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**ANTITRUST: Use of the Judicial or Administrative Adjudicatory Process Should be Exempt from the Antitrust laws**

**Trucking Unlimited v. California Motor Transport Co.**

Trucking Unlimited filed suit in federal district court alleging violations of sections 1 and 2 of the Sherman Act and seeking treble damages under section 4 of the Clayton Act. On consideration of the defendant carriers' motion to dismiss, the following allegations of the complaint were taken to be true: Trucking in the state of California is licensed and regulated by the California Public Utilities Commission (PUC) as well as by the Interstate Commerce Commission (ICC). The PUC's policy has been readily to grant, and to approve transfers of, common carrier licenses in the form of certificates of public convenience and necessity in order to encourage competition among truckers. Until 1963 the ICC would register any such certificate granted by the PUC without requiring a further hearing. In 1961 California Motor Transport Company, the largest highway common carrier in the western states, and the other defendant carriers embarked on a course of action designed to discourage smaller companies from seeking the easily obtainable cer-

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1. 432 F.2d 755 (9th Cir. 1970).
   Section 1 of the Act provides, in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."
   Section 2 of the Act provides:
   Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
   The section provides:
   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
4. 432 F.2d at 757. Since Trucking Unlimited came before the court on appeal from the lower court's granting of defendants' motion to dismiss for failure to state a claim upon which relief could be granted (Fed. R. Civ. P. 12(b) (6)), all allegations of the complaint were taken as true for the purposes of the appeal. See 2A J. Moore, Federal Practice ¶ 12.08 at 2266-67 (2d ed. 1968), cited by the Trucking Unlimited appellate court at 757.
7. 432 F.2d at 762.
tificates from the PUC and ICC. The defendants established and maintained a joint trust fund and told their competitors that the trust fund would be used to oppose all applications filed by the competitors with the PUC or the ICC. The defendants further informed their competitors that all such applications would be opposed with or without probable cause and without regard to the merits of each application. Opposition would be maintained through all available steps of administrative and judicial review. The plaintiffs could not afford to challenge the financial resources of the defendants and, as a result, either the plaintiffs' applications were rejected or their approval was delayed or granted subject to restrictions. Competition in the west coast trucking industry was severely restricted.

The district court dismissed the complaint, holding that the doctrine established by the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, that attempts to influence actions of public officials, even when made with the intent to restrain trade, do not violate the antitrust laws, prevented the defendants' conduct from constituting a Sherman Act violation. On appeal, the Ninth Circuit Court of Appeals reversed and remanded, holding that use of the judicial and administrative adjudicative process is not protected from the operation of the antitrust laws by the *Noerr* doctrine and that, even if *Noerr* does extend its protection to such activities, the defendants' real purpose was not to induce governmental action and therefore *Noerr* is inapplicable. This note will critically examine the appellate court's holding and will analyze the impact which that holding should have on similar litigation.

### The Noerr-Pennington Doctrine

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Supreme Court defined a major exception to the application of the antitrust laws. A group of Pennsylvania truckers
sued twenty-four eastern railroads and an association of eastern railroad presidents, contending that efforts by the defendants through a publicity campaign and through lobbying to influence the Pennsylvania state legislature to enact legislation favorable to the railroads and restrictive of the trucking industry, and to persuade the Governor of Pennsylvania to veto legislation favorable to truckers, violated the antitrust laws. The Supreme Court reversed the lower court’s ruling for the truckers, holding that joint action by individuals seeking to persuade a legislature to enact a law, or the executive branch to act in reference to legislation, does not violate the antitrust laws even if the legislative or executive action will produce a restraint of trade. Such conduct is not of a type which the Sherman Act was intended to prevent. 17 Since government is entitled to enact and enforce legislation which has the effect of restraining trade, 18 a judicial application of antitrust restrictions to these lobbying activities would hinder government in the performance of its proper functions. The Court refused to enlarge the scope of operation of the antitrust laws beyond the regulation of business activities to include the restriction of such political activities: 19 “[T]hese branches of government act on behalf of the people . . . the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold . . . that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose which would have no basis whatever in the legislative history of that Act.” 20 The Court reasoned that the Sherman Act cannot be interpreted as in any way restricting persons from informing a legislature or an executive of their position on matters merely because they have a financial interest in the decision of that body or person whom their communication is intended to influence. 21 Indeed, said the Court,

... it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters

17. Id. at 136.

18. Governmental action which restrains trade is exempt from the operation of the antitrust laws under Parker v. Brown, 317 U.S. 341 (1943), discussed infra in text at note 34 et seq.

19. 365 U.S. at 137. See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), where the Court reiterated that the Noerr doctrine applies only to political acts. “Respondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws. To subject them to liability under the Sherman Act . . . would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr.” Id. at 707-08. See also Schenley Indus. v. New Jersey Wine & Spirit Wholesalers Ass’n, 272 F. Supp. 872 (D.N.J. 1967).

20. 365 U.S. at 137.

21. Id. at 137-38. “The right of the people to inform their representatives . . . of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so.” Id. at 139.
in which they are financially interested would thus deprive the government of a valuable source of information... 22

And regardless of Congressional intent, application of the antitrust laws to political activities could unconstitutionally restrict such persons in the exercise of their right to petition the government. As the concept of representative democracy protects even those competitors whose sole purpose in petitioning their government is to destroy competition, 23 the Sherman Act cannot be used to restrict persons from taking a position on matters in which they have a financial interest. On the other hand, the scope of the Noerr doctrine does not extend to a situation in which the acts of the competitor are not really sincere attempts to influence governmental action, but are a "mere sham" disguising attempts to directly interfere with competition. 24 In such a case the Noerr doctrine would not be applied and such actions would constitute violations of the Sherman Act.

Four years after its decision in Noerr, the Court was asked in United Mine Workers of America v. Pennington, 25 to apply its Noerr ruling to activities which were not so obviously political. In order to eliminate small competitors, certain large mining companies acted with the United Mine Workers successfully to persuade the Secretary of Labor to exercise his statutory authority 26 to set minimum wages for employees of contractors selling coal to the Tennessee Valley Authority. The minimum wage set was higher than that set for other industries, making it difficult for small companies to compete. They also persuaded the TVA to reduce the number of its "spot purchases" of coal from sources which were in large part exempt from the operation of the Secretary's order. 27 In holding that evidence of these attempts to influence the Secretary of Labor and the TVA could not

22. 365 U.S. at 139.


In United States v. Harriss, 347 U.S. 612, 625 (1954), the Court explained that the danger of lobbying is that special-interest groups will have greater influence with Congress than will the general public. The dissent in Harriss discussed the difficulty of controlling lobbying without interfering with the right to petition. Id. at 636 (Jackson, J., dissenting).

24. 365 U.S. at 144. No specific definition of the term "sham" was provided by the Court. For an article criticizing the Noerr decision, see 33 ROCKY MT. L. REV. 413 (1961). See also Costilo, Antitrust's Newest Quagmire: The Noerr-Pennington Defense, 66 MICH. L. REV. 333 (1967); Note, Appeals to the Electorate by Private Businesses: Injury to Competitors and the Right to Petition, 70 YALE L.J. 135 (1960); Note, 19 U. PIT. L. REV. 777 (1958).


27. The main facts are set forth in 381 U.S. at 659-61.
be used to show violation of the Sherman Act, the Court reiterated its holding in *Noerr* that the presence of anti-competitive intent behind such political activity does not render that activity violative of the Sherman Act. 28 "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." 29

*Trucking Unlimited* posed the question of whether the *Noerr-Pennington* exemption from antitrust liability is applicable to the use of the judicial or administrative adjudicatory process. Giving a negative answer to this question, the Ninth Circuit concluded that, under the rationale of *Noerr* and *Pennington*, the defendants’ use of the adjudicatory rather than the political process to effectuate a restraint of trade was not an activity which required exemption from the operation of the antitrust laws. 30 Courts do not determine whether statutes should be. Recognition of the right to petition the legislature or an executive in order to influence them in their determinations of policy is not inconsistent with denying the *Trucking Unlimited* defendants protection from Sherman and Clayton Act liability for their use of the courts in challenging their competitors. As judicial officials do not act in a representative capacity, 31 the desire to protect the right to engage in political petitioning which prompted the *Noerr* holding does not demand protection of the defendants in their use of the judicial process. 32

Although a series of post-*Noerr* decisions had held that particular uses of the adjudicative process were exempt from the prohibitions of the antitrust laws under the *Noerr* doctrine, these decisions were distinguished by the court as being instances of valid governmental action, which is not subject to the antitrust laws. 33 And the Ninth

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28. Id. at 669.
29. Id. at 670. Even if, in approaching the Secretary of Labor, the defendant was motivated by an intention to eliminate competitors, the conduct was not prohibited by the Sherman Act. In 432 F. 2d at 759 n.5 the Ninth Circuit explained that *Pennington* did not control its holding. Neither the actions of the Secretary nor those of the TVA officials were adjudicatory in nature, and the defendant’s activities therefore fell within the political-acts exemption from Sherman Act Liability created by *Noerr*. But the actions of the PUC and the ICC in *Trucking Unlimited* are adjudicatory rather than political in nature, and thus the defendant’s conduct in seeking these actions does not conform to the requirement for *Noerr-Pennington* immunity.
30. 432 F.2d at 758.

See Note, Application of the Sherman Act to Attempts to Influence Government Action, 81 HARV. L. REV. 847, 852-53 (1968), where it is concluded that the availability of antitrust immunity for attempts to influence government officials depends upon whether the particular officials act within a political or an economic framework. The PUC and the ICC act within an economic framework.
32. The licensing procedure is an adjudicative rather than a legislative function. 432 F.2d at 758 n.4. But see the dissent, Id. at 763, which argues that the activities of the PUC are closer to a legislative function and that, therefore, attempts to influence these actions are protected by the *Noerr-Pennington* exception.
33. Id. at 760 n.7. See Woods Exploration & Production Co. v. Aluminum Co. of America, 284 F. Supp. 582 (S.D. Tex. 1968), rev’d and remanded in part, 438 F.2d 1286 (5th Cir. 1971).

Circuit buttressed its verdict by employing an alternate theory: the defendants' acts fell within the scope of the "sham" exception to Noerr, and the rationale of Noerr was therefore irrelevant. This holding apparently was based on the conclusion that in opposing the plaintiff truckers' applications the defendants did not reasonably expect to win on the merits, either before the regulatory bodies or before the courts. They sought to restrict competition by harassment, not by influencing governmental decisions.

An analysis of whether Noerr-Pennington should apply to the use of the judicial and administrative adjudicatory process, as urged by the defendants in Trucking Unlimited, must be preceded by a determination of the standard to be used in applying Noerr. To do this requires an ascertainment of the purpose of Noerr's protection.

An implicit foundation of the Noerr-Pennington doctrine is the concept that governmentally imposed restraints of trade are not violative of the antitrust laws. It might be argued that the leading Supreme Court decision on this point suggested that only restraints specifically authorized by legislation are within this governmental action exemption. In Parker v. Brown the Court refused to find a violation of the Sherman Act in California's enforcement of an agricultural marketing scheme adopted by a state agency acting pursuant to statutory authority, even though such enforcement against the plaintiff grower would injure his competitive position vis-a-vis other growers. Despite the fact that the carrying out of the scheme would, if done by mere individuals, have violated the Sherman Act, the Court held that "[w]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." But later decisions have ignored this reference to the legislature, a reference which would seem to place severe limits upon the breadth of the rule of Parker v. Brown, and there is no doubt that this rule now embraces actions taken by regulatory agencies and

Forman, 204 F.2d 230 (3d Cir. 1953), the court held that the abuse of an adjudicatory proceeding would be a violation of the Sherman Act.

In another pre-Noerr case, Okefenokee Rural Elec. Membership Corp. v. Florida Light & Power Co., 214 F.2d 413 (5th Cir. 1954), the court held that use of the adjudicatory process was not itself a violation of the Sherman Act. But, according to the Ninth Circuit in Trucking Unlimited, that case involved valid governmental action. 432 F.2d at 760 n.7. Perhaps the element that distinguishes Trucking Unlimited from the cases cited at 432 F.2d 760 n.7 is that Trucking Unlimited presents neither a case of mere governmental rule-making nor a case in which government initiated the proceedings, as in Citizens Wholesale Supply Co. v. Snyder, 201 F. 907 (3d Cir. 1913), cited in 432 F.2d 760 n.7. Rather, Trucking Unlimited presented a case where government acted in response to litigation initiated by private individuals on behalf of their private economic interests. As such, the Trucking Unlimited court did not view the facts as warranting exemption from the Sherman Act and Clayton Act prohibitions under the "governmental action" exception.

34. 317 U.S. 341 (1943).
35. Id. at 351.
36. Id. at 350-51. Courts have consistently ruled that government action itself is not regulated by the Sherman Act. In addition, the Eighth Circuit has held in a recent case that "[g]enerally . . . solicitation of governmental action in accordance with a valid regulatory scheme for the sake of obtaining an economic or competitive advantage is not prohibited by the antitrust laws." Central Sav. and Loan Ass'n v. Federal Home Loan Bank Bd., 422 F.2d 504, 509 (8th Cir. 1970). Since the
Courts themselves — the governmental bodies involved in *Trucking Unlimited* — in applying the law or in exercising their legally vested discretion. Therefore, if the purpose of the *Noerr-Pennington* doctrine is to immunize all attempts by others to obtain state-imposed restraints which would themselves be immune, the first holding of the *Trucking Unlimited* appellate court goes too far when it distinguishes between attempts to obtain legislative or executive action, on the one hand, and attempts to detain judicial or administrative adjudicatory action, on the other.

The purpose of *Noerr* may be stated to be that of protecting all political activity from antitrust law sanctions, regardless of the economic nature of the matter involved:

"The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities. . . ."38

In *N.A.A.C.P. v. Button*, the Supreme Court dealt with a Virginia statute which forbade a lawyer’s accepting legal business from a person not a party to the proceeding. The Court noted that the N.A.A.C.P.’s engagement of the attorney’s services was not "a technique of resolving private differences." Rather, it was "a form of political expression." The Court ruled that in such situations access, free from restrictions, should be given to parties seeking to use the courts.

It would not seem logical to allow parties free access to the courts for the purposes of political expression and, likewise, freedom from restraints upon their political activity, only when some "public" interest is involved, and to deny that access by binding them with the restraints of the antitrust laws when only a patently private economic interest is involved. That distinction cannot be material for purposes individual’s action follows a valid regulatory scheme, his action may be defined as governmental action and is, therefore, not prohibited by the Sherman Act.


In *Stroud v. Benson*, 155 F. Supp. 482, 492 (E.D.N.C. 1957), vacated on other grounds, 254 F.2d 448 (4th Cir. 1958), cert. denied, 358 U.S. 817 (1958), the court explained that the achievement of the goal of the antitrust laws of furthering competition is in the public interest and that, since the government is deemed to act in the public interest, its actions cannot be considered to violate the antitrust laws. It is the acts of individuals which the Sherman Act was intended to regulate. See *Standard Oil Co. v. United States*, 221 U.S. 1, 51–62 (1911).

In *Travelers Ins. Co. v. Blue Cross*, 298 F. Supp. 1109 (W.D. Pa. 1969), the court found the transactions of the Blue Cross to be the acts of a private corporation and not the acts of government; therefore, the activities of the Blue Cross were not exempt from control by the antitrust laws.

37. 365 U.S. at 135–36, where the *Noerr* court held:

"... no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Id.* at 135 (emphasis added).

See also *Standard Oil Co. v. United States*, 221 U.S. 1, 51–62 (1911).

38. *Id.* at 141.


40. *Id.* at 429.
of applying Noerr, for Noerr itself was a private economic interest case. And in Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar,\textsuperscript{41} the Supreme Court followed Button in allowing the union to recommend attorneys to workmen with claims against employers and found that a state cannot restrict the rights of citizens to petition the courts. The Railroad Trainmen Court thus held that, although the advancement of workers' economic interests was the union's motive in seeking to utilize the court system, free access to that court system could not be interfered with by the enforcement of state bar regulations. But even if some "public" interest must be found to make the right of free access to the courts superior to some statutory restriction, it would seem that both Noerr and Trucking Unlimited involved public interest questions concerning transportation policy and regulation of public utilities. As a matter of fact, most court decisions on the law probably include policy determinations and, if made on the basis of societal values, involve "public" interest.

Bracken's Shopping Center, Inc. v. Ruwe\textsuperscript{42} was a post Noerr-Pennington case challenging a suit which the defendant had filed in an Illinois court to test the validity of a municipal ordinance permitting construction of the plaintiff's shopping center. The plaintiff alleged that this use of the judicial process by the defendant violated the antitrust laws. The federal district court read the Noerr-Pennington exception to exclude such action from the scope of the antitrust laws' prohibitions and seemed to conclude that the Noerr doctrine applies to both political and judicial activities: "[T]he general principle [is] that seeking lawful legislative, executive, or judicial action does not violate the anti-trust laws . . . even if the purpose and effect is to curtail competition."\textsuperscript{43}

From Button and Bracken's Shopping Center emerges a standard indicating that, at least in matters where a public policy question is presented, a party's good-faith resort to governmental process in an attempt to obtain governmental action which is favorable to that person, without the employment of illegitimate means for inducing such a favorable decision, should not subject him to antitrust liability, regardless of the person's private economic interest in the decision or of a desire by him to obtain the favorable decision in order to restrain trade. The defendant in Bracken's Shopping Center acted in good faith to test the validity of the law, and a good-faith test of a law's validity does not violate the antitrust laws.\textsuperscript{44} The state trial court had actually upheld the defendant's challenge to the municipal ordinance, causing the Bracken's Shopping Center court to note that "[a]t least one test of good faith is the existence of probable cause . . . ."\textsuperscript{45}

\textsuperscript{42} 273 F. Supp. 606 (S.D. Ill. 1967).
\textsuperscript{43} \textit{Id.} at 607.
\textsuperscript{44} Citizens' Wholesale Supply Co. v. Snyder, 201 F. 907, 909-10 (3d Cir. 1913), cited with approval in Bracken's Shopping Center, Inc. v. Ruwe, 273 F. Supp. 606, 607-08 (S.D. Ill. 1967).
\textsuperscript{45} 273 F. Supp. at 608.
Commentators have argued that broad application of Noerr is necessary to insure fulfillment of the purpose of the Noerr doctrine.\textsuperscript{46} Trucking Unlimited does not further this position. The Trucking Unlimited court was correct in stating that the defendants' alleged use of the judicial and administrative adjudicatory machinery was a "sham" designed to directly prevent the plaintiffs from utilizing the state and federal licensing procedures, and that for this reason the Noerr defense was unavailable to the defendants. But there does not appear to be a legitimate basis for the court's broad alternate holding that Noerr does not protect any use of the judicial and administrative adjudicatory process.\textsuperscript{47} It is submitted that good-faith, genuine attempts to secure favorable governmental action, including administrative and judicial decisions, should not give rise to antitrust liability, at least where legitimate means are employed.\textsuperscript{48}

The Noerr sham exception is directed at apparent attempts to influence governmental action where there is no real intent or expectation of receiving a favorable decision. Thus the bad faith which would give rise to antitrust liability under this rule would not seem to include an earnest attempt to secure a judicial or other governmental decision by bribery or other illegal means.\textsuperscript{49} But at present it cannot be said with certainty that the use of illegal means in an otherwise good faith attempt to influence governmental decisions is in fact within the protection of the Noerr doctrine.\textsuperscript{50}

In its recent decision in George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,\textsuperscript{51} the First Circuit could have decided that the Noerr exemption was unavailable because of the bad means which in that case were used to try to influence a public official's action. Instead, the court denied the exemption on grounds which lend some

\textsuperscript{47} 432 F.2d at 762.
\textsuperscript{48} In Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1297 (5th Cir. 1971), the court cited the Ninth Circuit's decision in Trucking Unlimited with approval in holding that the filing of false information with the Texas Railroad Commission in order to restrain the plaintiffs from competing in the gas production business was not an effort "to influence policy, which is all the Noerr-Pennington rule seeks to protect." Id. at 1298. This is consistent with our reasoning that only a lack of good faith or of legitimacy of purpose will cause the defendants to lose the protection of Noerr. But see United States v. Singer Mfg. Co., 374 U.S. 174 (1963); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 561 (1944); Note, Antitrust: The Brakes Fail on the Noerr Doctrine — Trucking Unlimited v. California Motor Transport Company (N.D. Cal. 1967), 57 Calif. L. Rev. 518, 519 (1969), which indicate that, ordinarily, only Congress may grant exemptions from the operation of the Sherman Act.

\textsuperscript{49} It may be argued that inasmuch as there are no restrictions placed upon the testimony of witnesses in court — in that even libelous or slanderous testimony is permitted and protected in order to encourage people to participate in the judicial process — free access to the courts should similarly be encouraged by exempting the litigants from antitrust liability.


\textsuperscript{51} 424 F.2d 25 (1st Cir. 1970), cert. denied, 400 U.S. 850 (1971).
support to the Ninth Circuit's view that the Noerr doctrine exempts only attempts to influence policy makers. The defendant in Paddock had attempted, through methods including "high pressure salesmanship," "fraudulent statements" and "threats," to persuade a municipal government to purchase the product manufactured by the defendant rather than that of the plaintiff. Paddock's techniques included that of persuading the municipality to adopt specifications for the type of product needed which could only be met by the defendant's product. The denial of the exemption was based in part on the competitive bidding setting; the court reasoned:

Paddock's right to tout its wares to government agencies unlike the right to seek legislation involved in Noerr, is purely a creature of statute and must be exercised within the confines of bidding procedures designed to insure the maximum possible competition for the government's expenditures. In the light of these considerations, we see no constitutional objection to requiring that Paddock observe the same limitations in dealing with the government as it would in dealing with private consumers.53

More important to an analysis of the Trucking Unlimited decision, the Paddock court also held that Noerr protects approaches to officials when "some significant policy determination" is to be made, but not mere competitive bidding for one minor product at the municipal level, even when that bidding involves attempts to influence the municipality in its "technical decision about the best kind of weld to use in a swimming pool gutter," essentially a policy decision. Paddock's use of the words "significant policy determination" may have been an overstatement of the requirement, since the Paddock court may have merely been attempting to distinguish between resorts to government acting in its proprietary capacity — the case in Paddock where the municipality was building and operating a swimming pool — and government acting in its normal, governmental capacity; the court held that a government acting as proprietor should be dealt with by the defendant in the same way as the defendant would have dealt with "private consumers."55

But the court, in requiring the presence of a "significant policy determination", may have been making a finer distinction, one between government acting in its governmental capacity to make "sig-

52. Id. at 29.
53. Id. at 34.
54. Id. at 32.
55. Id. at 32. The Paddock Court also recognized that the availability of the Noerr defense depends upon the defendant's having made a real, good-faith effort to procure a favorable governmental decision, while acknowledging that the fact that some private economic interest is involved does not, by itself, preclude that availability. In Sacramento Coca-Cola Bottling Co., Inc. v. Local 150, Int'l Bhd. of Teamsters, 440 F.2d 1096 (9th Cir. 1971), the court held that Noerr-Pennington does not "protect those who employ illegal means to influence their representatives in government...[T]here can be little reason to extend the special immunity of Noerr and Pennington to a type of 'communication' which includes threats and other coercive measures." Id. at 1099.
56. 424 F.2d at 34.
significant” policy decisions and government acting in the same capacity to make technical decisions, such as those involved in the establishment of specifications.57 This distinction appears to be invalid for purposes of determining whether Noerr is applicable; since the establishment of standards is involved in the making of specifications, Noerr should apply in the case of even technical decisions, as it did in Pennington. Although some commentators have concluded that Noerr is to be applied only to political and not to business activities, our thesis is that business activities which utilize the political process are not excluded per se from Noerr’s protection.58

The Patent Cases

Cases closest to the question posed by Trucking Unlimited — whether use of the judicial or administrative adjudicatory process may constitute a violation of the antitrust laws — involve patent litigation. Typical of these is Kobe, Inc. v. Dempsey Pump Co.,59 in which the defendant, charged with patent infringement, counterclaimed that the patent holder had violated the antitrust laws through abuse of its patent right. In answer to the counterclaim, the owner of the patent argued that to allow “recovery of [antitrust] damages resulting from the infringement action would be a denial of free access to the courts.”60 In holding that there was a violation of the antitrust laws, the court stressed that the initiation of an infringement suit61 does not per se violate the antitrust laws but that in certain circumstances such initiation could be deemed a violation of those laws. “[T]he real purpose of the infringement action and the incidental activities of Kobe’s representatives was to further the existing monopoly and to eliminate Dempsey as a competitor.”62

The patent statutes give a patent holder the express right to sue for patent infringement in the federal courts. This right flows in turn from another right: that to obtain a patent upon devices having certain characteristics. One obtaining a patent is given a statutory monopoly. Thus, mechanically at least, the patent scheme is simply a regularized version of the type of situation under discussion throughout this paper: one person instigates the government to make a decision which favors him over his competitor while resulting in a restraint of trade.

Trucking Unlimited suggests that the decision sought must involve a policy determination in order for the use of governmental

57. Id. at 29.
59. 198 F.2d 416 (10th Cir. 1952), cert. denied, 344 U.S. 837 (1952).
60. Id. at 424.
61. The mere bringing of an infringement suit does not violate the antitrust laws. The bringing of a suit must be a part of a general scheme to restrain trade, and not merely an isolated act, in order for the restraint to be actionable. Virtue v. Creamery Package Co., 227 U.S. 8, 37 (1913); International Visible Systems Corp. v. Remington-Rand, Inc., 65 F.2d 540 (6th Cir. 1933). See 35 U.S.C. § 271(d) (1964).
62. 198 F.2d at 425.
process to be protected by *Noerr*. In the view of the *Trucking Unlimited* court, most judicial and many administrative decisions would not involve policy making. It is perhaps arguable that patent cases do not involve public policy determinations, but rather effect only the immediate parties to the suit, and that for this reason the use of the courts by a patent holder for the purpose of restraining trade is, on its face, an activity which is not protected by *Noerr* from antitrust liability. It is submitted that this view is inaccurate; a decision on the question of whether to grant rights in a patent, and thereby to determine the marketing procedure for a given product, does involve considerations of public policy. A court's decision on the question of whether an idea is sufficiently new or useful to merit protection against its infringement is a typical law-fact decision in which the trial judge exercises the same sort of discretion as does the Secretary of Labor in finding a prevailing wage, the situation in *Pennington*. In both situations the fact finder's conception of what is good public policy can have an unquestioned influence on the decision. Thus patent cases should be subject to the same rules as those governing the availability of *Noerr* protection in other circumstances.

In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, the Supreme Court agreed that the initiation of a patent infringement suit, in combination with other factors, could constitute a violation of the antitrust laws. If it could be proven that the patent holder engaged in an intentional fraud upon the Patent Office in order to obtain the patent which was the subject of the infringement suit, the holder would lose the immunity from antitrust liability which the patent law otherwise would have given him. But, significantly, the Court also held that "[b]y the same token, Food Machinery's [the patent holder's] good faith would furnish a complete defense." That is, if the holder's original acquisition of a patent was without intentional fraud, its subsequent resort to the judicial process for purposes of preventing infringement would not cause the holder to incur antitrust liability, even though in fact the patent might be annulable.

By allowing one who is given a statutory right to utilize the judicial process to do so without incurring antitrust liability if he does so in good faith, the Supreme Court's decision in *Walker* suggests that the Ninth Circuit was indeed in error when it held in *Trucking Unlimited* that a resort to judicial or administrative ad-

63. 382 U.S. 172 (1965).
64. Id. at 177.
65. Id.

66. Additional patent decisions holding that violations of the antitrust laws may result from the use of the judicial process, when other factors are present, are *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963); *Lynch v. Magnavox Co.*, 94 F.2d 883 (9th Cir. 1938) (holding that a threat to sue can constitute a violation of the antitrust laws in certain circumstances).

For a discussion of the patent cases, see Weinstein & Distler, *Comments on Precedural Reform; Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 533 (1969). The *Singer* case involved a series of agreements arrived at between Singer and competitors and the Magnavox case involved economic pressure through the threats of addition patent litigation.
judicatory process is not protected by the Noerr defense. Like the patent statute, the Interstate Commerce Act expressly grants a licensee the right to oppose the granting of a certificate to a competitor. Under the Walker rationale, such opposition would be without risk of antitrust liability if made in good faith. Of course, the defendants in Trucking Unlimited did not act in good faith. The Ninth Circuit, dealing with the patent cases in Trucking Unlimited, does not define any rationale for these cases themselves, but instead uses them to show that, regardless of the substance of the litigation, use of the judicial process can, under the right circumstances, constitute a violation of the Sherman Act. But despite the Ninth Circuit’s treatment of the patent cases, their point seems clear: under the Walker Court’s dictum that “good faith would furnish a complete defense,” the patent decisions are in no way inconsistent with the conclusion of our general analysis that use of the judicial and administrative process should be immune from the antitrust law restrictions when those uses are in good faith.

Implications of the Trucking Decision

Our conclusion that Noerr protects use of the courts and administrative agencies only if good faith is used has special significance today in view of the widespread use of the political and judicial process by conservationists and consumer groups seeking to restrain certain business activities. Consumer groups and conservationists may be exempt from the Sherman Act because of their noncommercial motives, a question outside the scope of this note. However, this exemption is not firmly established and such groups would be well advised to shape their activities so as to come within the protection of the Noerr-Pennington doctrine.

Conclusion

The Trucking Unlimited appellate court’s holding that use of the judicial and administrative adjudicative process can, regardless of the defendant’s motive in so using, violate the antitrust laws, is too broad and conflicts with the basic purpose of the Noerr-Pennington rule. The defendants in Trucking Unlimited clearly were not entitled to the protection of the rule because their use of these processes was a “sham.” Although it is possible to say with absolute certainty only that a party will be in no danger of incurring antitrust liability for attempting to produce a governmental decision which will restrain trade when that party is acting (1) in good faith (2) using legitimate means (3) to effect a policy decision (4) by a governmental entity

67. 432 F.2d at 760.
68. 382 U.S. at 177.
acting in a non-proprietary capacity, in general good-faith attempts to influence governmental actions, including even the setting of governmental standards, would be immune from antitrust liability under *Noerr-Pennington*.

If the foregoing analysis is correct, it may be possible to go even further and conclude that the *Noerr-Pennington* doctrine, with its heavy emphasis and reliance upon a first amendment rationale, will be immaterial in most cases. In *Noerr*, the railroads "conspired" to influence others to take otherwise lawful action, specifically the enactment of legislation. If they had "conspired" to get shippers of steel to prefer the railroads through trade association advertising and so forth, they would not be said to have violated the antitrust laws. Only where they employed fraudulent, tortious, or other bad faith means in attempting to influence actions of others would they be held to have conspired to restrain trade. If the *Noerr-Pennington* doctrine, with its first amendment origins, does not immunize attempts to influence public officials by fraudulent, tortious or other bad faith means or by sham efforts, then it may be difficult to find a case where the doctrine does make a difference, since good faith attempts to influence others are generally not within those actions prohibited by the antitrust laws.

Although the trend of the cases is clear, it is not yet certain whether a conspiracy to restrain trade by, for example, bribing legislators to pass restrictive laws is protected by *Noerr-Pennington*. The doctrine remains at least as a helpful, if somewhat obvious, addition to the ideas expressed in *Parker v. Brown*. Just as restraints imposed or sanctioned by law are not violative of the antitrust laws, so fair and good-faith joint efforts to procure the imposition of such lawful restraints through influencing public officials are not prohibited by these laws.