

## THE HAZARDS OF DOING BUSINESS WITH THE GOVERNMENT: EXPANDING EXCEPTIONS TO NOERR-PENNINGTON

Local government actions often restrain competition,<sup>1</sup> frequently at the behest of private competitors. Traditionally, government has enjoyed immunity from federal antitrust laws under the *Parker*<sup>2</sup> state

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1. See generally Ettinger, *Antitrust Liability of Local Government*, 23 MUN. ATT'Y 7, 12 (1982); Slawsky, *Can Municipalities Avoid Antitrust Liability*, 14 URB. LAW. vii (1982); Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518 (1979). In the regulatory context, see Miller, *Antitrust and Certificates of Need: Health Systems Agencies, the Planning Act, and Regulatory Capture*, 68 GEO. L.J. 873 (1980). In the zoning context, see Payne, *Recent Changes in Federal Law—Antitrust Law and Zoning*, 10 REAL EST. L.J. 146 (1981); Note, *Antitrust Laws, Zoning and Agreements to Zone: Delegation of Police Powers after LaFayette v. Louisiana Power and Light*, 25 S. D. L. REV. 314 (1980); Note, *Post-LaFayette Municipal Liability for Refusing to Zone Outlying Development*, 59 WASH. U.L.Q. 485 (1979).

2. *Parker v. Brown*, 317 U.S. 341 (1943). See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 238 (1977). The state action exemption is grounded upon federalism principles, *Parker*, 317 U.S. at 351; however, the United States Supreme Court variously interprets the doctrine as a constitutional limitation on congressional power or as a matter of statutory intent. Compare *City of LaFayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 423 (1978) (Burger, C.J., concurring) (even Congress cannot subject traditional governmental functions to the antitrust laws) with *LaFayette*, 435 U.S. at 430 n.67 (Stewart, J., dissenting) (*Parker* interprets the antitrust statutes to exempt state governmental action) and *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 n.15 (1982) (Brennan, J., majority opinion) (scope of the state action exemption in application to a governmental function is a matter of congressional intent). See also LaPierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L.Q. 779, 902 n.473 (1982) (majority of the Court recognizes constitutional limitations upon the power of Congress to bring states carrying out governmental functions under the antitrust laws).

The Supreme Court recently applied the Robinson-Patman Act, 15 U.S.C. § 13 (1982), to state proprietary activity, specifically the purchase and resale of pharmaceuticals. *Jefferson City Pharmaceutical Ass'n v. Abbott Laboratories*, 103 S. Ct. 1011 (1983). The Court found that state resale of pharmaceuticals placed the state in direct competition with retail pharmacies, *id.* at 1014 n.7, and thus created the potential for competitive abuse against which the antitrust laws are to provide redress. The Court, however, strongly implied that the tenth amendment constitutionally exempted states from the antitrust laws when the states purchase goods for state use in

action exemption.<sup>3</sup> Similarly, solicitation of anticompetitive acts of government has enjoyed protection from antitrust scrutiny under the *Noerr-Pennington* doctrine.<sup>4</sup> Recent decisions<sup>5</sup> limiting the scope of the *Parker* state action exemption<sup>6</sup> have caused reexamination of the related *Noerr-Pennington* defense. Several recent decisions in the lower courts indicate increased potential for liability under the antitrust laws when private parties solicit anticompetitive acts of government.

## I. NOERR-PENNINGTON DOCTRINE AND ITS EXCEPTIONS

### A. *The Doctrine*

Good faith lobbying enjoys antitrust immunity under the first

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traditional governmental functions, *id.* at 1014 n.6 (citing *LaFayette*, 435 U.S. at 413 n.42).

3. See generally P. AREEDA & D. TURNER, 1 ANTITRUST LAW § 207 (1978 & Supp. 1982); Areeda, *Antitrust Immunity for "State Action" After LaFayette*, 95 HARV. L. REV. 435 (1981); Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363 (1978); Posner, *The Proper Relationship Between State Regulation and Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974).

4. The *Noerr-Pennington* doctrine is derived from United States Supreme Court decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The former decision immunized the lobbying efforts of an association of railroads from antitrust attack. The latter decision exempted union and coal owner's attempts to influence decisions of the Secretary of Labor and the Tennessee Valley Authority. *Noerr-Pennington* protection extends to adjudicative forums. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). See generally Oppenheim, *Antitrust Immunity for Joint Efforts to Influence Adjudication Before Administrative Agencies and Courts—From Noerr-Pennington to Trucking Unlimited*, 29 WASH. & LEE L. REV. 209 (1972).

5. The state action exemption requires a clearly articulated, actively supervised state policy of restraint of trade. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *City of LaFayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

6. Private instigation of anticompetitive governmental action that fails to meet the state action exemption may also lose *Noerr-Pennington* protection. See *infra* note 24 and accompanying text. See SUSMAN & WHITE, *THE PERSPECTIVE OF A PLAINTIFF'S LAWYER*, in *ANTITRUST AND LOCAL GOVERNMENT* 21, 27 (J. Siena ed. 1982); Bern, *The Noerr-Pennington Immunity for Petitioning in the Light of City of LaFayette's Restriction on the State Action Immunity*, 1980 ARIZ. ST. L.J. 279, 285. The growing inadequacy of the *Noerr-Pennington* defense is becoming a matter of some concern in the business community. *An Old Antitrust Defense Falters*, BUS. WEEK, April 11, 1983, at 66.

amendment rights of petition<sup>7</sup> and free speech.<sup>8</sup> To guarantee the right of the public, through government officials and agencies at all levels of government, to the free flow of information, the *Noerr-Pennington* doctrine exempts private communications with the government from antitrust liability.<sup>9</sup> The doctrine, both constitutionally and statutorily based,<sup>10</sup> protects communications with government regardless of anticompetitive intent.<sup>11</sup> The *Noerr-Pennington* doctrine extends beyond lobbying to include communications with administrative and adjudicative agencies of government.<sup>12</sup>

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7. U.S. CONST. amend. I states: "Congress shall make no laws . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances."

8. The Supreme Court reaffirmed the right of corporations to engage in protected speech in *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) and *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

9. *Noerr*, 365 U.S. at 137. The statutory argument was premised, in turn, upon the federalism principles of *Parker v. Brown*, 317 U.S. 341 (1943). *Id.* See also *La-Fayette*, 435 U.S. at 399-400. Justice Stewart made explicit the logical linkage between the *Parker* state action exemption and *Noerr* protection of free speech and right of petition in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 516 n.3 (1972) (concurring opinion).

10. See Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977) (author believes *Noerr-Pennington* should be limited to constitutionally required protection of speech and petition). But see *Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991, 1024 (S.D. Tex. 1981), *rev'd on other grounds*, 700 F.2d 226 (5th Cir. 1983) (*Noerr* and *Parker* jointly construe the antitrust laws to avoid interference with governmental decision-making that results in a valid restraint of trade).

The Court of Appeals for the Fifth Circuit recently examined the basis of the *Noerr-Pennington* doctrine and decided that solicitation and petition are statutorily exempted from the antitrust laws, not merely constitutionally protected. *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, *reh'g en banc denied*, 699 F.2d 1163 (5th Cir. 1983) (immunity extends to actions brought in foreign courts because *Noerr-Pennington* is a statutory exemption).

11. *Noerr*, 365 U.S. at 139.

12. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Justice Douglas rested his opinion squarely upon first amendment grounds, *id.*, but also took the opportunity to articulate the "sham litigation" exception, *id.* at 511. See *infra* note 17 and accompanying text. Although Justice Stewart, concurring, characterized this aspect of the majority opinion as a retreat from the first amendment protection provided under *Noerr*, *id.* at 516, *Noerr* itself anticipated the sham litigation exception when the Court distinguished protected lobbying from attempts to interfere directly in the business relations of a competitor. *Noerr*, 365 U.S. at 144. Compare *Vendo Co. v. Lekto-Vend Corp.*, 433 U.S. 623, 635 n.6 & 644 (1977) (plurality and dissent) (single lawsuit may constitute an antitrust violation) with *Otter Tail Power Co. v. United States*, 410 U.S. 366, *on remand*, 360 F. Supp. 451 (D. Minn. 1973), *aff'd mem.*, 417 U.S. 801 (1974) (*Noerr-Pennington* does not protect repetitious lawsuits brought by monopolist as part of a scheme to delay competition) and *Grip-*

### B. *The Sham Litigation Exception*

#### The Supreme Court of the United States, in *Eastern Railroads Pres-*

Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (7th Cir. 1982) (malicious prosecution in the antitrust sense occurs when the defendant brings suit not to vindicate rights but to harass a competitor).

The *Noerr-Pennington* immunity loses force in the adjudicative context. Behavior considered relatively insignificant in the legislative arena is taken far more seriously in the adjudicative context. Compare *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) (legislator's personal reasons for lawful action irrelevant to antitrust laws) with *Associated Radio Serv. Co. v. Page Airways, Inc.*, 414 F. Supp. 1088 (N.D. Tex. 1976) (*Noerr-Pennington* does not protect litigation brought with improper purpose and coincident with other acts probative of abuse of process), *aff'd*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). See also *Metro Cable Co. v. CATV of Rockford*, 516 F.2d 220, 228 (7th Cir. 1975) (unethical conduct that would prevent *Noerr-Pennington* immunity in adjudicative setting is of little relevance in legislative context). The distinction derives from *California Motor Transport*, 404 U.S. at 513, but logically follows from the nature of the injury inflicted. See *infra* note 17.

The characterization of an act of government as adjudicative (or "quasi-judicial") or legislative thus assumes some importance. See *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1079 & 1087 n.1 (9th Cir. 1976) (majority and dissenting opinions). The Court of Appeals for the Seventh Circuit decided that the defendant city council in *Metro Cable*, 516 F.2d 220 (1975), acted in a legislative capacity when the council awarded a cable franchise. Council members enjoyed *Noerr-Pennington* immunity from allegations of bribery and conspiracy. The Seventh Circuit decided that the franchise award was a legislative act because Illinois statutes granted to the "corporate authorities" of the municipality the power to franchise. *Id.* at 228 n.12. In addition, the court examined the procedure followed by the council, noting that the city council retained no evidentiary record and could receive information through *ex parte* contacts. *Id.* at 228. Presumably, these criteria are part of the federal common law.

In some instances there may exist state law controlling the characterization of governmental acts as legislative or adjudicative. The federal courts appear to consider state law. In the zoning context, see, e.g., *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976) (due process challenge of referendum by which small parcel of land was rezoned; rezoning characterized as a legislative act, following state law). *But see, e.g., Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 n.15 (1982) (state law investing Home Rule municipality with full powers of state is not relevant to availability of state action exemption). See also *Fasano v. Board of County Comm'rs of Wash. County*, 264 Ore. 574, 507 P.2d 23 (1973) (proceedings before city council to consider rezoning in accordance with standards provided by a comprehensive plan are quasi-judicial). *Cf. also Stauffer v. Town of Grand Lake*, 1981-1 Trade Cas. ¶ 64,029 (D. Colo. 1980) (rezoning decision is quasi-judicial according to state law and individual municipal defendants usually enjoy immunity in antitrust action. The district court, however, in finding liability, held the municipal defendants acted outside the scope of the authority extended by the legislature.). The question remains whether *ex parte* contacts, for example, may occur in a rezoning without endangering the *Noerr-Pennington* defense in a subsequent antitrust action.

*idents Conference v. Noerr Motor Freight, Inc.*,<sup>13</sup> qualified the anti-trust immunity conferred upon lobbying, excepting those activities ostensibly directed toward influencing governmental action but that amounted to a mere sham concealing an attempt to interfere directly with the business relations of a competitor.<sup>14</sup> In *California Motor Transport Co. v. Trucking Unlimited*,<sup>15</sup> the United States Supreme Court expanded the sham litigation exception delineated in *Noerr* to include unethical conduct that denies a competitor "free and unlimited access"<sup>16</sup> to administrative and judicial proceedings.<sup>17</sup>

13. 365 U.S. 127 (1961).

14. *Id.* at 144.

15. 404 U.S. 508 (1972).

16. *Id.* at 511.

17. In *California Motor Transport*, 404 U.S. 508 (1972), truckers alleged that trucking competitors instituted state and federal proceedings in order to interfere with plaintiff's petitions for operating licenses. The Court extended the "sham litigation" exception, first alluded to in *Noerr*, 365 U.S. at 144, to include misconduct that perpetrates a fraud on the court, bribery, or conspiracy with government officials. *Id.* at 513. The Court reasoned that such misconduct is "access barring" because the behavior effectively usurps the decision-making process. *Id.* at 513. See *supra* note 12.

There are two general rationales for the sham litigation exception, at least in the adjudicative setting. First, baseless and repetitive lawsuits resemble an antitrust tort of malicious prosecution. See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982). Compare *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) (concurring opinion) (single lawsuit may qualify under the sham litigation exception) with *Otter Tail Power Co. v. United States*, 410 U.S. 86 (1973) (sham litigation exception carries hallmark of repetitive lawsuits of insubstantial claims). See generally Balmer, *Sham Litigation and the Antitrust Laws*, 29 BUFFALO L. REV. 39 (1980); Note, *The Limitations of the Noerr-Pennington Doctrine as a Defense for Political Activity in Restraint of Trade*, 12 LOY. U. CHI. L.J. 773, 788-91 (1981).

Second, corruption or abuse of the adjudicative process is "access denying" because the abuse renders the forum incapable of making a fair and reasoned determination of individual rights. See *Litton Sys. v. American Tel. & Tel. Co.*, 700 F.2d 785, 809-12 (2d Cir. 1983); *Wilmorite, Inc. v. Eagar Real Estate, Inc.*, 454 F. Supp. 1124 (N.D.N.Y. 1977), *aff'd*, 578 F.2d 1372 (2d Cir. 1978), *cert. denied*, 439 U.S. 983 (1978). See Crawford, Jr. & Tschoepe II, *The Erosion of Noerr-Pennington Immunity*, 13 ST. MARY'S L.J. 291, 320 (1981). See generally Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715 (1973).

In theory, both "sham lobbying" and sham litigation may exist. In practice, acts probative of corruption or abuse of the adjudicative forum carry little weight where legislation is involved. The antitrust plaintiff cannot readily show causation or lack of "policy bias" by probing the mind of a legislator. See generally 1 P. AREEDA & D. TURNER, ANTITRUST LAW § 203.3 (Supp. 1982). See, e.g., *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). But see *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982) (legitimate lobbying activities accompa-

Courts struggle to give meaning to the sham litigation exception.<sup>18</sup> Abuse of the right of petition bars access when meaningful adjudicatory or administrative proceedings are denied.<sup>19</sup> Repetitive baseless suits abuse the right of petition.<sup>20</sup> Use of baseless litigation to delay or otherwise disadvantage a competitor constitutes an antitrust violation where the competitive injury flows directly from the act of petitioning and not incidentally from an act of government.<sup>21</sup> Finally, corruption of the adjudicative process denies access to a fair and impartial forum<sup>22</sup> and is subject to antitrust scrutiny.<sup>23</sup>

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nied by illegal or fraudulent activities created an anticompetitive preference for defendant's development project).

18. *See, e.g.*, *Ross v. Bremer*, 1982-2 Trade Cases (CCH) ¶ 64,746, 71,618 (W.D. Wash. 1982) ("no satisfactory definition of the sham exception to *Noerr-Pennington* immunity exists").

19. *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 275 (D.C. Cir. 1972) (action by drug manufacturers alleging that competitors conspired to preclude manufacturers from the market by influencing FDA to deny fair consideration of new applications). *See supra* note 17 and accompanying text.

20. *Ernest W. Hahn, Inc. v. Coddling*, 615 F.2d 830, 840-41 (9th Cir. 1980) (developer selected by urban renewal agency to develop regional shopping center brought action against unsuccessful developer for filing thirteen baseless lawsuits). *See supra* note 17 and accompanying text.

21. *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891 (2d Cir. 1981) (real estate developers brought antitrust action against shopping center owners and managers, alleging defendants conspired to prevent developers from opening a competing shopping mall by organizing protracted opposition before state administrative agencies and by bad-faith litigation); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977). The Court of Appeals for the Ninth Circuit in *Franchise Realty* required the plaintiff to allege not only that the defendant undertook "access barring" litigation, but also that the defendant communicated threats of litigation in order to directly accomplish his anticompetitive purpose. *Franchise Realty*, 542 F.2d at 1081. *See Note*, *Franchise Realty v. Culinary Workers: "Chilling" the Sham Exception*, 72 Nw. U.L. REV. 407, 410 (1978). As a matter of logic, compare the analysis applied by the Second Circuit when a municipality brought frivolous litigation for the expressed purpose of delay and obstruction, *Miracle Mile Assoc. v. City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980) (public purpose in bringing admittedly frivolous litigation precludes antitrust scrutiny). Whether the rationale of *Miracle Mile* escapes *LaFayette*, *infra* notes 26-31 and accompanying text, when municipalities protect proprietary enterprises is problematic.

22. *See, e.g.*, *Ross v. Bremer*, 1982-2 Trade Cas. (CCH) ¶ 64,746 (W.D. Wash. 1982) (solicitation and financing of litigation by other parties); *Brown v. Carr*, 1980-1 Trade Cas. (CCH) ¶ 63,033 (D.D.C. 1979) (agent's breach of duty); *Mason City Center Assoc. v. City of Mason City*, 468 F. Supp. 737 (N.D. Iowa 1979) (anticompetitive agreement with city council to delegate right to veto competitor's application for rezoning to private party); *Nelson v. Utah County*, 1978-1 Trade Cas. ¶ 62,128 (D.

### C. *The Commercial Function Exception*

Several courts construe *Noerr-Pennington* as a corollary of the *Parker* state action exemption.<sup>24</sup> If an anticompetitive act of government is not exempt from the antitrust laws as a state-mandated policy of restraint,<sup>25</sup> then private solicitation of anticompetitive governmental restraints of trade may lack antitrust immunity under *Noerr-Pennington*. One major category of unprotected state action exists where government acts as a commercial competitor of private enterprise.<sup>26</sup>

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Utah 1977) (conspiracy with governmental officials to adopt unlawful zoning ordinance).

23. Judge Higgenbotham has noted that once the courts accept an allegation of "sham litigation," antitrust courts can hardly avoid relitigating decided cases, notwithstanding *res judicata* principles. Higgenbotham, *The Noerr-Pennington Problem: A View from the Bench*, 46 ANTITRUST L.J. 730, 736 (1978). See, e.g., *Ross v. Bremer*, 1982-2 Trade Cas. ¶ 64,746, at 71,619 (W.D. Wash. 1982).

One solution to this problem is to devalue "baselessness" as a factor in deciding whether an antitrust claim can arise from bringing a lawsuit. Arguably, this is the antitrust court's answer to the defendant's responsive pleading of meritorious litigation. See *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891 (2d Cir. 1981).

24. See, e.g., *Kurek v. Pleasure Driveway and Park Dist. of Peoria*, 557 F.2d 580, 593 (7th Cir. 1977) (antitrust action against city park district resulting from termination of concessions); *Duke & Co. v. Foerster*, 521 F.2d 1277, 1282 (3d Cir. 1975); *Huron Valley Hosp., Inc. v. City of Pontiac*, 466 F Supp. 1301, 1313-14 (E.D. Mich. 1979), *vacated*, 666 F.2d 1029 (6th Cir. 1981) (non-profit organization action against city and state officials alleging that defendants conspired to exclude organization from market of providing hospital facilities and services in violation of antitrust laws); *Nelson v. Utah County*, 1978-1 Trade Cas. (CCH) ¶ 62,128 (D. Utah 1977) (property owners brought antitrust action against county alleging defendants conspired to restrain trade in the use and sale of real estate).

25. See *supra* note 5.

26. Whether the commercial function exception survives *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), is not clear. For a general discussion of *Boulder*, see 12 SETON HALL L. REV. 835 (1982) and 35 VAND. L. REV. 1041 (1982). In *Boulder*, the Court reversed the court of appeals holding that restraints of trade resulting from governmental functions automatically come under the state action exemption, while those arising from proprietary functions are exempt only under the more stringent tests of *LaFayette* and *Midcal*. At the very least, *Boulder* must be read to apply the state action tests to all restraints of trade by political subdivisions, irrespective of the kind of governmental activity involved. See *Boulder*, 455 U.S. at 55 n.18. The distinction, however, between proprietary and governmental functions remains in state action exemption analysis. In *Jefferson County Pharmaceutical Assoc., Inc. v. Abbott Laboratories*, 103 S. Ct. 1011 (1983), retail pharmacies brought action against certain drug manufacturers and state university hospitals for violations of the Robinson-Patman Act, 15 U.S.C. § 13(f) (inducing or receiving a price discrimination). In a decision largely concerned with statutory interpretation of certain saving provisions in the Act, the Court also noted that state competition in the retail markets cannot share in the constitutionally-based protection of the state action ex-

In *City of LaFayette v. Louisiana Power & Light Co.*,<sup>27</sup> the Supreme Court considered the antitrust consequences of sham litigation allegedly brought by a municipal competitor of a private utility in conspiracy with certain private parties. In response to the city's claimed *Parker* state action exemption defense, a majority of the Court held that the city could not claim state action immunity when the municipality acted as a competitor with private enterprise.<sup>28</sup> Justice Brennan, writing for a plurality, concluded that municipalities could not claim immunity absent a showing that the municipality carried out a state-mandated policy of restraint of trade.<sup>29</sup> Chief Justice Burger, concurring,<sup>30</sup> focused upon the nature of the activity in which the municipality engaged. In order to qualify for *Parker* state action exemption, proprietary<sup>31</sup> municipal activity in restraint of trade must be state-mandated.

As a result of the Supreme Court's holding in *LaFayette*, proprietary activity of the government may not enjoy the state action exemp-

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emption otherwise accorded to governmental functions. *Abbott Laboratories*, 103 S. Ct. 1011, 1014 n.6 and 1016-17 n.17.

27. *City of LaFayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

28. *Id.* at 403.

29. *Id.* at 406-07.

30. *Id.* at 418.

31. Chief Justice Burger defined governmental activity, in federalist terms, as traditional and integral functions of state government. *Id.* at 422 and note 3. The majority opinion first addressed the question whether the state authorized the local governmental purpose and then inquired whether the legislature intended local government to act anticompetitively to accomplish that purpose. *Id.* at 412.

The lower courts have created a "commercial activity" exception to *Noerr-Pennington* immunity. *Kurek v. Pleasure Driveway and Park Dist. of Peoria*, 557 F.2d 580, 592-93 n.10 (7th Cir. 1977) (*see supra* note 24); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150*, 440 F.2d 1096, 1099 (9th Cir. 1971), *cert. denied*, 404 U.S. 826 (1971) (bottler and seller of soft drinks brought action against Teamsters' Union alleging coercive measures by defendants upon state fair officials resulting in officials issuing directives forbidding the sale of Coca-Cola; Ninth Circuit held unions not exempted from antitrust liability); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 31-34 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970), *on remand*, 376 F. Supp. 125 (D. Mass. 1974), *aff'd*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) (where public bodies in connection with purchase of pipeless swimming pools acted under laws requiring competitive bidding, adoption by public bodies of defendant-contractors' specifications does not fall within antitrust exemption for valid governmental action); *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 Trade Cas. ¶ 64,527, at 72,926 (N.D. Ga. 1981) (*Noerr-Pennington* exception does not apply when government acts as consumer in the marketplace unless city officials act in commercial rather than policy-making context).



tion. Private parties, therefore, may find communications which solicit such restraints of trade subject to antitrust scrutiny.<sup>32</sup>

#### D. Governmental Co-conspirators

Justice White's opinion in *United Mine Workers v. Pennington*<sup>33</sup> left open the possibility that conspiracy between public officials and private parties may deprive the private co-conspirator of *Noerr-Pennington* immunity.<sup>34</sup> Similarly, in *California Motor Transport*,<sup>35</sup> Justice Douglas specifically referred to conspiracy with a licensing authority as an example of "illegal or reprehensible" conduct, resulting in a loss of antitrust immunity.<sup>36</sup> Because governmental co-conspiracy results in both improper adjudication and illegal or *ultra vires* acts of government, the conspiracy falls under an exception to *Noerr-Pennington*<sup>37</sup> and moots the policy rationale underlying the *Parker* state action exemption.<sup>38</sup>

## II. NOERR-PENNINGTON AND THE STATE ACTION EXEMPTION

The widening sham litigation exception to *Noerr-Pennington* is premised upon "access barring" activity of private petitioners and litigants that inhibits fair and impartial decision-making.<sup>39</sup> This ration-

32. The significance of the proprietary-governmental function distinction must be evaluated in light of *Community Communications Co. v. City of Boulder*, 455 U.S. 40. See *supra* note 26.

Whether *Noerr-Pennington* fails to protect speech soliciting nonexempt state action is discussed in Bern, *The Noerr-Pennington Immunity for Petitioning in Light of Lafayette's Restriction on the State Action Immunity*, 1980 ARIZ. ST. L.J. 279, 289. See *infra* notes 54-63 and accompanying text.

33. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

34. *Id.* at 671.

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

36. *Id.* at 513.

37. See, e.g., *Duke & Co. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975). See also *Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991, 1016-26 (S.D. Tex. 1981), *rev'd on other grounds*, 700 F.2d 226 (5th Cir. 1983). See *infra* notes 54-63 and accompanying text.

38. Not surprisingly, allegations of governmental co-conspiracy frequently appear in otherwise routine state-law franchise, zoning, and regulatory cases. Plaintiffs asserting antitrust claims premised upon boilerplate allegations of governmental co-conspiracy rarely succeed on the merits. I P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 203.3a (Supp. 1982).

39. Barring access means more than the instigation of baseless repetitive litigation and may include private unethical acts such as solicitation and maintenance of suits by others. See *supra* notes 12 and 17. In *Landmarks Holding Corp. v. Bermant*, 664

ale applies equally well to bring solicitation of non-exempt anticompetitive governmental action within the reach of the antitrust laws.

In circumstances where the *Parker* state action exemption does not apply,<sup>40</sup> the antitrust plaintiff may contend that the private defendant instigated unprotected anticompetitive conduct by the government or that the government acted as an antitrust co-conspirator.<sup>41</sup> Similarly, *ultra vires* anticompetitive acts of government may generate an antitrust claim against the private party soliciting anticompetitive action. Moreover, anticompetitive decisions rendered without sufficient due process safeguards<sup>42</sup> may preclude *Noerr-Pennington* immunity.

Several recent decisions shed light on the relationship between *Noerr-Pennington* and the federalism principles underlying the *Parker* state action exemption. In *Ross v. Bremer*,<sup>43</sup> plaintiffs seeking to develop a downtown shopping center brought action against defendants, owners of a downtown department store and prospective developers of a competing mall.<sup>44</sup> The plaintiffs alleged that the defendants conspired to block the proposed development of the competing mall in order to preserve and expand their existing monopoly.<sup>45</sup> The plaintiffs claimed that the defendants, engaging in a concerted scheme of sham zoning litigation, solicited and financed

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F.2d 891 (2d Cir. 1981), the Second Circuit held that litigation coupled with the solicitation and financing of suits by other parties was not entitled to first amendment protection, even though the defendants had been granted certiorari to the state supreme court at that court's "sound judicial discretion" in light of "special and important reasons" for review. *Id.* at 894-95 n.6. Because the defendant solicited and financed litigation by others for the purpose of gaining standing and because of defendant's alleged scheme of delay, the Second Circuit decided that the plaintiff stated a cause of action under the sham litigation exception. *Id.* at 896. *See also* *Litton Sys. v. American Tel. & Tel. Co.*, 700 F.2d 785, 809-12 (2d Cir. 1983); *Ross v. Bremer*, 1982-2 Trade Cas. (CCH) ¶ 64,746 (W.D. Wash. 1982) (defendant's solicitation and financing of suits constitutes sham litigation, even though the actions made new law in state court). *See infra* notes 44-53 and accompanying text.

40. *See supra* notes 2 and 31.

41. *See, e.g.*, *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981); *Stauffer v. Town of Grand Lake*, 1981-1 Trade Cas. (CCH) ¶ 64,029 (D. Colo. 1980); *Nelson v. Utah County*, 1978-1 Trade Cas. (CCH) ¶ 62,128 (D. Utah 1977).

42. *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 2122 (1983). *See supra* note 12 and *infra* notes 70-76 and accompanying text.

43. 1982-2 Trade Cas. (CCH) ¶ 64,746 (W.D. Wash. 1982).

44. *Id.* at 71,617.

45. *Id.*

lawsuits to gain standing.<sup>46</sup> Contending that the defendants misused the adjudicatory process, the plaintiffs argued that the defendants' conduct constituted sham litigation rather than conduct protected under *Noerr-Pennington*.<sup>47</sup> The defendants, however, asserted that because they prevailed before the Supreme Court of Washington, the actions failed to fall within the scope of the sham litigation exception to *Noerr-Pennington*.<sup>48</sup>

The United States District Court of Washington, relying principally upon the plaintiffs' allegations of solicitation and maintenance, held that the defendants' lawsuits might constitute sham litigation, violative of the antitrust laws.<sup>49</sup> Although the defendants' litigation resulted in the formulation of new state law,<sup>50</sup> the *Ross* court concluded that the success of litigation does not determine the litigation's antitrust immunity under *Noerr-Pennington*.<sup>51</sup> Because the antitrust injury stemmed from delay in the adjudicatory process, the defendants, in effect, litigated at their own peril. Apparently, litigation need be neither repetitious<sup>52</sup> nor meritless as a matter of state law to establish a sham, at least when combined with professional misconduct indicative of an intent to perpetuate fraud upon the court.

In *Airport Car Rental Antitrust Litigation*,<sup>53</sup> a United States District Court in California, in finding that regulation of ancillary airport services constitutes a proprietary activity, held that concerted efforts

46. *Id.* at 71,618.

47. Plaintiff presented evidence of defendant's intent to delay construction and prolong litigation. *Id.* at 71,617.

48. *Id.* at 71,618. *But see* Landmarks Holding Corp. v. Bermant, 664 F.2d 891 (2d Cir. 1981); Ernest W. Hahn, Inc. v. Coddling, 615 F.2d 830 (9th Cir. 1980).

49. *Ross*, 1982-2 Trade Cas. (CCH) ¶ 64,746 at 71,618, 71,619.

50. The actions, brought by an adjacent landowner, resulted in new law on the "collateral issues" of zoning due process, record and notice of hearing requirements, and environmental protection, requiring full disclosure of the impact of the proposed development upon the "socioeconomic environment." *Id.* at 71,617.

51. *Id.* at 71,619. In finding defendants' successful litigation not determinative on the question of antitrust liability, the district court stated:

Nor is this a proper case for *res judicata* or collateral estoppel. It appears that the Washington State Supreme Court cases were not a final judgment on the issues of zoning. The causes of action in the state litigation are not identical to those in the instant case, which is based on allegations of antitrust violations. Those two factors preclude a finding of *res judicata*.

*Id.*

52. *See supra* note 12.

53. 474 F. Supp. 1072 (N.D. Cal. 1979).

by automobile rental agencies to influence airport authorities to limit eligibility to engage in the on-airport automobile rental market were not protected under *Noerr-Pennington*.<sup>54</sup> On consolidation and reassignment,<sup>55</sup> the district court rejected the notion that lobbying before governmental agencies not exempt from the antitrust laws precludes protection under *Noerr-Pennington*.<sup>56</sup>

Finding first amendment protection of commercial speech, the district court rejected the prior holding that activities intended to influence government engaged in a commercial capacity are distinguishable from activities directed towards government engaged in a governmental capacity.<sup>57</sup> Noting the United States Supreme Court's growing concern over commercial speech,<sup>58</sup> the court avoided the imputation of municipal liability for anticompetitive acts to soliciting private parties.<sup>59</sup> In determining whether the application of federal antitrust laws to activities intended to influence government officials or agencies engaged in a proprietary function constitutes constitutionally permissible regulation, the district court concluded that to condition protection of speech and petition upon a *post hoc* determination that the governmental agency acted within the scope of the *Parker* state action exemption would be inherently unfair.<sup>60</sup>

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54. *Id.* at 1091-96. The court clearly thought that *Noerr-Pennington* immunity stands or fails with the *Parker* state action exemption:

This is not at all a novel idea . . . . One of the bases of the Supreme Court's decision in *Noerr* was its earlier holding in *Parker* that "where a restraint upon trade or monopolization is the result of *valid* governmental action, as opposed to private action, no violation of the Act can be made out." . . . The Court is therefore not breaking new ground in suggesting that the reach of *Noerr-Pennington* may be limited to cases in which the government's conduct would be immunized. *Id.* at 1089 n.15, quoting *Noerr*, 365 U.S. at 136 (emphasis added).

55. *In re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982).

56. *Id.* at 584.

57. *Id.* at 577.

58. *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The Supreme Court issued the *Central Hudson* opinion one year after the federal district court opinion in *In re Airport Car Rental Antitrust Litig.*, 474 F. Supp. 1072 (N.D. Cal. 1979). On consolidation, the district court viewed the balancing approach of the earlier opinion, 474 F. Supp. at 1085-87, as constitutionally unsound. *Car Rental Antitrust Litigation*, 521 F. Supp. at 582.

59. *Car Rental Antitrust Litigation*, 521 F. Supp. at 582-83. The Ninth Circuit Court of Appeals affirmed, in pertinent part, the district court's decision. 693 F.2d 84 (9th Cir. 1982).

60. *Car Rental Antitrust Litigation*, 521 F. Supp. at 584.

Finally, the district court, in finding antitrust regulation incompatible with first amendment guarantees, further concluded that the mere potential for antitrust liability would have a chilling effect upon commercial speech.<sup>61</sup>

Based upon the alleged facts, the federal court dismissed the plaintiffs' claim of conspiracy among the automobile rental agencies and the airport authorities to exclude new automobile rental agencies from the on-airport market. Pushing *Parker* out the front door, the district court promptly swept *Parker* in through the back door. Conceding that sufficient allegations of governmental co-conspiracy might be made, the district court suggested that a finding of unlawful anticompetitive action desired on the part of the private defendants, coupled with a finding that the action undertaken failed to fall within the scope of the agency's authority, would preclude the private defendants from *Noerr-Pennington* protection.<sup>62</sup>

Other courts have reached similar results. In *Affiliated Capital Corp. v. City of Houston*,<sup>63</sup> the plaintiff applied for a municipal cable television franchise but refused to participate in a market-allocation agreement allegedly sponsored by the city in conspiracy with competing franchise applicants. Although deciding the case on alternative grounds,<sup>64</sup> the district court carefully analyzed the relationship between the state action exemption and the governmental co-conspirator exception to *Noerr-Pennington*.<sup>65</sup> In finding that certain governmental officials were not only co-conspirators but actively "orchestrated" and "manipulated" aspects of the conspiracy, the district court removed the private parties from *Noerr-Pennington* protection.<sup>66</sup>

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61. *Id.*

62. The district court noted that the plaintiff had alleged a governmental co-conspiracy, but had not shown defendant's direct participation in any anticompetitive combination. *Id.* at 590. The district court further noted, however, that whether the private co-conspirator should lose *Noerr-Pennington* immunity may depend upon whether the private co-conspirator intended to produce only valid governmental restraints on trade. *Id.* at 590 n.30. This proposed test accomplishes little by way of distinguishing the interdependent defenses under *Parker* and *Noerr-Pennington*. *Noerr-Pennington* brings even communications made with anticompetitive intent under constitutional protection. See *supra* note 11 and accompanying text.

63. 519 F. Supp. 991 (S.D. Tex. 1981), *rev'd on other grounds*, 700 F.2d 226 (5th Cir. 1983).

64. *Id.* at 1012.

65. *Id.*

66. *Id.* at 1021-22.

Rather than basing the holding upon the "access barring" effects of the conspiracy on the adjudicative process, the district court based the holding upon corruption in the legislative process.<sup>67</sup> Inasmuch as the illegal activities of the individual governmental co-conspirators were imputed to the governmental entity itself, the district court invalidated the franchise agreement.<sup>68</sup> Moreover, protection under *Noerr-Pennington* proved unavailable to the private defendants who had sought the illegal activity.<sup>69</sup>

Governmental co-conspiracy may extend to violations of procedural due process in a regulatory context. In *Westborough Mall v. City of Cape Girardeau*,<sup>70</sup> developers of a shopping mall brought an antitrust action against the municipality and a competing developer. The Westborough developers alleged that the city illegally acted to deprive the plaintiffs of their zoning rights without due process.<sup>71</sup> Specifically, the developers claimed that the city manager and a competing developer illegally conspired to prevent competition by improperly reverting<sup>72</sup> the zoning classification obtained to develop Westborough Mall. The reversion, in effect, discouraged financial supporters and prospective tenants, and eventually destroyed the shopping mall project.<sup>73</sup>

The Eighth Circuit Court of Appeals, in reversing summary judg-

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67. *Id.* at 1020 n.26. Analogizing corrupt zoning decisions to franchising, the district court relied upon *Mason City Center Assoc. v. City of Mason City*, 468 F. Supp. 737 (N.D. Iowa 1979).

68. *Affiliated Capital Corp.*, 519 F. Supp. at 1025. The district court noted that *Parker* had left undecided what result should follow proof of governmental co-conspiracy. *Id.* at 1026 (citing *Parker*, 317 U.S. at 351).

The court explained this result by asserting that *Noerr-Pennington* is grounded upon the need for free citizen participation in government. An absolute first amendment immunity for anticompetitive conspiracies with government would not improve democratic decision-making, but would obstruct it. *Id.* at 1026. As the district court suggested earlier in its opinion, there remains little to distinguish this rationale from that of the sham litigation exception. *Id.* at 1013 n.22.

69. *Id.* at 1025.

70. 693 F.2d 733 (8th Cir. 1982), *rev'g and rem'g*, 532 F. Supp. 284 (E.D. Mo. 1981), *cert. denied*, 103 S. Ct. 2122 (1983).

71. The original rezoning ordinance had expressly exempted plaintiff from an ordinance that purported to automatically revert undeveloped land to its prior use within three years of rezoning. *Westborough Mall*, 693 F.2d at 737.

72. *Id.* at 736.

73. Plaintiff alleged, in effect, that the city desired certain businesses associated with his competitor to locate in Cape Girardeau. *Id.* at 744 n.6.

ment in favor of the municipality and competing developer,<sup>74</sup> held that the preferential relationship between the private defendants and the municipality constituted sufficient circumstantial evidence to support an inference of a conspiracy to deprive Westborough developers of their zoning rights.<sup>75</sup> The Eighth Circuit, however, declined to rely upon the governmental co-conspiracy exception to bring the private defendant under the antitrust laws. In finding the defendant precluded from *Noerr-Pennington* protection, the Eighth Circuit concluded that the illegal zoning reversion, coupled with the municipality's delay in correcting the improper zoning classification, may have reflected the intended result of the defendant's lobbying activity.<sup>76</sup> Finally, the Eighth Circuit concluded that the conspiracy to "thwart normal zoning procedures" and to deprive Westborough developers of their property interests failed to advance any clearly articulated state policy.<sup>77</sup> The conspiracy, therefore, failed to fall within the *Parker* state action exemption.

### III. CONCLUSION

Growing uncertainty concerning the advantages of the *Noerr-Pennington* defense will have a chilling impact upon basic constitutional rights of speech and petition. Courts should be reluctant to deprive private parties of *Noerr-Pennington* protection. Under the sham litigation exception, there exists a growing danger that antitrust courts will retry allegedly baseless litigation or develop federalized standards of professional ethics.<sup>78</sup> Although some doubt exists concerning the applicability of the commercial state action exception to

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74 532 F. Supp. 284 (E.D. Mo. 1981).

75 Plaintiff presented evidence of delay in correcting the erroneous reversion of his property, evidence of the private defendant's intent to cause such delay, and evidence of the private defendant's efforts to cause the city to undertake an illegal rezoning. 693 F.2d at 744 and n.6.

76. *Id.* at 746.

77. *Id.* See *supra* note 12. Ironically, the Eighth Circuit found the individual governmental co-conspirators exempted from antitrust liability, *id.* at 748 n.9, following the rule of absolute immunity for legislative officials announced in *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (civil rights action brought under 42 U.S.C. § 1983 (1982)).

78. See *supra* notes 43-52 and accompanying text. Unexpected hazards may await counsel in any potentially anticompetitive litigation, including personal antitrust liability as a defendant and loss of privilege otherwise protecting communications with his client. Higgenbotham, *supra* note 23, at 736.

*Parker*,<sup>79</sup> counsel should be cognizant of the potential liabilities posed by solicitation of anticompetitive state action in connection with proprietary functions of government. Moreover, non-commercial anticompetitive government action that is declared nonexempt state action may result in the withdrawal of *Noerr-Pennington* immunity from private party defendants.<sup>80</sup> Finally, private liability for tainted or procedurally-defective regulatory action may survive a *Noerr-Pennington* defense so long as the governmental actor appears to have responded to private solicitation.<sup>81</sup> This result will persuade cautious private parties to abjure their rights of petition and inhibit proper functioning of local government. Until the Supreme Court addresses the question of governmental antitrust liability for illegal government activities, it is anomalous to burden the private exercise of speech and petition when government wrongfully accedes to anticompetitive proposals.

*Scott A. Garretson*

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79. *See supra* notes 54-63 and accompanying text.

80. *See supra* notes 64-69 and accompanying text.

81. *See supra* notes 70-75 and accompanying text.