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## THE EXCEPTION OF *NOERR-PENNINGTON* MATERIALS FROM DISCOVERY UNDER THE PETITION CLAUSE OF THE FIRST AMENDMENT

Parties that jointly attempt to influence government action, either by petitioning the government or by commencing or supporting litigation, are provided with immunity from the federal antitrust laws<sup>1</sup> under the *Noerr-Pennington* doctrine.<sup>2</sup> Under *Noerr-*

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<sup>1</sup> See, e.g., 15 U.S.C. §§ 1-11 (1985). The Sherman Act provides in part that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” *Id.* § 1.

Public outcry over monopolistic business practices led to a broad political consensus favoring government regulation. See JOHN J. FLYNN, *FEDERALISM AND STATE ANTITRUST REGULATION* 90-91 nn.336-37 (1964). Prior to the enactment of the Sherman Act in 1890, 26 states had enacted their own individual antitrust laws. *Id.* Federal action was prompted when it became clear that most state regulations were unenforceable on constitutional grounds and inadequate for purposes of uniformity. See *id.* at 10-14 (tracing growth of federalism and subsequent defeat of state antitrust laws on constitutional grounds); EARL W. KINTNER, *AN ANTITRUST PRIMER* 9-10 (2d ed. 1973) (viewing federal antitrust regulation as cure to complexities and confusion of state regulation).

Although many of the state laws were aimed at elementary forms of monopoly or interference with free trade, some might be considered true precursors to the Sherman Antitrust Act. See *id.* at 8-9. In fact, one of the purposes cited by Senator Sherman for his bill was to “supplement the enforcement of” the state laws. 21 CONG. REC. 2457 (1890), reprinted in 1 *State Antitrust Practice and Statutes*, ABA ANTITRUST SEC. 20 (1990).

The federal antitrust statutes are much broader than those based on the common law of the states, and include provisions prohibiting unlawful contracts, combinations and conspiracies in restraint of trade, monopolization and attempts to monopolize, and unfair methods of competition. See THOMAS V. VAKERICS, *ANTITRUST BASICS* § 1.01, at 1-2 to 1-3 (1992).

The primary rationale behind all antitrust regulation is the belief that the laws serve to protect the economy from the abuses inherent in monopolization. See DOMINICK T. ARMENTANO, *ANTITRUST POLICY: THE CASE FOR REPEAL* 9 (1986). Monopoly is the antithesis of the much valued notion in America that competition in business will lead to greater business efficiency. See *id.*; see also MARSHALL C. HOWARD, *ANTITRUST AND TRADE REGULATION* 1 (1983) (“Basic public policy toward business in the American economy has been to promote and maintain competition as the most desirable means of allocating resources.”); VAKERICS, *supra*, § 1.01, at 1-2 (“[U]nrestrained competition will result in the most favorable allocation of economic resources and the lowest prices possible.”).

<sup>2</sup> The *Noerr-Pennington* doctrine is the product of three seminal cases decided by the Supreme Court from 1961 through 1972: *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); and *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). See James D. Hurwitz, *Abuse of Government Processes, The First Amendment, and the Bound-*

*Pennington*, such activities are protected, even if part of a larger scheme of anticompetitive conduct.<sup>3</sup> This exclusion from the antitrust laws is founded primarily on the First Amendment right to petition the government.<sup>4</sup>

Parties that have engaged in activity protected by the *Noerr-Pennington* doctrine<sup>5</sup> have argued that discovery into these activities should not be allowed.<sup>6</sup> The principal argument why such dis-

*aries of Noerr*, 74 GEO. L.J. 65 (1985); see also *infra* notes 3-4 and accompanying text (tracing development of *Noerr-Pennington* through case law); Lawrence A. Sullivan, *Developments in the Noerr Doctrine*, 56 ANTITRUST L.J. 361 (1987) (explaining doctrine).

<sup>3</sup> See *California Motor*, 404 U.S. at 510-11 (right of petition includes access to courts to advocate personal business interests without violating antitrust laws); *Pennington*, 381 U.S. at 670 (recognizing that "*Noerr* shields from Sherman Act concerted efforts to influence public officials regardless of intent or purpose").

<sup>4</sup> See *Noerr*, 365 U.S. at 136-38. The *Noerr* Court stated that even if the "essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act" was not itself conclusive on the question of whether the Act was applicable, the question *was* conclusively settled when this essential dissimilarity [was] considered along with other difficulties that would be presented by a holding that the Sherman Act forb[ade] associations for the purpose of influencing the passage or enforcement of laws[:]

In the first place, such a holding would substantially impair the power of the government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government 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. . . . Secondly, and of at least equal significance, such a construction of the Sherman Act 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 invade these freedoms.

*Id.*; see also *California Motor*, 404 U.S. at 510-11 (access to courts is form of right to petition which must also be protected under the *Noerr-Pennington* doctrine).

<sup>5</sup> See Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 80 (1977). The scope of the *Noerr-Pennington* doctrine has proven difficult to define "largely because of the variety of governmental institutions whose decisions affect private economic interests and the diverse means that private parties utilize in attempting to influence these institutions." *Id.* For example, private anticompetitive ends may be sought without antitrust liability by "lobbying the legislature to enact a statute, petitioning the executive to enforce a law in a certain manner, opposing the grant of a license by an administrative body to a competitor, [or by] bringing a lawsuit against a competitor to reduce competition . . ." *Id.* at 80-81 (citations omitted). Further complicating the determination of the exact scope of *Noerr-Pennington* is the fact that the very right to petition embodied in the first amendment is a "right whose boundaries remain uncertain." *Id.* at 81.

<sup>6</sup> See *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 51 (4th Cir. 1981) (holding *Noerr-Pennington* merely an exemption from antitrust liability and not a bar to discovery); *Australia/Eastern U.S.A. Shipping Conference v. United States*, 537 F. Supp. 807, 808 (D.D.C. 1982) (balancing harm to First Amendment values against need for information sought).

covery should be prohibited is that forced disclosure of materials produced during the course of protected activities will have a "chilling effect" on the very petitioning process the doctrine seeks to protect.<sup>7</sup> The few cases addressing this issue have been inconsistent in their holdings and in the focus of their inquiry.<sup>8</sup>

This Note will discuss the methods used by the courts to determine whether the discovery of *Noerr-Pennington* materials will be allowed and under what circumstances. Part One will examine the trilogy of Supreme Court decisions creating this doctrine. Part Two will discuss the inconsistent decisions addressing the application of the *Noerr-Pennington* doctrine as a bar to discovery, and

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<sup>7</sup> See *Carolina Power*, 666 F.2d at 53; *Australia/Eastern*, 537 F. Supp. at 808-09. "[T]here is no doubt that the overwhelming weight of authority is to the effect that forced disclosure of first amendment activity creates a chilling effect which must be balanced against the interests in obtaining the information." *Id.* at 810.

<sup>8</sup> See *Carolina Power*, 666 F.2d at 52. In *Carolina Power*, the Fourth Circuit held that *Noerr-Pennington* did not apply to discovery. *Id.* In *Australia/Eastern*, the District Court for the District of Columbia criticized the *Carolina Power* court's casual dismissal of the doctrine's applicability as a bar to discovery, refusing to read that case "to stand for the proposition that the harm to first amendment values attendant upon forced disclosure of *Noerr*-protected conduct should not be weighed against the interests favoring disclosure." *Australia/Eastern*, 537 F. Supp. at 809. A similar balancing test has been employed by several courts to determine the admissibility of *Noerr-Pennington*-protected evidence at trial. See *Feminist Women's Health Ctr. v. Mohammad*, 586 F.2d 530, 543 n.7 (5th Cir. 1978) ("Admissibility . . . should be governed by a test that weighs the probativeness of and the plaintiff's need for the evidence against the danger that admission of the evidence will prejudice the defendant's first amendment rights."); *Lamb Enter., Inc. v. Toledo Blade Co.*, 461 F.2d 506, 516 (6th Cir. 1972) (deferring to trial judge's decision not to admit *Noerr-Pennington*-protected evidence where prejudicial effect outweighed probative value).

Authority for admitting *Noerr-Pennington*-protected conduct into evidence at trial stems from the *Pennington* case itself:

It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis of a suit, may nevertheless be introduced if it tends to show the purpose and character of the particular transactions under scrutiny."

*United Mine Workers v. Pennington*, 381 U.S. 657, 670-71 n.3 (quoting *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683, 705 (1948)).

Still other courts have avoided the issue of whether or not the doctrine may be used in and of itself as a bar to discovery by coupling the applicability of the doctrine as a bar to antitrust liability with other relevant rules of discovery and admissibility. See *In re Burlington Northern, Inc.*, 822 F.2d 518, 523-32 (5th Cir. 1987) (doctrine as possible bar to discovery in conjunction with traditionally recognized attorney-client and work product immunity exemptions from discovery), *cert. denied*, 484 U.S. 1007 (1988); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1257, 1279 (N.D. Ohio 1981) (plaintiffs barred from inquiry designed solely to trigger admission of doctrine-protected conduct unless defendants first "open the door" by introducing such privileged conduct in defending suit).

suggest that the proper focus is not the applicability of the doctrine to discovery matters, but rather a case by case evaluation of whether a party's First Amendment right to petition outweighs its adversary's interest in obtaining discovery. Finally, Part Three will propose a refinement to this balancing approach as suggested in a recent New York district court decision.

### I. THE NOERR-PENNINGTON DOCTRINE

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>9</sup> a group of trucking companies brought suit against a number of railroads, a professional railroad association, and a public relations firm, alleging that the defendants violated the Sherman Act by conspiring to monopolize the long-distance freight business.<sup>10</sup> The plaintiffs alleged that the railroads hired the public relations firm to conduct a smear campaign against the trucking industry in order to eliminate it as a competitor.<sup>11</sup> Specifically, plaintiffs charged that the smear campaign had succeeded in persuading the Governor of Pennsylvania to veto a bill that was favorable to the trucking industry.<sup>12</sup> Plaintiffs asked that the defendants be restrained from attempting to exert any more pressure on the Governor or the legislature in furtherance of the alleged conspiracy.<sup>13</sup>

The Supreme Court utilized a three-pronged rationale<sup>14</sup> in holding 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 a monopoly."<sup>15</sup> First, the Court noted that the association of the railroads and the public relations firm bore little resemblance to the combinations normally held violative of the Sherman Act.<sup>16</sup> Second, the Court stated that

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<sup>9</sup> 365 U.S. 127 (1961).

<sup>10</sup> *Id.* at 129; see also *supra* note 1 (discussing Sherman Act).

<sup>11</sup> See *Noerr*, 365 U.S. at 129-30.

<sup>12</sup> *Id.* at 130. The bill in question was known as the "Fair Truck Bill," which would have given truckers an advantage in the long-distance freight industry by permitting trucks to carry heavier loads over Pennsylvania roads. See *id.*

<sup>13</sup> *Id.* at 130-31.

<sup>14</sup> See *id.* at 136-38.

<sup>15</sup> *Id.* at 136.

<sup>16</sup> See *id.*, 365 U.S. at 136. The Court reasoned that combinations in restraint of trade were "ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away

a representative democracy depends upon the ability of the people to make their wishes known to their representatives, and that to impute a congressional intent to regulate political activity, as opposed to business activity, by restricting public access to these representatives had no basis in the legislative history of the Sherman Act.<sup>17</sup> Finally, the Court stressed the right of the people to petition the government under the First Amendment<sup>18</sup> and refused to impute any congressional intent to invade this freedom with the passage of the Sherman Act.<sup>19</sup>

The Court stated that even if a party intended an anticompetitive result in its campaign to influence the legislature, such conduct was not within the scope of the Sherman Act.<sup>20</sup> The Court, however, recognized that the imposition of antitrust liability would be justifiable if the effort to influence governmental action was a mere "sham" calculated to obscure an attempt to interfere directly with a competitor's business.<sup>21</sup>

The doctrine was developed further in *United Mine Workers*

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the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements." *Id.* (citations omitted).

<sup>17</sup> *See id.* at 137.

<sup>18</sup> U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* (emphasis added).

<sup>19</sup> *Noerr*, 365 U.S. at 137-38.

<sup>20</sup> *Id.* at 143-44.

<sup>21</sup> *Id.* at 143-44. In *Noerr*, there was no issue as to whether or not the railroads had made genuine attempts to influence legislation; thus, the anticompetitive motives behind such efforts were not violative of the Sherman Act. *Id.* at 144.

Parties have been uniformly unsuccessful in attempting to categorize legislative petitioning activity as a sham. *See* Milton Handler & Richard A. De Sevo, *The Noerr Doctrine and its Sham Exception*, 6 CARDOZO L. REV. 1, 18 (1984). It has been suggested that "the only evidence that would demonstrate impropriety would be in the [antitrust defendant's] own admission that his [legislative petitioning activities] were undertaken in bad faith." *See* PHILIP E. AREEDA & DONALD F. TURNER, *ANTITRUST LAW* ¶ 203a, at 40 (1978). Only in the judicial forum, with its higher and more objective standards for such abuses of process, have parties been successful in breaking through the protection of *Noerr-Pennington*. *See* Sullivan, *supra* note 2, at 362-63.

Unlike the infinite possible objectives of legislative petitions, adjudication occurs within bounds fixed both by existing statutes and, to some extent, by the precedents of the tribunals involved. Such boundaries may provide administrative [and judicial] criteria for determining whether the defendant used adjudication in good faith. Thus, the bad faith or "sham" exception to *Noerr* immunity can be more readily applied here than in the legislative context.

AREEDA & TURNER, *supra* ¶ 203b, at 41. However, even in an adjudicatory context, it is difficult to discern the existence of a "sham". *See id.* ¶ 203b, at 42.

*v. Pennington*.<sup>22</sup> In *Pennington*, the partners of a small coal mining company sued trustees of the United Mine Workers of America (UMW), alleging that attempts by UMW and certain large coal operators to influence the Secretary of Labor to establish a higher minimum wage in the mining industry were part of an illegal conspiracy to eliminate the competition of smaller coal companies.<sup>23</sup> The Court found reversible error in the trial judge's failure to instruct the jury that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."<sup>24</sup> Thus, the Court reemphasized that an anticompetitive purpose does not affect the legality of the act itself.<sup>25</sup>

In 1972, the Supreme Court extended *Noerr-Pennington* in *California Motor Transport Co. v. Trucking Unlimited*<sup>26</sup> to include certain activities beyond attempts to influence the legislature or the executive branch.<sup>27</sup> In *California Motor*, the defendant motor carriers allegedly monopolized trade in the transportation of goods by instituting administrative and judicial proceedings in opposition to the plaintiffs' applications for motor carrier operating rights in California.<sup>28</sup> The Court extended the right of petition protected in *Noerr* and *Pennington* to include the rights of groups with common interests to "use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view."<sup>29</sup>

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<sup>22</sup> 381 U.S. 657 (1965).

<sup>23</sup> *Id.* at 659-61. The Walsh-Healey Act requires all parties under contract with any branch or agency of the United States government to pay their employees no less than the minimum wage as determined by the Secretary of Labor. 41 U.S.C. § 35(b) (1978). This restriction applies to parties that for the manufacture or furnish materials valued in excess of \$10,000. *Id.* In *Pennington*, the smaller mining company alleged that UMW and several large coal companies had violated the Sherman Act by successfully petitioning the Secretary of Labor to raise the minimum wage for employees of contractors selling coal to a governmental agency, thus making it more difficult for the smaller companies to compete for sales of coal to that agency. *Pennington*, 381 U.S. at 660.

<sup>24</sup> *Id.*, at 670.

<sup>25</sup> *Id.*

<sup>26</sup> 404 U.S. 508 (1972).

<sup>27</sup> *Id.* at 510-11.

<sup>28</sup> *Id.* at 509.

<sup>29</sup> *Id.* at 510-11. In discussing the First Amendment right of all citizens to petition the government, the Court noted that this right extends to all three branches of government. *Id.* at 510. Thus, while *Noerr* concerned itself with the legislative branch, and *Pennington* with an official of the executive branch, *California Motor* necessarily included administrative agencies and the judicial system within the scope of the First Amendment right of petition. *Id.*

Although traditionally raised as an exemption from antitrust liability, *Noerr-Pen-*

The Court, however, recognized that the adversarial nature of administrative and judicial proceedings may give rise to frequent allegations of baseless litigation,<sup>30</sup> which would make it difficult for the presiding court or agency to draw a line between genuine litigation and anticompetitive abuse of the judicial or administrative processes.<sup>31</sup> While no precise standards were provided to alleviate this burden, the Court made it clear that "a pattern of baseless, repetitive claims" is an abuse of process.<sup>32</sup>

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*nington* has been extended to protect First Amendment petitioning of the government from claims brought under non-antitrust laws. *See, e.g.,* Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075, 1084 (5th Cir. 1988) ("[A]ny behavior by a private party that is protected from antitrust liability by the *Noerr-Pennington* doctrine is also outside the scope of section 1983 liability."), *cert. denied*, 491 U.S. 906 (1989); *Evers v. County of Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984) (applying *Noerr-Pennington* as defense to section 1983 claim); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1344-45 (7th Cir.) (applying *Noerr-Pennington* and "sham" exception to section 1985 conspiracy suit), *cert. denied*, 434 U.S. 975 (1977).

<sup>30</sup> *See California Motor*, 404 U.S. at 513.

<sup>31</sup> *See id.*; *see also* AREEDA & TURNER, *supra* note 21, ¶ 203b, at 42 (application of "sham" test difficult to apply in administrative or judicial context); Fischel, *supra* note 5, at 122 (applying *Noerr-Pennington* problematic due to ambiguous basis for doctrine); Earl W. Kintner & Joseph P. Bauer, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the Noerr-Pennington Doctrine*, 17 U.C. DAVIS L. REV. 549, 553 (1984) (discussing problem of drawing line between sham and legitimate governmental petitioning).

<sup>32</sup> *California Motor*, 404 U.S. at 513. Many courts have interpreted this language as a mere example of when a court might reasonably determine the existence of "sham" litigation, and not as a prerequisite to such determination. *See* Thomas A. Balmer, *Sham Litigation and the Antitrust Laws*, 29 BUFF. L. REV. 39, 49-56 (1980) (citations omitted). Other courts have held *California Motor* to require repetitive "sham" suits as a prerequisite to antitrust liability. *Id.* at 54 (citations omitted). It has been suggested that the legislative intent behind the Sherman Act justifies the prohibition of a single "sham" suit under the rationale that "[a] single, well-timed, and carefully pleaded suit, with appeals, can cost a potential competitor large amounts of money and time, even if the suit is completely frivolous." *Id.* at 49, 56.

Recently, the Ninth Circuit held that the *California Motor* Court actually identified two distinct types of "sham" activity: "misrepresentations . . . in the adjudicatory process" and the pursuit of "a pattern of baseless, repetitive claims." *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 1991) (citation omitted), *cert. granted*, 112 S. Ct 1557 (1992). Under *Columbia Pictures*, a plaintiff alleging "sham" litigation must satisfy a two-prong test: "(1) that the suit is baseless . . . ; and (2) that the suit was brought as part of an anticompetitive plan external to the underlying litigation . . ." *Id.* at 1532. Thus, "[w]hen the antitrust plaintiff challenges one suit and not a pattern, a finding of sham requires not only that the suit is baseless, but also that it has other characteristics of grave abuse, such as being coupled with actions or effects external to the suit that are themselves anticompetitive." *Id.* at 1530 (emphasis added) (citation omitted). Consequently, a single successful lawsuit alone is protected by *Noerr-Pennington* regardless of anticompetitive intent, and "it cannot be a sham as a matter of law." *Id.* at 1530-31.



## II. THE NOERR-PENNINGTON DOCTRINE AND DISCOVERY

Under Federal Rule of Civil Procedure ("FRCP") 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."<sup>33</sup> Thus, the scope of discovery is very broad, and information can be obtained regarding any matter that is reasonably calculated to lead to the discovery of admissible evidence as long as such information is not privileged.<sup>34</sup>

Privileged information refers to the formal privileges as recognized under the Federal Rules of Evidence ("FRE").<sup>35</sup> Under FRE

In direct contrast, the Fifth Circuit has rejected the argument that a successful lawsuit can never be a sham. See *In re Burlington Northern, Inc.*, 822 F.2d 518, 528 (5th Cir. 1987), cert. denied, 484 U.S. 1007 (1988). According to the *Burlington* court, "the determinative inquiry is not whether the suit was won or lost, but whether it was significantly motivated by a genuine desire for judicial relief." *Id.* (emphasis added); see also *Warner-Amex*, 858 F.2d at 1083 (reaffirming *Burlington* holding that even successful petitioning activity can constitute "sham").

<sup>33</sup> FED. R. CIV. P. 26(b)(1).

<sup>34</sup> See JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE § 7.2, at 381 (1985) (discussing broad scope of discovery under Federal Rules and in state practice).

Discontent with our system of discovery was expressed recently at the American Bar Association's 1990 Annual Meeting in Chicago, where lawyers, judges, professors, and clients universally agreed that abuse of discovery practice has rendered "[t]he Federal Rule of Civil Procedure's promise of the 'just, speedy, and inexpensive determination of every action' at best, a hollow incantation and, at worst, a cruel joke." See Loren Kieve, *Discovery Reform*, A.B.A. J., Dec. 1991, at 78, 80. Pre-trial arguments about "the scope of discovery, privilege, protective orders, the length (and place) of depositions, and so on" result primarily in the generation of more billable hours rather than the enlightenment of the litigants as to the merits of their respective cases. See *id.*

<sup>35</sup> See FED. R. EVID. 501. Article V of the Federal Rules of Evidence provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they might be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law.

*Id.*

Article V, as submitted to Congress by the Supreme Court, included proposed Rules which listed specific non-constitutional privileges that the federal courts must recognize. See H.R. REP. NO. 650, 93d Cong., 1st Sess. 8 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7082; S. REP. NO. 1277, 93d Cong., 2d Sess. 11 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7058-59. The list afforded privileged status to traditionally recognized privileged communications between lawyer-client, husband-wife, and psychotherapist-patient. See *id.* Congress, however, eliminated all of the Court's specific Rules on privileges with the enactment of Rule 501. See *id.* Under FRE 501, privileges were to be governed by principles of the common law as interpreted by the federal courts, except in the case of an element of a civil claim under

501, it is the common law, as "interpreted . . . in the light of reason and experience," that will determine the privileges applicable in federal question and criminal cases, while privileges in diversity actions will derive from state law.<sup>36</sup>

In the context of antitrust litigation, evidence of *Noerr-Pennington* activity may be relevant to show that the conduct falls within the sham exception.<sup>37</sup> In addition, under *Pennington*, evidence of protected activity may also be admissible, within the discretion of the trial court, to the extent it tends to show the purpose or character of other non-protected activity.<sup>38</sup> Assuming that material produced in the course of *Noerr-Pennington* activity is otherwise discoverable, the extent to which this material should be protected becomes an issue.

The courts agree that *Noerr-Pennington*, standing alone, does not create a privilege against discovery within the meaning of FRCP 26.<sup>39</sup> The possibility of a chilling effect on the right to petition, however, necessitates restrictions on the broad scope of discovery under the federal rules.<sup>40</sup> Consequently, there is apparent conflict among the courts regarding the proper test to be applied in determining whether discovery into *Noerr-Pennington* activities should be allowed.<sup>41</sup>

In *North Carolina Electric Membership Corp. v. Carolina*

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state law, in which any relevant privilege was to be governed by the common law of the state. *See id.* The rationale behind this change is to prevent federal law from superseding state law in substantive areas and to eliminate incentives for forum shopping. *See id.*

<sup>36</sup> *See* FED. R. EVID. 501.

<sup>37</sup> *See* *Australia/Eastern U.S.A. Shipping Conference v. United States*, 537 F. Supp. 807, 809 (D.D.C. 1982); *supra* notes 21, 30-32 and accompanying text (discussing sham exception).

<sup>38</sup> *Pennington*, 281 U.S. at 670-71 n.3 (1969); *Australia/Eastern*, 537 F. Supp. at 809 (discussing admissibility of evidence of *Noerr-Pennington* activity).

<sup>39</sup> *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 52-53 (4th Cir. 1981); *see also* *Australia/Eastern*, 537 F. Supp. at 808-10 (balancing of First Amendment interest required before discovery allowed). Several courts have held that the First Amendment interests embodied in the *Noerr-Pennington* doctrine, coupled with other evidentiary privileges, will act as a bar to discovery. *See In re Burlington Northern, Inc.*, 822 F.2d 518, 525, 533-34 (5th Cir. 1987) (attorney client privilege coupled with First Amendment interest barred discovery); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1257, 1274-79 (N.D. Ohio 1981) (holding trial judge has broad discretion as to admissibility under *Noerr-Pennington*).

<sup>40</sup> *See* *Australia/Eastern*, 537 F. Supp. at 810-811; *infra* notes 63-67.

<sup>41</sup> *See* *infra* notes 53-57 and accompanying text (discussion of *Australia/Eastern* court's criticism of *Carolina Power* for inadequate consideration of chilling effect of forced disclosure on First Amendment right to petition).

*Power and Light Co.*,<sup>42</sup> an antitrust suit against several electric utilities, the plaintiffs sought discovery of documents relating to the utilities' political lobbying efforts.<sup>43</sup> The defendants claimed that these materials were protected by the *Noerr-Pennington* doctrine and should thus be absolutely privileged.<sup>44</sup>

The United States Court of Appeals for the Fourth Circuit held that discovery was permissible, stating that *Noerr-Pennington* was "by definition an exemption from anti-trust liability, and not a bar to discovery of evidence."<sup>45</sup> The court recognized that under *Pennington*, evidence of *Noerr-Pennington* activity is admissible to the extent that it tends to show the character of other non-protected activity.<sup>46</sup> The court concluded that since evidence of the lobbying activity would be admissible, it was also discoverable.<sup>47</sup>

The court dismissed as without merit the argument that allowing discovery of activity protected by the doctrine would have a chilling effect on the First Amendment right to petition the government.<sup>48</sup> Relying on *Herbert v. Lando*,<sup>49</sup> in which the Supreme Court ordered production of a planning conference memorandum for a television news special,<sup>50</sup> the *Carolina Power* court stated, without additional explanation, that "[i]f discovery into the [editorial process] would not have a chilling effect, then neither would discovery in this case."<sup>51</sup>

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<sup>42</sup> 666 F.2d 50 (4th Cir. 1981). In *Carolina Power*, sixteen rural electrical cooperatives sued two utility companies alleging monopolization of the electric power market in violation of the Sherman Act. *Id.* at 51. Plaintiffs appealed the lower court decision, which held that documents relating to legislative lobbying were exempt from discovery because such documents were protected by *Noerr-Pennington*. *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 51.

<sup>45</sup> *Id.* at 53.

<sup>46</sup> *Id.* at 52; see also *supra* note 8 (language of *Pennington* authorizing admission of government petitioning into evidence).

<sup>47</sup> *Carolina Power*, 666 F.2d at 53.

<sup>48</sup> See *id.*

<sup>49</sup> 441 U.S. 153, 155 (1979). Plaintiff, a public figure, brought a defamation action against a television network and its employees. *Id.*

<sup>50</sup> *Id.* at 174.

<sup>51</sup> *Carolina Power*, 666 F.2d at 53. The *Lando* court, in recognizing the substantial burden placed upon a plaintiff required to prove actual malice, held that the First Amendment afforded no absolute constitutional privilege from discovery to defendants in a defamation suit. See *Lando*, 441 U.S. at 169. In rejecting defendants' claim that requiring disclosure of the editorial process would produce an intolerable chilling effect on activity protected by the First Amendment, that Court argued that "if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely

Thus, under *Carolina Power*, any material that is “arguably admissible” would be discoverable, without regard for the defendant’s First Amendment right of petition.<sup>52</sup> This broad scope of allowable discovery has since been called into question.

In *Australia/Eastern U.S.A. Shipping Conference v. United States*,<sup>53</sup> the United States District Court for the District of Columbia, holding that discovery of *Noerr-Pennington* activity could be prevented, stated that the *Carolina Power* decision could not be read “to stand for the proposition that the harm to first amendment values attendant upon forced disclosure of *Noerr-Pennington*-protected conduct should not be weighed against the interests favoring disclosure.”<sup>54</sup> The court persuasively pointed to a long history of precedent dealing with forced disclosure of activities protected by the First Amendment, and stated that the overwhelming authority supported the principle that the harm to these values must, in all cases, be balanced against the need for discovery.<sup>55</sup> The court criticized the *Carolina Power* court’s selective reli-

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what . . . [the seminal cases requiring proof of actual malice] have held to be consistent with the First Amendment.” *Id.* at 171.

In concurrence, Justice Powell agreed that although the initial inquiry in deciding any discovery request was one of relevance, “when a discovery demand arguably impinge[s] on First Amendment rights,” a higher threshold of relevance may be required. *Id.* at 179 (Powell, J., concurring). In determining a satisfactory standard of relevance, Justice Powell stated that a court must balance the need for First Amendment protection of the conduct at issue against the need of the party seeking discovery of information pertaining to such conduct. *Id.*

<sup>52</sup> *Carolina Power*, 666 F.2d at 53.

<sup>53</sup> 537 F. Supp. 807 (D.D.C. 1982). In *Australia/Eastern*, the government sought reconsideration of the district court’s exclusion of certain paragraphs from the government’s Civil Investigative Demand on *Noerr-Pennington* grounds. *Id.* at 808. The government also argued that “if the chilling effect of *Noerr* disclosure [was] to be considered at all, an actual, rather than assumed, chilling effect [was] required to quash governmental inquiry.” *Id.* at 808-09.

<sup>54</sup> *Id.* at 809.

<sup>55</sup> *Id.* at 809-10; see e.g., *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (chilling effect of mandatory disclosure to board of education of all organizational associations outweighs any legitimate state interest in the information); *Talley v. California*, 362 U.S. 60, 64 (1960) (ordinance requiring names and addresses of circulators of handbills to be printed thereon unconstitutional without legitimate state interest); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (chilling effect of disclosure of NAACP membership lists to the State forbidden where no compelling state interest shown).

Although *Noerr*-protected activities were admittedly different from the types of information traditionally sought in the cases dealing with forced disclosure of constitutionally protected activities, the court recognized that the individual rights afforded by the First Amendment were of equal constitutional value, and the chilling effect on the right to petition the government was no less violative of the Constitution than a chill upon the expression of other First Amendment freedoms. See *Australia/Eastern*, 537 F. Supp. at 810.

ance on *Herbert v. Lando*<sup>56</sup> to dismiss the "chilling effect" argument, pointing out that even in *Lando* the Supreme Court made it clear that while the balance in that case favored disclosure, the chilling effect on First Amendment activities would prevail absent sufficient compelling interest in disclosure.<sup>57</sup>

Under *Australia/Eastern* and *Carolina Power*, the *Noerr-Pennington* doctrine clearly does not provide an absolute privilege from discovery.<sup>58</sup> However, *Australia/Eastern* supports the proposition that discovery may be limited when a trial court, in its discretion, determines that the chilling effect discovery would have on a party's First Amendment right of petition outweighs its adversary's interest in obtaining discovery.<sup>59</sup> Although courts may disagree as to the proper weight to give each of these competing interests,<sup>60</sup> *Australia/Eastern* dictates that only a sufficiently "compelling" interest in disclosure outweighs the chilling effect that forced disclosure has on First Amendment activity.<sup>61</sup> Unfortunately, the *Australia/Eastern* court did not provide specific procedural guidelines for determining the existence of a "compelling" interest in obtaining discovery.<sup>62</sup>

<sup>56</sup> 441 U.S. 153 (1979); see *supra* note 51 (discussing *Lando* opinion).

<sup>57</sup> See *Australia/Eastern*, 537 F. Supp. at 810. Other courts have also utilized the *Australia/Eastern* rationale. See e.g., *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1196 (8th Cir. 1982) (*Noerr-Pennington* activity admissible only to extent it tends to show purpose or character of other non-exempt activity); *Feminist Women's Health Ctr. v. Mohammad*, 586 F.2d 530, 543 n.7 (5th Cir. 1978) (admissibility should be governed by weighing probative value of plaintiff's need for evidence against the potential for prejudice of defendant's First Amendment rights); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1257, 1278-79 (N.D. Ohio 1981) (allowing plaintiff to initiate inquiry designed solely to trigger admission of *Noerr-Pennington* conduct would have "chilling effect" upon the exercise of First Amendment rights).

Analogizing speech that is not protected by the First Amendment to the "sham" exception to *Noerr-Pennington* immunity has met with other criticism. See *Balmer*, *supra* note 32, at 60-62. While such "constitutional analysis . . . suggests that the first amendment protects litigation from antitrust liability to the same extent that speech is protected from government restriction," it offers little help in determining the First Amendment value of the right to petition in light of statutory antitrust policies. See *id.*

<sup>58</sup> See *supra* note 39 and accompanying text.

<sup>59</sup> See *Australia/Eastern*, 537 F. Supp. at 810-11; *supra* notes 53-57 and accompanying text (discussing *Australia/Eastern*)

<sup>60</sup> See *supra* notes 53-57 and accompanying text (*Australia/Eastern* court placed higher value on First Amendment interests than *Carolina Power* court); see also *Columbia Pictures Indus. v. Professional Real Estate Investors*, 944 F.2d 1525, 1531 (9th Cir. 1991), *cert granted*, 112 S. Ct. 1557 (1992) ("sham" exception to *Noerr-Pennington* must be applied with caution to avoid chilling effect on First Amendment petitioning).

<sup>61</sup> See *Australia/Eastern*, 537 F. Supp. at 810.

<sup>62</sup> See *id.* at 811. However, the court importantly held that failure to show an "actual"

### III. DETERMINATION OF A COMPELLING INTEREST IN DISCLOSURE

An appropriate set of guidelines for determining the discoverability of *Noerr-Pennington* material was recently applied by the United States District Court for the Eastern District of New York in *P. & B. Marina, Ltd. Partnership v. Logrande*.<sup>63</sup> The *P. & B. Marina* court confirmed that, while *Noerr-Pennington* protection did not extend to discovery, the Petition Clause of the First Amendment may, in certain cases, establish a qualified privilege with regard to documents produced within the scope of the doctrine.<sup>64</sup> The court held that where such a First Amendment interest is present, the party seeking discovery must assert a compelling interest of its own.<sup>65</sup> In determining whether a compelling interest in discovery exists, a court must ask three questions: 1) whether the documents are relevant;<sup>66</sup> 2) whether the documents are critical to the complainants' claims;<sup>67</sup> and 3) whether the documents are obtainable from any other source.<sup>68</sup>

Once a compelling interest in obtaining discovery is established, a court theoretically affords it equal status with the competing First Amendment concerns, leaving the trial court to determine the dominant interest on a case-by-case basis.<sup>69</sup> By

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chilling effect did not automatically mandate disclosure. *Id.* Rather, a showing of "actual" chill tended to weigh the balance in favor of First Amendment values. *Id.*

<sup>63</sup> 136 F.R.D. 50, 61 (E.D.N.Y. 1991). In *P. & B. Marina*, plaintiff marina owners filed suit under various federal and state laws, claiming in part that defendant association and the Town of Islip conspired to deprive plaintiff of ownership of plaintiff's marina. *Id.* at 52. Specifically, plaintiffs alleged that defendants had instigated "sham" legislative, executive, administrative, and judicial proceedings for the sole purpose of wresting control of plaintiff's business. *Id.* at 61. Defendants claimed immunity from suit under *Noerr-Pennington*, *id.* at 52, and refused to comply with plaintiff's request for discovery of certain documents on several grounds, including: attorney-client privilege, *id.* at 53; work product immunity, *id.* at 53, 57; and the First Amendment right of petition, *id.* at 59.

<sup>64</sup> *Id.* at 52-53.

<sup>65</sup> *Id.* at 61.

<sup>66</sup> *Id.* (citations omitted). The court held that inquiry into the intentions of defendants was relevant to plaintiff's allegations of "sham" abuse of governmental process. *Id.* at 61-62.

<sup>67</sup> *Id.* Without distinguishing that which is relevant from that which is critical, the court held that it was critical "for plaintiffs to inquire into the intentions of the association regarding the marina." *Id.*

<sup>68</sup> *Id.* at 61. The court's finding that the information sought was only available from the defendants themselves completed the inquiry and firmly established that plaintiffs had a compelling interest in obtaining discovery. *Id.* at 62.

<sup>69</sup> See *id.* at 61-63. The court's requirement that a complainant must assert a compelling interest in obtaining disclosure before the trier of fact may resort to balancing the competing interests implicitly recognizes that the resultant balancing can favor either interest, and that the facts of each case will be determinative of the outcome. *Id.*

implementing this three step analysis, a court will protect a petitioning party from absolute discovery of all relevant evidence.<sup>70</sup> Materials that are requested "merely to satisfy curiosity or to serve some general end, such as public interest," will not be discoverable because such an interest alone will not meet the "compelling" standard.<sup>71</sup> Consequently, it seems that parties contemplating some type of petitioning activity will not be apprehensive to petition for fear that extensive discovery demands will be placed on them.

### CONCLUSION

The *Noerr-Pennington* doctrine protects the First Amendment right of petition by creating an exemption from antitrust liability for genuine attempts to petition the government. Although a litigant in an antitrust suit may not claim immunity from discovery based solely on *Noerr-Pennington* protection, the fundamental right of petition itself may be the source of a qualified privilege from discovery. Once a litigant alleges that allowing discovery would have a chilling effect on his or her First Amendment right of petition, the court must determine if there is a compelling need for disclosure of the documents sought. If a compelling interest in discovery exists, the court may then proceed to balance the competing interests based on the facts before it. Thus, while *Noerr-Pennington* documents may be excluded from discovery, it is the Petition Clause of the First Amendment, and not the doctrine itself, upon which such exclusion may be properly based.

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<sup>70</sup> *Id.* at 61.

<sup>71</sup> *Australia/Eastern*, 537 F. Supp. 807, 810.