

1972

## Antitrust - As Adapted to the Adjudicative Process the Noerr "sham exception" Assumes an Expanded Application

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### Recommended Citation

John P. Joyce Jr., *Antitrust - As Adapted to the Adjudicative Process the Noerr "sham exception" Assumes an Expanded Application*, 3 Loy. U. Chi. L. J. 373 (1972).

Available at: <http://lawcommons.luc.edu/lucj/vol3/iss2/11>

## **ANTITRUST—As Adapted to the Adjudicative Process the Noerr “sham exception” Assumes an Expanded Application.**

Highway common carriers in California are subject to regulation by the California Public Utilities Commission (PUC)<sup>1</sup> and the Interstate Commerce Commission (ICC)<sup>2</sup>. The PUC grants certificates of public convenience and necessity, without which the California common carriers cannot move their trucks. Thus, it is of utmost importance to every carrier that there be free access to the PUC.<sup>3</sup> In the past, in order to encourage rigorous competition among motor carriers, the PUC would frequently announce to the trucking industry that certificates would be liberally granted and their transfer liberally approved. Although applications for new routes could be contested, there was little opposition, since only carriers which were directly affected by potential competition entered protests. Thus, in effect, the PUC granted certificates as a matter of course.<sup>4</sup> To implement this policy, the ICC followed a practice of registering certificates issued by the PUC automatically, without further hearing.<sup>5</sup> The policy of the PUC and the ICC accomplished the objective of vigorous competition among California truckers.

In 1961, faced with greater competition from smaller companies, California Transport and the other large truckers in California and in the sister states decided to lessen competition, not by trying to change PUC and ICC policy, but by deterring the filing of applications by competitors with these commissions. To achieve their goal, these large truckers undertook a common scheme. Each of these large truckers would make a monthly contribution to a joint trust fund established by the truckers. The size of the contributions were based upon each trucking company's gross income. The truckers then informed their competitors that they would use the trust fund to finance opposition to each rival application pending before the PUC and the ICC, or thereafter filed with these commissions. Opposition to com-

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1. Cal. Pub. Util. Code sec. 1061-64, 1071 (West 1956).

2. 49 U.S.C. sec. 306(a)(1), 307(a), 308 (a) (1964).

3. 57 Calif. L. Rev. 518, 521 (1969).

4. *Id.* at 521-22.

5. *Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755, 762 (9th Cir. 1970). The Ninth Circuit's opinion, also, contains an excellent summary of the facts of this case.

petitors' application would be opposed with or without probable cause. This opposition would be pursued through all stages of administrative and judicial review. Only by abandoning pending applications and limiting or refraining from filing further applications, could the competitors of the large truckers avoid such opposition.

The scheme of the large truckers to lessen competition succeeded. Applications to the PUC and ICC by competitors of the large truckers were defeated, delayed, or restricted, depleting the resources of the smaller companies so that they were deterred from instituting or pursuing applications. Thus, the joint activities of the large truckers effectively foreclosed their competitors from access to the PUC, the ICC, and to the courts. In effect, the large trucking companies supplanted the PUC as the regulator of trucking in California.

Trucking Unlimited was one of the small competitors of the large trucking companies. Together with other smaller trucking firms that were adversely affected by the activities of the larger companies, Trucking Unlimited brought suit<sup>6</sup> in 1966 in the Federal District Court for the Northern District of California. The complaint alleged that the attempt of the large trucking companies to deny their competitors access to the PUC was a violation of the federal antitrust laws.<sup>7</sup> The district court,<sup>8</sup> however, relying on *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*<sup>9</sup> and *United Mine Workers v. Pennington*<sup>10</sup> dismissed the complaint for failure to state a cause of action.<sup>11</sup> On appeal, the Ninth Circuit reversed the holding of the district court and remanded the case for further proceedings.<sup>12</sup> The court found that the dismissal was improper for two reasons. First, the court concluded that "the *Noerr-Pennington* defense does not bar relief when a conspiracy to employ judicial and adjudicative

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6. The suit was brought under sec. 4 of the Clayton Act, 15 U.S.C. sec. 15, for injunctive relief and damages. Sec. 4 of the Clayton Act allows any person injured in his business or property by violation of the antitrust laws to sue for treble damages.

7. Specifically, the complaint alleged violation of sec. 1 and sec. 2 of the Sherman Act, 15 U.S.C. sec. 1-2. But the main thrust of the complaint was a conspiracy among the large truckers in restraint of trade, sec. 1 of the Sherman Act.

8. *Trucking Unlimited v. California Motor Transport Co.*, 1967 Trade Cas. 72, 298 (N.D. Cal. 1967).

9. *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

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

11. Taken together, *Noerr* and *Pennington* basically hold that attempts to influence legislation or public officials are immune from the antitrust laws even if such attempts have an anticompetitive effect. These two decisions will be dealt with at length later in this comment.

12. *Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755 (9th Cir. 1970).

processes in a scheme to restrain trade is alleged.”<sup>13</sup> Second, the court held that even if the *Noerr-Pennington* defense applied to adjudicative processes, the defendants’ conduct in this case fell within the *Noerr-Pennington* defense “sham exception”<sup>14</sup> which allows application of the antitrust laws to defendants’ conduct.<sup>15</sup>

The United States Supreme Court affirmed, in part, the decision of the Ninth Circuit.<sup>16</sup> The majority’s opinion, delivered by Justice Douglas concluded:

. . . (1) that any carrier has the right of access to agencies and courts, within the limits, of course, of their prescribed procedures, in order to defeat applications of its competitors for certificates as highway carriers; and (2) that its purpose to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts may be implicit in that opposition.<sup>17</sup>

However, the Court further warned:

First Amendment rights may not be used as the means or pretext for achieving “substantive evils” . . . which the legislature has the power to control. . . . A combination of entrepreneurs to harass and deter their competitors from having “free and unlimited access” to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another. . . . If the end result is unlawful, it matters not that the means used in violation may be lawful.<sup>18</sup>

Finally, the Court declared that the conduct of the large truckers fell “within the ‘sham exception’ in the *Noerr* case, as adapted to the adjudicatory process.”<sup>19</sup>

13. *Id.* at 760.

14. The “sham exception” to the *Noerr-Pennington* defense is derived from the *Noerr* case. If a campaign ostensibly directed toward influencing governmental action is really an attempt to directly interfere with business relationships of a competitor, the antitrust laws are applicable. See *Eastern R.R. President’s Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961).

15. *Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755, 761 (9th Cir. 1970).

16. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The Ninth Circuit based its decision on two grounds: first, that *Noerr* did not apply to the adjudicative process, and, second, that even if *Noerr* did apply, the large truckers’ direct intent was to restrain trade, thus their conduct fell within the *Noerr* “sham exception.” The Supreme Court overruled the Ninth Circuit by applying the *Noerr* exemption to the adjudicative process, but upheld that court’s application of the sham exception. Justice Stewart and Justice Brennan concurred with the decision of the majority, but they saw no need to distinguish the “sham exception” in its application to legislative bodies as opposed to adjudicative or administrative bodies. Justice Powell and Justice Rehnquist took no part in the decision.

17. 404 U.S. at 515.

18. *Id.*

19. 404 U.S. at 516.

The above quoted language is significant for it marks a change in the *Noerr-Pennington* defense. The fact that the Supreme Court stated that the allegations in the complaint fell "within the 'sham exception' of the *Noerr* case as *adapted* to the adjudicative process"<sup>20</sup> indicates that some change has taken place. But in order to understand this change, a familiarity with the *Noerr* and *Pennington* cases is necessary.

*Noerr*<sup>21</sup> involved a dispute between the trucking industry and the railroad industry. The dispute arose from the fact that the trucking industry had taken from the railroads a great part of the extremely profitable business of hauling heavy freight. The railroads sought to prevent the trucking industry from making any more gains in this area. In order to do so, they hired a third party to conduct a publicity campaign designed to influence the passage of laws unfavorable to the trucking industry and to present to the public an unfavorable view of the trucking industry. The publicity campaign used the third party technique, making it appear that the publicity circulated was the view of independent citizens. When the Governor of Pennsylvania vetoed a favorable trucking bill, the truckers charged that it was the railroads' publicity campaign that had led to his action. Subsequently, the truckers filed an antitrust suit against the railroads seeking damages and an injunction restraining the railroads from any acts in furtherance of this conspiracy.<sup>22</sup>

In deciding *Noerr*, the Supreme Court considered *Parker v. Brown*,<sup>23</sup> a decision which held that a restraint of trade created pursuant to valid state action, once in effect, is immune from the antitrust laws, and extended that decision to *Noerr*. The court determined that since it is not an antitrust violation for a government to validly restrain trade, it should not be an antitrust violation to legitimately attempt to influence the government to impose that restraint of trade. The rationale of the Court was predicated upon the right of the people to make their views known to their elected representatives who then had the responsibility to decide whether such views should be given the status of laws. The *Noerr* court then stressed that the function of the antitrust laws is to regulate economic activity, not political activity.<sup>24</sup>

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20. *Id.*

21. 365 U.S. 127 (1961).

22. *Id.* at 130.

23. 317 U.S. 341 (1943).

24. The *Noerr* Court said:

In a representative democracy such as this, these branches of government

Therefore, the Court held that the railroads' actions were beyond the scope of antitrust laws.<sup>25</sup> As a warning, however, that all attempts to influence governmental action may not be immune to the antitrust laws, the Court announced the "sham exception." This pronouncement recognized that some attempts to influence governmental action may be nothing more than a "sham" to hide an actual purpose of direct interference with a competitors' business relations. Even though the railroads in *Noerr* conducted an intensive, perhaps even malicious, lobbying campaign against the railroads, the Court found their lobbying activities a genuine attempt to influence legislation and not a "sham."<sup>26</sup>

Four years after the *Noerr* decision, the Supreme Court decided the *Pennington* case.<sup>27</sup> In this case the United Mine Workers, and various large mine operators had sought to drive smaller coal producers out of business. As a part of their plan to do this, they attempted to influence governmental decision. Primarily, they strove to persuade the Secretary of Labor to set a higher minimum wage for the employees of those coal producers who sold to the Tennessee Valley Authority. *Pennington* was a small coal producer whom the United Mine Workers sued for welfare fund payments due under the union's collective bargaining contract. *Pennington* then counterclaimed asking for treble damages, alleging a violation of the antitrust laws by the larger coal companies and the union in seeking to drive the smaller producers out of the industry.<sup>28</sup>

The Supreme Court in *Pennington* held that the efforts to influence the Secretary of Labor and the TVA officials were exempt under *Noerr*.<sup>29</sup> In so holding the Court made no mention of the "sham exception" of *Noerr*. The Court stated:

The Sherman Act, it was held [in *Noerr*], was not intended to bar concerted action of this kind even though the resulting official action damaged other competitors at whom the campaign

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act on behalf of the people and, 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. 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. 365 U.S. at 137.

25. *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961).

26. 365 U.S. at 144.

27. 381 U.S. 657 (1965).

28. *Id.* at 659.

29. *Id.* at 670.

was aimed. Furthermore, the legality of the conduct "was not at all affected by any anticompetitive purpose it may have had . . . even though the "sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long distance freight business," . . . Nothing could be clearer from the Court's opinion [in *Noerr*] than that anticompetitive purpose did not illegalize the conduct there involved.<sup>30</sup>

The Court then expanded the *Noerr* doctrine to include attempts to influence the executive branch of government:

Joint efforts to influence public officials do not violate antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act.<sup>31</sup>

The *Noerr* "sham exception" had warned that where the actual purpose of an attempt to influence the government is to destroy a competitor, that conduct will not be exempt from the antitrust laws.<sup>32</sup> *Pennington*, by failing to mention the *Noerr* "sham exception", implies that any attempt to influence the government is exempt from the antitrust laws.<sup>33</sup> If such an analysis is valid, *Pennington* broadens considerably the scope of the *Noerr* exemption.<sup>34</sup>

How then does the decision of the Supreme Court in *Trucking Unlimited*<sup>35</sup> affect the *Noerr* and *Pennington* decisions? First, while *Noerr* and *Pennington* consider only the legislative and executive functions of government, *Trucking Unlimited* applies the *Noerr-Pennington* exemption to the adjudicative process.<sup>36</sup> Since there had been some differences of opinion as to the applicability of *Noerr* to the adjudicative process among the lower courts,<sup>37</sup> *Trucking Unlimited* definitely establishes that the *Noerr* exemption applies to the ad-

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30. 381 U.S. at 669.

31. *Id.* at 670.

32. 365 U.S. at 144.

33. *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965).

34. *See Note, Application of the Sherman Act to Attempts to Influence Government Action*, 81 *Harvard L. Rev.* 847, at 852. The author suggests the reason for this difference between *Noerr* and *Pennington* is that *Pennington* ignores the general principle underlying *Noerr*: that the Sherman Act should be applied to activity governed by economic mechanisms, but should permit political decisions to be responsive to the political processes. *Pennington*, thus, concentrates solely on political considerations, ignoring the economic considerations.

35. 404 U.S. 508 (1972).

36. *Id.* at 510-11.

37. For example, a federal district court in the 7th Circuit applied the *Noerr* exemption to the adjudicative process. *See Brackens Shopping Center, Inc. v. Ruwe*, 273 F. Supp. 606 (S.D. Ill. 1967). Courts in the 8th and 9th Circuits, however, refused to apply the *Noerr* exemption to the adjudicatory process. *See United States v. Otter Trail Power Co.*, 331 F. Supp. 54 (D. Minn. 1971) and *Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755 (9th Cir. 1970).

judicative process. More importantly, however, *Trucking Unlimited* reaffirms the "sham exception" which was expounded in *Noerr* and omitted in *Pennington*, for the decision proclaims that although every one has the right of access to adjudicative processes to defeat his competitor, implicit in such opposition may be the desire to eliminate him as a competitor. Such a purpose is illegal for it violates the anti-trust laws, and any conduct to achieve that end cannot be sanctioned.<sup>38</sup> Not only does *Trucking Unlimited* reaffirm the *Noerr* "sham exception", it also strengthens it by broadening its scope so that certain activities permitted in the legislative area are forbidden in the adjudicative process. The Court said:

Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. . . . One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused . . . . Insofar as administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."<sup>39</sup>

The impact of *Trucking Unlimited* may well extend to other areas in which *Noerr* and *Pennington* have been cited as authorities. *Noerr* has been cited as supporting the first amendment right of assembly.<sup>40</sup> *Trucking Unlimited* affirms the right of association as applied to the adjudicative process.<sup>41</sup>

*Noerr* has also been cited<sup>42</sup> as strongly supporting the state action exemption as enunciated in *Parker v. Brown*.<sup>43</sup> Most likely, *Trucking Unlimited* will not affect the *Parker* decision which gave an exemption from the antitrust laws to legitimate state action. There is, however, some language in *Trucking Unlimited* that might cause some concern to advocates of the state action exemption. The Supreme Court in *Trucking Unlimited* stated in dictum that regarding the anti-trust laws: "If the end result is unlawful, it matters not that the

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38. 404 U.S. at 515.

39. *Id.* at 513.

40. N.A.A.C.P. v. Button, 371 U.S. 415, 430 (1963), *United States v. Robel*, 389 U.S. 258, 283 (1967) (White and Harlan, J.J., dissenting), and *Williams v. Rhodes*, 393 U.S. 23, 42 (1968) (Harlan, J. concurring).

41. 404 U.S. at 510-11.

42. See *Allstate Ins. v. Lanier*, 361 F.2d (4th Cir. 1966), *cert. denied*, 385 U.S. 930 (1966), *Wiggins Airways v. Mass. Port Authority*, 362 F.2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947 (1966), and *Alabama Power Co. v. Alabama Electric Coop.*, 394 F.2d 672 (5th Cir. 1968), *cert. denied*, 393 U.S. 488 (1968).

43. 317 U.S. 341 (1943).

means used in violation may be lawful."<sup>44</sup> If lower courts take these words literally, they could undermine the state action exemption, for if the end is unlawful, (a restraint of trade or monopoly), it matters not that the means (state action) are legitimate. It remains to be seen if such an interpretation will be given to these words in *Trucking Unlimited*.<sup>45</sup>

The proposition for which *Noerr* and *Pennington* is most frequently cited is that attempts to influence the government as policy maker are exempt from the antitrust laws. The lower court cases decided after *Noerr* and before *Pennington* were generally faithful to *Noerr* and its "sham exception." These courts apparently realized that *Noerr* had not given blanket protection to all attempts to influence governmental action.<sup>46</sup> When *Pennington* was decided, however, there arose differences between lower courts concerning the application of the sham exception. For example, one court held that the *Noerr-Pennington* exemption applied even though the direct intent of the party seeking to influence the governmental action was to put his competitor out of business.<sup>47</sup> Similarly, another court held that an inquiry into motive behind an attempt to influence the government was foreclosed by *Noerr* and *Pennington*.<sup>48</sup> On the other hand, some courts have deemed it appropriate to inquire as to the motive of the parties attempting to influence the government, and have refused to exempt from the antitrust laws attempts to influence governmental policy action which utilized fraud, misrepresentation, and coercion.<sup>49</sup> These courts viewed such attempts not as legitimate efforts to influence political policy, but as attempts to drive competitors from business, thus viewing the "sham exception" as encompassing more than it did in *Noerr*.

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44. 404 U.S. at 515.

45. There are also a small number of cases which have cited *Noerr* as authority for the proposition that if legitimate activities of the market place harm a competitor, no antitrust violation results. See, e.g., *United States v. American National Gas Co.*, 206 F. Supp. 908 (N.D. Ill. 1962), and *Indus. Bldg. Materials, Inc. v. Interchemical Corp.*, 278 F. Supp. 938 (C.D. Cal. 1967). The language of *Trucking Unlimited* concerning illegal ends and legitimate means casts doubt upon the validity of that proposition today. In light of *Trucking Unlimited* the proposition is probably not valid as regards the adjudicative function of government, and courts may now be reluctant to apply it to the legislative and executive functions of government.

46. See *Union Carbide v. Nisley*, 300 F.2d 561 (10th Cir. 1962), cert. denied, 371 U.S. 801 (1963); *United States v. Northern California Pharm. Ass'n*, 235 F. Supp. 378 (N.D. Cal. 1964).

47. *Schenley Indus., Inc. v. N.J. Wine & Spirit Wholesalers*, 272 F. Supp. 872 (D. N.J. 1967).

48. *Brackens Shopping Center, Inc. v. Ruwe*, 273 F. Supp. 606 (S.D. Ill. 1967).

49. *Control Data Corp. v. I.B.M. Corp.*, 306 F. Supp. 839 (D. Minn. 1969), aff'd 430 F.2d 1277 (8th Cir. 1970), *Woods Exploration and Prod. Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), and *Sacramento Coca Cola Bottling Co. v. Teamsters Local 150*, 440 F.2d 1096 (9th Cir. 1971).

By reaffirming and strengthening the "sham exception" of *Noerr*,<sup>50</sup> *Trucking Unlimited* suggests that the Supreme Court views the latter group of above cases as correct. It is submitted that *Trucking Unlimited* puts to rest the notion held by some lower courts that the *Noerr* exemption, as expanded by *Pennington*, applies irrespective of the motive behind an attempt to influence government policy making. Although *Trucking Unlimited* deals with the adjudicative process of government, its emphasis on the *Noerr* "sham exception" perhaps indicates that the Supreme Court considers the "sham exception" to be an integral part of the *Noerr* exemption and, thus, still very much applicable even in the policy making area.

There remain two areas in which courts have cited *Noerr* and *Pennington* as authority; conspiracy with government officials and influencing the government as a buyer or seller. The first case involving conspiracy with a government official in which *Noerr* was cited was *Parmalee Transp. Co. v. Keeshin*.<sup>51</sup> In *Parmalee* the Seventh Circuit held that no antitrust violation occurred where an ICC (member) had wrongfully aided a company in securing an exclusive contract to transfer baggage at a railroad terminal. The *Parmalee* court applied the "sham exception" of *Noerr* with its political activity rationale to this attempt to influence a public official whose function was more that of a decision maker rather than that of a policy maker.<sup>52</sup> Three years later, the Ninth Circuit in *Harmon v. Valley National Bank*<sup>53</sup> reached a different conclusion. In that case, the court held that where the attorney general was a participant in a scheme to place a financial institution in receivership, as part of a larger scheme to monopolize financial operations in an area, an antitrust violation could be found. The court held that in such a situation the *Noerr* exemption was inapplicable.<sup>54</sup> Both *Parmalee* and *Harmon* were decided before *Pennington*. After *Pennington* was decided, two lower court cases considered the *Noerr* exemption in relation to a conspiracy with governmental officials to restrain commerce. In *Independent Taxicab Operators Ass'n v. Yellow Cab Co.*,<sup>55</sup> a district court decision, the court, citing *Harmon*, stated that *Noerr* did not exempt from the antitrust laws conspiracies involving public officials.<sup>56</sup> The next year, the Court of Appeals for the Ninth Circuit in

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50. See p. 375 (supra).

51. 292 F.2d 794 (7th Cir. 1961).

52. *Id.* at 805.

53. 339 F.2d 564 (9th Cir. 1964).

54. *Id.* at 566.

55. 278 F. Supp. 979 (N.D. Cal. 1968).

56. *Id.* at 985.

*Sun Valley Disposal Co. v. Silver State Disposal Co.* held that the defendants' actions in obtaining an exclusive franchise for garbage pick-up and disposal was not violative of the antitrust laws.<sup>57</sup> Involved in the defendants' actions was an alleged participation by some county commissioners in a conspiracy to obtain an exclusive franchise. The court noted that while *Harmon* held that an attempt to influence an official, when part of a broader scheme, was a violation of the anti-trust act, *Pennington* has subsequently held that joint efforts to influence public officials were not antitrust violations either standing alone or as a part of a broader scheme.<sup>58</sup> The *Sun Valley* court, having concluded that *Harmon* had been overruled by *Pennington*, therefore applied the *Noerr* exemption, as expanded by *Pennington*, to the area of governmental participation in a conspiracy.

The decision by the Supreme Court in *Trucking Unlimited* however, endangers the viability of the *Sun Valley* and *Parmalee* decisions. First, *Trucking Unlimited*, in enlarging the "sham exception" to *Noerr*, retreats from *Pennington* by stating that an illegal end may make the means illegal.<sup>59</sup> In light of this statement, a court should be hesitant to hold, as did *Pennington*, that joint efforts to influence the government, even though part of a larger scheme to restrain trade, do not violate the antitrust laws. Second, *Trucking Unlimited* stresses that the *Noerr* exemption is based on political activity, and that unethical conduct, though permitted in the political arena, is not allowable in the adjudicative process.<sup>60</sup> A conspiracy between private parties and government officials to restrain trade may go well beyond the political arena. Thus, a lower court will now have to decide whether or not a conspiracy involving governmental officials is concerned with the legislative or adjudicative function of government. If it involves the adjudicative process, such unethical conduct as government conspiracy will fall within the scope of the "sham exception" as broadened by *Trucking Unlimited*, and no immunity will exist. *Parmalee*, *Harmon*, and *Sun Valley* involved activities of an ICC member, an attorney general, and a county commissioner; all their activities concerned adjudicative rather than policy making functions, since their duties were not to make policy, but to carry out policies already made. Thus, it is submitted, only the *Harmon* decision is consistent with the rationale of *Trucking Unlimited*.

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57. 420 F.2d 341 (9th Cir. 1969).

58. *Id.* at 342.

59. *See* p. 379 (*supra*).

60. *See* p. 379 (*supra*).

Finally, there are two cases which cite *Noerr* as authority in the area of the government as buyer. These two cases reached opposite conclusions. *United States v. Johns-Manville Corp.*<sup>61</sup> held that any activity engaged in to influence the decisions of public officials on pipe specifications could not be the basis of a finding of a violation of the antitrust laws. The court cited *Noerr* as authority for its position.<sup>62</sup> In a later decision, *George R. Whitten Inc. v. Paddock Pool Builders, Inc.*,<sup>63</sup> the First Circuit held that the *Noerr* exemption from the antitrust laws did not apply to an effort to influence public officials to adopt certain specifications for swimming pools. The court's rationale was that *Noerr* applied to political activity and that attempts to influence government officials as to purchases were more in the economic than the political realm. The court said:

The state legislatures, by enacting statutes requiring public bidding, have decreed that government purchases will be made according to strictly economic criteria. Paddock is free to seek legislative change in this basic policy, but until such change is secured, Paddock's dealings with officials who administer the bid statutes should be subject to the same limitations as its dealings with private consumers. Indeed, to hold otherwise might impair the effectiveness of competitive bidding.<sup>64</sup>

In *Hecht v. Pro Football*,<sup>65</sup> which involved the government as "seller", the D.C. Circuit held that although the D.C. Armory Board had the right to provide a stadium for athletic events, Congress did not intend for their activities to be outside the scope of the antitrust laws. The court found that the lease granted by the board to a professional football team violated the antitrust laws because the lease prohibited all other professional football teams from using the stadium. Stating that the *Noerr* exemption could not shelter the defendants from the application of the antitrust laws, the court stressed that *Noerr's* emphasis was on insuring uninhibited access to government policy makers. In the area of the government as seller and buyer, *Hecht* viewed a policy maker as one who could make significant policy determinations and not merely technical decisions.<sup>66</sup> *Hecht*, thus, agrees with *Paddock Pool* that the *Noerr* exemption does not apply to influencing the government as seller or buyer. An interest-

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61. 259 F. Supp. 440 (E.D. Penn. 1966).

62. *Id.* at 452-53.

63. 424 F.2d 25 (1st Cir. 1970).

64. *Id.* at 33.

65. 444 F.2d 931 (D.C. Cir. 1971).

66. *Id.* at 941.

ing aspect of *Hecht* is that the court considered the Ninth Circuit's opinion in *Trucking Unlimited* and its view that the procurement function of government was similar to an adjudicative process:

The court in *Trucking Unlimited* apparently considered that an adjudicative agency was in a position similar to a governmental agency charged with procurement, as in *Paddock Pool*. In neither case was the governmental agency in a position to make governmental policy, it was obligated to carry out the policy as already made, hence the rationale of *Noerr-Pennington*, guaranteeing access of private parties in combinations which would otherwise be illegal under the antitrust laws to influence such agency simply did not apply.<sup>67</sup>

If the Ninth Circuit view in *Trucking Unlimited*, that the government as buyer or seller is exercising an adjudicative function, is implicit in the Supreme Court's opinion, *Trucking Unlimited* will apply to the government as buyer or seller. Since *Trucking Unlimited* broadens the "sham exception"<sup>68</sup> of *Noerr*, certain activities condoned in the legislative process will not be condoned in the area of influencing governmental buying and selling. If, for example, any fraud is involved in influencing government to buy or sell, no antitrust exemption will be permitted. If the actual purpose of an attempt to influence governmental buying and selling is to restrain trade, then *Trucking Unlimited* makes it clear that such conduct is illegal: "If the end result is unlawful, it matters not that the means used in violation may be lawful."<sup>69</sup> Thus, if *Trucking Unlimited* applies to the area of governmental buying and selling, then the view expressed in *Paddock Pool* and *Hecht* is compatible.

*Trucking Unlimited*, in stressing that the adjudicative process must be treated differently from the legislative process, affirms that the antitrust laws are an economic rather than a political measure. In upholding the "sham exception" and broadening it in the adjudicative area, the Court has perhaps reversed a trend, started by *Pennington*, to disregard all considerations of intents in applications of the *Noerr* exemption. Now, perhaps, with lower courts made aware by *Trucking Unlimited* that certain unethical practices exempted by *Noerr* in the legislative area will not be condoned in the adjudicative area, such practices as government participation in conspiracy and influencing the government, as buyer, to employ questionable standards will cease.

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67. *Id.* at 942.

68. *See* p. 379 (*supra*).

69. 404 U.S. at 515.

Perhaps, the most difficult aspect of *Trucking Unlimited* for courts to apply will be the distinction between policy making and adjudicative processes. This distinction is important, for in the adjudicative area, the "sham exception" is broader. For example, certain types of governmental involvement in a conspiracy to restrain trade might possibly escape the more narrow "sham exception" of the policy making process, but "[M]isrepresentations condoned in the political arena are not immunized when used in the adjudicatory process."<sup>70</sup> Thus, the scope of the *Noerr* exemption in future decisions will depend upon how each particular court answers this question: Is the alleged violation an attempt to influence a governmental policy making process or an attempt to influence an adjudicative process?

JOHN PATRICK JOYCE, JR.

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70. 404 U.S. 513.