

ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE

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This Report represents the views of the FTC staff and does not necessarily represent the views of the Commission or any individual Commissioner. The Commission (with Commissioner Rosch recused), however, has voted to authorize the staff to issue this Report.

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Antitrust law promotes consumer welfare by condemning concerted or unilateral private conduct that impedes competition. As the United States Supreme Court has observed, “ultimately competition will produce not only lower prices, but also better goods and services. ‘The heart of our national economic policy long has been faith in the value of competition.’”¹ In some circumstances, however, courts must harmonize competition values with other values, such as the ability of citizens to request government action, even if such action would hinder or supplant competition. The First Amendment guarantees citizens freedom of speech, of assembly, and “to petition the government for a redress of grievances.”² To avoid a conflict with these fundamental rights, the Supreme Court has limited the enforcement of the antitrust laws against certain private acts that urge government action in a line of cases that has come to be known as the *Noerr-Pennington* doctrine.³

Such non-competition values are significant and, when Constitutionally mandated, require deference, but accommodating these values sometimes also imposes costs on consumers.⁴ Thus, it is important to consumer welfare to analyze carefully these values when determining the extent to which anticompetitive conduct is properly shielded from antitrust challenge.

With these concerns in mind, the staff of the Federal Trade Commission (FTC or Commission) has undertaken an examination of the *Noerr-Pennington* doctrine. This Report provides the staff’s views on how best to interpret the application of the *Noerr* doctrine to three

¹ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)); accord *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 423 (1990).

² U.S. CONST. amend. I.

³ The doctrine takes its name from the first two cases that the Supreme Court considered in this jurisprudential line. See *E. R.R. Presidents’ Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). This line of cases is referred to collectively as the “*Noerr*” doctrine in the remainder of the Report.

⁴ See, e.g., Deborah Platt Majoras, A Dose of Our Own Medicine: Applying a Cost/Benefit Analysis to the FTC’s Advocacy Program, Address Before the Charles River Associates’ Conference on Current Topics in Antitrust Economics and Competition Policy 2 (Feb. 8, 2005), available at <http://www.ftc.gov/speeches/majoras/050208currebtttopics.pdf> (discussing costs to consumers from government restraints on competition).

types of conduct where the risk to competition is great and antitrust enforcement need not impinge on the values underlying *Noerr*. Guiding staff's choice of these particular circumstances are its recent enforcement experience and its assessment of the types of issues the Commission is likely to encounter in the future.⁵

⁵ By singling out for analysis the three types of conduct addressed in this Report, we do not mean to state or imply either that all other forms of petitioning deserve *Noerr* protection or that no other conduct aimed at inducing government action can inflict serious competitive harm. We treat here only three varieties of conduct, frequently alleged to be *Noerr*-protected, that the Commission has learned from experience are often used for anticompetitive ends.

Introduction

A fundamental goal of the Commission's antitrust enforcement program is to prevent parties, acting either unilaterally or in concert, from improperly acquiring and exercising market power to the detriment of consumers. One of the most effective ways for parties to acquire or maintain market power is through the abuse of government processes. The cost to the party engaging in such abuse typically is minimal, while the anticompetitive effects resulting from such abuse often are significant and durable.⁶ Thus, the reach of the antitrust laws to conduct that abuses government processes for anticompetitive ends is of particular importance to the Commission's enforcement program.

When challenging conduct that involves communications to government, however, an enforcement agency must take into account other considerations. As the Supreme Court has explained in a series of cases that has come to be known collectively as the *Noerr-Pennington* doctrine, courts must interpret the Sherman Act in a way that respects the ability of government to take and the rights of citizens to request government action – even when that government action limits or eliminates competition. Grounded in First Amendment principles and concerns about impinging on the governmental decision-making process, the protection provided by *Noerr* and its progeny furthers important goals in our democracy. As the Supreme Court has noted, the right to petition government is “among the most precious of the liberties safeguarded by the Bill of Rights.”⁷

Although the *Noerr* doctrine secures important interests that promote our democratic system of government, some have tried to invoke this protection in circumstances that could impose substantial costs on consumers and competition without furthering the core principles underlying *Noerr*. For example, in several recent FTC cases, the alleged petitioning conduct threatened to raise prices to consumers by millions of dollars for particular products but had little to do with facilitating informed government decision-making or furthering First Amendment goals.⁸ Because *Noerr* protects certain communications to the government from antitrust

⁶ See Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 977-87, 990-92 (2005) (identifying abuse of government processes as an example of “cheap exclusion” (*i.e.*, exclusionary conduct that (1) costs or risks little, in both absolute terms and relative to the potential gains; and (2) is facially unlikely to generate cognizable efficiencies)).

⁷ *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

⁸ As discussed in more detail in Part II.B *infra*, in a matter involving Union Oil Company of California, the Commission noted that failure to take antitrust action potentially could have increased gasoline prices in California by over \$500 million a year (or almost six cents per gallon). See *Union Oil Co. of Cal.*, FTC Dkt. No. 9305, at 1 (2004) (statement of the

enforcement, it is important to understand both the benefits and costs of that protection.

Based on the enforcement principles discussed above and drawing upon the perspective gained through the Commission's recent activities, this Report focuses on the proper application of *Noerr* protection to three types of conduct that can use government processes to seek anticompetitive rewards: 1) requests for ministerial government acts; 2) misrepresentations to a government decision maker in a non-political context; and 3) repetitive requests for government action filed regardless of merit solely to use the government process to suppress competition. A brief description of the Commission's recent enforcement activities in these areas provides context for this Report's focus on these three types of conduct.

Conduct involving alleged abuse of the Food and Drug Administration (FDA) process for approval of generic drugs prompted the Commission recently to consider whether certain private conduct in connection with this process was protected under *Noerr*. The FDA makes public the patents identified by branded-drug companies as claiming a given product in a publication entitled "Approved Drug Products with Therapeutic Equivalence Evaluations," which is commonly referred to as the "Orange Book." To obtain approval to make and sell a generic version of a branded drug, a company must provide certification to the FDA that there is no valid patent listed with the FDA that will be infringed by marketing of the generic product.⁹ The FDA, however, simply lists such patents; it performs no independent review of the patents. In *In re Buspirone*, generic drug manufacturers charged that Bristol-Myers Squibb had fraudulently filed a patent with the FDA for its branded drug. The filing caused the FDA to list the patent in question in the Orange Book, and that listing, in turn, enabled Bristol-Myers Squibb to trigger a statutory 30-month stay of FDA approval of applications for competing generic products. The Commission filed an amicus brief arguing against *Noerr* protection on the grounds that Orange Book filings are not petitioning because the government performs no independent review of these filings, but instead acts solely in reliance on the private party's representations.¹⁰ The court

Commission), available at <http://www.ftc.gov/os/adjpro/d9305/050802statement.pdf>. At the same time, the Commission stressed how the type of intentional misrepresentations alleged in *Unocal* do not further any values protected by the First Amendment and hamper effective state governmental decision-making. *Union Oil Co. of Cal.*, FTC Dkt. No. 9305, slip op. at 17-23 (2004) (opinion of the Commission), available at <http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf>.

⁹ For additional information on the generic drug approval process, see *Bristol-Myers Squibb Co.*, FTC Dkt. No. C-4076, at 3-4 (2003) (complaint), available at <http://www.ftc.gov/os/2003/04/bristolmyerssquibbcomp.pdf>.

¹⁰ See Memorandum of Law of Amicus Curiae the Federal Trade Commission in Opposition to Defendant's Motion to Dismiss at 10-11, 23, *In re Buspirone Patent Litig./In re Buspirone Antitrust Litig.*, MDL No. 1410 (JGK) (S.D.N.Y. Jan. 8, 2002), available at <http://www.ftc.gov/os/2002/01/busparbrief.pdf>. The Commission's brief also argued that even if

ultimately held that *Noerr* did not shield the Orange Book filing.

The Commission also commenced an independent antitrust enforcement action against Bristol-Myers Squibb, alleging that it engaged in a pattern of anticompetitive conduct to delay market entry by low-price generic substitutes for three branded drugs, including (1) making false and misleading statements to the Patent and Trademark Office (PTO) to obtain unwarranted patent protection; (2) making false and misleading statements to the FDA to obtain listing of patents in the Orange Book that did not satisfy the statutory listing criteria; (3) filing meritless patent infringement lawsuits, thereby triggering multiple, automatic 30-month stays; and (4) entering into anticompetitive agreements that delayed generic entry still further. The Commission and Bristol-Myers Squibb entered into a consent order that resolved the case.

Another example of enforcement activity aimed at the alleged abuse of government processes is the FTC's recent case against Union Oil Company of California (Unocal), in which the Commission addressed the application of *Noerr* to misrepresentations to the government outside of the political context. In *Unocal*, the Commission reinstated charges that Unocal illegally acquired monopoly power in the technology market for low-emission reformulated gasoline by misrepresenting to the California Air Resources Board (CARB) that certain information was non-proprietary and in the public domain, while at the same time pursuing patents that would enable Unocal to charge substantial royalties if CARB enacted regulations that effectively required complying refiners to use Unocal's technology. The Commission and Unocal ultimately entered into a consent order in which Unocal agreed to refrain from enforcing its patents.

* * *

This Report focuses on the proper parameters of the *Noerr* doctrine as applied to filings that seek purely ministerial government responses, misrepresentations outside of the political arena, and repetitive filings. It first briefly summarizes the history and underpinnings of the doctrine and then examines in greater depth the issues surrounding the application of *Noerr* to these three types of conduct, with the goal of identifying those cases where staff believes that application of the antitrust laws will not impinge on the values that the doctrine is meant to safeguard and may significantly increase consumer welfare. Based on this examination, the Report concludes with recommendations for clarifying or limiting the application of the *Noerr* doctrine to such conduct.

Orange Book filings were petitions that requested discretionary government action, dismissal of the complaint on *Noerr* grounds would be inappropriate because the plaintiffs had alleged that the patent filing was an objectively baseless assertion that the patent could be properly listed in the Orange Book. *See id.* at 22-24.

Part I: History and Underpinnings of the Doctrine

In what has come to be known as the *Noerr-Pennington* doctrine, the Supreme Court has decided several cases over the past 45 years that have defined the Sherman Act's ability to reach certain unilateral and concerted efforts to procure government action. Although the Court has not provided a consistent source for the doctrine, it appears to be rooted in a construction of the Sherman Act to avoid conflict with the constitutional right to petition the government for redress of grievances and the principle of effective government decision-making.

A. Evolution of Supreme Court Jurisprudence

In *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*,¹¹ the Supreme Court first recognized that liability under the Sherman Act¹² may not be premised on concerted efforts to secure government-imposed restraints on competition. In *Noerr*, trucking companies sued a group of railroads and their public relations firm for conspiracy to monopolize the long-distance freight business. The trucking companies alleged that the defendants had conspired to conduct a public relations campaign to encourage the adoption of laws destructive of the trucking business, as well as to disparage truckers to both their customers and the general public. The Court held that these claims failed to state a cause of action, reasoning that: (1) the Sherman Act does not prohibit efforts to influence the passage and enforcement of laws; and (2) insofar as disparagement to customers and the public was alleged to be part of a strategy to influence legislation and law enforcement, such disparagement was "incidental" to petitioning and therefore protected as well.¹³

The Court also emphasized that it was irrelevant whether the motive behind the petitioning was to harm competitors: "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so."¹⁴ A construction of the Sherman Act that would make liability for urging government action turn on intent to advantage oneself at the expense of marketplace rivals, reasoned the Court, would both deprive government of "a

¹¹ 365 U.S. 127.

¹² The Court subsequently has applied *Noerr* principles to the National Labor Relations Act. See *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983). The Court, however, has never explained precisely which federal statutes are affected by *Noerr* or whether the FTC Act is among them. Accordingly, this Report is concerned only with the application of *Noerr* to the Sherman Act.

¹³ 365 U.S. at 135-44.

¹⁴ *Id.* at 139.

valuable source of information” and “deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.”¹⁵

The Court acknowledged, however, that there may be certain situations involving petitioning activity that, although “ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.”¹⁶ In such situations, the Court explained, application of the antitrust laws would be appropriate.

The Court next applied the same principles four years later in *United Mineworkers of America v. Pennington*.¹⁷ In *Pennington*, the Court extended *Noerr* protection beyond the legislative arena to prohibit an antitrust challenge to a petition by a mine workers’ union and a group of large mines to the Secretary of Labor and a federal agency (the Tennessee Valley Authority) that sought a higher minimum wage for mining companies wishing to sell coal to the agency. The Court reiterated that it is irrelevant to the *Noerr* analysis whether parties seek government action that would hinder rivals: “Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”¹⁸

In *California Motor Transport Co. v. Trucking Unlimited*,¹⁹ a group of in-state highway carriers sued a group of interstate carriers for antitrust violations, alleging that the interstate carriers conspired to institute state and federal proceedings “with and without probable cause, and regardless of the merits of the cases” to defeat applications by the in-state carriers to acquire operating rights.²⁰ The Court held that access to the courts and administrative agencies is an aspect of the right to petition, and hence *Noerr*’s protection generally extends to administrative and judicial proceedings, as well as to efforts to influence legislative and executive action.²¹ The Court also found, however, that the specific conduct complained of fell under the “sham” exception to *Noerr* because it “effectively barr[ed] respondents from access to the agencies and

¹⁵ *Id.*

¹⁶ *Id.* at 144.

¹⁷ 381 U.S. 657 (1965).

¹⁸ *Id.* at 670.

¹⁹ 404 U.S. 508 (1972).

²⁰ *Id.* at 512 (internal quotation omitted).

²¹ *Id.* at 510.

courts.”²² Although the Court did not delineate clear parameters for the “sham” exception, it listed examples of a number of activities that might qualify.²³

Similarly, a restraint that otherwise violates the Sherman Act does not escape condemnation merely because it incidentally has a political impact. In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,²⁴ the Court considered whether the *Noerr* doctrine applied to private efforts to affect the standard-setting process of a private association. The defendant had arranged a concerted effort to exclude a competitor’s product from the standard, which typically was widely adopted into state and local law.

In reaching its conclusion that *Noerr* did not apply, the Court looked at the source, context, and nature of the restraint. First, the Court examined whether the government or private parties were the source of the restraint: when the anticompetitive effect “is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.”²⁵ The Court held that the standard-setting association was the source of the restraint.²⁶ The Court further held that the association was not a quasi-legislative body because it had no official authority and its decision-making body was composed, at least in part, of those with economic incentives to restrain trade.²⁷ Therefore, the defendant could not claim *Noerr* protection for lobbying the private standard-setting association.

Next, addressing the defendant’s conduct as a means to influence state and local governments (which had adopted the standard-setting association’s rules as law), the Court inquired into the nature and context of the restraint. The Court acknowledged that *Noerr* protection extends to private action that leads to an anticompetitive restraint as long as that

²² *Id.* at 513. See *infra* Part II.C for a more detailed discussion of the sham exception.

²³ *Cal. Motor Transp.*, 404 U.S. at 512-13 (noting that perjury in the adjudicatory process can result in sanctions, and that enforcement of a patent obtained by fraud, conspiracy with a licensing authority to eliminate a competitor, and bribery of a purchasing agent may run afoul of the Sherman or Clayton Act). *But see Omni*, 499 U.S. 365 (even when the manner of lobbying in legislative fora is “improper or even unlawful,” it enjoys *Noerr* protection when the “regulatory process is being engaged genuinely”).

²⁴ 486 U.S. 492 (1988).

²⁵ *Id.* at 499 (internal quotation omitted).

²⁶ *Id.* at 500.

²⁷ *Id.* at 501.

conduct is “incidental to a *valid* effort to influence governmental action.”²⁸ It rejected, however, an “absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action,”²⁹ and added that the “validity” of genuine efforts to obtain government action, “and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity.”³⁰

The Court concluded that the challenged activity – coordination among competitors in a standard-setting organization – although ostensibly designed to urge government action, was the type of conduct that the antitrust laws traditionally scrutinized.³¹ Accordingly, the Court ultimately held that the defendant’s actions could “more aptly be characterized as commercial activity with a political impact,” and so did not warrant *Noerr* protection where the restraint complained of was due to private action, not governmental rules.³²

In addition to holding that conduct genuinely aimed at procuring favorable government action nonetheless could be subject to antitrust scrutiny if it were “invalid,” the Court also firmly tied the definition of “sham” petitioning to the concept of “genuineness.” The Court explicitly rejected a definition of “sham” that covers conduct that “genuinely seeks to achieve [a] governmental result, but does so *through improper means*.”³³ The Court argued that such a definition of “sham” bore “little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action,” and that it would provide little guidance to courts or litigants because it would effectively render “sham no more than a label courts could apply to activity they deem unworthy of antitrust immunity.”³⁴

²⁸ *Id.* at 499 (emphasis added) (internal quotation omitted).

²⁹ *Id.* at 503 (noting that anticompetitive conduct such as horizontal price agreements, conspiracies, and boycotts are not *Noerr*-protected even if they are part of a genuine effort to influence government).

³⁰ *Id.* at 499. The Court also noted that “whatever the forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action.” *Id.* at 500 n.4.

³¹ *Id.* at 505-06.

³² *Id.* at 507.

³³ *Id.* at 507 n.10 (emphasis in original) (internal quotation omitted).

³⁴ *Id.*

In *Federal Trade Commission v. Superior Court Trial Lawyers Ass’n (SCTLA)*,³⁵ the Court focused on whether the restraint was “the consequence of public action” or “the means by which respondents sought to obtain favorable legislation,” rejecting the application of *Noerr* in the latter situation.³⁶ In an effort to secure higher fees for their work, court-appointed attorneys for indigent defendants in Washington, D.C., jointly withheld their services from the courts. The Court distinguished the facts before it from those in *Noerr* by noting that the attorneys’ effort to influence government – a concerted refusal to deal – was itself a restraint of trade.³⁷ The competitive harm flowed entirely from the boycott, not from government action: “The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted.”³⁸ In the Court’s view, *Allied Tube* “largely disposed of” the notion that *Noerr* protects “every concerted effort that is genuinely intended to influence governmental action.”³⁹

A year later, in *City of Columbia v. Omni Outdoor Advertising, Inc.*,⁴⁰ the Court again considered the scope of the *Noerr* doctrine. Omni filed suit against a dominant competitor in the market for billboards in Columbia, South Carolina, and against the City of Columbia, alleging that city ordinances restricting new entry were the result of an anticompetitive conspiracy between the city and the competitor. Without explicitly invoking the “source, context, and nature” of the conduct inquiry of *Allied Tube*, the Court held that the sham exception to *Noerr* did not apply to “improper or even unlawful” lobbying efforts to obtain the zoning restrictions when “the regulatory process is being invoked genuinely.”⁴¹ The Court explained that “the

³⁵ 493 U.S. 411 (1990).

³⁶ *Id.* at 425 (emphases in original).

³⁷ *Id.* at 424-25.

³⁸ *Id.* at 425.

³⁹ *Id.* (quoting *Allied Tube*, 486 U.S. at 503). The Court also distinguished the lawyers’ boycott from the civil rights boycott in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). It observed that unlike the boycott participants in *Claiborne* who “sought no special advantage for themselves,” the lawyers’ “immediate objective was to increase the price that they would be paid for their services.” *SCTLA*, 493 U.S. at 426-27. *Claiborne* “is not applicable to a boycott conducted by business competitors who ‘stand to profit financially from a lessening of competition in the boycotted market.’” *Id.* at 427 (quoting *Allied Tube*, 486 U.S. at 508).

⁴⁰ 499 U.S. 365 (1991).

⁴¹ *Id.* at 381-82. The lack of explicit reliance on *Allied Tube* may be explained by the fact that there was no allegation that the plaintiff had suffered any harm as a direct result of the lobbying effort, as opposed to the government-imposed zoning rule. Thus, because there was no dispute that the “source” of the restraint was government action, there was no need to inquire

purpose of delaying a competitor’s entry into the market does not render lobbying activity a ‘sham,’ unless . . . the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks.”⁴² The Court also rejected any “conspiracy exception” to *Noerr*, noting that it would be “impracticable or beyond [the] scope [of the antitrust laws] to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials.”⁴³

The Court most recently addressed the scope of the *Noerr* doctrine in the antitrust context⁴⁴ in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. (PRE)*.⁴⁵ In *PRE*, the Court addressed a previously unanswered question: “whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant.”⁴⁶ In answering that question in the negative, the Court expounded on the role of intent in the *Noerr* doctrine, stating that its protection extends to attempts to influence government officials regardless of intent, and that the Court’s various applications of the doctrine have demonstrated that neither it nor the sham exception “turns on subjective intent alone.”⁴⁷ While emphasizing that anticompetitive intent by itself cannot transform otherwise legitimate activity into a sham, the Court also noted a corollary: an intent to influence government action cannot shield otherwise anticompetitive restraints of trade.⁴⁸ With respect to the sham exception, the Court delineated a two-part test that it applied to the single lawsuit at issue in the case. First, the lawsuit must be “objectively baseless” in the sense that no reasonable litigant could realistically expect success on the merits. Second, the suit must reflect a subjective intent to use the

into the “context and nature” of the conduct at issue. *See Allied Tube*, 486 U.S. at 499.

⁴² *Omni*, 499 U.S. at 381.

⁴³ *Id.* at 383. *See also id.* at 377 (discussing how a rule under which application of the state action doctrine turned on “whether the officials involved thought [the action was in the public interest] . . . would require the sort of deconstruction of the governmental process and probing of the official ‘intent’ that [the Supreme Court has] consistently sought to avoid”).

⁴⁴ The Supreme Court also has applied the principles of *Noerr* in the context of labor disputes. For example, in *BE & K Construction Co.*, the Supreme Court employed the *PRE* test for sham litigation in holding that the National Labor Relations Board cannot find a defendant liable under its rules for filing reasonably based, but unsuccessful, suits with a retaliatory purpose. 536 U.S. at 536. *See also supra* note 12.

⁴⁵ 508 U.S. 49 (1993).

⁴⁶ *Id.* at 57.

⁴⁷ *Id.* at 59.

⁴⁸ *Id.*

governmental process – as opposed to the outcome of that process – as an anticompetitive weapon.⁴⁹

B. Doctrinal Underpinnings

The Supreme Court has grounded the *Noerr* doctrine in two related concerns. First, *Noerr* protects the right to petition. Second, by respecting the political process, *Noerr* also protects government decision-making, whether it be decisions by federal or state governments.⁵⁰ Taken as a whole, *Noerr* and its progeny may best be interpreted as an attempt to reconcile the important goals of the Sherman Act with the right to petition and effective decision-making at all levels of government. In the *Noerr* line of jurisprudence, the Supreme Court appears to have skirted a “difficult Constitutional question” by limiting the reach of the Sherman Act to avoid direct conflict with any of these Constitutional concerns.⁵¹

1. Right to Petition

The primary principle upon which the *Noerr* doctrine appears to rest is the right of citizens under the First Amendment to urge government action. In *Noerr*, the Supreme Court stressed the “essential dissimilarity” between concerted lobbying of the government to act and the type of agreements that the Sherman Act typically confronts, such as price fixing, boycotts, and market divisions.⁵² The Court bolstered its interpretation that the Sherman Act does not reach the type of conduct at issue by noting that to conclude otherwise “would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to evade these freedoms.”⁵³

In *California Motor Transport*, the Court appeared to rest its decision entirely on First Amendment grounds:

[I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating

⁴⁹ *Id.* at 60-61.

⁵⁰ See AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, THE *NOERR-PENNINGTON* DOCTRINE 34-38 (1993).

⁵¹ See, e.g., *BE & K*, 536 U.S. at 535-36 (discussing avoidance of difficult First Amendment issue via limiting construction of relevant National Labor Relations Act provision).

⁵² 365 U.S. at 136.

⁵³ *Id.* at 137-38.

the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.⁵⁴

More recently, the Court in both *SCTLA*⁵⁵ and *PRE*⁵⁶ has noted that the interpretation of the Sherman Act in *Noerr* rests on a desire to avoid conflict with the right to petition.

The recent application of *Noerr* principles to the National Labor Relations Act (NLRA) provides additional insight into the role that the First Amendment plays in defining the scope of *Noerr* protection. In *BE & K Construction Co. v. NLRB*, an employer had filed unsuccessful suits against various unions alleging that their concerted activities violated federal law.⁵⁷ The unions filed a complaint with the National Labor Relations Board (NLRB), which ultimately decided that the employer had violated the NLRA by prosecuting an unsuccessful, but not baseless, suit with a retaliatory motive.⁵⁸ The Supreme Court applied *Noerr* principles to the case and provided an analysis that turned solely on the extent to which the NLRB's decision intruded on the First Amendment right to petition. The Court concluded that by burdening genuine, but losing, lawsuits that are brought for retaliatory purposes, the NLRB's interpretation of the NLRA posed a "difficult constitutional question: namely, whether a class of petitioning may be declared *unlawful* when a substantial portion of it is subjectively *and* objectively genuine."⁵⁹ The Court noted that even losing lawsuits vindicate the right to petition when they are brought pursuant to a

⁵⁴ *Cal. Motor Transp.*, 404 U.S. at 511. The Court in *California Motor Transport* also noted that its decision in *Pennington* rested on protecting the right to petition. *See id.*

⁵⁵ 493 U.S. at 424 (the Court in *Noerr* was "[i]nterpreting the Sherman Act in the light of the First Amendment's Petition Clause").

⁵⁶ 508 U.S. at 57 (the Court in *Noerr* interpreted the Sherman Act, in part, to avoid imputing "'to Congress an intent to invade' the First Amendment right to petition").

⁵⁷ 536 U.S. 516. The Court first applied *Noerr* principles to the NLRA in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). There, the issue was whether the NLRB could enjoin a restaurant owner's state court suit against individuals who had picketed his restaurant. The Court concluded that "First Amendment and federalism concerns prevented the filing and prosecution of a well-founded lawsuit from being enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the NLRA." *BE & K*, 536 U.S. at 526-27 (internal quotations and brackets omitted).

⁵⁸ *Id.* at 519.

⁵⁹ *Id.* at 535 (emphasis in original).

legitimate grievance and further explained that “unsuccessful but reasonably based suits advance some First Amendment interests” by allowing “public airing of disputed facts” and promoting the “evolution of the law by supporting the development of legal theories.”⁶⁰

As in *Noerr*, the Court in *BE & K* turned to statutory construction to avoid the constitutional question, holding that the NLRB’s standard was invalid because there was nothing in the relevant statutory text to suggest that it “must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose.”⁶¹ In light of the *BE & K* decision, the Ninth Circuit recently concluded that the *Noerr* doctrine “stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause.”⁶²

2. *Protecting the Governmental Decision-Making Process*

An interest in preserving the proper functioning of government at all levels serves as an additional basis for the *Noerr* doctrine. The Sherman Act regulates business activity, not political activity, and *Noerr* ensures that antitrust law does not impinge on government decision-making. The Court has expressed concern that a rule limiting citizens’ right to petition their government for anticompetitive rules may hinder governmental decision-making. Specifically, in *Noerr* the Court noted that “to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.”⁶³ Subjecting legitimate lobbying to antitrust scrutiny would deter this valuable conduct and hence “would substantially impair the power of government to take actions through its legislature and executive that operate to restraint trade.”⁶⁴ The Supreme Court has echoed this basis for protecting certain petitioning activity in *California Motor Transport*⁶⁵ and *PRE*.⁶⁶

⁶⁰ *Id.* at 532 (internal quotations omitted).

⁶¹ *Id.* at 535-36.

⁶² *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006); *see also id.* (“Under the *Noerr-Pennington* rule of statutory construction, we must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise.”).

⁶³ 365 U.S. at 137.

⁶⁴ *Id.*

⁶⁵ 404 U.S. at 510.

⁶⁶ 508 U.S. at 56 (“In light of the government’s power to act in its representative capacity and to take actions . . . that operate to restrain trade, we reasoned that the Sherman Act does not punish political activity through which the people . . . freely inform the government of

In *Noerr*, the Court explained that if concepts of federalism protect certain state action from Sherman Act scrutiny, then these same considerations must protect private conduct to urge such action:

[W]here 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. These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution. We think it equally clear that 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.⁶⁷

Citing *Parker*, the Court continued: “To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.”⁶⁸

Noerr, then, is “a corollary to *Parker*.”⁶⁹ If the government can take an action, then an individual must be able to lobby for that action. Otherwise, the banning of the petitioning would allow the antitrust laws to indirectly regulate political decisions: it would be “obviously peculiar . . . to establish a category of lawful state action that citizens are not permitted to urge.”⁷⁰ Indeed, the *Omni* Court went further, adding that “*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States’ acts of governing, and the latter the citizens’ participation in government.”⁷¹

their wishes.”) (quoting *Noerr*, 365 U.S. at 137) (internal quotations and brackets omitted).

⁶⁷ 365 U.S. at 136 (internal citation omitted).

⁶⁸ *Id.* at 137.

⁶⁹ *Omni*, 499 U.S. at 379.

⁷⁰ *Id.*

⁷¹ *Id.* at 383.

Part II: Delineating the Proper Parameters of the Doctrine

Clearly, the *Noerr* doctrine is meant to protect the ability of governments acting in their sovereign capacity to hinder or supplant competition and the ability of citizens to request such government action. Equally clearly, the doctrine recognizes that not all activities directed at government are genuine attempts to request a sovereign government action. What is not clear, however, are the exact boundaries of *Noerr*'s protection for such activities, and neither the Supreme Court case law nor federal appellate decisions provide a firm guide. In the absence of clear court guidance, this Report attempts to interpret the doctrine to fully protect the values underlying the right to petition while also protecting, where possible, the competition values animating antitrust enforcement with respect to the three varieties of conduct addressed herein. The Report reflects the viewpoint of FTC staff, who has grappled with these issues when faced with anticompetitive conduct in the form of communications with the government. Given that limits on competition impose substantial costs on consumers, staff believes it is vital to consumer welfare to avoid setting the boundaries of *Noerr* protection beyond the limits compelled by the First Amendment or effective government decision-making concerns. It would be pointless to permit anticompetitive behavior to thrive and inflict increasing harm on consumers, if such behavior does not advance the important values *Noerr* is meant to safeguard.

A generous level of access to government has numerous benefits and is a strength of the U.S. political system. Although our government could not function properly without open access, it is also true that the abuse of governmental processes can impose a substantial financial burden on competitors, much of which may be incurred regardless of the outcome of the process. One prime example of the dual nature of access to government is litigation. Private lawsuits provide firms with an important means of protecting their legitimate interests, both commercial and otherwise. However, the substantial costs associated with litigation may, at times, create strong incentives for firms to invoke the process – without regard for its ultimate outcome – as a means of burdening competitors, or raising the costs of entry, rather than as a means of vindicating legal rights. Firms can also use repetitive administrative filings to inflict similar harm. Likewise, significant intentional misrepresentations or omissions of fact, if left unchecked, can subvert governmental processes, resulting in well-intentioned but ill-informed rules or regulations that grant firms monopoly power or otherwise harm consumers. Interpretations of the *Noerr* doctrine that would shield abuse of the process and misrepresentations or omissions from antitrust enforcement stray from the underlying objectives of *Noerr* and are likely to impose costs on consumers without protecting genuine actions that are truly directed at obtaining a favorable government decision.

For these reasons, *Noerr* does not shield from the reach of antitrust laws all activity involving communication with the government. For example, the federal courts have recognized that not all requests for government action implicate the type of political activity about which *Noerr* was concerned. The core type of activity that *Noerr* is meant to address is a request to a government decision maker to exercise its discretion to decide in a certain way. In some cases,

however, the government decision maker lacks discretion to evaluate the communication and must simply accept it and its contents.

Even determining that an activity could qualify as protected petitioning does not end the inquiry. For example, current case law supports an exception to *Noerr* for material misrepresentations or omissions made to government decision makers outside of the political arena.⁷² Further, in the *Noerr* case itself the Supreme Court stated that “[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.”⁷³ In subsequent cases, the Court elaborated further, explaining that the sham exception “encompasses situations in which persons use the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon,”⁷⁴ and that “in whatever forum,” if the petitioning “is not genuinely aimed at procuring favorable government action,” the sham exception applies.⁷⁵

This section explores three varieties of communications with the government. Each raises serious competitive concerns under certain circumstances. For each, we show that it is feasible to apply the antitrust laws without intruding upon the principles that *Noerr* and its progeny seek to protect.⁷⁶

⁷² Courts have used a variety of labels to describe erstwhile petitioning conduct that is not protected from antitrust liability. Rather than determining whether conduct should be called a sham, a variant of sham, or something else, this Report instead focuses on whether sheltering such conduct from the antitrust laws protects the values identified in *Noerr*. Thus, for the sake of convenience, this Report utilizes the term “misrepresentation exception” in analyzing the applicability of *Noerr* protection to certain material and deliberate misrepresentations.

⁷³ *E. R.R. Presidents’ Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961).

⁷⁴ *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991) (emphasis in original).

⁷⁵ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988).

⁷⁶ It is important to note that a conclusion that the conduct at issue is not *Noerr*-protected does not mean that the conduct violates the Sherman Act; an underlying antitrust violation must still be established.

A. Filings That Seek Only a Ministerial Response

Petitioning is, at a minimum, an effort to convince the government to *do* something. Black’s Law Dictionary defines a “petition” as “[a] written address, embodying an application or prayer from the person or persons preferring it, to the power, body, or person to whom it is presented, for the exercise of his or their authority in the redress of some wrong, or the grant of some favor, privilege, or license.”⁷⁷ As the *Noerr* Court itself noted, petitioning activity is by its nature “directed toward *obtaining governmental action*.”⁷⁸

*Litton Systems v. American Telephone & Telegraph Co.*⁷⁹ is one of the leading cases to highlight the distinction between communications that call for ministerial action, and so cannot constitute “petitioning” within the meaning of *Noerr*, and those petitioning communications that call for a bona fide exercise of governmental discretion. In *Litton*, the Second Circuit addressed the status under *Noerr* of a tariff filed by AT&T with the Federal Communications Commission (FCC), which required the use of an AT&T interface device to connect non-AT&T telephone equipment to the Bell System network. Because the tariff filings at issue there were mechanical and the FCC’s consideration of them ministerial, the Second Circuit concluded they did not amount to petitioning under *Noerr*:

AT&T erroneously assumes that a mere *incident* of regulation – the tariff filing requirement – is tantamount to a request for governmental action akin to the conduct held protected in *Noerr*

⁷⁷ Black’s Law Dictionary 1145 (6th ed. 1990). Because not all communications with government embody these characteristics, not all such communications are protected by *Noerr*. See generally 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 210 (2d ed. 2000) (addressing compulsory filings with government agencies).

⁷⁸ 365 U.S. at 140 (emphasis added). See also Timothy J. Muris, *Clarifying the State Action and Noerr Exemptions*, 27 HARV. J.L. & PUB. POL’Y 443, 453 (2004) (expressing concern that some lower courts have not sufficiently grasped this distinction, with the result that “[p]arties have been granted *Noerr* protection even if the anticompetitive conduct at issue had no ‘petitioning’ component whatsoever.”); Raymond Ku, *Antitrust Immunity, the First Amendment and Settlements: Defining the Boundaries of the Right to Petition*, 33 IND. L. REV. 385, 404 (2000) (“Valid petitioning is defined as a formal or informal attempt to *persuade* an independent governmental decision maker” If no such attempt is made, the protection is not triggered, regardless of whether the criteria for a “sham” are met.) (emphasis added); Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2173 (1998) (as developed in English law and known to the Framers, “[a] petition was a communication that, 1) had to be addressed to an authority such as the King, 2) had to state a grievance, and, 3) *had to pray for relief*”) (emphasis added).

⁷⁹ 700 F.2d 785 (2d Cir. 1983).

and *Pennington*. But in this case, as in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962), the *Noerr-Pennington* doctrine is “plainly inapposite” because AT&T was “engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws.” . . . AT&T cannot cloak its actions in *Noerr-Pennington* immunity simply because it is required, as a regulated monopoly, to disclose publicly its rates and operating procedures.⁸⁰

Other courts, as well as the FTC, have agreed that tariffs and other similarly ministerial filings are not protected by *Noerr*.⁸¹ In matters involving such filings, the filing party is neither requesting governmental action nor expressing a political opinion, and this “essentially procedural aspect of regulation . . . cannot [support an antitrust exemption].”⁸² Such filings require purely ministerial action and do not involve discretionary judgment or adjudication.

The distinction between ministerial government acts and genuine exercises of discretion reflects in part the reality that, with the former, there is little check on the truth or falsity of parties’ representations, whereas with the latter, the government decision maker can assess veracity and weigh those statements in accordance with the public interest. Under *Noerr*, it is both the nature of the submission (informational or persuasive) and the nature of the governmental agency’s review (ministerial or discretionary) that determine whether a given

⁸⁰ *Id.* at 807 (emphasis in original).

⁸¹ *See, e.g., Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1138 (3d Cir. 1993) (holding that a collective rate filing is not a petition to the government); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1181 (8th Cir. 1982) (holding that utility rate filings are not protected petitions; tariff filings “may not be used as a pretext to achieve otherwise unlawful results”); *New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 284 (1989) (holding that joint applications to regulators for tariff changes are not protected petitions), *modified on other grounds*, 908 F.2d 1064 (1st Cir. 1990); *In re Wheat Rail Freight Rate Antitrust Litig.*, 579 F. Supp. 517, 537-38 (N.D. Ill. 1984) (finding that a tariff filing is not protected under *Noerr* because “[t]hrough the [ICC] may reject a tariff on its own initiative or at the request of a third party, the filing of a tariff itself cannot be considered a ‘petition’ to the government.”); AREEDA & HOVENKAMP, *supra* note 77, ¶ 210 (collecting cases).

⁸² *Litton*, 700 F.2d at 807. *Cf. Noerr*, 365 U.S. at 138 (protected petitioning involves “solicitation of governmental action with respect to the passage and enforcement of laws”); *Ku*, *supra* note 78, at 417, 422 (equating protected petitioning with “an effort to persuade an independent government decision-maker through the presentation of facts and arguments,” and noting that purely private settlements are not *Noerr*-protected “because they are in fact the antithesis of efforts to solicit government action”).

communication may be shielded from antitrust enforcement. Thus, while advocacy filings in political contexts are protected, informational filings in ministerial contexts are not.⁸³

Notably, even though there was some potential for action by the FCC, the *Litton* court still found that AT&T's filings were not shielded by *Noerr*:

The fact that the FCC might ultimately set aside a tariff filing does not transform AT&T's independent decisions as to how it will conduct its business into a "request" for governmental action or an "expression" of political opinion. Similarly, the FCC's failure to strike down a tariff at the time of its filing does not make the conduct lawful, particularly where, as in this case, the agency specifically declines to rule on a tariff's legality.⁸⁴

By contrast, neither of these characteristics – (1) a purely mechanical, information-providing content of the filing, or (2) an absence of judgment or discretion on the part of the government agency – has been present in recent cases in which *Noerr* was held to apply. Rather, cases in which *Noerr* is successfully invoked typically involve efforts to persuade or negotiate with the government to promulgate statutes or regulations, enter into agreements, or engage in law enforcement actions (*i.e.*, appeals to the substantive judgment or discretion of a government agent).⁸⁵

⁸³ For example, misrepresentations in a purely informational tariff filing are not protected petitioning under *Noerr*, but arguing to a legislature or regulator that a competitor's tariffs should be higher would be.

⁸⁴ 700 F.2d at 807-08.

⁸⁵ See, e.g., *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239, 252 (3d Cir. 2001) (affirming district court's holding that tobacco companies' successful negotiations with state governments to enter the Master Settlement Agreement and secure implementing state legislation were *Noerr*-protected); *Mass. Sch. of Law at Andover, Inc. v. ABA*, 107 F.3d 1026, 1037-38 (3d Cir. 1997) (affirming district court's holding that efforts by the ABA to convince states to prohibit graduates of unaccredited law schools from taking the bar examination were *Noerr*-protected); *PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp. 2d 1179, 1193 (C.D. Cal. 2000) (holding that "activities involved with the negotiation, execution, and attempts to implement the [tobacco litigation] MSA, the Qualifying Statute, and the Model Act" were *Noerr*-protected); *Omega Homes, Inc. v. City of Buffalo*, 4 F. Supp. 2d 187, 193-94 (W.D.N.Y. 1998) (holding that successful lobbying efforts to secure an exclusive contract to build a low-income housing development were *Noerr*-protected); *Ehlinger & Assocs. v. La. Architects Ass'n*, 989 F. Supp. 775, 784-85 (E.D. La. 1998) (holding that efforts to influence a state board that selected architects for state projects were *Noerr*-protected); *Ass'n of Minority Contractors & Suppliers v. Halliday Props., Inc.*, 1998-2 Trade Cas. (CCH) ¶ 72,250, at 82,576-78 (E.D. Pa. 1998) (holding

More recently, the view that protected petitioning involves an effort to induce some exercise of governmental discretion or judgment has been extended beyond the tariff-filing context. In *In re Buspirone*,⁸⁶ the Southern District of New York considered whether the listing of certain patents in the FDA's Orange Book was shielded by the *Noerr* doctrine. Defendant Bristol-Myers Squibb asserted, among other things, that the mere fact that its patent filings were accepted and reviewed by the FDA was sufficient to trigger *Noerr* protection, but the *Buspirone* court rejected this argument.⁸⁷ Just as the *Litton* court had focused on the passive role of the FCC in the tariff-filing process, the *Buspirone* court focused on the passive role of the FDA in

that efforts to convince city council to initiate a lawsuit to dissolve a local redevelopment authority were *Noerr*-protected).

⁸⁶ *In re Buspirone Patent Litig./In re Buspirone Antitrust Litig.*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

⁸⁷ Another judge in the Southern District of New York issued a subsequent opinion, *Twin City Bakery Workers and Welfare Fund v. Astra Aktiebolag*, 207 F. Supp. 2d 221 (S.D.N.Y. 2002), which also dealt with Orange Book filings. It might be argued that the *Twin City Bakery* court's attempt to distinguish *Buspirone* suggests that the *Noerr* status of an Orange Book filing is only relevant to the triggering of a 45-day stay of generic drug approval, not a 30-month stay, as the latter, longer, and hence more competitively significant stay can only be triggered by the combination of an Orange Book filing *and* a patent infringement lawsuit. The argument would continue that, because a 30-month stay is necessarily triggered, in part, by the filing of a lawsuit, which is clearly *Noerr*-protected conduct, no antitrust liability may follow.

The flaw in this reasoning is that it is well-established – particularly in the intellectual property context – that the antitrust laws may condemn an action that causes an anticompetitive effect in conjunction with some other, subsequent action that is beyond the reach of those laws. For example, the acquisition of a previously-issued, valid patent may violate Section 7 of the Clayton Act or Section 2 of the Sherman Act. *See* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW*, ¶ 707a, at 200 (2d ed. 2002); U.S. Dep't of Justice and FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.7 (1995). In such a case, the anticompetitive effect occurs only because of the combined impact of two separate causes: (1) a non-*Noerr* protected step – the acquisition of the patent, and (2) a subsequent *Noerr*-protected step – enforcement of the patent through infringement litigation. In the Orange Book context, as the *Buspirone* court explained, an Orange Book filing can cause an anticompetitive effect in conjunction with a subsequent *Noerr*-protected patent enforcement action in that, under the Hatch-Waxman framework, filing a patent infringement action triggers certain additional and automatic statutory rights for the patentee, but an infringement lawsuit nonetheless is a separate action because it does not depend on a prior Orange Book filing. *See In re Buspirone*, 185 F. Supp. 2d at 372.

the Orange Book listing process. Like the FCC, the FDA expressly declined to rule on the legality of the filings in question.⁸⁸

The court observed that, when deciding whether particular communications with government are protected, it is critical to distinguish between activities in which the decision maker acts “only after an independent review of the merits of the petition,” and those in which the decision maker acts “in a merely ministerial or non-discretionary capacity in direct reliance on the representations made by private parties.”⁸⁹ Activities that fall into the first category are protected, unless they satisfy some exception to the *Noerr* doctrine, while those that fall into the second category are not. One reason for this distinction is that government involvement acts as an important check, and potential limitation, on a private petitioner’s potentially anticompetitive agenda. As the *Buspirone* court explained, “[o]ne of the reasons for extending *Noerr-Pennington* immunity to [the first category of activities discussed above] . . . is that these private parties can often only obtain the anticompetitive effects in question by first convincing the government of the merits of their views and by obtaining a valid and independent governmental decision, which intervenes between the private parties’ actions and these anticompetitive results.”⁹⁰

This differing treatment of communications that call for a discretionary act and those that do not is instructive for determining the boundaries of *Noerr* in other contexts. Where the communication furthers the exercise of governmental discretion or judgment, it likely warrants protection. Where it does not further – or even undermines – a valid and independent government decision, it likely deserves no special treatment and should be subject to the antitrust laws. This analysis provides guidance for evaluating whether certain communications to the government that request a discretionary government act but seek to distort or abuse the government process – either through serious misrepresentations to the government decision maker or by using the decision-making process, rather than the outcome of the process, to harm rivals – warrant *Noerr* protection.

B. Misrepresentations

As detailed by the Commission in its *Unocal* decision, case law provides substantial support for a misrepresentation exception to *Noerr* in appropriate circumstances. Regardless of

⁸⁸ *Id.* at 371. See also *Organon, Inc. v. Mylan Pharms., Inc.*, 293 F. Supp. 2d 453, 458-59 (D.N.J. 2003) (ruling that filing a patent for listing in the Orange Book is not “petitioning activity” under *Noerr* because the FDA’s action is “purely ministerial”); *Mylan Pharms., Inc. v. Thompson*, 139 F. Supp. 2d 1, 10-11 (D.D.C.) (noting the FDA’s own characterization of its role in listing patents as “purely ministerial”), *rev’d on other grounds*, 268 F.3d 1323 (Fed. Cir. 2001).

⁸⁹ *In re Buspirone*, 185 F. Supp. 2d at 369.

⁹⁰ *Id.* at 369-70.

whether a misrepresentation exception is an independent exception or a variety of sham, it is distinguishable from the *PRE* sham litigation exception.⁹¹ There are instances in which parties may mislead government decision makers in an attempt to secure government action that harms competition.⁹² Such misrepresentations differ from traditional sham activities, such as the initiation of baseless litigation, in that the purpose of making the misrepresentations likely *is* to obtain government action.⁹³ Because the parties in such cases are concerned with the outcome of the governmental process (as distorted by the parties' misrepresentations), and not just with using the process itself to hamper competitors, rigid application of *PRE*'s sham test fails to identify the anticompetitive intent and thus could shield this type of serious anticompetitive conduct.

The roots of a misrepresentation exception go back at least to *California Motor Transport*, in which the Court observed: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."⁹⁴ Similarly, in *Allied Tube*, the Court stressed that the *Noerr* doctrine does not protect all genuine attempts to procure governmental action.⁹⁵ Instead, "the applicability of *Noerr* immunity varies with the context and nature of the activity."⁹⁶ Thus, for example, *Noerr* protects a publicity campaign that employs unethical and deceptive methods in seeking legislative or executive action, "[b]ut in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations."⁹⁷ The reason for this distinction is that there is an expectation that the information supplied to the government in a non-political context is not

⁹¹ See *infra* Part II.C for a more detailed discussion of the sham exception.

⁹² The misrepresentation exception involves issues similar to those in *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 174 (1965), in which the Supreme Court, without mentioning the *Noerr* doctrine, concluded that the enforcement of a patent procured by fraud on the Patent and Trademark Office may violate Section 2 of the Sherman Act. To date, the Court has not, however, explained the relationship, if any, between its *Walker Process* holding and the *Noerr* doctrine. A detailed analysis of *Walker Process* and its progeny is beyond the scope of this Report.

⁹³ See 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW*, ¶ 203a, at 164, ¶ 203f, at 173 (2d ed. 2000).

⁹⁴ *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

⁹⁵ 486 U.S. at 503 (rejecting the "absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action").

⁹⁶ *Id.* at 499 (comma omitted).

⁹⁷ *Id.* at 500.

misleading and, therefore, provides a sound basis for decision-making and dispute resolution.⁹⁸ In this context, a misrepresentation or omission “threatens the fair and impartial functioning” of the proceeding and “does not deserve immunity from the antitrust laws.”⁹⁹

Although the above-quoted statements in *California Motor Transport* and *Allied Tube* regarding misrepresentation were *dicta* and the Supreme Court has expressly refused to rule on the existence of a misrepresentation exception,¹⁰⁰ as the Commission recently concluded in its *Unocal* decision, “the weight of lower court authority, spanning more than thirty years, has recognized that misrepresentations may preclude application of *Noerr-Pennington* in less political arenas than the legislative lobbying at issue in *Noerr* itself.”¹⁰¹ In *Unocal*, complaint counsel alleged that defendant Unocal made misrepresentations regarding its patent rights that induced the California Air Resources Board (CARB) to adopt an industry-wide standard reading on those patents. Although an FTC administrative law judge initially accepted Unocal’s argument that its advocacy of the standard in question, including its statements regarding relevant intellectual property rights, constituted petitioning of the CARB authority protected by *Noerr* as a matter of law, the Commission ultimately reversed that decision and remanded for development of a factual record.¹⁰²

⁹⁸ Put another way, as the governmental process of information-gathering and decision-making becomes formalized, improper and unethical conduct “is more readily identified as improper and more widely regarded as reprehensible.” AREEDA & HOVENKAMP, *supra* note 93, ¶ 203e, at 169.

⁹⁹ *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) (“There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body. The first amendment has not been interpreted to preclude liability for false statements.”); *see also Whelan v. Abell*, 48 F.3d 1247, 1254-55 (D.C. Cir. 1995) (“We see no reason to believe that the right to petition includes a right to file deliberately false complaints. . . . However broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods.”).

¹⁰⁰ *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61 n.6 (1993).

¹⁰¹ *Union Oil Co. of Cal. (Unocal)*, FTC Dkt. No. 9305, slip op. at 16 (2004) (opinion of the Commission), *available at* <http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf>.

¹⁰² Unocal subsequently entered into a consent decree with the Commission, agreeing, among other things, not to assert or enforce the relevant patents against those manufacturing, selling, distributing, or otherwise using motor gasoline to be sold in California. *Id.* (final order), *available at* <http://www.ftc.gov/os/adjpro/d9305/050802do.pdf>.

In its decision, the Commission confirmed that misrepresentation warrants denial of *Noerr* protection outside of the political arena, provided that (1) the misrepresentation or omission is “deliberate, factually verifiable, and central to the outcome of the proceeding or case,” and (2) “it is possible to demonstrate and remedy this effect without undermining the integrity of the deceived governmental entity.”¹⁰³ In reviewing the extensive case law addressing misrepresentations, the Commission observed that federal appellate courts in nine circuits¹⁰⁴ have

¹⁰³ *Id.*, slip op. at 48 (opinion of the Commission). The Commission previously had recognized support in the case law for the misrepresentation exception to *Noerr* in connection with the allegedly anticompetitive activities of Bristol-Myers Squibb discussed above. See Memorandum of Law of Amicus Curiae the Federal Trade Commission in Opposition to Defendant’s Motion to Dismiss at 21, *In re Buspirone*, MDL No. 1410 (JGK) (S.D.N.Y. Jan. 8, 2002), available at <http://www.ftc.gov/os/2002/01/busparbrief.pdf> (“[M]any courts have held that *Noerr* immunity does not extend to knowing and material misrepresentations made in adjudicatory or administrative proceedings.”). See also *Bristol-Myers Squibb Co.*, FTC Dkt. No. C-4076 (2003) (analysis to aid public comment), available at <http://www.ftc.gov/os/2003/03/bristolmyersanalysis.htm> (“BMS’s filings and other statements to the FDA are alleged to involve knowing and material misrepresentations, and would therefore fall outside the protection of the *Noerr* doctrine for that reason as well.”).

¹⁰⁴ *Unocal*, slip op. at 16-17 (citing, among others, *Whelan*, 48 F.3d 1247 (D.C. Cir. 1995); *Juster Assocs. v. City of Rutland, Vt.*, 901 F.2d 266 (2d Cir. 1990); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286 (5th Cir. 1971); *Potters Med. Ctr. v. City Hosp. Ass’n*, 800 F.2d 568 (6th Cir. 1986); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975); *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077 (8th Cir. 1999); *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056 (9th Cir. 1998); *St. Joseph’s Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948 (11th Cir. 1986); *Rodime PLC v. Seagate Tech., Inc.*, 174 F.3d 1294 (Fed. Cir. 1999)). The Commission further noted that, although the Third Circuit has expressed skepticism regarding, and the Fourth Circuit has declined to rule on the existence of, the misrepresentation exception, the relevant decisions of those two circuits are not necessarily inconsistent with the Commission’s conclusion that such an exception exists. See *Unocal*, slip op. at 27-28 (discussing *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem’l Hosp.*, 185 F.3d 154, 164 n.8 (3d Cir. 1999) (distinguishing case before it from cases like *Walker Process* and *Woods Exploration* in which the governmental decision-making process relies almost solely on information provided by petitioners); and *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 124 (3d Cir. 1999) (“[A] material misrepresentation that affects the very core of a litigant’s . . . case will preclude *Noerr-Pennington* immunity.”)); *Unocal*, slip op. at 17 n.30 (citing *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 401-02 (4th Cir. 2001) (“If a fraud exception to *Noerr-Pennington* does exist, it extends only to the type of fraud that deprives litigation of its legitimacy.”)).

indicated, in diverse terms and in varying settings,¹⁰⁵ that misrepresentations may vitiate *Noerr* protection in certain circumstances. Some courts, for example, have ruled that the misrepresentations at issue were not petitioning subject to *Noerr* protection.¹⁰⁶ Other courts speak specifically of a misrepresentation exception,¹⁰⁷ or refuse to apply *Noerr* to deliberate misrepresentations without attaching a specific doctrinal label.¹⁰⁸ Still other courts analyze misrepresentations under the general rubric of sham petitioning.¹⁰⁹ The Commission concluded that, regardless of the nomenclature used, there is a solid consensus among the lower courts in support of a misrepresentation exception to *Noerr*:

Whether we view misrepresentation as a distinct variant of sham petitioning or as a separate exception to *Noerr-Pennington*, the fabric of existing law is rich enough to extend antitrust coverage, in appropriate circumstances, to anticompetitive conduct flowing

¹⁰⁵ See, e.g., *Whelan*, 48 F.3d 1247 (involving misrepresentations to state securities administrators and federal courts with respect to allegations of franchise law violations, racketeering, and securities fraud); *St. Joseph's Hosp.*, 795 F.2d 948 (involving misrepresentations to state health planning agency considering application for hospital certificate of need); *Clipper Express*, 690 F.2d 1240 (involving misrepresentations to Interstate Commerce Commission in ratemaking context); *Israel v. Baxter Labs., Inc.*, 466 F.2d 272 (D.C. Cir. 1972) (involving misrepresentations to FDA in context of pharmaceutical drug approval process); *Woods Exploration*, 438 F.2d 1286 (refusing to apply *Noerr* doctrine to conduct involving misrepresentations to state railroad commission in setting of natural gas production quotas).

¹⁰⁶ See, e.g., *St. Joseph's Hosp.*, 795 F.2d at 955.

¹⁰⁷ See, e.g., *U.S. Futures Exch., LLC v. Bd. of Trade*, No. 04 C 6756, 2005 WL 2035652, at *2 (N.D. Ill. Aug. 22, 2005) (“The misrepresentation exception applies to material misrepresentations made during an adjudicatory proceeding.”) (citing *Kottle*, 146 F.3d at 1063; *Whelan*, 48 F.3d at 1255; *St. Joseph's Hosp.*, 795 F.2d at 955); *Livingston Downs Racing Ass'n v. Jefferson Downs Corp.*, 192 F. Supp. 2d 519, 535 (M.D. La. 2001) (presuming existence of, but finding insufficient evidence to apply, “fraud exception” to *Noerr* for misrepresentations in adjudicatory context).

¹⁰⁸ See, e.g., *Whelan*, 48 F.3d at 1253-55.

¹⁰⁹ See, e.g., *Kottle*, 146 F.3d at 1060-61 (recognizing at least three distinct types of sham activity, including (1) “bringing a single sham lawsuit (or a small number of such suits)”; (2) the filing of a series of sham lawsuits; and (3) the use of “knowing fraud” or “intentional misrepresentations” that “deprive the litigation of its legitimacy”).

from deliberate misrepresentations that undermine the legitimacy of government proceedings.¹¹⁰

To identify these “appropriate circumstances,” the Commission set forth an analytical framework that “considers both the context of the proceeding and the nature of the relevant communications.”¹¹¹ First, the case law makes clear that misrepresentations should vitiate *Noerr* protection only outside of the political context.¹¹² The political/non-political distinction¹¹³ accounts for several important factors, including governmental expectations of truthful representations, the degree of governmental discretion, the extent of necessary reliance on petitioners’ factual assertions, and the ability to determine causation, linking the government’s actions to the petitioner’s communications.¹¹⁴

In the political context, there is generally little governmental expectation of truthful petitioning (and thus little necessary reliance on petitioners’ factual assertions), a high degree of governmental discretion that is policed by the electorate (rather than, for example, the legal system), and an inability to establish that a given misrepresentation caused the government to act as it did. In contrast, outside of the political context, there is more likely to be a governmental expectation of truthful representations, limited discretion on the part of the governmental entity (whose decision may be dependent on an evidentiary record and/or subject to judicial review), necessary reliance on petitioners’ factual assertions, and an ability to establish (for example, by means of a written evidentiary record) a causal link between petitioning conduct and a subsequent governmental action.

Second, with respect to the nature of the petitioning, in order to lose *Noerr* protection, the misrepresentation or omission must be: (1) deliberate (something more than mere error is necessary); (2) subject to factual verification; and (3) central to the legitimacy of the affected governmental proceeding.¹¹⁵ The courts have made this last factor an essential element in the inquiry, with some requiring that the misrepresentation “deprive the litigation of its legitimacy,” others asking whether the misrepresentation “infect[s] ‘the very core’ of the case,”

¹¹⁰ *Unocal*, slip op. at 30.

¹¹¹ *Id.* See also *Allied Tube*, 486 U.S. at 499 (the applicability of *Noerr* “varies with the context and nature of the activity”).

¹¹² *Unocal*, slip op. at 30-32 (discussing relevant case law).

¹¹³ See *id.* at 31-32 (explaining that the political/non-political inquiry is more useful than the legislative/adjudicatory or quasi-legislative/quasi-adjudicatory inquiry).

¹¹⁴ *Id.* at 32-35.

¹¹⁵ *Id.* at 36.

and still others asking “whether the government action would have resulted ‘but for’ the misrepresentation or omission.”¹¹⁶

Finally, the invocation of the misrepresentation exception should be subject to various policy considerations that stem from *Noerr* itself. Confining such an exception to cases of deliberate misrepresentation provides the same type of “breathing space” for legitimate petitioning in the *Noerr* context as it provides in the free speech arena.¹¹⁷ Application of the exception also must protect governmental decision-making. It should be clear that antitrust enforcement in these circumstances is not challenging government action itself, but rather attacking a private misrepresentation that “effectively supplanted government action.”¹¹⁸ Similarly, application of the misrepresentation exception must not interfere unnecessarily with the governmental decision-making process.¹¹⁹ For example, there should not be any reassessment of the governmental entity’s determination of public welfare or after-the-fact regulation of the outcome of that entity’s political processes.¹²⁰

Unocal’s analytical framework carefully harmonizes competing values. It respects government process values by giving deference to the decision-making functions of other governmental entities and to the right of citizens to petition for such decisions. The Commission’s denial of protection to deliberate misrepresentations that go to the core of non-political government decisions also helps to protect the proper functioning of the government decision-making process. Finally, it advances competition values by helping to ensure that such communications to the government do not cause competitive injury that may not be otherwise addressable.

C. Repetitive Petitioning

Unocal teaches that abuses of the government process may be sufficiently severe to overcome the protection *Noerr* gives to most petitioning conduct. As the Supreme Court held in *PRE*, another circumstance that vitiates *Noerr* protection is a lawsuit that the plaintiff could not

¹¹⁶ *Id.* (citations omitted).

¹¹⁷ *Id.* at 17-19, 43.

¹¹⁸ *Id.* at 44. *See also id.* at 19-20 (“The Supreme Court has explained that the *Noerr-Pennington* doctrine also serves, in part, as a corollary to the state action doctrine and reflects the maxim that ‘where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out.’”) (citations omitted).

¹¹⁹ *Id.* at 19-23, 44-45.

¹²⁰ *Id.* at 44-45.

reasonably expect to win and that the plaintiff brought to interfere directly with the business of a competitor. Specifically, the *PRE* Court announced a two-part test to determine whether a lawsuit was a sham for purposes of applying the *Noerr* doctrine. First, “the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.”¹²¹ The Court added that “[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.”¹²² Next, if the suit is found to lack objective merit, the court may examine “the litigant’s subjective motivation.”¹²³ This inquiry “should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor through the use of the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon.”¹²⁴

One question that remains after *PRE* is how to apply *Noerr* to a series of petitions. May a plaintiff alleging that a pattern of petitioning constitutes an antitrust violation predicate such an action only on those filings in the pattern that meet *PRE*’s standard for objective baselessness, or can a court also consider a pattern of conduct that includes individual acts that may not be objectively baseless under *PRE*’s stringent test? Put another way, when there is evidence that a competitor is repetitively invoking the petitioning process – and its concomitant burdens of expense and delay – without regard to the merits but simply to hamper a marketplace rival, can such evidence satisfy the requirement of objective baselessness, even if by chance some aspect of the conduct turns out to have been meritorious or could not, after the fact, be deemed “unreasonable”?

In addressing this issue, staff in this Report advocates an approach similar to that for filings that seek only a ministerial response and for significant misrepresentations: one that takes into account whether repetitive petitions filed without regard to merit and only for the purpose of hindering marketplace rivals are valuable to the governmental process or are an abuse of the processes *Noerr* is meant to protect. Logically, a pattern of invoking government processes for anticompetitive purposes need not be confined to repetitive litigation or to a series of identical filings to justify an exception to *Noerr* protection. Rather, a “pattern” exception to *Noerr* should apply when a party invokes administrative processes, judicial processes, or a combination thereof, to hinder marketplace rivals. Recently, in the settlement of antitrust claims with Bristol-Myers Squibb (BMS), the FTC explained that apart from *PRE*’s two-part sham test, BMS’ “overall course of conduct” across all of the products in question – including repeated filing of

¹²¹ *PRE*, 508 U.S. at 60.

¹²² *Id.* at 60 n.5. The Court also noted that the “existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation.” *Id.* at 62.

¹²³ *Id.* at 60.

¹²⁴ *Id.* at 60-61 (internal quotations and citations omitted) (emphasis in original).

lawsuits “without regard to the merits,” repeated filings of patents with the FDA “without regard to their validity, enforceability, or listability,” and repeated filing of false statements with government agencies – constituted “a clear and systematic pattern of anticompetitive misuse of the government process,” and thus was outside of the scope of *Noerr*’s protection.¹²⁵

The logic and policy underlying a pattern exception to *Noerr* that does not require a plaintiff to show that each underlying filing meets *PRE*’s test for objective baselessness can be found in *California Motor Transport*.¹²⁶ In that case, the plaintiff alleged that a group of trucking companies had agreed to oppose, without regard to the merits, every application for additional motor carrier operating rights, regardless of whether the applications were filed with state agencies, federal agencies, or the courts. Among other important holdings, the Court concluded that such a pattern of actions brought “with or without probable cause, and regardless of the merits,” may lead the fact-finder to conclude that the administrative and judicial processes have been abused in a way that justifies application of a sham exception to *Noerr*.¹²⁷

Although citing *California Motor Transport* approvingly, the Court in *PRE* said that the decision had left unresolved the question of whether “litigation may be sham merely because subjective expectation of success does not motivate the litigant.”¹²⁸ The Court then answered the question in the negative, stating that “an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.”¹²⁹ The concurring opinion by Justice Stevens, joined by Justice O’Connor, however, raised questions about the “unnecessarily broad dicta” in the majority opinion, disagreeing with “the Court’s equation of ‘objectively baseless’ with the answer to the question whether ‘any reasonable litigant could realistically expect success on the merits.’”¹³⁰ Specifically, the concurring Justices stressed that “it may not be objectively reasonable to bring a lawsuit just because some form of success on the merits – no matter how insignificant – could be expected.”¹³¹ For example, “[t]he label ‘sham’ is appropriately applied to a case, or a series of

¹²⁵ See *Bristol-Myers Squibb Co.*, FTC Dkt. No. C-4076 (2003) (analysis to aid public comment), available at <http://www.ftc.gov/os/2003/03/bristolmyersanalysis.htm>.

¹²⁶ 404 U.S. 508.

¹²⁷ *Id.* at 512.

¹²⁸ 508 U.S. at 57.

¹²⁹ *Id.*

¹³⁰ *Id.* at 67. The concurring opinion asserted that the majority exaggerated the confusion about the scope of the sham exception, especially as it applies to cases involving the filing of a single lawsuit, and “set up a straw man to justify its elaboration of a two-part test describing all potential shams.” *Id.* at 69 (Stevens, J., concurring).

¹³¹ *Id.* at 68.

cases, in which the plaintiff is indifferent to the outcome of the litigation itself, but has nevertheless sought to impose a collateral harm on the defendant, by for example, impairing his credit, abusing the discovery process, or interfering with his access to government agencies.”¹³² Citing *California Motor Transport*, the concurring Justices argued that “[r]epetitive filings, some of which are successful and some unsuccessful, may support an inference that the process is being misused. In such a case, a rule that a single meritorious action can never constitute a sham cannot be dispositive.”¹³³

The only two federal courts of appeal to have addressed squarely how pattern cases like *California Motor Transport* should be analyzed after *PRE* have held that the standard for objective baselessness when a party is alleged to have repetitiously abused government processes to harm marketplace rivals may be inferred from evidence such as the plaintiff’s failure to ascertain probable cause for filing suit.¹³⁴ Both the Second and the Ninth Circuits have applied *California Motor Transport* to hold that a pattern of invoking the judicial or administrative process, without regard to the individual merit of each filing and with the intent to harm competitors, amounts to an abuse of government process that is not shielded from antitrust enforcement by *Noerr*, even though some of the filings individually may not meet *PRE*’s standard for objective baselessness.

¹³² *Id.*

¹³³ *Id.* at 73 (internal citation omitted). The concurrence also cited *Otter Tail Power Co. v. United States*, 410 U.S. 366, 379 n.9 (1973), for the proposition that the *PRE* test “may be hard to apply when there is evidence that the judicial process has been used as part of a larger program to control a market and to interfere with a competitor’s financing without any interest in the outcome of the lawsuit itself.” *PRE*, 508 U.S. at 73. In *Otter Tail*, the Supreme Court remanded to the district court the issue of Otter Tail’s pattern of litigation, which “had the purpose of delaying and preventing the establishment” of competitors, with instructions to reconsider whether this conduct was protected under *Noerr* in light of the Court’s decision in *California Motor Transport*. *Otter Tail*, 410 U.S. at 379. On remand, the district court held that “the repetitive use of litigation by Otter Tail was timed and designed principally to prevent the establishment of municipal electric systems,” and fell within the sham exception to *Noerr* as articulated in *California Motor Transport*. *United States v. Otter Tail Power Co.*, 360 F. Supp. 451, 451-52 (D. Minn. 1973). The Supreme Court affirmed this finding without comment. *Otter Tail Power Co. v. United States*, 417 U.S. 901 (1974).

¹³⁴ See *Primetime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92, 101 (2d Cir. 2000) (Winter, J.); *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 810-11 (9th Cir. 1994) (Kozinski, J.); see also *Amarel v. Connell*, 102 F.3d 1494, 1519 (9th Cir. 1996) (adopting the *USS-POSCO* test but finding it inapplicable to the two lawsuits alleged).

In *USS-POSCO*, the Ninth Circuit stated that *PRE*'s evaluation of a single suit is “essentially retrospective: If the suit turns out to have objective merit, the plaintiff can’t proceed to inquire into subjective purposes, and the action is performed not a sham.”¹³⁵ Because the Supreme Court recognized in *California Motor Transport*, however, that a series of suits can inflict much more harm on a competitor than a single suit, the Ninth Circuit reasoned that “[w]hen dealing with a series of lawsuits, the question is not whether any one of them has merit – some may turn out to, just as a matter of chance – but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.”¹³⁶ Thus, when there are a number of lawsuits, the inquiry is prospective: “Were the legal filings made, not out of a genuine interest in redressing grievances, but as a part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?”¹³⁷ Because the defendants in *USS-POSCO* had succeeded in fifteen of twenty-nine suits, however, the court concluded that plaintiffs could not carry their burden of overcoming defendants’ *Noerr* defense.¹³⁸

The Second Circuit subsequently adopted similar reasoning in *Primetime 24*, which involved allegations that the defendants violated Section 1 of the Sherman Act by coordinating a series of repeated signal-strength challenges under the Satellite Home Viewer Act, without regard to the merits of each, for the purpose of injuring a market rival. When adjudicating defendants’ *Noerr* defense, the court followed *USS-POSCO*, citing its distinction between the retrospective test for a single suit under *PRE* and the prospective test for multiple suits.¹³⁹ Applying this standard, the court concluded that defendants’ conduct was not entitled to *Noerr* protection because *Primetime 24* had alleged adequately that the signal-strength challenges were “brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.”¹⁴⁰

¹³⁵ 31 F.3d at 811.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ The court used the success rate as a means to infer whether the litigation was filed without regard to merit. *See id.* (that more than half of the actions turned out to have merit “cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success”).

¹³⁹ *Primetime 24*, 219 F.3d at 101.

¹⁴⁰ *Id.*

At least one district court has employed the *USS-POSCO/Primetime 24* test to strip a defendant of *Noerr* protection for a pattern of litigation.¹⁴¹ In *Livingston Downs Racing Ass'n v. Jefferson Downs Corp.*,¹⁴² the plaintiff alleged that defendants had engaged in a pattern of baseless litigation designed to “prevent or delay its entry into the market for live horse racing.” The court concluded that because the defendants “filed a series of predatory lawsuits” with “repetitive and groundless claims,” it should “invoke the *USS-POSCO* variant of the sham-litigation analysis.”¹⁴³ The court found that although “[n]o court has delimited the number of lawsuits necessary to trigger the prospective test of *California Motor*,” the “approximately nine law suits at issue” were sufficient.¹⁴⁴ After reviewing the history of the suits at issue, the court denied summary judgment to defendants, holding that the pattern of litigation did not qualify for *Noerr* protection.¹⁴⁵

In sum, these courts appear to apply a more flexible standard when a pattern of petitioning is involved, recognizing that such cases may present more complex fact patterns and, in some instances, graver antitrust harm. Implicit in these decisions appears to be a view that to the extent that *PRE* limited *California Motor Transport*, it did so only with respect to cases presenting facts similar to those in *PRE*, not those involving repetitive use of government processes to hinder competitors directly. Although the *PRE* Court made clear that *California Motor Transport* fits within the Court’s consistent requirement that only objectively baseless conduct would forfeit *Noerr* protection, *PRE* did not involve repetitive conduct,¹⁴⁶ and the test that *PRE* articulated may need to be applied flexibly to take into consideration the particular circumstances presented by repetitive conduct.

¹⁴¹ Some district courts appear to have adopted the *USS-POSCO/Primetime 24* test for repetitive petitioning but have found insufficient allegations or facts to deny the defendants *Noerr* protection. See, e.g., *Twin City Bakery*, 207 F. Supp. 2d at 224 & n.2; *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 959 (S.D. Cal. 1996).

¹⁴² 192 F. Supp. 2d 519, 537 (M.D. La. 2001).

¹⁴³ *Id.* at 538-39.

¹⁴⁴ *Id.* at 539.

¹⁴⁵ *Id.* at 541.

¹⁴⁶ Unlike *California Motor Transport*, which concerned numerous filings in various fora, *PRE* involved an allegation that a single copyright infringement lawsuit was a sham “that cloaked underlying acts of monopolization and conspiracy to restrain trade.” 508 U.S. at 52. It is unclear whether *PRE* alleged that the harm from the defendants’ copyright infringement suit would have flowed from a finding that *PRE* had infringed defendants’ copyright or from the cost, delay, and uncertainty that *PRE* had to endure as a result of being sued for copyright infringement.

This line of cases also appears consistent with the Court’s decision in *Allied Tube*. In that case, the Court held that *Noerr* does not “immunize[] every concerted effort that is genuinely intended to influence governmental action.”¹⁴⁷ Instead, in cases where the restraint on competition is the result of private rather than government action, the “validity” of the effort to urge government action, even if not a sham, must be judged by the “nature and context” of the activity: “in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.”¹⁴⁸ Thus, even if some petitions in a pattern were, by themselves, objectively reasonable under *PRE* – and thus deemed to be “genuine” attempts to procure government action – the “nature and context” of the pattern, taken as a whole, may nonetheless call into question the “validity” of a defendant’s conduct. This may support an inference that the process is being misused, leaving the challenged conduct outside of the scope of *Noerr*’s protection.¹⁴⁹

As discussed, only two circuit courts of appeal have addressed directly whether a separate pattern exception to *Noerr* exists after *PRE*. Some district courts, however, have expressed skepticism about a pattern exception. In *Travelers Express Co. v. American Express Integrated Payment Systems, Inc.*,¹⁵⁰ for example, a district court read a Federal Circuit case, *Glass Equipment Development, Inc. v. Besten*,¹⁵¹ as applying *PRE*’s standard for objective baselessness to each filing in a pattern of repetitive petitioning. Given the small number of suits in *Besten* (two lawsuits and threats of other suits), however, it is not clear that the Federal Circuit’s decision actually dealt with a pattern of repetitive petitioning. Further, in *In re Terazosin Hydrochloride Antitrust Litigation*, a district court expressed doubt that the inquiry into the defendant’s success rate under the *USS-POSCO/Primetime 24* test is distinct from merely determining whether each litigation has met *PRE*’s test for objective merit.¹⁵² The view that the *USS-POSCO/Primetime 24* test is nothing more than an application of *PRE*’s objectively baseless test to each individual petition in a series, however, is hard to reconcile with the

¹⁴⁷ 486 U.S. at 503.

¹⁴⁸ *Id.* at 499-500 (citing *Cal. Motor Transp.*, 404 U.S. at 512-13).

¹⁴⁹ *PRE*, 508 U.S. at 73 (Stevens, J., concurring).

¹⁵⁰ 80 F. Supp. 2d 1033 (D. Minn. 1999).

¹⁵¹ 174 F.3d 1337 (Fed. Cir. 1999). *See also* *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367, 1377 (Fed. Cir. 2004) (holding that the district court properly granted summary judgment for defendant on state unfair competition claims that were based on one email and six letters to the same company alleging patent infringement, when plaintiff made no attempt to show that the underlying claims of patent infringement were objectively baseless).

¹⁵² 335 F. Supp. 2d 1336, 1367 n.29 (S.D. Fla. 2004).

language from each court expressly stating that the test it is applying is distinct from that in *PRE*.¹⁵³ Indeed, in *USS-POSCO* the Ninth Circuit explicitly answered in the affirmative the question “[w]hether litigation *that is not objectively baseless* can still constitute ‘sham litigation’ sufficient to eliminate . . . *Noerr-Pennington* immunity.”¹⁵⁴

Viewed in its entirety, the case law provides ample room to conclude that, outside of the political arena, a pattern of repetitive petitions filed without regard to merit and for the sole purpose of using the government process, rather than the outcome of the process, to harm directly marketplace rivals and suppress competition should be subject to antitrust liability without the requirement that each underlying filing meet *PRE*’s standard for objective baselessness. In addition, sound policy reasons support treating repetitive use of the government process against rivals differently from single lawsuits.

Ultimately, courts are concerned with detecting petitioning that is “a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.”¹⁵⁵ In light of the high value placed on access to governmental processes, however, courts strive to avoid rules that chill incentives to petition; a legal rule that too easily allows a plaintiff to bring an antitrust challenge to petitioning conduct would impose significant costs on society. When trying to discern whether petitioning conduct evidences a scheme to restrict competition, one lawsuit is unlikely to provide courts with sufficient information to determine with any degree of precision the true nature of a defendant’s petitioning conduct. Thus, given the high risk of erroneously subjecting legitimate petitioning conduct to antitrust scrutiny, *PRE*’s high threshold represents a sensible rule when courts face only one data point.¹⁵⁶

¹⁵³ See *USS-POSCO*, 31 F.3d at 811 (“[w]hen dealing with a series of lawsuits, the question is not whether any one of them has merit . . . but whether they are brought pursuant to a policy of starting legal proceedings *without regard to the merits and for the purpose of injuring a market rival.*”) (emphasis added); *Primetime 24*, 219 F.3d at 101 (*PRE*’s two-part test is applicable only when “determining whether a single action constitutes sham petitioning”) (internal quotation omitted). The court in *Livingston Downs*, moreover, asserted that the inquiry into the defendant’s win-rate is not a separate *PRE* inquiry into each case, but “merely . . . circumstantial evidence of the defendants’ intent in filing them. In effect, the *POSCO* court inferred that, inasmuch as most of the suits had merit, the defendants’ purpose in filing them was not to delay or harass the plaintiff, but rather was to achieve a favorable ruling.” 192 F. Supp. 2d at 538 n.17.

¹⁵⁴ 31 F.3d at 810 (emphasis in original).

¹⁵⁵ *Noerr*, 365 U.S. at 144.

¹⁵⁶ Cf. *AREEDA & HOVENKAMP*, *supra* note 93, ¶ 205c, at 229 (in the case of a single successful suit, a “defendant should enjoy a presumption that such a suit was initiated with a genuine desire to obtain the government action actually taken”).

Even though parties can initiate either a baseless or a reasonably based suit with the intent to hinder marketplace rivals, only when a challenged suit stands no objective chance of success can a court safely conclude that the suit was not brought to redress a grievance.

When a pattern of petitioning is involved, however, a court has more information and thus is likely to be in a better position to determine accurately whether a defendant's conduct is best characterized as a misuse of governmental processes that conceals an attempt directly to harm marketplace rivals and suppress competition. Because the risk of error is likely lower in the multiple petitioning case, the test advanced by the courts in *USS-POSCO* and *Primetime 24* appears to reach an appropriate accommodation between concern for deterring legitimate attempts to redress grievances and the consumer benefits from preventing anticompetitive conduct.

Like the treatment of ministerial filings and significant, deliberate misrepresentations, an exception for repetitive petitioning should be cabined by the values underlying *Noerr* itself, such as providing “breathing space” for legitimate petitioning and avoiding unnecessary interference with the governmental decision-making process. Thus, for example, repetitive petitions to a legislature should be sheltered from antitrust liability for the same reasons that misrepresentations to a legislature are sheltered. Further, another prerequisite that avoids undue burdens on the interests surrounding government decision-making is the requirement that the competitive harm spring directly from the defendant's actions rather than from a discretionary act that truly can be ascribed to the government decision maker.¹⁵⁷ As Justice Stevens wrote in his concurrence to *PRE*, “[t]he distinction between abusing the judicial process to restrain competition and prosecuting a lawsuit that, if successful, will restrain competition must guide any court's decision whether a particular filing, or series of filings, is a sham.”¹⁵⁸

¹⁵⁷ See *supra* Part II.A for a discussion of the important distinction between communications that call for a purely ministerial response from the government and those that call for a bona fide exercise of governmental discretion. See also *supra* Part II.B for the conclusion that for a misrepresentation to lose *Noerr* protection, the misrepresentation must be central to the legitimacy of the affected government proceeding.

¹⁵⁸ 508 U.S. at 68 (Stevens, J., concurring).

Part III: Recommendations

This Report reflects FTC staff’s views on how to maximize competition values embodied in the antitrust laws while fully respecting the core values identified in *Noerr* when analyzing three types of conduct: filings that seek only a ministerial government response, material misrepresentations, and repetitive petitioning. As explained in the following recommendations, the Commission should take appropriate opportunities – either in cases brought by the Commission itself or by means of amicus filings in other cases – to further delineate the proper application of the *Noerr* doctrine to such conduct.

1. Clarify that conduct protected by *Noerr* does not extend to filings, outside of the political arena, that seek no more than a ministerial government act.

It is important to distinguish *Noerr*-protected petitioning from other kinds of communications with government that do not require discretionary action by a government decision maker. An over-broad application of *Noerr* to any interaction with the government would shield anticompetitive conduct from antitrust enforcement, potentially resulting in substantial consumer harm, without advancing any countervailing political objective.

If courts brought greater analytical scrutiny to the beginning of the *Noerr* analysis, they would not start from a presumption that almost any interaction with government falls into the category of protected petitioning. With respect to filings that seek a government act, courts could focus with renewed rigor on one of the core indicia of petitioning: the nature of government action the party requests. Courts should determine whether the governmental decision maker’s review is discretionary or simply an automatic response. Likewise, a communication that seeks a discretionary review by the governmental decision maker may be evidence of *Noerr* petitioning, whereas a filing requiring mere ministerial review may not. For example, an advocacy filing may be indicative of petitioning, whereas a merely informational submission may not.

2. Clarify that conduct protected by *Noerr* does not extend to misrepresentations, outside of the political arena, that meet the standards set forth in the Commission’s *Unocal* decision.

The Commission already has set forth the grounds for the existence of a misrepresentation exception not subject to *PRE* in its recent decision in *Unocal*.¹⁵⁹ In addition to standard-setting contexts, such as the one at issue in *Unocal*, courts and the Commission should carefully scrutinize deliberate and material misrepresentations that deprive governmental proceedings of their legitimacy in other non-political contexts. For example, to the extent that misrepresentations in the FDA drug-approval context are deemed actual petitioning potentially

¹⁵⁹ See discussion *supra* Part II.B.

protected by *Noerr* (rather than ministerial filings not subject to *Noerr*),¹⁶⁰ courts should consider whether *Unocal* and other relevant case law would disqualify such misrepresentations from *Noerr* protection.

3. Clarify that conduct protected by *Noerr* does not extend to patterns of repetitive petitioning, outside of the political arena, filed without regard to merit that employ government processes, rather than the outcome of those processes, to harm competitors in an attempt to suppress competition.

Initiating litigation (or a burdensome administrative proceeding) is one of the most attractive means by which a firm, or a group of firms, can successfully prey on competitors. Indeed, as former federal judge and antitrust scholar Robert Bork has observed, “very little (if any) predation is accomplished through pricing, while a good deal is achieved through litigation.”¹⁶¹ A pattern of litigation, or other petitioning outside of the legislative process, can impose far greater costs on a competitor than a single lawsuit, both in delay and expense of responding.

The Supreme Court’s decision in *PRE* provides some check on the use of petitioning – particularly meritless litigation – as an anticompetitive weapon. Nevertheless, courts and the Commission should take appropriate opportunities to clarify that the case law supports the denial of *Noerr* protection to repetitive petitioning, outside of the political arena and undertaken without regard to merit, that employs government processes, rather than the outcome of those processes, to harm a competitor – even in instances where certain filings within the pattern do not meet *PRE*’s strict definition of “objectively baseless.” An enforcement approach that supports antitrust scrutiny of a pattern of litigation, administrative, or other filings outside of the political arena that has directly harmed a competitor through the cost and delay associated with responding to such filings would not conflict with the values that *Noerr* was intended to protect while furthering consumers’ interest in marketplace competition that the antitrust laws were designed to protect.

¹⁶⁰ See discussion *supra* Part II.A.

¹⁶¹ Robert H. Bork, *THE ANTITRUST PARADOX* 357 (1978).



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