be disadvantaged by the traditional dichotomy. Some phrasings of that distinction seem to imply that innocent misrepresentations to an adjudicative body can result in serious antitrust scrutiny. *See Sessions*, 827 F.2d at 468 ("Where the executive action sought was more a matter of *administering* than of *making* law, misrepresentations inducing the governmental decision will be actionable in antitrust despite the *Noerr-Pennington* doctrine.") (citations omitted).

¹¹⁶ *Allied Tube* qualified the distinction between misrepresentations to the legislature and the judiciary by suggesting that deliberate misrepresentations under oath during the legislative hearing would not be protected by *Noerr*. 108 S. Ct. at 1939. The same suggestion can be found in R. BORK, *supra* note 21, at 360 ("When the legislature creates a fact-finding process fashioned after the judicial model—with witnesses, oaths, cross-examination, a written record, and the like—it becomes correspondingly able to punish deliberate falsehoods and other abuses of its process that would be immune in the regular political arena.")

¹¹⁷ *See supra* at text accompanying notes 49–56.

¹¹⁸ *Cf. Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261–62 (9th Cir. 1982) (the first amendment does not protect the predatory furnishing of false information to an administrative or adjudicative body), *cert. denied*, 459 U.S. 1227 (1983)

¹¹⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *see Hustler Magazine v. Falwell*, 108 S. Ct. 876, 880 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas [The necessary] breathing

debate with appropriately varying standards of care, even with respect to "public figures" the first amendment does not protect libelous statements of fact made with "malice," i.e., actual knowledge of falsity or reckless disregard for the truth.¹²⁰

The right to petition is no broader than the rest of the first amendment. This was made clear by the Supreme Court's 1985 decision, *McDonald v. Smith*.¹²¹ That decision held that there is no absolute immunity for libelous statements in petitions to the government's executive and (by copy) legislative branches.¹²² It must be at least equally applicable to antitrust.¹²³ Constitutional protection for competitive harm directly caused by misrepresentations ought to be no more expansive than the protection for libelous statements about public figures.¹²⁴

space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability.").

¹²⁰ The limitation imposed by the words "of fact" should not be underestimated. The same cases that state that false statements of fact are valueless declare that the "First Amendment recognizes no such thing as a 'false' idea." *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 880 (1988); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.") (footnote omitted). The distinction between fact and opinion depends on "the totality of the circumstances," and is notoriously difficult to discern. See, e.g., *Ollman v. Evans*, 750 F.2d 970, 989 (D.C. Cir. 1984) (en banc) (5 of 11 judges dissented in part; seven judges issued opinions) (newspaper columnists' statement that a political science professor "has no status within the profession, but is a pure and simple activist" is a protected statement of opinion), *cert. denied*, 471 U.S. 1127 (1985).

¹²¹ 472 U.S. 479 (1985); see *Stanford Note*, *supra* note 13, at 1265-71 (endorsing approach Court took); cf. Fischel, *supra* note 18, at 102-03 (advocating use of libel law's "malice" standard for identifying activities unprotected by *Noerr*).

¹²² 472 U.S. at 484 ("petitions to the President that contain intentional and reckless falsehoods 'do not enjoy constitutional protection,' *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), and may . . . be reached by the law of libel").

¹²³ Hurwitz, *supra* note 20, at 83-84 (reading *McDonald* to say that tort and antitrust standards should be coterminous). The *Sessions* court interpreted *McDonald* as holding that misrepresentations deliberately made while seeking executive action are not protected from antitrust exposure. 827 F.2d at 468 n.9. Except to note that *McDonald* involved petitioning for executive action, *Sessions* gave no reason for so limiting *McDonald's* reasoning (and, in fact, the allegedly libelous communication in *McDonald* also had been sent to legislators). There is no such reason. As the Court said with respect to communications to the President, "First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." 472 U.S. at 485 (citation omitted).

¹²⁴ Some have suggested that petitioning by businesses for a reduction in competition should be explicitly regarded as commercial speech, which enjoys only limited constitutional protection. Note, *The Sham Exception to the Noerr-Pennington Doctrine: A Commercial Speech Interpretation*, 49 BROOKLYN L. REV. 573, 594 (1983) [hereinafter *Brooklyn Note*] (as is commercial speech, business's petitioning for reductions in competition is "hardy" and "would thus not be chilled by a requirement of truthfulness"); cf. Balmer, *supra* note 18, at 59-60 (litigation similar to commercial speech); *Yale Note*, *supra* note 53, at 841 (*Noerr* should

Nonetheless, one is left with the *Noerr* opinion and its possible implication that misrepresentations to Congress are absolutely protected. Some have read *Noerr* in that fashion.¹²⁵ In fact, however, the deception addressed by the Court in *Noerr* involved "the so-called third-party technique,"¹²⁶ that is, arranging to have apparently independent persons communicate views and information actually prepared by the conspirators.¹²⁷ Assertions that falsehoods are protected by the *Noerr* doctrine arose later.

Whether falsehoods *should* be protected depends in part on whether the *Noerr* doctrine is founded on constitutional principles or on statutory interpretation. If it is the former, there is little justification for protecting

be narrowed in part because corporate petitioning implicates few first amendment values).

The argument that corporate petitioning is commercial speech goes too far. It would be an extension of current understanding to include petitioning within commercial speech, which is most commonly defined as speech that "does 'no more than propose a commercial transaction.'" *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986) (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)); *see also* *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (rejecting claim that corporations have very limited first amendment rights). Most authorities would regard petitioning for legislation as political speech, even if the motivation is entirely financial. *See, e.g., Superior Court Trial Lawyers*, 7 Trade Reg. Rep. (CCH) at 59,317 (Silberman, J., concurring) (requests by legal aid lawyers for increased fees would be political speech), *petition for rehearing and rehearing en banc*, No. 86-1465 (D.C. Cir. filed Oct. 7, 1988); *see also* Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 10 (1979) (participation in the process of self-government is protected). *See generally* *Symposium: Commercial Speech and the First Amendment*, 56 U. CIN. L. REV. No. 4 (1988). The most that should be said with respect to genuine corporate petitioning for governmental action is that there is no reason to be unusually solicitous of free speech concerns in this context. On the other hand, as the purpose of ostensible petitioning changes from securing governmental action to injuring competitors directly, presumably first amendment protections wane. *Cf. Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (struggling to decide whether a brochure promoting a product and communicating health information was commercial speech).

¹²⁵ *See* Rill & Frank, *Antitrust Consequences of United States Corporate Payments to Foreign Officials: Applicability of Section 2(c) of the Robinson-Patman Act and Sections 1 and 2 of the Sherman Act*, 30 VAND. L. REV. 131, 151 (1977) (cases finding *Noerr* inapplicable to misrepresentations to government officials "appear to conflict with *Noerr*, in which the Supreme Court concluded that deliberate deception of public officials, reprehensible as it may be, is of no Sherman Act consequence"); *cf. Allied Tube*, 108 S. Ct. at 1936-37 ("unethical and deceptive methods" are protected when part of a publicity campaign "seeking legislation or executive action"); Handler & De Sevo, *supra* note 19, at 47 ("at least where the antitrust plaintiffs have a meaningful opportunity to contest the deliberate misrepresentations or other improprieties of the defendants, the defendants should incur no liability under the antitrust laws").

¹²⁶ 365 U.S. at 129-30.

¹²⁷ 365 U.S. at 130, 133, 140-41; *cf. id.* at 133 n.8 ("The District Court did not expressly find that any particular part of the railroads' publicity campaign was false in its content. Rather, it found that the technique of the railroads was 'to take a dramatic fragment of truth and by emphasis and repetition distort it into falsehood.'") (quoting 155 F. Supp. at 814).

deliberate falsehoods that directly cause anticompetitive harm, whether the falsehoods are made to Congress, the executive, an administrative agency, or the judiciary. The question is more challenging if *Noerr* is rooted in statutory construction. Even here, understanding is advanced by recognizing that the first amendment does not protect such statements. Other than because of first amendment concerns, moreover, why should deliberate misrepresentations be protected? The most legitimate concern—and it is a serious one—is that harm caused by government action may be mischaracterized as directly caused harm, thus eviscerating the right to petition.¹²⁸ The proper response to such a concern, however, may be to give searching scrutiny to assertions of direct harm, not to protect all misrepresentations to legislative and executive bodies.¹²⁹

2. Co-Conspirator Exception

Disagreement continues over the existence and scope of the “co-conspirator exception.”¹³⁰ The Ninth Circuit has provided two sharply different views. The *Sessions* court stated that “*Noerr-Pennington* does not extend to private parties who have entered into a ‘conspiracy’ with governmental actors.”¹³¹ On the other hand, just six months later a different Ninth Circuit panel, in *Boone*, declared that there is no “co-conspirator

¹²⁸ There are claims that this occurred in both *Allied Tube* and *Sessions*, *See supra* note 49. Compare *Sessions Tank Lines, Inc. v. Joor Mfg., Inc.*, 1986-1 Trade Cas. (CCH) ¶ 66,989, at 62,067 (C.D. Cal. 1986) (“As indicated by plaintiff’s own allegations, defendant’s lobbying . . . brought about plaintiff’s injuries precisely because, and only to the extent that, the recommendations made by those organizations were actually adopted by the governmental entities.”) with *Sessions*, 827 F.2d at 468–69 (reversing to let plaintiff try to show that misrepresentations to fire officials acting in administrative capacity caused injury unrelated to the amending of model code).

¹²⁹ Concerns that baseless claims may support years of burdensome antitrust litigation ring more hollow now than once was the case. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Calkins, supra* note 86; *see also* C.H. Smith Trucking Co. v. Bill Hodges Trucking Co., 671 F. Supp. 1329, 1335 (W.D. Okla. 1987) (summary judgment granted for failure to produce evidence of perjury; courts “cannot rely on suspicions, suggestions and conclusory allegations in opposition to motions for summary judgment”); cases cited *infra* note 13.

¹³⁰ *See California Motor Transport*, 404 U.S. at 513 (“Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression.”) (citations omitted); *Pennington*, 381 U.S. at 671 (*Noerr* protected successful petitioning of Secretary of Labor who was “not claimed to be a co-conspirator”). *See generally* P. AREEDA & H. HOVENKAMP, *supra* note 32, at ¶ 203.3 (also discussing bribery as part of the co-conspirator exception).

¹³¹ 827 F.2d at 466 (dictum) (citing *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1252 n.17 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983), and *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964)); *accord, e.g.*, *Oberndorf v. City and County of Denver*, 653 F. Supp. 304, 310 (D. Colo. 1986) (illegal conspiracy not protected), *on motion for reconsideration*, 653 F. Supp. 312, 313 (D. Colo. 1987) (same); *Englert v. City of McKeesport*, 637 F. Supp. 930, 934 (W.D. Pa. 1986) (denying motion to dismiss).

exception," and, without mentioning *Sessions*, said that one of the cases on which *Sessions* principally relied had been repudiated.¹³²

Both common sense and intimations in *Allied Tube* suggest that a "thoughtful co-conspirator exception" will survive. By itself, "conspiracy," at least in the Sherman Act sense which treats conspiracy interchangeably with agreement,¹³³ is irrelevant. Of course a simple agreement between a government official or agent and a petitioner should not be condemned, lest all successful petitioning be jeopardized.¹³⁴ The question is, or at least should be, whether the government official had some independent, anticompetitive, non-governmental motive to conspire.¹³⁵ *Allied Tube* presumably would ask whether the challenged restraint was imposed by governmental action or by private action;¹³⁶ if the latter,

¹³² 841 F.2d at 897 ("In *Harman v. Valley National Bank* . . . we suggested in dicta that *Noerr* might not apply if a public official were a participating conspirator in the alleged agreement to restrain trade. This view, however, was repudiated by *Pennington*." (citation omitted); see also *J. Fred Creek v. Village of Westhaven*, 1987 U.S. Dist. LEXIS 191 (N.D. Ill. Jan. 15, 1987) (civil rights case applying *Noerr*) (rejecting exception); *Sherman College of Straight Chiropractic v. American Chiropractic Ass'n*, 654 F. Supp. 716 (N.D. Ga. 1986) (doubting wisdom of exception), *aff'd per curiam*, 813 F.2d 349 (11th Cir.), *cert. denied*, 108 S. Ct. 160 (1987).

¹³³ Cf. 15 U.S.C. § 1 (1982) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").

¹³⁴ E.g., *Federal Prescription Serv. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981) ("That a public official is persuaded by the entreaty of a lobbyist does not make him the lobbyist's co-conspirator."), *cert. denied*, 455 U.S. 928 (1982); *Woolen v. Surtran Taxicabs, Inc.*, 615 F. Supp. 344, 354-55 (N.D. Tex. 1985), *aff'd per curiam on basis of lower court opinion*, 801 F.2d 159 (5th Cir. 1986), *cert. denied*, 480 U.S. 931 (1987); cf. *Fischel*, *supra* note 18, at 114-15 (urging rejection of exception except where, as in *Continental Ore*, purported government official was acting solely as a private actor).

¹³⁵ Cf. *Video Int'l Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 7 Trade Reg. Rep. (CCH) ¶ 68,305, at 59,761 (5th Cir. Oct. 31, 1988) (judgment n.o.v. for defendant affirmed where public officials sought to increase city's revenues, not out of "some selfish or otherwise corrupt motive"); *Sherman College of Straight Chiropractic v. American Chiropractic Ass'n*, 654 F. Supp. 716 (N.D. Ga. 1986) ("the evidence must show true complicity"), *aff'd per curiam*, 813 F.2d 349 (11th Cir.), *cert. denied*, 108 S. Ct. 160 (1987). A useful parallel could be drawn to the "intraenterprise conspiracy" cases finding a plurality of actors when a corporation's employee or agent has an "independent personal stake" in accomplishing the objectives of the challenged agreement. See ANTITRUST LAW DEVELOPMENTS, *supra* note 2, at 14 & n.94. Malice, ill will, and bias unrelated to competition should not be sufficient for liability. Cf. *Chambers Dev. Co. v. Municipality of Monroeville*, 617 F. Supp. 820, 823 (W.D. Pa. 1985) (citizen/councilman's campaign to close landfill at end of his street protected).

For a related although slightly different standard, see *Kintner & Bauer*, *supra* note 2, at 587 ("the appropriate criteria in determining whether *Noerr-Pennington* applies would be whether the government officials also take part in the preliminary steps prior to the implementation of the conspiracy, and whether the officials act in an essentially private capacity while wearing a 'government hat.'").

¹³⁶ 108 S. Ct. at 1938 n.7 (citing "conspiracy" cases as references to its observation that the line between governmental and private action may be difficult to draw). One of the

liability should follow.¹³⁷ The ease of alleging conspiracy makes necessary the requiring of specificity in pleading,¹³⁸ but the ability of the courts to require specificity¹³⁹ makes possible the preservation of the "exception."

3. Bribery

With wavering precision, courts continue to follow a line generally tying antitrust exposure for questionable political payments to the legality of those payments on non-antitrust grounds.¹⁴⁰ The Ninth Circuit in *Sessions* was untroubled by entertainment and gifts of coffee mugs and

cases cited by the Court, *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690, 707-08 (1962), provides a stark example: the putative government official actually was employed by and working for private interests. *Cf. Defino v. Civic Center Corp.*, 718 S.W.2d 505, 512-13 (Mo. App. 1986) (were city to have been part of conspiracy, its enactment of an ordinance would not break the chain of causation).

This approach is not altogether dissimilar from that taken by courts reasoning that a finding of conspiracy supports application of the sham exception because it indicates that others were denied meaningful access to the decision-maker, *see, e.g., Huron Valley Hospital, Inc. v. City of Pontiac*, 650 F. Supp. 1325, 1342 (E.D. Mi. 1986), *aff'd per curiam*, 849 F.2d 262 (6th Cir. 1988), *petition for cert. filed*, No. 88-465 (U.S. Sept. 16, 1988); *Garst v. Stoco, Inc.*, 604 F. Supp. 326, 332 (E.D. Ark. 1985) (citing cases). *See generally City Communications, Inc. v. City of Detroit*, 660 F. Supp. 932, 935 & n.2 (E.D. Mich. 1987) (denying summary judgment) (state action exemption would not protect private parties regulated by a municipality where private parties were the "effective decision makers"), *summary judgment granted upon completion of discovery*, 1988 U.S. Dist. LEXIS 10759 (E.D. Mich. Sept. 28, 1988).

¹³⁷ *Allied Tube* also would ask whether the plaintiffs had been harmed directly by the "petitioning" (in which event one might well find liability on the grounds that the petitioning was invalid), but it seems unlikely that many "conspiracy" cases would involve direct harm.

¹³⁸ *See, e.g., Smith v. Combustion Engineering Inc.*, 7 Trade Reg. Rep. (CCH) ¶ 68,224, at 59,448 (6th Cir. Aug. 24, 1988) (affirming summary judgment where "the plaintiff has alleged no set of facts" that would support the conspiracy exception) (opinion not recommended for full-text publication); *Oberndorf v. City and County of Denver*, 1988 U.S. Dist. LEXIS 10876 (D. Colo. Sept. 19, 1988) (granting summary judgment where no evidence supported claim of bribery or conspiracy); *Pope v. Mississippi Real Estate Comm'n*, 7 Trade Reg. Rep. (CCH) ¶ 67,953 (N.D. Miss. Apr. 5, 1988) (summary judgment granted where no specific evidence of conspiracy); *Huron Valley Hospital, Inc. v. City of Pontiac*, 650 F. Supp. 1325, 1342 (E.D. Mi. 1986) (summary judgment granted based on government officials' sworn denial that adverse decision was result of agreement), *aff'd per curiam*, 849 F.2d 262 (6th Cir. 1988), *petition for cert. filed*, No. 88-465 (U.S. Sept. 16, 1988); *P. AREEDA & H. HOVENKAMP, supra* note 32, at ¶ 203.3e; *cf. A&M Records, Inc. v. A.L.W., Ltd.*, 7 Trade Reg. Rep. (CCH) ¶ 68,132 (7th Cir. July 1, 1988) (affirming summary judgment for counter-defendant where insufficient evidence of conspiracy to lessen competition other than through protected petitioning).

¹³⁹ *See, e.g., Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1082-83 (9th Cir. 1976) ("in any case . . . where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required"), *cert. denied*, 430 U.S. 940 (1977); authorities cited *supra* note 129.

¹⁴⁰ *See also P. AREEDA & H. HOVENKAMP, supra* note 32, at ¶ 203.3c.

tape measures.¹⁴¹ The Ninth Circuit in *Boone* argued with spirit that “[p]ayments to public officials, in the form of honoraria or campaign contributions, is a legal and well-accepted part of our political process.”¹⁴² On the other hand, the Tenth Circuit, in *Instructional Systems Development Corp. v. Aetna Casualty and Surety Co.*, wrote that “bribery, or misuse or corruption of governmental processes are outside the protection of the *Noerr-Pennington* doctrine and may give rise to an antitrust claim.”¹⁴³ Perhaps most intriguingly, in *Cipollone v. Liggett Group, Inc.*,¹⁴⁴ a products liability case applying *Noerr*, the court refused to grant a blanket exclusion of evidence of the tobacco industry’s lobbying of Congress. The court ruled that if “defendants improperly rewarded legislators for their actions in proposing or opposing certain legislation, it is inconceivable that such activity is entitled to first amendment protection.”¹⁴⁵

In *Allied Tube* the Supreme Court wrote that it had “never suggested” that bribery “merits protection” from the antitrust laws.¹⁴⁶ However, the Court did not make clear the reasoning by which bribery is unprotected. If the bribery resulted directly in competitive harm, presumably the Court would consider this to be “invalid” petitioning that does not qualify for protection. If the bribery resulted in harm only through the action of a party nominally in the government, the Court appears to suggest that, as with conspiracy, it might conclude that the restraint nonetheless resulted from private action.¹⁴⁷

¹⁴¹ 827 F.2d at 466-67 (treating issue as one of “conspiracy”).

¹⁴² *Boone v. Redevelopment Agency of the City of San Jose*, 841 F.2d 886, 895 (9th Cir. 1988), *petition for cert. filed*, No. 87-2086 (U.S. May 31, 1988).

¹⁴³ 817 F.2d 639, 650 (10th Cir. 1987).

¹⁴⁴ 668 F. Supp. 408 (D.N.J. 1987).

¹⁴⁵ 668 F. Supp. at 410 (denying defendants’ motion to exclude all petitioning evidence, without prejudice to right to object to admissibility at trial). The financial rewards at issue in *Cipollone* apparently were “campaign contributions,” rather than payments directly to politicians. The court failed to discuss the possibility that even otherwise lawful campaign donations may be illegal when given in return for a quid pro quo. *See, e.g.*, 18 U.S.C. § 201.

¹⁴⁶ 108 S. Ct. at 1939 (“one could imagine situations where the most effective means of influencing government officials is bribery, and we have never suggested that that kind of attempt to influence the government merits protection”); *see also id.* at 1938 n.7 (noting that dicta in *California Motor Transport* stated that “‘bribery of a public purchasing agent’ may violate the antitrust laws”).

¹⁴⁷ *Cf.* 108 S. Ct. at 1938 n.7 (citing bribery case as reference to discussion of difficulty of distinguishing governmental and private action). (For discussion of the unavailability of the sham exception under *Allied Tube*, *see supra* at Part B.1.) This is not to suggest that it will be easy for a plaintiff to prevail by claiming that financial incentives transformed what was nominally governmental action into private action. *Cf.* *Campbell v. City of Chicago*, 823 F.2d 1182 (7th Cir. 1987) (Flaum, J.) (*Noerr* applied where the two dominant taxicab companies agreed to end litigation against the city in return for two near-exclusive franchises, since any injury to competing taxicab companies “stems from the result of the plaintiffs’ successful lobbying efforts, rather than from the lobbying itself,” and the lobbying was not “sham”) (citation omitted).

If campaign donations can cause competitive harm directly (i.e., by imposing costs on a competitor), the *Allied Tube* analysis conceivably might deny *Noerr's* protection to some campaign donations not otherwise illegal. Here, also, clarity would be gained by identifying those aspects of *Noerr* that are founded on constitutional principles. In *Buckley v. Valeo*,¹⁴⁸ the Court upheld congressionally imposed ceilings on the donations individuals may make to candidates. The Court reasoned that relatively little is communicated by the size of the donation, and first amendment interests are threatened much less by limits on donations to candidates than by limits on spending to communicate ideas. This distinction suggests that the first amendment might not protect a program of major campaign donations designed in substantial part (even if not so predominantly as to be sham) to impose costs on a competitor. However, even if the first amendment does not protect such payments, one might well conclude that the antitrust laws have little to contribute to the troubled world of campaign finance law. Prudence dictates at least a strong presumption that *Noerr's* protection should be coterminous with other legal standards.

4. Commercial Activity

The issue posed by the controversial "commercial activity" exception is simple.¹⁴⁹ Why should antitrust exposure for anticompetitive conduct directed at a purchasing agent depend on whether the agent represents the government or a private party?¹⁵⁰ Government purchases constitute more than 20 percent of the gross national product,¹⁵¹ which would make

¹⁴⁸ 424 U.S. 1 (1976).

¹⁴⁹ See generally Comment, *Noerr-Pennington Antitrust Immunity and Proprietary Government Activity*, 1981 ARIZ. ST. L.J. 749 (criticizing commercial exception); *Indiana Note*, *supra* note 28 (supporting exception).

¹⁵⁰ See, e.g., *Manville Sales Corp. v. Paramount Sys., Inc.*, 3 U.S.P.Q.2d 1042, 1044 (E.D. Pa. 1987) (common-law tort suit; alternative holding) (*Noerr* would not protect disparaging letters to government purchasing agency, since government was "a consuming participant in the general economy," not a "law maker or law enforcer"; "[t]he mere fact that the object of the correspondence is a government agency is insufficient to elevate what might otherwise be actionable libel to the level of a constitutional exercise of the right to petition"); P. AREEDA & D. TURNER, *supra* note 2, at ¶ 206 (thoughtful discussion concluding that there generally should be no special immunity); Kintner & Bauer, *supra* note 2, at 584 (there should be "some commercial exception"); Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 HARV. L. REV. 847, 848 (1968) ("no substantial reasons to distinguish attempts to influence private commercial conduct . . . from efforts to influence the government in its role as a customer"); cf. *Schachar v. American Academy of Ophthalmology, Inc.*, 7 Trade Reg. Rep. (CCH) ¶ 67,986, at 58,052 (N.D. Ill. Feb. 25, 1988) (promoting federal sponsorship of research proposal not protected (although participation in study might be): "the underwriting by the government of [this] study does not constitute the type of government decision making and policy making that the *Noerr-Pennington* doctrine was intended to protect").

¹⁵¹ Superior Court Trial Lawyers Ass'n v. Federal Trade Comm'n, 7 Trade Reg. Rep.

rather severe the exemption of this segment of the economy from anti-trust scrutiny.¹⁵² On the other hand, the government is different from other buyers, and frequently acts with multiple (even conflicting or possibly secret) purposes.¹⁵³ Thus, the military maintains bases to protect the county but also to help lessen unemployment in parts of the country that are favored for governmental reasons (whether of public policy or partisan politics, or both); the government awards procurement contracts to persons who can supply the product at the best combination of price

(CCH) ¶ 68,196, at 59,312 (D.C. Cir. Aug. 26, 1988) (citing U.S. Bureau of the Census, Statistical Abstract of the United States: 1988 at 410 (108th ed. 1987)), *petition for rehearing and rehearing en banc filed*, No. 86-1465 (D.C. Cir. Oct. 7, 1988).

¹⁵² Even critics of the "commercial activity" exception would apply antitrust to certain activity directed against the government. *Cf.* *Greenwood Utilities Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1505 & n.14 (5th Cir. 1985) (Higginbotham, J.) (rejecting exception, but noting that "[i]f a monopolist uses his market power to dictate the terms of trade to the government . . . no legitimate petitioning conduct would be involved," and adding that "[a]ll would agree that . . . if as the result of a price fixing agreement by private parties the government pays more for products it purchases in the marketplace, the participants in the anticompetitive scheme should not escape liability because of the identity of the victim"); *Handler & De Sevo*, *supra* note 19, at 24-26 (criticizing the exception, but justifying the outcome of the leading "commercial activity" case, *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970), as a case where a government purchasing official conspired with a seller); *Hurwitz*, *supra* note 20, at 87-88 (arguing against "commercial activity" exception, but saying its abandonment "should be of little consequence" if courts retain "co-conspirator exception" and "vigorously withhold protection from conduct that is corrupt or vexatious").

¹⁵³ *E.g.*, *Greenwood Utilities*, 751 F.2d at 1505 (rejecting exception because "although such a distinction may be intuitively appealing it proves difficult, if not impossible, of application in a case such as ours where the government engages in a policy decision and at the same time acts as a participant in the marketplace"); *Hurwitz*, *supra* note 20, at 87 (same); *Indiana Note*, *supra* note 28, at 411. This tension is seen even in the case most frequently cited as extending *Noerr* to commercial activities, *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The desired government activity—requiring the government's coal suppliers to pay relatively high minimum wages—could be regarded as tangential to a purchasing decision, or as central to an economic development program; the Court did not give its understanding. *Fischel*, *supra* note 18, at 85.

Several opinions critical of the "commercial" exception can be read as holding that certain activity is governmental, not commercial. *See* *Bustop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F. Supp. 989, 996 n.9 (S.D.N.Y. 1981) (granting of franchise to build bus shelters, in return for a share of advertising revenue, was governmental); *Handler & De Sevo*, *supra* note 19, at 26 (interpreting *In re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568 (N.D. Cal. 1981) (Schwarzer, J.), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983), as holding that the granting of an airport franchise is a governmental activity). This interpretation is not free from doubt, of course; when a city grants a franchise, it is in effect "buying" a package of services for its citizens (and perhaps fees for its coffers), in exchange usually for promised exclusivity.

The difficulty of distinguishing "governmental" from "commercial" is reminiscent of the largely aborted effort to distinguish municipalities' "proprietary activities" from their "traditional governmental functions" when applying the state action antitrust exemption, *City of Lafayette*, 435 U.S. at 422, 424 (Burger, C.J., concurring); *See* P. AREEDA & H. HOVENKAMP, *supra* note 32, at ¶ 212.2d; ANTITRUST LAW DEVELOPMENTS, *supra* note 2, at 611 n.83.

and quality, or who will employ the right kinds of people, or who will provide jobs in the right geographic areas, or who will preserve capacity needed in anticipation of future government needs, or who will develop technology useful in eliminating the trade deficit, or for other reasons. Some cynics might even suggest that city governments are never more political than when awarding contracts.

Allied Tube, while not directly addressing the issue, lends support to the commercial activity exception. The factors relied upon to identify private action—lack of accountability by the decision-maker to the public, and the presence of financial incentives to restrain competition¹⁵⁴—counsel in favor of treating petitioning less forgivingly when the government is acting in a purely commercial capacity.¹⁵⁵ The Court's pervasive attention to the "context and nature" of challenged activity is consistent with a willingness to condemn conspiracies directed at the government.¹⁵⁶ Thus, although the "commercial exception" poses a vexing question that defies easy solutions, at least when the government is acting solely as a cost-minimizing purchaser or a cost-maximizing seller, the *Noerr-Pennington* doctrine should provide no special protection.¹⁵⁷

¹⁵⁴ 108 S. Ct. at 1938 (also noting lack of official authority).

¹⁵⁵ *Allied Tube's* discussion of the difficulty of distinguishing private from governmental action referenced Professors Areeda and Turner's generally supportive discussion of the commercial exception. 108 S. Ct. at 1938 n.7.

In *Superior Court Lawyers*, the FTC wrote that the important distinction is not between "commercial" and "governmental" activity, but rather between the government's role as victim and as regulator, restrained and restrainer. 107 F.T.C. at 596-99; see also Michigan State Medical Soc'y, 101 F.T.C. 191 (1983) (government as target). The Court of Appeals applied *Allied Tube* and agreed that *Noerr* did not protect a well-publicized "boycott" by the lawyers accepting court appointments for the defense of indigents (although the court also found that the implication of other first amendment issues required the FTC to find market power before condemning the boycott, see *infra* Part II.A.). 7 Trade Reg. Rep. (CCH) ¶ 68,196 (D.C. Cir. Aug. 26, 1988), petition for rehearing and rehearing en banc filed, No. 86-1465 (D.C. Cir. Oct. 7, 1988). The court noted that the government's status as the target of the boycott made inapposite *Allied Tube's* concern with whether the restraint was " 'incidental' to a valid effort to influence governmental action." Instead, the court elevated *Allied Tube's* distinction between "commercial" and "political" petitioning, making this the lodestar by which to evaluate the "context and nature" of a restraint. *Id.* at 59,309. Finally, the court upheld the FTC's conclusion "that the boycott was motivated primarily by economic self-interest." *Id.* at 59,311. Judge Silberman, concurring, argued that the distinction should not be between "commercial" and "political" petitioning, but rather between prevailing because of coercion and because of persuasion. *Id.* at 59,317 (Silberman, J., concurring).

¹⁵⁶ *Cf.* 108 S. Ct. at 1940 (part of the "context and nature" of the activity was that it "did not take place in the open political arena"); *id.* at 1941 ("the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact").

¹⁵⁷ *Accord* Fischel, *supra* note 18, at 115-18; *Indiana Note*, *supra* note 28, at 421-24 (burden should be on plaintiff to prove government was acting in a purely economic capacity); *cf.* Sullivan, *supra* note 2, at 365 ("a court might draw a line between instances where the

5. *Sham Exception*¹⁵⁸

As noted above, *Allied Tube* has quite clearly and correctly rejected the amorphous “improper petitioning” view of the “sham” exception to *Noerr*. Even as traditionally and now authoritatively defined (i.e., “to cover activity that was not genuinely intended to influence governmental action”), however, the sham exception poses difficulties. The diversity of views is suggested by three recent cases.

In *Westmac, Inc. v. Smith*,¹⁵⁹ the Sixth Circuit appeared to rule that petitioning is not sham unless its *only* purpose is to harm a third party directly, i.e., not by the petitioned-for action.¹⁶⁰ The case arose after a group of grain elevator operators sought to block a competitor’s attempt to obtain tax-favored bond financing for a new elevator facility. The defendants attended and spoke at public hearings on the matter but failed to prevent administrative approval of the plan. Prior to the final administrative decision, one of the defendants instructed his lawyer that if the lobbying failed, “‘start a lawsuit—bonds won’t sell.’”¹⁶¹ The defendants subsequently challenged the constitutionality of the financing program in state court and, although their lawsuit failed at the trial court and on appeal, apparently succeeded in blocking sale of the bonds. The plaintiff’s antitrust suit challenged the defendants’ filing of the state court suit.

The Sixth Circuit affirmed an award of summary judgment to the defendants. It ruled that the issue was whether the plaintiffs (in the state court suit) were “indifferent to obtaining a favorable judgment.”¹⁶² The court further held “that when a lawsuit raises a legal issue of genuine substance, it raises a rebuttable presumption that it is a serious attempt

government actor is performing some regulatory function, however minimal, and those when it is performing none”).

¹⁵⁸ See generally Balmer, *supra* note 18; Hurwitz, *supra* note 20, at 93–125.

¹⁵⁹ 797 F.2d 313 (6th Cir. 1986), *cert. denied*, 479 U.S. 1035 (1987).

¹⁶⁰ See also Sullivan, *supra* note 2, at 362 (activity “is not a sham . . . unless petitioner is really not looking for government action at all,” which “does not mean that a petitioner cannot have other collateral, or even another primary goal”); Handler, *Twenty-Five Years of Antitrust (Twenty-Fifth Annual Antitrust Review)*, 73 COLUM. L. REV. 415, 436 (1973) (“The sham exception applies only where the defendant is not really seeking to elicit government action at all.”).

¹⁶¹ 797 F.2d at 318.

¹⁶² 797 F.2d at 318. The court also wrote as follows:

[T]he sham exception is a “narrow one” and “is applicable when the activity in question corrupts governmental processes to such an extent that it constitutes access barring conduct of the sort described in *California Motor*.” . . . “[T]he key to the ‘sham exception’ is an improper interference with governmental process.”

797 F.2d at 318 (quoting *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 487 (8th Cir. 1985)).

to obtain a judgment on the merits instead of a mere sham or harassment."¹⁶³ According to the court, the plaintiff had failed to overcome that presumption even to raise a triable issue: "It defies common sense to suggest defendants did not seek a favorable judgment."¹⁶⁴

At the other extreme is *Premier Electrical Construction Co. v. National Electrical Contractors Association, Inc.*¹⁶⁵ In that case Judge Easterbrook embellished the test Judge Posner had offered in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*¹⁶⁶ as follows:

We elaborated further in [*Grip-Pak*], holding that a suit brought only because of the costs litigation imposes on the other party also may fit the "sham" exception to the *Noerr-Pennington* doctrine. We explained, *id.* at 472: "many claims not wholly groundless would never be sued on for their own sake; the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation." If the expected value of a judgment is \$10,000 (say, a 10% chance of recovering \$100,000), the case is not "groundless"; yet if it costs \$30,000 to litigate, no rational plaintiff will do so unless he anticipates some other source of benefit. If the other benefit is the costs litigation will impose on a rival, allowing an elevation of the market price, it may be treated as a sham.¹⁶⁷

In other words, a lawsuit is sham unless it would be cost-justified for a disinterested litigant.

Finally, the most intriguing case is *In re Burlington Northern, Inc.*¹⁶⁸ This was an extraordinary decision, and is important in several respects. It arose out of a discovery skirmish in the war between the coal slurry pipeline interests and the railroads. The railroads resisted turning over certain litigation papers, claiming attorney-client privilege; the pipeline interests asserted the "crime/fraud exception;" the railroads claimed *Noerr* protected their litigation and sought a writ of mandamus. The issue was joined; its resolution, according to the Fifth Circuit, turned on the sham exception.¹⁶⁹

¹⁶³ *Id.* at 318. Professor Handler would go even further: "Only an attempt to petition the government that is plainly foreclosed as a matter of law or is otherwise frivolous, and which the petitioner instigated knowing that it lacked any factual or legal bases, should subject the defendant to antitrust liability." Handler & De Sevo, *supra* note 19, at 55 (emphasis added).

¹⁶⁴ *Id.* at 319 n.9.

¹⁶⁵ 814 F.2d 358 (7th Cir. 1987) (Easterbrook, J.), *followed*, *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 683 F. Supp. 681, 696 (1988).

¹⁶⁶ 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983).

¹⁶⁷ 814 F.2d at 372 (lawsuit not sham because brought to win, although not protected since brought to enforce illegal cartel).

¹⁶⁸ 822 F.2d 518 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 701 (1988).

¹⁶⁹ 822 F.2d at 533-34 ("Even if prior litigation was part of an overall conspiracy which itself violated antitrust law, *Noerr-Pennington* requires a prima facie finding that the particular litigation was a sham to warrant discovery of documents initially protected by the attorney/client privilege or work product immunity.")

The pipeline interests challenged the defendants' roles in two kinds of litigation. The first was a lawsuit brought by three states, several environmental groups, and one railroad, seeking to invalidate a water contract between the pipeline interests and the U.S. Department of the Interior. The plaintiffs had prevailed in the two decisions issued in that lawsuit as of the date of *Burlington Northern*, and later prevailed in the Supreme Court.¹⁷⁰ The second was a series of lawsuits brought by the pipeline interests against various railroads seeking to establish a pipeline owner's right, as owner of a (purchased) easement, to cross rail lines. The pipeline interests alleged that the railroads resisted these suits and sought discovery even though they "knew that they had no viable defense," in order to delay the pipeline project and obtain information for use in other forums.¹⁷¹

The broadest importance of *Burlington Northern* stems from its teaching about the standards for identifying sham petitioning. It held that litigation is sham if it "was undertaken without a genuine desire for judicial relief as a significant motivating factor, or if there was no reasonable expectation of judicial relief, or if there was no reasonable basis for a party's standing."¹⁷² (This last possibility referred to one railroad's quietly lending assistance to a state that was a plaintiff in the suit against the Department of the Interior.) The Court also held that even litigation that ultimately succeeds (i.e., the lawsuit against the Department of the Interior) can be sham,¹⁷³ and that even defending lawsuits can be sham.¹⁷⁴

A vigorous petition for certiorari was denied.¹⁷⁵ In the petition, the railroads urged the Supreme Court to adopt an objective, bright line standard: "in the absence of fraud or collusion with the court, successful litigation cannot be a sham."¹⁷⁶ There is substantial support for this view (including dicta in *Allied Tube*),¹⁷⁷ but there also is substantial contrary

¹⁷⁰ *Missouri v. Andrews*, 586 F. Supp. 1268 (D. Neb. 1984), *aff'd*, 787 F.2d 270 (8th Cir. 1986), *aff'd sub nom.* ETSE Pipeline Project v. Missouri, 108 S. Ct. 805 (1988). As of the date of *Burlington Northern*, certiorari had been granted. 107 S. Ct. 1346 (1987).

¹⁷¹ 822 F.2d at 532.

¹⁷² 822 F.2d 518, 533-34 (5th Cir. 1987) (emphasis added), *cert. denied*, 108 S. Ct. 701 (1988).

¹⁷³ *Id.* at 534.

¹⁷⁴ 822 F.2d at 532-33 ("We perceive no reason to apply any different standard to defending lawsuits than to initiating them.").

¹⁷⁵ 108 S. Ct. 701 (1988).

¹⁷⁶ Petition for Certiorari at 11; *see also id.* at i (first "question presented").

¹⁷⁷ *See Greenwood Utilities Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1500 (5th Cir. 1985) (Higginbotham, J.); *Handler & De Sevo*, *supra* note 19, at 30; *Sullivan*, *supra* note 2, at 364 (if petitioner won or even demonstrated merit, a court usually should grant summary judgment in its favor); *cf. Allied Tube*, 108 S. Ct. at 1938 ("The effort to influence

authority.¹⁷⁸ Even some of those who believe that success is an important consideration would let it erect only a strong presumption,¹⁷⁹ and this seems the better view (and, indeed, the view adopted by *Burlington Northern*¹⁸⁰).

The success of challenged petitioning is an issue principally because it proves or at least strongly suggests that the petitioning was not "baseless." Some courts and commentators have argued that only baseless suits should be sham,¹⁸¹ and this was the thesis of the *Burlington Northern*

governmental action in this case certainly cannot be characterized as a sham given the actual adoption of the 1981 [model] Code in a number of statutes (sic) and local ordinances.").

¹⁷⁸ *Sessions Tank Liners*, 827 F.2d at 465 n.5 (success "is not dispositive"); *G. Heileman Brewing Co. v. Anheuser-Busch Inc.*, 676 F. Supp. 1436, 1476-77 (E.D. Wis. 1987) (success creates strong but rebuttable inference); Superior Court Trial Lawyers Ass'n, 107 F.T.C. 510, 593 (1986) ("The First Amendment right to petition the government does not include the right to be effective."); *vacated on other grounds and remanded*, 7 Trade Reg. Rep. (CCH) ¶ 68,196 (D.C. Cir. Aug. 26, 1988), *petition for rehearing and rehearing en banc filed*, No. 86-1565 (D.C. Cir. Oct. 7, 1988); Fischel, *supra* note 18, at 111 n.160 ("the success of the petitioning activity should not be dispositive: lobbying activity characterized by abusive tactics should not enjoy antitrust immunity even if successful"); Kintner & Bauer, *supra* note 2, at 576 ("even a claim on which the defendant prevailed may be the basis for loss of petitioning immunity through application of the sham exception") (citing cases).

The tort of malicious prosecution normally requires "[t]ermination of the proceeding in favor of the accused." *E.g.*, W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 871 (5th ed. 1984). For the leading authority arguing that this should be applied by analogy in *Noerr* cases, see 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, 727-31 (1973). *Contra, e.g.*, Cornell Note, *supra* note 18, at 1321 n.114.

¹⁷⁹ *See, e.g.*, *Smith v. Combustion Engineering Inc.*, 7 Trade Reg. Rep. (CCH) ¶ 68,224, at 59,448 (6th Cir. Aug. 24, 1988) (affirming summary judgment where defendant instigated a prosecutor's search of plaintiffs' residence that led to plaintiffs' guilty pleas) (opinion not recommended for full-text publication), *relying on Potters Medical Center v. City Hospital Ass'n*, 800 F.2d 568, 578 (6th Cir. 1986) (conclusion that efforts to persuade state to deny capital spending reimbursement certification was not sham was "reinforced by the very fact that its [defendant's] position prevailed"); *Clipper Express*, 690 F.2d at 1254 ("while success or failure . . . is not singularly determinative of a party's intent, this Circuit regards such success or failure as indicative of a party's intent"); *see also* Hurwitz, *supra* note 20, at 108-09 (strong presumption). Professor Areeda, who was of counsel for the plaintiffs in their successful effort to persuade the Supreme Court to deny certiorari in *Burlington Northern*, has written that "a successful judicial action is not a 'sham,' regardless of the motive of the plaintiff in that action," P. AREEDA & H. HOVENKAMP, *supra* note 32, at 19, but advocates this as "merely a strong presumption," in order to recognize the possibilities of serious misuse of discovery, a wrongly decided principal case, and possible conspiracy with the decision-maker, *id.* at 21.

¹⁸⁰ *E.g.*, 822 F.2d at 527 ("success on the merits is forceful evidence that the petitioner did in fact wish to influence the governmental decision and obtain the relief prayed for").

¹⁸¹ *E.g.*, *Handler & De Sevo*, *supra* note 19, at 13; *see* *Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1413-14 (9th Cir. 1984); *Sherman College of Straight Chiropractic v. American Chiropractic Ass'n*, 654 F. Supp. 716, 723-24 (N.D. Ga. 1986), *aff'd per curiam*, 813 F.2d 349 (11th Cir.), *cert. denied*, 108 S. Ct. 160 (1987); *see also* Balmer,

petition for certiorari.¹⁸² As had the concurring opinion in *Burlington Northern*, the petition relied heavily on *Bill Johnson's Restaurants, Inc. v. NLRB*.¹⁸³ In *Bill Johnson's*, the Court held that the NLRB can enjoin only suits brought with a retaliatory motive and lacking a reasonable basis.¹⁸⁴ The Court wrote that *California Motor Transport* "recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances," and the Court "should be sensitive to these First Amendment values in construing the NLRA."¹⁸⁵

Bill Johnson's can be cited fairly for the proposition that the first amendment may be implicated when aggrieved parties are enjoined from filing lawsuits. The case should not be read to support a constitutional right

supra note 18, at 68 & n.137 (denying that showing of baselessness is constitutionally required, but somewhat tentatively suggesting a required showing that suit was brought without probable cause).

Attention to "baselessness" originated with *California Motor Transport*, where the Court wrote as follows: "One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused." 404 U.S. at 513; *cf.* *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (in *California Motor Transport* "we held that the principle of *Noerr* 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"). The difficulty of interpreting these declarations is that Justice Douglas was writing illustratively, not prescriptively. It is doubtful that the Court meant to hold either that a single suit cannot be a sham or that a suit that is not baseless cannot be a sham. *See infra* note 189; *cf.* *Handler & De Sevo*, *supra* note 19, at 28-30 (most courts have eliminated any multiplicity requirement); *Hurwitz*, *supra* note 20, at 101 (same).

¹⁸² Petition for Writ of Certiorari at 18-22 (offering a choice between circuits that assertedly employed an "objective" standard focusing on the merits of the petitioning (Third, Sixth, Tenth, Eleventh, and D.C. Circuits), and ones that assertedly employed a "subjective" standard similar to the *Burlington Northern* court's "substantial motivating factor" approach (Fourth, Fifth, and Seventh Circuits).

¹⁸³ 461 U.S. 731 (1983).

¹⁸⁴ The *Bill Johnson's* Court also wrote, in dicta, that litigation proven to be meritorious (by success) "is not an unfair labor practice." 461 U.S. at 747.

¹⁸⁵ 461 U.S. at 741 (citing *California Motor Transport*, 404 U.S. at 510, where the Court wrote that "the right of petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." (citations omitted)); *see also* *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984) (*Bill Johnson's* "stressed that the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government") (dictum; case ruled that it was an unfair labor practice for an employer to request an Immigration and Naturalization Service investigation of employees solely because they supported a union).

The right of access to courts also has been addressed by a line of cases initially concerned with associational rights to seek legal services, *N.A.A.C.P. v. Button*, 371 U.S. 415, (1963), that was extended to include a right to take collective action to secure effective and economical counsel, *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971) (Black, J.) ("collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment").

to file unlimited non-baseless suits. The case involved an interpretation of the National Labor Relations Act, not (directly) an interpretation of the Constitution.¹⁸⁶ Moreover, the decision turned in part on issues of federalism: the Court recognized "the States' compelling interest in the maintenance of domestic peace . . . [by] providing a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility.'" ¹⁸⁷ Issues of federalism were implicated because the NLRB had ordered the withdrawal of a lawsuit filed in state court. It is significant, moreover, that the Court ruled that the NLRB may find that an unsuccessful lawsuit filed with retaliatory intent is an unfair labor practice, even if the lawsuit had a reasonable basis.¹⁸⁸ Finally, it would be difficult to reconcile a constitutional right to file non-baseless lawsuits with earlier *Noerr* cases, particularly *California Motor Transport*, which found that even a series of lawsuits that substantially succeeded could be sham.¹⁸⁹ The

¹⁸⁶ See *Burlington Northern*, 822 F.2d at 528–29 n.7 (limiting case to labor law); see also *Stanford Note*, *supra* note 13, at 1261.

¹⁸⁷ 461 U.S. at 741 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)); see *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897–98 (1984) (citing lack of federalism concerns to support decision not to apply *Bill Johnson's*).

¹⁸⁸ 461 U.S. at 749:

(If the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief. In short, then, although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoined unless the suit lacks a reasonable basis.)

Hurwitz argues that *Bill Johnson's* conclusion that substantial lawsuits can be illegal should be limited to the labor context, Hurwitz, *supra* note 20, at 104–05, but this distinguishing is unpersuasive. There is no more reason to protect litigation when interpreting the Labor Act than when interpreting the Sherman Act. Hurwitz argues that risks are lower in the labor context, since only an agency can sue, but that should not determine whether the Constitution protects non-baseless litigation. Moreover, until and unless one can compare the relative importance of enforcement of the two statutes, one cannot conclude that unsuccessful litigation should be protected from the antitrust laws but not labor law.

¹⁸⁹ *Cf. Clipper Express*, 690 F.2d at 1257 (interpreting "baseless" to include administrative protests "filed automatically and without regard to merit," although the protests at issue were unsuccessful). The *California Motor Transport* complaint had alleged the initiation of proceedings "with or without probable cause, and regardless of the merits." 404 U.S. at 512. The district court found the sham exception to be inapplicable because the complaint "did not allege that the presentations defendants made to the agencies and the courts were in themselves false, misleading, or lacking in evidentiary or legal support." *California Motor Transport*, 432 F.2d 755, 762 (9th Cir. 1970). The court of appeals ruled that "[s]ince all applications were to be opposed, it is irrelevant that a valid basis existed for opposing some applications." *Id.* at 762–63. The Supreme Court affirmed. *Cf. Original Appalachian Artworks, Inc. v. Granada Electronics, Inc.*, 816 F.2d 68, 74 (2d Cir. 1987) (suit not sham "because there is no evidence that the suit was brought in bad faith, to harass, or in any way such that it would not be immune"); *Disenos Artisticos E Industriales, S.A. v. Work*, 676 F. Supp. 1254, 1286 (E.D.N.Y. 1987) (suit not sham where not "brought in bad faith or without probable cause or to harass").

One of the more serious efforts to reconcile *Bill Johnson's* and other *Noerr* cases was by

Court would not lightly change such settled law. And having not found a right to file non-baseless suits in the Constitution, courts probably should not find it in the Sherman Act.¹⁹⁰

Were it feasible, there would be good reason for *Noerr-Pennington* law to move increasingly toward an objective test for evaluating the sham exception.¹⁹¹ It is troubling to have such major decisions turn on subjective intent, particularly in an age when an intent standard may serve merely to reward those who use good counsel effectively. Particularly troubling are those opinions that rely exclusively on subjective intent and then respond to concerns about excessive liability by placing heavy burdens on the plaintiff to prove bad faith, with varying degrees of particularity.¹⁹² The problem, of course, is the difficulty of identifying a satisfactory yet entirely objective test.

Westmac and *Premier Electrical* each offer objective tests.¹⁹³ *Westmac's* very strong presumption that litigation raising a substantial question is not sham probably goes too far.¹⁹⁴ If, as the court suggested, petitioning is sham only where the petitioner is indifferent about the outcome, it is

Hurwitz. Without much support in *Bill Johnson's*, he interpreted that opinion to provide that only petitioning lacking a reasonable basis (and, if decided, being unmeritorious) can be a sham unless the petitioning is "unethical, part of a larger unlawfully anticompetitive scheme, or . . . undertaken in complete disregard of the merits." Hurwitz, *supra* note 20, at 102–05 (citations omitted).

¹⁹⁰ Courts are increasingly disenchanted with the amount of litigation, see *infra* note 196, and seem unlikely to become more protective of rights to sue. Why protect lawsuits filed without regard to the merits, or lawsuits filed solely to impose litigation costs on defendants, or to discover information for use unrelated to the litigation?

¹⁹¹ See P. AREEDA & H. HOVENKAMP, *supra* note 32, at ¶ 203.1c (objective test is needed); *cf.* *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("excessive disruption of government" should be avoided by relying on the "objective reasonableness" of a government official's actions to decide whether the official has violated "clearly established statutory or constitutional rights of which a reasonable person would have known").

¹⁹² See, e.g., *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1986) (affirming dismissal of complaint alleging agreement "to oppose, repeatedly, baselessly and in bad faith, the granting of building permits . . . for the construction of McDonald's restaurants"), *cert. denied*, 430 U.S. 940 (1977); *cf.* *G. Heileman Brewing Co. v. Anheuser-Busch Inc.*, 676 F. Supp. 1436, 1476 (E.D. Wis. 1987) (sham exception "often involves questions of motive or subjective intent"; "plaintiffs must prove the defendant's bad faith by clear and convincing evidence"). Compare *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1155 (7th Cir.), (jury instructions had required proof of sham by clear and convincing evidence), *cert. denied*, 464 U.S. 891 (1983) with *Litton Sys., Inc. v. AT&T*, 700 F.2d 785, 813–14 (2d Cir. 1983) (holding that only preponderance of evidence is required), *cert. denied*, 464 U.S. 1073 (1984).

¹⁹³ *Handler & De Sevo* argue that the *Grip-Pak* standard turns on "intent" and "has almost guaranteed that each case will be submitted to a jury." *Handler & De Sevo, supra* note 19, at 39. This seems incorrect. Judge Posner's formula may be difficult to apply, but it is designed to be applied consistently regardless of the mental process of the defendant.

¹⁹⁴ *But cf.* P. AREEDA & H. HOVENKAMP, *supra* note 32, at ¶ 203.1c (appearing to endorse *Westmac* approach).

difficult to imagine a sham. Most litigants would have at least a sporting interest in winning.¹⁹⁵ With courts becoming increasingly intolerant of vexatious litigation,¹⁹⁶ it seems unlikely that such a permissive standard will survive.

The difficulties posed by *Premier Electrical's* cost-justification standard have been well catalogued.¹⁹⁷ Nonetheless, the formula offers insight: to determine whether petitioning is being done for impermissible reasons, ask what the hypothetical reasonably prudent firm would do.¹⁹⁸ The court's model is flawed because it ignores what could be considered legitimate "externalities" of commercial litigation. A reasonable firm might bring a meritorious trademark infringement suit to establish the validity of its claim or to demonstrate its resolve to enforce its rights, even though that particular suit would not be "profitable." This is permitted. So also, as Professors Areeda and Hovenkamp suggest, it might be permissible to collect a debt from a competitor even when the expenses were such that the creditor would not have collected it from another firm.¹⁹⁹ What is not permitted—or should not be permitted—is to bring a lawsuit, to use the Seventh Circuit's phrasing, "only because of the costs litigation imposes on the other party."²⁰⁰ A better operational question than the one asked by *Premier Electrical* would be whether a reasonable firm in the defendant firm's market position would have invested the expected litigation costs in order to win the expected value of the judgment,

¹⁹⁵ See *Yale Note*, *supra* note 53, at 837.

¹⁹⁶ Judicial intolerance is most noticeable in the increasingly tough application of Rule 11 of the Federal Rules of Civil Procedure, for violations of which sanctions are becoming commonplace. See Calkins, *supra* note 86, at 1105–06 n.288; Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987); cf. Balmer, *supra* note 18, at 68–69 (describing the developing law of sanctions as a "fruitful source of assistance in determining what is a sham suit").

¹⁹⁷ Professor Handler has written that "it is difficult to conceive of an opinion more at war with *Noerr* than *Grip-Pak*." Handler & De Sevo, *supra* note 19, at 36. Professors Areeda and Hovenkamp argue that the *Grip-Pak* court's reasoning "seems very speculative." P. AREEDA & H. HOVENKAMP, *supra* note 32, at ¶ 203.1 They criticize *Grip-Pak* as overlooking "that injury to rivals and the suppression of competition is an altogether proper purpose—indeed, the very purpose—of legal process to prevent appropriation of trade secrets or infringement of patents." Hurwitz objects to *Grip-Pak* because he asserts that "it is virtually impossible to forecast either a suit's potential rewards or its costs," and notes that a litigation may offer "legitimate strategic and psychological benefits." Hurwitz, *supra* note 20, at 107. This overstates the case a little, since litigation costs increasingly are estimated, but the concern is valid.

¹⁹⁸ Not all commentators are hostile. The *Grip-Pak* test was endorsed as "the soundest test" by Kintner and Bauer, who quoted with approval the following: "The line is crossed when [the defendant's] purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself—regardless of outcome—of litigating." Kintner & Bauer, *supra* note 2, at 573.

¹⁹⁹ P. AREEDA & H. HOVENKAMP, *supra* note 32, at ¶ 203.1

²⁰⁰ *Premier Electrical Construction Co.*, 814 F.2d at 372.

including any legitimate “externalities,” but not including the benefit of imposing litigation expenses on the defendant.²⁰¹

The most sensible course would be to use the objective standards of *Westmac* and *Premier Electrical* as thresholds that would establish a prima facie case of sham. In other words, a plaintiff would meet its burden of going forward by showing that challenged petitioning lacked a reasonable basis, or was not cost-justified as described above. That done, the burden of going forward (or perhaps even of proof, where challenged petitioning lacked a reasonable basis) would shift to the defendant to introduce evidence of its intent. For the ultimate standard, however, it is difficult to improve upon the (admittedly subjective) standard traditionally used by the Fifth Circuit, which was reiterated in part in *Burlington Northern: Noerr* is applicable to litigation “so long as a genuine desire for judicial relief is a significant motivating factor underlying the suit.”²⁰²

6. Noerr’s “Penumbra”

With a notable exception, courts have continued to be unimpressed by what I refer to as the *Noerr-Pennington* doctrine’s “penumbra.” Defendants regularly invoke *Noerr*’s constitutional overtones to argue that petitioning activity carries with it a general immunizing quality. Courts have shown some ability to resist these expansionist invitations. Although not certain, *Allied Tube* should not change this.

²⁰¹ This approach would not credit the “psychological benefits” of litigation mentioned by Hurwitz. However, bringing lawsuits out of personal spite unrelated to competitive harm should not violate the antitrust laws; proof of this motivation should prevent antitrust liability.

²⁰² *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1372 (5th Cir. 1983), followed, *Burlington Northern*, 822 F.2d at 527; accord *G. Heileman Brewing Co. v. Anheuser-Busch Inc.*, 676 F. Supp. 1436, 1476 (E.D. Wis. 1987) (adding that “the issue of intent that controls is whether the litigant wished to obtain its anticompetitive end through obtaining court-ordered relief or simply through the filing and maintenance of the lawsuit”); *Woolen v. Surtran Taxicabs, Inc.*, 615 F. Supp. 344, 354 (N.D. Tex. 1985), *aff’d per curiam on basis of lower court opinion*, 801 F.2d 159 (5th Cir. 1986), *cert. denied*, 480 U.S. 931 (1987). Indeed, even after advocating objective standards, Professors Areeda and Hovenkamp conclude by saying that “[p]erhaps we cannot hope to be more precise” than this. P. AREEDA & H. HOVENKAMP, *supra* note 32, at 24.

In addition to requiring that interest in prevailing was a substantial motivating factor, *Burlington Northern* required a reasonable expectation of judicial relief. 822 F.2d at 534; accord *G. Heileman Brewing Co. v. Anheuser-Busch Inc.*, 676 F. Supp. 1436, 1476 (E.D. Wis. 1987). Professors Areeda and Hovenkamp also believe it is unnecessary to protect the honest assertion of an unreasonable claim, explaining that “it seems wise policy to hold business actors to a standard of reasonable care in using governmental machinery.” P. AREEDA & H. HOVENKAMP, *supra* note 32, at 17. This analysis begs the question. Rule 11 charges all litigants to use care before filing complaints; the issue is whether also to threaten antitrust liability. Although it is a close call, I would prefer to protect from antitrust exposure the genuinely good faith assertion of even groundless claims.

The threat posed by *Noerr's* "penumbra" can be seen in an exception to the pattern. This was the questionable decision by the Tenth Circuit in *Bright v. Moss Ambulance Service, Inc.*²⁰³ In that case an ambulance company enjoying an exclusive franchise in Ogden City, Utah, allegedly employed predatory acts to expand its market share in the surrounding county.²⁰⁴ The court affirmed a grant of summary judgment for the defendant solely based on the plaintiff's failure to create an issue of fact on the existence of market or monopoly power:²⁰⁵ "We have held that Moss' conduct in obtaining and enforcing its franchise is immune from the antitrust statutes [under *Noerr*]. Therefore, its enjoyment of the market share devolved from the protected activity cannot support allegations of market power."²⁰⁶ The court excluded the defendant's operations in Ogden City, when computing market and monopoly power.²⁰⁷

The court showed excessive deference to *Noerr*. To be sure, there is nothing illegal about defendants' requesting an exclusive franchise, but that is all that *Noerr's* "immunity" requires. Just as a lawfully obtained patent monopoly may be misused in a manner violative of Sherman Act Section 2,²⁰⁸ so also monopoly power lawfully obtained through petitioning activity should be subject to Sherman Act Section 2. Whether the monopoly in Ogden City resulted from a patent, a superior product, an exclusive franchise, or any other source, the Sherman Act applies if the defendant has sufficient power and Section 2's conduct element is satisfied.²⁰⁹

²⁰³ 824 F.2d 819 (10th Cir. 1987) (Moore, J.).

²⁰⁴ The allegedly predatory acts included responding to a sheriff's policy of summoning the geographically closest ambulance by locating an ambulance station immediately adjacent to the plaintiff's. Much of the plaintiff's suit apparently had been devoted to challenging the defendant's (*Noerr*-protected) efforts to obtain and enforce the franchise. 824 F.2d at 822 & n.4.

²⁰⁵ The court explained that "monopoly power" is required for the offense of monopolization, and "market power" is usually required for the offense of attempted monopolization. The court did not define market power, but said that it "requires a lesser showing than is necessary to establish monopoly power." 824 F.2d at 824 n.5. *Bright* is not the first court to struggle with these concepts. See Briggs & Calkins, *Antitrust 1986-87: Power and Access (Part I)*, 32 ANTITRUST BULL. 275, 294-301 (1987).

²⁰⁶ 824 F.2d at 824.

²⁰⁷ *Id.*

²⁰⁸ See, e.g., L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 94 (1977) ("thrust upon" defense applies only "if the firm does not engage in market conduct which has the purpose or effect of protecting, enhancing or extending its power").

²⁰⁹ Of course, saying that the court should not have relied on *Noerr* to grant summary judgment for want of an issue of market power does not mean that the plaintiff should have prevailed. To this observer, the defendant's "dirty tricks," see *supra* note 204, resemble vigorous competition more than anything else. But that was not the issue before the *Bright* court.

Happily, *Bright* is an exception. Three notable counter-examples come from the Seventh Circuit.²¹⁰ In *Premier Electrical Construction Co. v. International Brotherhood of Electrical Workers*,²¹¹ the court, in an opinion by Judge Easterbrook, held that the constitutionally protected right to file a lawsuit does not immunize an illegal agreement subsequently enforced by a lawsuit.²¹² In *A&M Records, Inc. v. A.L.W., Inc.*,²¹³ the court reminded us that *Noerr*'s protection of the petitioning of Congress to make unlawful the unauthorized renting of records offers no protection for any subsequent agreements to deny such authorization. And in *Hospital Corporation of America v. Federal Trade Commission*,²¹⁴ the court enforced an FTC order against a merger, observing that although hospitals are free to petition government agencies to lessen competition through the certificate of need process, the FTC and a court are free to consider this potential anticompetitive activity when evaluating a merger's likely competitive effect. Finally, the Third Circuit, in *Pennsylvania Dental Association v. Medical Service Association of Pennsylvania*²¹⁵ held that a group of dentists' "associational interests" did not justify what was in effect a boycott of an insurance company's "balance billing" plan.

Questions about the scope of *Noerr*'s protection frequently arise in evidentiary disputes. Here there is reason to be sensitive to *Noerr*'s concerns, since juries and judges learning of evidence admitted on one issue may not be able to cabin their knowledge. The uniformly accepted standard establishes that evidence of petitioning activity that is not illegal under the antitrust laws nevertheless may be admitted for proof of motive or intent, provided that any prejudicial effect does not outweigh the probative value of the evidence.²¹⁶ One court has ruled that *Noerr*-pro-

²¹⁰ See also *J. Fred Creek v. Village of Westhaven*, 1987 U.S. Dist. LEXIS 191 (N.D. Ill. Jan. 15, 1987) (civil rights case applying *Noerr*) (refusing to dismiss counts also alleging conduct other than protected petitioning activity).

²¹¹ 814 F.2d 358 (7th Cir. 1987) (Easterbrook, J.).

²¹² Quite a different situation would be presented were a city's exclusive franchisee to complain about violations of the franchise ordinance's exclusivity provisions. See *G. Fruge Junk Co. v. City of Oakland*, 637 F. Supp. 422, 425 (N.D. Calif. 1986) (Schwarzer, J.) (complaints protected).

²¹³ 7 Trade Reg. Rep. (CCH) ¶ 68,132, at 58,910-911 (7th Cir. July 1, 1988) (Flaum, J.) (dictum) (accepting plaintiff's theory *arguendo*, but affirming summary judgment for defendant for want of evidence of conspiracy).

²¹⁴ 807 F.2d 1381 (7th Cir. 1986) (Posner, J.), *cert. denied*, 107 S. Ct. 1975 (1987).

²¹⁵ 815 F.2d 270 (3d Cir.), *cert. denied*, 108 S. Ct. 153 (1987).

²¹⁶ See *Pennington*, 381 U.S. at 670-71 n.3 ("It would of course still be within the province of the trial judge to admit this [*Noerr*-protected] evidence, if he deemed it probative and not unduly prejudicial . . . if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 543 n.7 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); see also *United States Football League v. NFL*, 842 F.2d 1335, 1373-75 (2d Cir. 1988); Schachar

tected evidence is "presumptively prejudicial."²¹⁷ Not all courts agree with this, however,²¹⁸ and one court ruled that any such presumption would be "inappropriate" where the petitioning was "ethically questionable."²¹⁹ Thus, even petitioning activity that qualifies for protection under *Noerr* is not wholly without antitrust risk.

In *Bright* the court extended the "penumbra" of *Noerr-Pennington* too far, but *Bright* was an exception. The pattern is jeopardized somewhat by *Allied Tube's* repeated, rather casual references to the *Noerr* doctrine as conferring "immunity," since, as apparently happened in *Bright*, notions of "immunity" may fuel expansionist arguments. The pattern also is jeopardized somewhat by the Court's failure to identify the aspects of *Noerr* (if any) that are creatures only of statutory interpretation,²²⁰ since doctrines that are founded on constitutional principles may be applied relatively aggressively. Nonetheless, *Allied Tube's* careful disaggregation of *Noerr's* several aspects offers hope that new claims for expansive protection will be critically received.

v. American Academy of Ophthalmology, Inc., 7 Trade Reg. Rep. (CCH) ¶ 67,986, at 58,052 (N.D. Ill. Feb. 25, 1988).

²¹⁷ United States Football League v. NFL, 634 F. Supp. 1155, 1181 (S.D.N.Y. 1986); *on appeal from jury verdict*, 842 F.2d 1335, 1373-75 (2d Cir. 1988) (lobbying evidence properly excluded; no mention of presumption); *cf.* Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 661 F. Supp. 1448, 1481 (D. Wyo. 1987) (*Noerr* "bars" evidence of a threat to intervene in a FERC proceeding); United States v. Johns-Manville Corp., 259 F. Supp. 440, 453 (E.D. Pa. 1966) (inferring predatory intent from protected activity would be illogical and would infringe on first amendment rights). For the argument that all *Noerr*-protected evidence should be excluded, see, *e.g.*, Fischel, *supra* note 18, at 121 (emphasizing first amendment rationale of doctrine). For the argument that such evidence should be presumptively excluded, see P. AREEDA & H. HOVENKAMP, *supra* note 32, at ¶ 203.7 (stressing "logical infirmity" of such evidence).

²¹⁸ *Cf.* Schachar v. American Academy of Ophthalmology, Inc., 7 Trade Reg. Rep. (CCH) ¶ 67,986, at 58,052 (N.D. Ill. Feb. 25, 1988) (no mention of any presumption). In Consolidated Gas Co. of Florida, Inc. v. City Gas Co., 665 F. Supp. 1493 (S.D. Fla. 1987), a monopolization suit, the court permitted the plaintiff to introduce evidence of the defendant's opposition of plaintiff's application for a license from FERC. The plaintiff claimed this evidence helped show a pattern of anticompetitive activity. The court explained its ruling as follows:

Whether the *Noerr-Pennington* defense is applicable or not, two facts are clear: first, Consolidated [the plaintiff] was severely damaged by the delay which occurred as a direct result of City Gas' [the defendant's] intervention; and, second, City Gas' reason for opposing Consolidated's application was to protect its own domain. Thus, although we do not hold that City Gas' intervention in the FERC proceeding violated § 2, we believe evidence of City Gas' motives are derived from its officers' statements regarding Consolidated's application.

665 F. Supp. at 1542 (citation to record omitted).

²¹⁹ Cipollone v. Liggett Group, Inc., 668 F. Supp. 408, 411 (D.N.J. 1987) (products liability case). The lobbying allegedly had involved misrepresentations and financial rewards for legislative action. See *supra* notes 144-45 and accompanying text.

²²⁰ See *supra* Part B.4.

D. NOERR-PENNINGTON CONCLUSION

For many years courts have struggled through the "quagmire" of the *Noerr-Pennington* doctrine. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, the Supreme Court has contributed an important opinion that offers uncertain guidance but that contains a structure that ultimately may contribute to greater clarity. The important concept of "valid" petitioning is inadequately explained, and the implications of *Allied Tube* for private standard-setters are ambiguous and await further developments. This uncertainty should not eclipse the Court's important "disaggregation" of the *Noerr* doctrine. The Court distinguished between harm caused by governmental action and harm caused by petitioning, between governmental and private action, and between petitioning that is not genuinely intended to influence governmental action (which is "sham") and activity that is merely unethical (which is not). Still greater clarity would have resulted from an identification of the aspects of the *Noerr* doctrine that are based only on statutory interpretation and not the Constitution.

Consideration of *Allied Tube* in light of recent developments suggests that the Court's approach conceivably could rewrite the "black letter" law concerning misrepresentation, with the key distinction shifting from the nature of the body to which misrepresentations are directed to the source of the restraint (i.e., governmental action or the petitioning itself). Similarly, the "commercial" exception is likely to be retained, but the "bribery" and "co-conspirator" exceptions may be recast as instances where the restraint does not stem from true governmental action. The "sham" exception should turn on the extent to which petitioning is significantly motivated by an interest in governmental action. Finally, the pattern of cases according *Noerr* only a narrow "penumbra" may continue, although this is not free from doubt. For each of these issues, indeed, the resolution is uncertain, and may remain so until the Court finally determines the extent to which *Noerr* rests on constitutional principles.

II. OTHER CASES BALANCING COMPETITION AND FREEDOM OF EXPRESSION

Noerr is only the principal focus of tension between the antitrust and freedom of expression.²²¹ Two important recent cases resolved that tension without relying on *Noerr*. Ironically, the first decisions in each case were written by former FTC Administrative Law Judge Morton Nadelman. As of this writing each case is on appeal.

²²¹ See generally Sullivan, *First Amendment Defenses in Antitrust Litigation*, 46 MO. L. REV. 517 (1981).

A. SUPERIOR COURT TRIAL LAWYERS ASSOCIATION

After this paper was delivered, the Court of Appeals for the District of Columbia Circuit decided *Superior Court Trial Lawyers Association v. Federal Trade Commission*,²²² a case that all would agree is difficult. The case has already produced three lengthy, thoughtful opinions, each adopting a different approach—and the case is not yet over.

The respondents' position was highly sympathetic. Relatively low paid attorneys who regularly accept court appointments to represent indigent criminal defendants had engaged in a well-publicized "strike" to pressure the District of Columbia government to increase legal fees, with the apparent tacit endorsement of the city government.²²³ FTC Administrative Law Judge Needelman had issued an initial decision finding that the antitrust laws prohibit such boycotts as this and that no recognized exemption applied. Nonetheless, he dismissed the complaint because the District had been "so supportive" of the boycott.²²⁴ "[W]hen the seller's action is accompanied by the buyer's knowing wink, this suggests that presumptions about the way free markets work . . . should be saved for another day."²²⁵

The FTC reversed Judge Needelman and condemned the boycott as illegal per se and illegal under a "truncated rule of reason."²²⁶ Although conceding that District officials were sympathetic to the criminal defense lawyers, the Commission rejected his finding that the District had supported the boycott.²²⁷ The Commission also ruled that any blessing by District officials could not immunize an otherwise illegal boycott.²²⁸

²²² 7 Trade Reg. Rep. (CCH) ¶ 68,196 (D.C. Cir. Aug. 26, 1988), *petition for rehearing and rehearing en banc filed*, No. 86-1465 (D.C. Cir. Oct. 7, 1988). Where relevant to the *Noerr* discussion above, this case has already been mentioned. For an earlier discussion of the case, see Sullivan, *supra* note 2, at 366-67.

²²³ *Id.* at 59,315 n.35 ("The record demonstrates that Mayor Barry and other important city officials were sympathetic to the boycotters' goals and may even have been supportive of the boycott itself.") (citations omitted); *see also* 107 F.T.C. at 560 (initial decision).

²²⁴ 107 F.T.C. at 561 ("[T]he boycott was viewed by city officials as the only feasible way of getting a rate increase, which was unpopular with the general public but was supported by virtually all elements of the community concerned with implementing the public policy behind the Sixth Amendment.").

²²⁵ 107 F.T.C. at 560.

²²⁶ 101 F.T.C. 510 (1986) (Azcuena, Comm'r).

²²⁷ 107 F.T.C. at 578. The Commission's conclusion that the District did not support the boycott was based on the city council's failure to increase legal fees prior to the boycott. This does not address the respondents' argument, which portrayed the boycott as a kind of public relations campaign conducted with the blessing of the District, to make it politically possible to do what District officials already wanted (but were otherwise unable) to do.

²²⁸ 107 F.T.C. at 578 (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 (1940)).

The court reversed in an opinion by Judge Douglas Ginsburg. As they had before the Law Judge (and, of course, the Commission), the respondents lost on most issues.²²⁹ Just as had Judge Needelman, however, the D.C. Circuit struggled to find a way to rule for these sympathetic respondents. Unfortunately for the FTC, the Court's chosen method may have broader implications for antitrust enforcement than did Judge Needelman's "tacit endorsement" theory.

The court relied on *United States v. O'Brien*,²³⁰ the famous draft card burning case, to rule that the boycott contained an "element of expression" deserving first amendment protection, and that, accordingly, any government restriction should be "'no greater than is essential' to further the government's interest in protecting competition."²³¹ Under the facts of the case, the court said this meant that the FTC could not rely on the *per se* rule's normal presumption of market power.²³² The court also found that the Commission's "truncated rule of reason" analysis was flawed, since it presumed market power from the success of the boycott, whereas that success could have resulted either from economic power or from publicity and political persuasion.

²²⁹ At the end of the third long part of its opinion, the court summarized as follows: "[W]e hold that the SCTLA boycott was an unlawful restraint of trade. Since no 'procompetitive' justification . . . has been offered in its defense, and no constitutional barrier has been interposed, the boycott could properly be condemned as a *per se* violation of Section 1 of the Sherman Act, unless it also comes within the protection of the First Amendment." 7 Trade Reg. Rep. at 59,307. Part four of the court's opinion then found *Noerr* to be inapplicable. Only thereafter did the tide turn.

It is interesting that the court gave only cursory attention to the argument that politically motivated boycotts are not illegal, *Missouri v. NOW*, 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980); E.T. SULLIVAN & J. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 47-48 (1988). See 7 Trade Reg. Rep. (CCH) at 59,308 n.23 (majority of decisions have disagreed with this proposition).

²³⁰ 391 U.S. 368 (1968).

²³¹ 7 Trade Reg. Rep. (CCH) at 59,313 (quoting *O'Brien*, 391 U.S. at 377).

²³² For a similar approach, see Note, *A Market Power Test for Noncommercial Boycotts*, 93 YALE L.J. 505 (1984). In a thoughtful concurrence, Judge Silberman wrote that the key question in these kind of quasi-political boycott cases is whether the boycotters "in fact prevailed because of political appeal or commercial might." 7 Trade Reg. Rep. (CCH) at 59,317 (Silberman, J., concurring). He explained that "if one gets one's way from the government *qua* legislator because of political persuasiveness, there is no liability. But using market power to coerce the government *qua* economic actor creates a distortion of the market and the political process." *Id.* Since boycotts can either "coerce" or "persuade," one must presume (apparently conclusively) that boycotters with market power prevailed by coercion, but that other boycotters prevailed by persuasion. For another consideration of the distinction between "persuasion" and "coercion," see *Schachar v. American Academy of Ophthalmology, Inc.*, 7 Trade Reg. Rep. (CCH) ¶ 67,986 (N.D. Ill. Feb. 25, 1988) (denying defense motion for summary judgment) (defendant Academy was so large and respected that "factors other than the mere persuasive power of its arguments render its statements influential"; they should be subject to antitrust laws).

The court went about as far as is seemly to limit its holding to the facts of this case:

First, our determination that the SCTLA boycott contained an element of protected expression is not based simply on the petitioners' claim that they needed to engage in the boycott in order to communicate effectively; instead, it is based on the "factual context and environment" in which the boycott was undertaken, including the petitioners' active efforts to appeal to the public for support of their demand for a raise. In this regard, their boycott was like the "strike" they called it. Second, as noted above, our evaluation of the petitioners' conduct is not unaffected by the special concern of the First Amendment with efforts to petition the government for redress of one's grievances. Where the measure of this constitutional right is at stake, it is not too much of a burden on the government to require that it prove rather than presume that the evil against which the Sherman Act is directed looms in the conduct it condemns.²³³

Unfortunately for the FTC, most of the elements central to the "factual context and environment" of this boycott—including the court-highlighted element of publicity-seeking—would be present in other "strikes" by workers compensated with public funds (including, most notably, physicians reimbursed by Medicaid²³⁴). The element least likely to be present—the apparent tacit endorsement of the boycott by the District—was discussed by the court but not made central to its reasoning.²³⁵ Should the FTC's effort to have the case reconsidered²³⁶ not succeed, the FTC will be in an awkward position. It may have to take the position that the District's tacit endorsement, the existence and legal significance of which it denied, is part of the holding of *Superior Court Trial Lawyers*. Even if the FTC were to succeed, as it might,²³⁷ presumably it would wish it had left Judge Needelman's opinion alone.²³⁸

²³³ 7 Trade Reg. Rep. (CCH) at 59,314.

²³⁴ See Respondent Federal Trade Commission's Petition for Rehearing and Suggestion of Rehearing *en banc*, at 12–13. See generally Michigan State Medical Soc'y, 101 F.T.C. 191 (1983). One irony is that strikes by public employees are prohibited by many state and local criminal laws.

²³⁵ 7 Trade Reg. Rep. (CCH) at 59,315:

[T]he Mayor's remarks could . . . be interpreted as encouraging the petitioners to stage a demonstration of their political muscle so that a rate increase could more easily be justified to the public. Such a demonstration would not offend the antitrust laws if the petitioners actually lacked the ability to exert any significant economic pressure on the city.

²³⁶ The FTC has filed a petition for rehearing and suggestion of rehearing *en banc*. No. 86-1465 (D.C. Cir. filed Oct. 7, 1988). The FTC claims that the opinion "erects formidable new barriers against antitrust challenges to publicly conducted price-fixing boycotts." Respondent Federal Trade Commission's Petition for Rehearing and Suggestion of Rehearing *En Banc* at 15.

²³⁷ Any holding turning on an activity's "factual context and environment" is susceptible to being narrowly limited. Moreover, it would not be frivolous to limit *Superior Court Trial*

B. THE PROPOSED DETROIT JOINT OPERATING ARRANGEMENT

The Newspaper Preservation Act²³⁹ represents a congressional attempt to accommodate competition and diversity of views. It permits competing newspapers to combine their non-editorial functions, including pricing, and to share profits. However, newspapers may form a "Joint Operating Arrangement" (JOA) only with the advance permission of the attorney general. The statute directs the attorney general to give permission only if one of the two newspapers is a "failing newspaper," which is defined as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure," and only if approving a JOA will "effectuate the policy and purpose" of the Act.²⁴⁰

Just before he resigned, Attorney General Meese approved the proposed Detroit Joint Operating Arrangement. By doing so, he effectively rejected the advice of three experts who had studied the issue: then-Assistant Attorney General Douglas Ginsburg, who had submitted a 70-page report concluding that the newspapers' application had not satisfied their burden; Assistant Attorney General Charles F. Rule, under whose direction the Antitrust Division litigated the merits of the proposed JOA; and Administrative Law Judge Morton Needelman, who conducted the fact-finding hearing and filed a lengthy opinion recommending that the JOA be denied. The validity of Attorney General Meese's decision is now at issue in an 11th hour lawsuit pending in federal court.²⁴¹

Lawyers to situations where the petitioned body has been unusually receptive. Harmed boycott victims are notoriously vocal protesters, as is suggested by the number of "boycott" cases, ANTITRUST LAW DEVELOPMENTS, *supra* note 2, at 40-49, yet here the "victim" declined to file suit and was conspicuously not among the supporters of the litigation, 107 F.T.C. at 559 n.222 (initial decision). Why should the antitrust laws conclusively presume injury have the injured party insists it is unharmed? Moreover, one hopes that the court's attention to publicity-seeking will not be over-emphasized. Coercion would be increased were the media summoned to publicize the suffering of patients neglected by striking doctors, the festering of garbage neglected by striking sanitation workers, and the distress of troubled youths neglected by striking social workers. Surely the court did not mean that the first amendment protects all publicized boycotts of governments. Assuming it did not, courts may seize on the apparent receptivity of the District of Columbia government to this boycott as a way to limit *Superior Court Trial Lawyers*. Even as so limited, the opinion would have to be applied with sensitivity, however. Since if "invited" boycotts were lawful, likely boycotters might coerce targets to issue invitations.

²³⁸ Presumably the opinion is most troubling for the facile way it adds a requirement of proving market power to what is conceivably a substantial part of antitrust enforcement. For a discussion of the increasingly important role of market power in antitrust cases, and the failure of the courts adequately to explain the meaning of this requirement, see Briggs & Calkins, *supra* note 205, at 276-301.

²³⁹ 15 U.S.C. §§ 1801-04.

²⁴⁰ *Id.* §§ 1802 (5), 1803.

²⁴¹ *Michigan Citizens for an Independent Press v. Attorney General of the United States*, 7 Trade Reg. Rep. (CCH) ¶ 68,219 (D.D.C. Sept. 14, 1988) (Revercomb, J.), *appeal docketed*,

To be charitable, Attorney General Meese's opinion is disappointing. The question posed by the statute is best understood as asking whether it is probable—not certain, but probable—that the *Free Press* (the allegedly failing newspaper) would have been closed had the newspapers not applied for a JOA.²⁴² Attorney General Meese never addressed this question. Instead, Attorney General Meese said that the statutory standard had been met by “the continuing and persistent operating losses suffered by the *Free Press* over the course of nearly a decade, with no prospect of unilaterally reversing that economic condition in the foreseeable future.”²⁴³ He accepted the conclusion of Judge Needelman that those losses were self-inflicted by the two firms, each of which deliberately sacrificed short-term profits in order to achieve “dominance” or a JOA, but apparently he was untroubled by the implications of this. Such behavior, he wrote, merely “signals prudent management judgment. Certainly, newspapers cannot be faulted for considering and acting upon an alternative that Congress has created.”²⁴⁴

Although Attorney General Meese asserted that he was not influenced by the newspapers' extraordinary, orchestrated threat to close the *Free Press* if a JOA was not granted,²⁴⁵ in fact the opinion appears very much the product of someone concerned about that threat.²⁴⁶ At the end of the opinion, Attorney General Meese noted that the preservation of

No. 88-5286 (D.C. Cir. argument scheduled for Oct. 28, 1988); see also *Michigan Citizens for an Independent Press v. United States Attorney*, Civ. No. 88-2322 (D.D.C. stay pending review ordered Aug. 17, 1988) (Green, J.).

²⁴² Calkins, *Comment: The Proposed Detroit Joint Operating Arrangement*, 6 WAYNE LAW. 15, 16 (Fall 1987).

²⁴³ *In re Application by Detroit Free Press*, slip op. at 14. My preferred standard—whether the weaker paper probably would have been closed had the papers not applied for a JOA—has the advantage of more closely tracking the statutory language. The Attorney General's approach finds support in *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 478 (9th Cir.), cert. denied, 464 U.S. 892 (1983), but that opinion is inconsistent, cf. *id.* at 480 (“Congress intended the phrase ‘probable danger of failure’ to mean a probability that the paper would be closed and an editorial voice lost”). The plans of a newspaper's publisher, if not shaped by litigation concerns, are the best evidence of the financial viability of a paper, and the Act does not preclude reliance on these plans. Calkins, *supra* note 242, at 16–17.

²⁴⁴ *Id.* at 13.

²⁴⁵ Slip op. at 11 n.4 (“Following the Recommended Decision of the Administrative Law Judge, Knight-Ridder took certain steps to underscore its corporate intention to close the *Free Press* if there is no approval of the JOA. Since those maneuvers occurred after the close of the record, they have not been included in any consideration of the instant application.”).

²⁴⁶ See also *Threat of paper's death swayed decision, exec says*, *Detroit Free Press*, Aug. 11, 1988, at 3A, col. 4, 6A, col. 2 (Knight-Ridder Inc. Chairman said lobbying campaign “was critical to the ultimate success” of the JOA application”).

multiple editorial voices in Detroit is "an outcome that does not appear to be in the future otherwise" than through a JOA.²⁴⁷

This could be characterized as "boot-strap litigation." Knight-Ridder and the *Detroit News* each deliberately lost money in order to achieve market dominance. There is no persuasive evidence that Knight-Ridder seriously considered closing the *Free Press*.²⁴⁸ Then, promptly after Gannett bought the *Detroit News*, the two newspapers petitioned the government to allow them to end their competition. In a joint brief filed with Attorney General Meese, Knight-Ridder and Gannett argued that he must grant what is in effect a monopoly because otherwise the *Free Press* would continue to lose money. The *Free Press* would continue to lose money, the brief argued, because the *Detroit News* would continue deliberately to lose money in order to inflict losses on the *Free Press*. The brief relied on the testimony of Gannett's chairman as proof of its intent.²⁴⁹

It is remarkable that two major corporate firms would be bold enough to make such an argument. It is even more surprising that the Attorney General would adopt that argument as his own. Losses deliberately inflicted for the purpose of achieving dominance should be disregarded unless the market is too small to support more than a single newspaper.²⁵⁰ Knight-Ridder's current intentions concerning the *Free Press* also should be disregarded, lest the legal system reward the most brazen firms; the only relevant "intent" question should ask what the parties would have done had they not applied for a JOA.²⁵¹ Attorney General Meese did not address this and other difficult questions, and he expressly found that the Detroit newspaper market could support two profitable newspapers.²⁵² If that finding is correct, approval of the JOA based upon predation-induced losses, if that is what these were, is inappropriate.

²⁴⁷ *Id.* at 13.

²⁴⁸ Recommended Decision at 93-95, *In re: Application by Detroit Free Press* (filed Dec. 29, 1987).

²⁴⁹ Reply Memorandum of Detroit Free Press, Incorporated and the Detroit News, Inc. at 24, *In re: Application by Detroit Free Press* (brief filed Oct. 14, 1987).

²⁵⁰ Calkins, *supra* note 242, at 18.

²⁵¹ *Id.* Unfortunately, the District Court wrote that it was proper to give weight to Knight-Ridder's threat to close the *Free Press*. 7 Trade Reg. Rep. at 59,423.

²⁵² *In re Application of Detroit Free Press*, slip op. at 9 n.3 (agreeing with the Law Judge that two profitable papers could be sustained if prices were increased). In the cited footnote, Attorney General Meese added that "both Knight Ridder and Gannett have elected to forego sharing the prize, resisting price increases in an effort to gain market dominance." It is particularly disappointing that the Attorney General failed even to mention the evidence that most impressed the Antitrust Division, namely, Gannett's willingness to share JOA revenues almost evenly. (The Division argued, not unreasonably, that Gannett would be less generous with a newspaper that was likely to fail.)

Attorney General Meese's decision has withstood challenge in federal district court, and may survive on appeal.²⁵³ The case is difficult. Left unchanged, the decision is an invitation to newspapers in two-paper cities to engage in predation, comforted by the knowledge that the reward for failure may be a JOA. Reversed, the "failing newspaper" test might become so stringent that JOAs become unavailable as a practical matter, since by the time a paper qualified as "failing" no competitor would be interested. It will take considerable judicial craftsmanship to find a prudential mean.

²⁵³ The newspapers and the Attorney General are aided substantially by the requirement that courts defer to administrative decision-makers. *See, e.g.*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).