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THE NOERR DEFENSE: USES AND MISUSES

Remarks by

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It is a pleasure once again to address those engaged in the private practice of law -- the profession from whence I came and the one to which I shall return -- before very long.

Traditionally, speeches by Antitrust Division officials to bar associations have been designed to provide guidance on current government antitrust policies that hopefully would assist attorneys in advising clients on antitrust compliance. That, of course, is my main purpose today, but it's appropriate to note that in these days and times, attorneys are realizing the importance of keeping their own antitrust house in order as well.

I think that lawyers in general have taken recent decisions applying the antitrust laws to our profession quite seriously and have made substantial efforts to eliminate anticompetitive practices. But, this is not to say that the job is done or that vestiges of serious problems do not remain. For example, in the last three months, the Antitrust Division has filed five cases against three local bar associations, seven individuals and four law firm partnerships, charging them with antitrust violations ranging from price fixing and boycotts to agreements to divide markets.

That we would even be discussing the application of the antitrust laws to the legal profession -- much less prosecuting lawyers for violating the antitrust laws -- reflects the convergence of two major antitrust developments of the 1970s:

the limitation of the "state action" doctrine and the application of the antitrust laws to professionals. Beginning with Goldfarb 1/ and most recently in Midcal, 2/ the Supreme Court has carefully limited the "state action" exemption. As developed by the Court, the "state action" doctrine only shields private conduct compelled and actively supervised by the state acting as sovereign. At the same time, the Antitrust Division has actively prosecuted anticompetitive activity in the professional service industries and met with substantial success. 3/ These two developments are related since the professional service industries had previously claimed the shield of a broadly defined "state action" doctrine, claiming antitrust protection as a result of the actions of various state agencies.

As the limitations of the "state action" exemption have been clarifed, courts and litigants now increasingly have focused on an important complement to that doctrine, the so-called Noerr-Pennington immunity. It is this subject I would like to discuss this afternoon.

Briefly stated, this doctrine essentially says that individual or collective efforts to petition the government

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1/ Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

2/ California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

3/ National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

to take actions that restrict competition are not antitrust violations. Litigants increasingly have sought to claim the doctrine's protection for anticompetitive behavior well outside its scope. For example, Noerr-Pennington has been claimed to grant blanket immunity to professional self-regulation involving petitions to state agencies and to price-fixing activities in the regulated industries and in government procurement. Since it has become more difficult to obtain state action immunity after the Supreme Court's holdings in Goldfarb and Cantor 4/, defendants more frequently argue that because they depend in some way on securing action from the state, their anticompetitive agreements or conduct are part of a petitioning activity which is protected by the Noerr-Pennington doctrine.

In light of these developments, I would like to discuss the evolution of the Noerr-Pennington doctrine and then describe some of its limitations.

The Scope of the Noerr-Pennington Doctrine

The Noerr-Pennington doctrine owes its origin to a dispute between some truckers and railroads in Pennsylvania during the 1950s. Noerr 5/ involved a lengthy, no-holds-barred battle between the railroads and the trucking industry in Pennsylvania for supremacy in long distance freight hauling.

4/ Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

5/ Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

A group of trucking companies challenged a railroad lobbying and publicity campaign designed to influence the legislature to pass laws removing truckers as serious competitors in hauling long-distance freight.

In addressing the antitrust ramifications of this campaign, the Court started with the proposition that the Sherman Act forbids only restraints of trade by private action; "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." 6/ The Court reasoned that since the legislature may take actions that restrain competition without violating the Sherman Act, the Sherman Act "does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly." 7/

In this respect, Noerr is just the other side of the Supreme Court's 1943 decision in Parker v. Brown. 8/ There, the Court made clear that the Sherman Act "must be taken to be a prohibition of individual and not state action." 9/

6/ 365 U.S. at 136 (footnote omitted)

7/ Id.

8/ 317 U.S. 341 (1943).

9/ Id. at 352.

Accordingly, where a restraint of competition was created by the legislative command of the state and amounted to an act of government, the Sherman Act simply did not reach it. Noerr simply turned this around and held that seeking governmental action that would have the effect of damaging one's competitors, with some exceptions, was not an antitrust violation.

The Supreme Court in Noerr stressed the "essential dissimilarity between an agreement jointly to seek legislation or law enforcement" and

> combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom or help one another take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements. 10/

The Court noted that, if concerted action to seek legislation could constitute an antitrust violation, then the government would probably be deprived of potentially useful information and important First Amendment questions would be raised. In these circumstances, the Court could not "impute to the Sherman Act a purpose to regulate, not business activity, but political activity. . . ." 11/

10/ 365 U.S. at 136 (footnote omitted).

11/ Id. at 137.

A few years later, in United Mine Workers v. Pennington, 12/ the Court reaffirmed its decision in Noerr, holding that joint efforts to influence public officials, even if intended to eliminate competition, are not illegal under the antitrust laws either standing alone or because they are a part of a broader scheme itself violative of the Sherman Act. In a footnote, the Court indicated that such petitioning activity could, however, be introduced to establish the purpose and character of other conduct, provided it was probative and not unduly prejudicial.

In Noerr itself, the Court suggested an important limitation on the immunity it announced. Specifically, it suggested that petitioning activity, ostensibly directed at influencing government policy, nevertheless, would not be exempt from the Sherman Act, if it was in fact a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." 13/ In the particular case before it, the Court concluded that "the railroads were making a genuine effort to influence legislation and law enforcement practices" 14/ and that the injury to the truckers' goodwill was an incidental by-product of this effort. The Court pointedly noted that

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12/ 381 U.S. 657 (1965).

13/ 365 U.S. at 144.

14/ Id.

the railroads had not acted directly to restrain trade by organizing a boycott against the truckers.

Several years later, in California Motor Transport 15/ the Court elaborated on the "sham" exception mentioned in Noerr. In that case, a group of trucking companies had engaged in a joint campaign of administrative and judicial harassment to prevent a rival corporation from obtaining operating rights. They allegedly had initiated proceedings "with or without probable cause and regardless of the merits of the cases." 16/ The initiation of baseless litigation, the Court held, qualified for the "sham" exception, thus subjecting this sort of "petitioning" activity to the Sherman Act.

Clearly, one of the factors involved in the Court's decision was the tendency of the baseless litigation to deny new entrants access to the agencies and the courts. But denial of access was not a necessary condition for invoking the "sham" exception. As examples of other types of conduct constituting a "sham" in the adjudicatory setting, the Court listed perjury, bribery, fraud, and a conspiracy in which a governmental authority participated.

In extending the Noerr-Pennington doctrine to the adjudicatory setting, the Court also indicated that the breadth of

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15/ California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

16/ Id. at 512.

the "sham" exception would vary with the context in which it arose. It noted that practices tolerated in the legislative setting might not be immunized in an adjudicatory proceeding.

Application of the Noerr Doctrine

The broad language of these three decisions has tempted a number of litigants in recent years to urge the expansion of Noerr beyond its current status as a limited immunity for seeking, in good faith, a governmental restraint of competition. Lower courts have been wrestling with the problem of applying Noerr to varying sets of circumstances. Yet, I think an understanding of the policies behind the Noerr-Pennington doctrine and an appreciation of its limitations provide sufficient guidance for applying the doctrine to specific factual settings.

In examining any claim of Noerr-Pennington immunity, we typically ask first whether this is an activity seeking governmental restraint or a private arrangement which only tangentially relates to the exercise of citizens' rights to participate in governmental decisions through the political process and to the government's need for information? If there are several related activities, each must be separately evaluated to determine whether it qualifies for Noerr immunity. 17/ Finally, if some or all of the activity

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17/ See Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978), cert. denied, 444 U.S. 924 (1979).

superficially appears to be petitioning activity, we must ask whether it is a "sham" intended to interfere directly with the competitive process under the guise of exercising Noerr protected rights.

These questions are asked in a variety of factual settings. The proper answers recognize the appropriateness of construing the immunity to avoid constraints on true governmental decision-making, allow for the exercise of First Amendment rights, and yet protect the public from privately imposed restraints on competition.

First, Noerr immunity does not extend to private commercial dealings with the government. Where the government is simply acting as an ordinary purchaser, bid rigging, boycotts and the like cannot be protected by the claim that sellers are collectively soliciting government action. Noerr protects joint efforts seeking governmental action that might eliminate competition; it is clearly improper to use the doctrine to justify private restraints of trade simply because the victim of such restraints happens to be the government.

Submitting collusive bids or boycotting a government purchaser can hardly be said to be an attempt to influence the passage or enforcement of laws. As the First Circuit stated in Whitten v. Paddock Pool Builders 18/ ". . . the

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18/ George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir.), cert denied, 400 U.S. 850 (1970).

immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials. . . ." As Whitten and other courts have recognized, in this situation "the government entity is not acting as a political body but as a participant in the marketplace." 19/

Second, Noerr does not confer immunity on private anticompetitive conduct merely because the parties attempt to secure government approval of their actions or its results. As the Supreme Court recognized in Cantor, Noerr held that concerted attempts to secure a governmentally imposed restraint do not violate the Sherman Act; it did not involve "any question of either liability or exemption for private action. . . ." 20/

Thus, the Division has successfully challenged under Section 1 a price-fixing agreement among motor carriers notwithstanding the submission of the agreed-upon rates to state regulatory agencies for approval. Defendants argued that because Noerr protected presentation of proposed rates to state agencies, it also protected anticompetitive agreements fixing those rates. This argument was properly rejected

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19/ General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3, 7 (D.D.C. 1979).

20/ 428 U.S. at 601.

by the district court. 21/ The restraint on price competition did not arise from governmental action; it arose from the antecedent private agreements. And those agreements were not merely the incidental result of attempts to obtain governmental action. Indeed, the agreements actually limited, rather than increased the flow of information to regulatory authorities. Thus, the collective ratemaking activity was not an essentially political activity -- dissimilar from price-fixing agreements and the like. It was essentially private, economic conduct, unprotected by Noerr and fully subject to the Sherman Act.

Similarly, the argument that has been advanced by other regulated utilities that their anticompetitive tariffs or rate structures are exempted from Section 2 liability by Noerr, because they must obtain regulatory approval before putting them into effect, misses the point. Noerr does not protect private conduct unless its objective is to secure governmental action. And the fact that governmental approval is a necessary step in a private scheme does not bring the entire scheme within the protection afforded by Noerr to petitioning activity. 22/

21/ United States v. Southern Motor Carriers Rate Conference, Inc., 467 F. Supp. 471 (N.D. Ga. 1979), appeal docketed, No. 79-3741 (Fifth Cir., November 15, 1979).

22/ Mid-Texas Communications Systems, Inc. v. AT&T, 615 F.2d 1372 (5th Cir.) cert. denied, 49 U.S.L.W. 3265 (Oct. 14, 1980); and Litton Systems Inc. v. AT&T, 487 F. Supp. 942 (S.D.N.Y. 1980).

Third, the fact that the stated objective of certain conduct is to secure governmental action does not necessarily confer immunity under Noerr, if the conduct used to attract governmental attention or express an opinion is by itself a direct and substantial restraint of trade. Thus, the Division has taken the position that an agreement among competing gasoline dealers to close their stations and deprive their customers of gasoline supplies can be a violation of Section 1, although the purpose of the station closings is to protest federal gasoline pricing regulations.

As the Court in Noerr specifically stated, Noerr did not involve any separate antitrust violation -- e.g., a joint refusal to deal. Neither Noerr nor the First Amendment automatically confer immunity for restraints of trade imposed by competitors that are intended in part as a means of expression. Under traditional First Amendment principles, 23/ it is clear that the antitrust laws further an important governmental interest. And other less restrictive means commonly are available for competitors who wish to make their views known to the government.

Fourth, Noerr does not shield from antitrust scrutiny baseless litigation or knowingly false statements made in regulatory or judicial proceedings. This, of course, is the teaching of California Motor Transport. In discussing the

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23/ U. S. v. O'Brien, 391 U.S. 367, 376-377 (1968).

circumstances in which the sham exception applies, the Court pointedly noted that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." 24/ Unethical conduct, such as making knowingly false statements, essentially converts that process into a tool for monopoly and undermines the integrity of the regulatory or administrative process. In addition, the making of knowingly false statements which are difficult for either the regulator or others to verify can effectively deny meaningful access to the regulatory process.

Although California Motor Transport involved repeated baseless litigation, repetition is not necessarily required. Whether litigation is a "sham" to directly restrain trade is usually a question of fact. While in some circumstances such abuse of administrative or judicial processes may become apparent only from a pattern of baseless claims, in other circumstances, evidence of knowingly false claims in a single proceeding or of the baselessness of a single piece of litigation may be sufficient. 25/ I do not want to overstate this last point, however. We should remember the importance of the right to bring grievances to the courts when considering an assertion that isolated, unsuccessful litigation should be viewed as a "sham."

24/ 404 U.S. at 513.

25/ See, e.g., Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168, 175 n. 9 (D. Del. 1979).

Conclusion

Notwithstanding some imaginative, and certainly earnest, arguments, I think it is fair to say that the courts have been reasonably careful in confining Noerr-Pennington to bona fide petitioning activity in legislative, administrative and judicial contexts. The Noerr-Pennington doctrine was never intended to be an excuse, a way to cheat on the nation's fundamental reliance on competition as expressed in the antitrust laws. It was intended only to allow for the legitimate exercise of the right to try to influence governmental decisionmaking and to protect all of the benefits derived from the exercise of that right. I am sure that the Antitrust Division will continue to assess Noerr claims with this basic philosophy in mind.