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Antitrust Law — Noerr-Pennington Doctrine — Metro Cable Co. v. CATV of Rockford, Inc

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Antitrust—*Noerr-Pennington* Doctrine—*Metro Cable Co. v. CATV of Rockford, Inc.*[1]—Plaintiff (Metro) and defendant (CATV) were cable television companies competing for a franchise from the City Council of Rockford, Illinois. The Illinois legislature has delegated to municipalities the power to grant cable television franchises,[2] and pursuant to that power the Rockford City Council granted a franchise to CATV. It denied Metro a franchise on three separate occasions.[3]

Metro operated a cable television system in unincorporated areas near Rockford and wished to extend the system into that city. Defendant Rock River Television, Inc. (WCEE) established CATV in order to compete with Metro for a cable television franchise and to keep Metro out of Rockford.[4] WCEE and CATV, through common officers and shareholders, enlisted the support of Mayor Schleicher and Alderman Skolrood, who, in return for "campaign contributions," were to prevent Metro from gaining a franchise from the City Council.[5] In April, 1966, the council's license committee recommended a franchise grant to Metro, but, due to the influence of Schleicher the full council instead granted a franchise to CATV.[6]

Metro applied for a franchise again in 1970, accompanying that application with a $100,000 deposit insuring speedy construction, but was denied a hearing due to pressure on the council from Skolrood and Schleicher.[7] At the same time, two officers of CATV told the License Committee that CATV had bought land and constructed an antenna (presumably to show they were progressing), when it was actually WCEE that had done so.[8]

A third application filed by Metro in 1971 was also denied without a hearing.[9] A subcommittee, of which Skolrood was a member, was formed to set up a procedure whereby a second franchise would be granted, but the sub-committee secretly decided to leave CATV with the only franchise.[10] Finally, when Metro sought a permit from

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[1] 516 F.2d 220 (7th Cir. 1975).

[2] "The corporate authorities of each municipality may license, franchise and tax the business of operating a community antenna television system as hereinafter defined." ILL. REV. STAT. ch. 24, § 11-42-11 (Supp. 1975). The statute sets no minimum or maximum number to be franchised and leaves broad discretion to the local authorities. *See id.*

[3] 516 F.2d at 222-23. The detailed allegations of the complaint are set out in the district court opinion, Metro Cable Co. v. CATV of Rockford, Inc., 375 F. Supp. 350, 352-56 (N.D. Ill. 1974). The facts discussed in the text are those alleged by the plaintiff (Metro) since the case came to the circuit court on appeal from the district court order dismissing the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See id.* at 361.

[4] Metro Cable Co. v. CATV of Rockford, Inc., 375 F. Supp. 350, 353 (N.D. Ill. 1974).

[5] *Id.*

[6] *Id.* at 354.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 354-55. The mayor also filed a certificate with the Federal Communications Commission stating that a public hearing had been held on CATV's franchise ap-

the City Council to use city utility poles in order to provide cable service to areas outsideRockford, an officer of CATV misrepresented to the council that transmission lines were available from the Illinois Bell Telephone Co. and the permit was denied.[11]

Metro brought suit in the United States District Court for the Northern District of Illinois[12] alleging that CATV and others, including Schleicher and Skolrood, had conspired to restrain trade and monopolize the cable television transmission market in Rockford in violation of sections 1[13] and 2[14] of the Sherman Act. Metro sought injunctive relief[15] and damages of $3,000,000 trebled.[16] The District Court granted CATV's motion to dismiss for failure to state a claim upon which the relief could be granted,[17] holding that under *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*,[18] and *United Mine*

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plication, when in fact no hearing had been held. *Id.* at 355. It is not clear what Metro alleges with regard to the certificate. FCC regulations require that before the cablevision company can receive the required FCC certification, "[t]he franchisee's legal, character, financial, technical, and other qualifications, and the adequacy and feasibility of its construction arrangements, [must be] approved by the franchising authority as part of a full public proceeding affording due process . . . ." 47 C.F.R. § 76.31(a)(1) (Supp. 1974). The regulations reflect a policy of allowing local authorities to issue franchises for cable television subject to the minimum standards set out in § 76.31. The FCC polices the process through the certification procedure. However, the FCC has held that where the franchise was granted before adoption of the rules in 1972, the franchise award must only be in "substantial compliance" with the new rules. FCC, Reconsideration of Cable Television Report and Order, 36 F.C.C. 2d 326, 366 (1972). When CATV of Rockford applied for certification, and Metro Cable opposed the application, raising many of the allegations made in the present case, the FCC held: "An examination of CATV of Rockford's franchise as well as the Mayor's accompanying affidavit persuades us that a public franchise-award proceeding in which the qualifications of CATV of Rockford were considered was held . . . ." CATV of Rockford, Inc., 38 F.C.C. 2d 10, 14 (1972), *petition for reconsideration denied*, 40 F.C.C.2d 493 (1973).

Nonetheless, the decision of the FCC in this case has no relevance to Metro's Sherman Act suit. In a case where the FCC approved an exchange of television stations, the approval did not bar the prosecution of an antitrust complaint against one of the transferors, who allegedly conspired with a subsidiary to force another party to exchange its large market area station for a smaller market area station. United States v. Radio Corp. of America, 358 U.S. 334, 337, 343-44 (1959). The Court held that the "courts retained jurisdiction to pass on alleged antitrust violations irrespective of Commission action." *Id.* at 343-44.

[11] Metro Cable Co. v. CATV of Rockford, Inc., 375 F. Supp. 350, 355 (N.D. Ill. 1974).

[12] Metro Cable Co. v. CATV of Rockford, Inc., 375 F. Supp. 350 (N.D. Ill. 1974).

[13] 15 U.S.C. § 1 (1970) provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

[14] 15 U.S.C. § 2 (1970) provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a misdemeanor . . . ."

[15] Injunctive relief is available under 15 U.S.C. § 26 (1970).

[16] Treble damages are authorized by 15 U.S.C. § 15 (1970).

[17] Metro Cable Co. v. CATV of Rockford, Inc., 375 F. Supp. 350, 361 (N.D. Ill. 1974).

[18] 365 U.S. 127, *reh. denied*, 365 U.S. 875 (1961).

Workers v. Pennington,[19] the alleged activities were immune from antitrust sanction.[20] The *Noerr-Pennington* doctrine states that genuine efforts to influence government action are not violative of the Sherman Act even though those efforts are directed at gaining a monopoly or restraining trade.[21]

The United States Court of Appeals for the Seventh Circuit affirmed, and HELD: CATV's alleged efforts were a genuine attempt to influence government action, and therefore were immune from antitrust scrutiny.[22] This note will first examine *Noerr, Pennington* and the Supreme Court's decision in *California Motor Transportation Co. v. Trucking Unlimited.*[23] It will then discuss the propriety of extending *Noerr* protection to the acts alleged by the plaintiff in *Metro Cable.* It will be noted that although the complaint arguably asserted that a bribe was given and received, thus making the mayor and alderman co-conspirators, the court characterized the transaction as a campaign contribution and thereby avoided the difficult issue of whether an official co-conspirator would preclude a *Noerr* defense. Next, the court's limited reading of *California Motor* and expansive reading of *Noerr* will be examined to determine whether the court devised a proper standard of review for the alleged acts of defendant CATV. Finally, the court's discussion and *arguendo* application of the "sham exception,"[24] first noted in *Noerr* and later expanded in *California Motor,* will be evaluated.

I. THE *NOERR-PENNINGTON* DOCTRINE

Noerr involved competition between the railroad and the trucking industries in the long distance hauling business. The railroads, through a public relations firm, had conducted a malicious and fraudulent campaign[25] to gain passage and enforcement of laws and regulations detrimental to the trucking industry.[26] Several trucking companies sued, and the district court held that the railroad's acts constituted a violation of sections 1 and 2 of the Sherman Act.[27] The court of appeals affirmed,[28] but the Supreme Court reversed.[29]

Justice Black, writing for a unanimous Court, concluded that the Sherman Act does not prohibit such campaigns to influence the legis-

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[19] 381 U.S. 657 (1965).

[20] Metro Cable Co. v. CATV of Rockford, Inc., 375 F. Supp. 350, 358 (N.D. Ill. 1974).

[21] *Pennington,* 381 U.S. at 669-70.

[22] 516 F.2d at 222.

[23] 404 U.S. 508 (1972).

[24] See text at note 36 *infra.*

[25] 365 U.S. at 133.

[26] *Id.* at 129.

[27] Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 155 F. Supp. 768, 775-811 (E.D. Pa. 1957).

[28] Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 273 F.2d 218 (3d Cir. 1959) (per curiam).

[29] 365 U.S. at 145.

lative or executive branch even if conducted with an anticompetitive intent.[30] He noted that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out."[31] It follows, the Court reasoned, that the Sherman Act cannot preclude two or more persons from "acting together to persuade the legislative or executive to take particular action with respect to a law that would produce a restraint or monopoly."[32]

The Court noted that a combination to influence a political body is not the type of act the Sherman Act was intended to proscribe, and reasoned that to extend the Act to such combinations would impute to Congress an intent to regulate "political activity," thus impairing the functioning of government by cutting off needed public input.[33] The Court further emphasized that it is normal and legitimate political activity to lobby in favor of governmental action economically detrimental to competitors.[34] Moreover, the Court stated that to apply the Sherman Act to such activities would raise constitutional problems regarding the rights of association and petition guaranteed by the First Amendment: "We cannot, of course, lightly impute to Congress an intent to invade these freedoms."[35]

The Court noted an exception to the enunciated rule: "There 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."[36] Thus, in order for the activity to be immune, there must be "a genuine effort to influence legislation and law enforcement practice.[37]

Pennington appeared to expand the scope of the *Noerr* doctrine. In *Pennington,* a small coal company alleged a conspiracy between certain large coal companies and the United Mine Workers to put the smaller companies out of business. Part of the scheme was to persuade the Secretary of Labor to set a high minimum wage for companies selling to the Tennessee Valley Authority.[38] In addition, the TVA was urged to refrain from "spot market" purchases, some of which could be made from companies not meeting the required wage

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[30] *Id.* at 139.

[31] *Id.* at 136, *citing* Parker v. Brown, 317 U.S. 341 (1943), and United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939).

[32] 365 U.S. at 136.

[33] *Id.* at 136-37.

[34] *Id.* at 139.

[35] *Id.* at 138. The Court expressly declined to rule on the constitutional defense asserted by the railroads, noting that the construction given to the Sherman Act made such a ruling unnecessary. *Id.* at 132 n.6.

[36] *Id.* at 144 (emphasis added).

[37] *Id.*

[38] 381 U.S. at 660.

level.[39] The Court held that "[j]oint efforts to influence *public officials* do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or *as part of a broader scheme* itself violative of the Sherman Act."[40]

Whether "public official" was consciously used instead of *Noerr's* "legislature or executive"[41] branch is not clear; however, the question was mooted when the Supreme Court decided *California Motor Transport Co. v. Trucking Unlimited.*[42] In *California Motor,* the Court held that efforts to influence adjudicative bodies, whether judicial or administrative, may also receive protection under *Noerr.*[43] *California Motor* involved a dispute between competing trucking companies. Plaintiff truckers alleged that defendant truckers jointly financed and carried out a plan to oppose in agencies and reviewing courts all of plaintiffs' applications for operating rights, and made known the plan to plaintiffs in order to deter them from making such applications.[44]

Justice Douglas, writing for the Court, emphasized two principles as the fundamental theoretical underpinnings of the *Noerr* doctrine. First, the Sherman Act does not regulate political activity such as efforts to influence the government.[45] Second, Congress did not intend, through the antitrust laws, to invade the constitutional right of petition.[46] In extending the *Noerr* protection to activities of citizens intended to influence courts and agencies, however, the court seemed to focus solely on the latter interest,[47] and held that to deny protection "would be destructive of rights of association and of petition."[48]

The Court proceeded to define the constitutional protection in the context of a *Noerr* sham exception "adapted to the adjudicatory process."[49] Justice Douglas noted that although individuals had a right to petition agencies and courts in order to challenge their competitors' permit applications, "a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused."[50] In *California Motor* this abuse, combined with the defendants' establishment of a joint fund to carry out the program of harassment and their publication to plaintiffs of their intent to use these methods, indicated an intent to "de-

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[39] *Id.*
[40] *Id.* at 670 (emphasis added).
[41] *Noerr,* 365 U.S. at 136.
[42] 404 U.S. 508 (1972).
[43] *Id.* at 510-11.
[44] *Id.* at 511.
[45] *Id.* at 510.
[46] *Id.*
[47] *See id.* at 510-17.
[48] *Id.* The Court ignored the "political activity" aspects of *Noerr,* which presumably are inapposite to an adjudicative setting.
[49] *Id.* at 516.
[50] *Id.* at 513.

prive the competitors of meaningful access to agencies and courts,"[51] rather than an intent to influence public officials and, as such, placed the activities within the sham exception and outside First Amendment protection.[52]

II. POST-*CALIFORNIA MOTOR*: *METRO CABLE*

Where the *Noerr* doctrine stands after *California Motor* is still not entirely clear.[53] Several issues raised in *Metro Cable* derive little guidance from the *California Motor* opinion. First, does the presence of an official co-conspirator—as an abuse of the governmental process—preclude *Noerr* immunity? Second, what standards should be used in applying the immunity, and should different standards apply in legislative and adjudicative settings? Third, what should the test be for the determination of a sham?

A. The Official Co-Conspirator

Clearly, the acceptance of a bribe by a public official implies sufficient involvement to deem him a co-conspirator in related illegal activity.[54] The issue presented in *Metro Cable* is whether official involvement in a conspiracy to restrain trade is enough to remove the *Noerr* protection.

There is language in *California Motor* which supports the proposition that where a public official is a named co-conspirator, the *Noerr* immunity should not apply. *California Motor* cited *Harman v. Valley National Bank*[55] for the proposition that "[c]onspiracy with a licensing authority to eliminate a competitor may . . . result in an antitrust transgression,"[56] as part of a general discussion of why certain conduct, protected in a political context, may result in antitrust sanctions in an adjudicatory setting.[57] The Court specifically stated that bribery

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[51] *Id.* at 512.

[52] *Id.*

[53] *See generally* Note, *The Quagmire Thickens: A Post-California Motor View of the Antitrust and Constitutional Ramifications of Petitioning the Government*, 42 U. CIN. L. REV. 281 (1973).

[54] A conspiracy is a combination of two or more persons with a common design to do an unlawful act. American Tobacco Co. v. United States, 328 U.S. 781, 810 (1945). A conspirator is one of those persons. However, where a public official is involved, especially a legislator, special caution is required before deeming him a conspirator. *See*, Comment, 81 HARV. L. REV. 847, 857 (1968). The question should be whether the official is acting pursuant to his public authority or to private interests. *See*, Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333, 340-41 (1967). Whether official immunity is available is a separate question, since the antitrust issue is whether the *presence* of an official co-conspirator removes *Noerr* protection as to the *private* parties. It is suggested that where an official agrees to further private anticompetitive interests in return for a bribe, he is a party to a conspiracy.

[55] 339 F.2d 564 (9th Cir. 1964).

[56] 404 U.S. at 513.

[57] *Id.* at 512-13.

of a public purchasing agent could give rise to an antitrust violation.[58]

In *Harman,* the Ninth Circuit had held that *Noerr* protection did not apply where the Attorney General of Arizona in his role as a co-conspirator brought a baseless suit to place a financial institution in receivership, where that act was part of a larger scheme to monopolize.[59] However, *Harman* was not followed five years later by the Ninth Circuit in *Sun Valley Disposal Co. v. Silver State Disposal Co.,*[60] where county commissioners were alleged to be conspirators in the grant of an exclusive garbage collection franchise.[61] The majority in *Sun Valley* felt that *Pennington* had eroded the *Harman* decision,[62] because *Pennington* had held that an effort to achieve anti-competitive action is not a Sherman Act violation either standing alone "or as part of a broader scheme;"[63] thus, they found no violation of the Sherman Act.[64] More important than its "broader scheme" language, however, is the fact that *Pennington* precluded relief for damages resulting from "the act of a public official *who is not claimed to be a co-conspirator.*"[65]

Sun Valley was not mentioned three years later in the *California Motor* opinion, but, as noted above, *Harman* was cited in support of the Supreme Court's reasoning that certain unethical conduct in the adjudicatory process could result in antitrust sanctions.[66] The "larger scheme" aspect of *Harman* clearly had been rejected in *Pennington;*[67] however, the fact that *California Motor* cited *Harman* indicates that the possibility remains open that the presence of an official co-conspirator will remove *Noerr* immunity.[68]

Perhaps in recognition of this confusing development, however, the court in *Metro Cable* skirted the official co-conspirator question. Metro's complaint, read liberally, alleged that CATV bribed the mayor and an alderman through "campaign contributions."[69] Explicit

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[58] *Id.* at 513, *citing* Rangen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (9th Cir. 1965).

[59] 339 F.2d at 566.

[60] 420 F.2d 341 (9th Cir. 1969).

[61] *Id.* at 342.

[62] *Id.* at 342-43.

[63] 381 U.S. at 670.

[64] 420 F.2d at 342-43.

[65] 381 U.S. at 671 (emphasis added).

[66] 404 U.S. at 512-13.

[67] 381 U.S. at 670. See text at note 40 *supra.*

[68] *See* Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972). In *Israel,* defendants, including a Food and Drug Administration official, were alleged to have conspired to keep plaintiff's drug off the market. *Id.* at 274. After examining the *Noerr* cases, the court concluded that "actions which impair the fair and impartial functioning of an administrative agency" should not be protected under *Noerr. Id.* at 278. Concluding that the complaint alleged a "sham" exception, the court reversed the lower court's grant of a motion to dismiss. *Id.* at 279. The court did not discuss whether *Noerr* was affected by the presence of an official co-conspirator, but left open the possibility of an *official immunity* defense on remand. *Id.* at 275 n. la.

[69] Complaint at 8, Metro Cable Co. v. CATV of Rockford, Inc., 375 F. Supp. 350 (N.D. Ill. 1974).

reference was made in Metro's brief to an alleged bribe.[70] However, while the court discussed whether the presence of an official co-conspirator would remove the *Noerr* protection,[71] no conclusion was reached because it read the complaint as alleging a traditional campaign contribution and concluded that, as such, the contribution was not enough to make the mayor and alderman alleged co-conspirators.[72] "Plaintiff's position is in essence that an agreement to attempt to induce legislative action is a 'conspiracy,' and that if some of the 'conspirators' persuade a member of the legislative body to agree to support their cause, he becomes a 'co-conspirator' and a Sherman Act violation results. Such a rule would in practice abrogate the *Noerr* doctrine."[73]

So stated, the conclusion is indisputable. *Noerr* clearly protects the political activity of petitioning the legislature. The conclusion fails to distinguish, however, between petitioning to induce legislative action and bribery to induce legislative action. Failure to protect the latter activity would not abrogate *Noerr,* since bribery is neither political activity which requires protection nor an exercise of the First Amendment right to petition.[74] On the other hand, by its interpretation of the complaint, the court in *Metro Cable* was able to avoid this necessary distinction. Carefully read, therefore, *Metro Cable* states only that campaign contributions are not enough to make a public official a co-conspirator. Hence, the mayor and the alderman were *not* co-conspirators.[75] *Metro Cable* does not hold, however, that a public official cannot be a co-conspirator or that if he were, *Noerr* would apply.[76]

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[70] Brief for Appellant at 17, Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975).

[71] *Id.* at 229-30.

[72] *Id.* at 230, 231.

[73] *Id.* at 230.

[74] *See* Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696 (D. Colo. 1975). The plaintiffs argued that *Noerr* should not apply "because defendant's efforts to influence the Department of Agriculture included bribery and illegal campaign contributions, activities which are certainly not protected by the First Amendment." *Id.* at 701. The court accepted the argument that there was no exercise of First Amendment rights but applied *Noerr*, evidently holding that whether political lobbying includes illegal acts is irrelevant since the Sherman Act is not applicable to lobbying. *Id.* at 705. It is submitted that the court's conclusion is incorrect. Illegal acts are not political activity and thus are not the type of conduct protected under *Noerr. See* Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 440 F.2d 1096 (9th Cir. 1971), which noted, "[i]t does not seem to this Court that the doctrines of *Noerr* and *Pennington* were intended to protect those who employed illegal means to influence their representatives in government." *Id.* at 1099. *Cf.* United States v. Marchetti, 466 F.2d 1309, 1314 (4th Cir. 1972) (bribes are not protected First Amendment activity simply because they are written or spoken).

[75] *See* 516 F.2d at 230.

[76] One commentator has framed the issue of whether or not official involvement in the conspiracy should preclude a *Noerr* defense in a different way: Is the official act taken a truly governmental act—a fact which triggers the *Noerr* analysis—or does the act amount to a private action which is beyond the scope of the official's authority? If

B. *Standards: One or Several?*

California Motor extended *Noerr* protection to efforts to influence courts and agencies but, in so doing, left considerable uncertainty as to the standards to be applied in these adjudicative settings. In *Metro Cable,* Judge Tone, apparently aware of the confusion resulting from *California Motor,*[77] noted that "[w]e must take the Supreme Court at its word when it reaffirms the authority of *Noerr.*"[78] Focusing on the importance of the factual background, the court read *California Motor* as applying only to adjudicative settings, leaving *Noerr* relatively untouched in a legislative or executive setting. Adopting the broad language of *Noerr* and *Pennington,* the court concluded:

> Whatever the significance of the citation of *Harman* in *California Motor Transport's* discussion of why unethical conduct may not be immune in an adjudicative, as opposed to a political, setting, that discussion is not applicable here, for the Rockford City Council was a legislative body, acting as such, and the conduct challenged here thus occurred in a political setting.[79]

These conclusions—that *California Motor* does not apply in a political setting and that a legislative body is necessarily political—are important, because *Metro Cable* is the first case to interpret *California Motor* in an arguably political setting.[80]

In *California Motor,* the Court distinguished political from adjudicative settings: "[M]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory

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the latter is the case then the *Noerr* protection should not be available. Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense,* 66 MICH. L. REV. 333, 340, 350 (1967). Another commentator has approached the official involvement issue by distinguishing between an official making a decision in a political context and an official making a decision furthering the economic interests of the private party. Comment, 81 HARV. L. REV. 847 (1968). If the latter, the author argues that the antitrust laws should be applicable because application of the Sherman Act would not impinge on the political process. However, in the political context, the "difficulty of distinguishing between genuinely political, if sordidly self-interested, approaches to officials and those which make the officials 'participants' in the conspiracy suggests that the antitrust laws should be applied only in the most extreme cases." *Id.* at 857. Such an extreme case would presumably arise where the official was bribed or where his personal business interests would gain from a reduction of competition. *See id.* at 856. In other cases, it would be best to rely on abuse of office laws. *Id.* at 857.

[77] See note 53 and accompanying text *supra.*

[78] 516 F.2d at 228.

[79] *Id.*

[80] For cases which arose in an adjudicative setting after *California Motor, see* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Edward B. Marks Music Corp. v. Colorado Magnetics, Inc., 497 F.2d 285 (10th Cir. 1974); Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 489 F.2d 203 (9th Cir. 1973); Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972); Semke v. Enid Auto Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972); First Delaware Valley Citizens Television, Inc. v. CBS, Inc., 398 F. Supp. 917 (E.D. Pa. 1975); and United States Dental Institute v. American Ass'n of Orthodontists, 396 F. Supp. 565 (N.D. Ill. 1975).

process.... Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.' "[81] *Metro Cable* read this language as establishing a separate, albeit uncertain standard to be applied in an adjudicative setting.[82] The City Council of Rockford, on the other hand, was found to be a *legislative* body,[83] which the court regarded as per se political.[84] Thus, the court applied the traditional *Noerr* standard. Under *Noerr,* the mere granting by the Council of a franchise to CATV and a denial of Metro's application would not constitute an antitrust violation even if brought about by CATV's unethical behavior.[85] Therefore, the court concluded that CATV's efforts to influence the Council, even if unethical or abusive, were immune unless Metro could prove a traditional sham.[86]

It is submitted that *Metro Cable's* analysis is plausible, but incorrect. *California Motor* distinguished between *political* and *adjudicative* settings, not legislative and judicial settings.[87] It is suggested that the reference to "political" and "adjudicative" rather than "legislative" and "judicial" properly places emphasis, not on the form of the governmental unit, but rather on the nature of the acts of the alleged conspirators. This is consistent with *Noerr,* which held that the Sherman Act does not extend to genuine efforts to influence the legislative and executive branches because such efforts are *political in nature* and may involve the exercise of First Amendment rights.[88]

The key to a *Noerr* defense—the presence of political activity or the exercise of First Amendment rights—must be viewed in the operative context of the affected governmental body to determine whether the acts of the conspirators were appropriate to the function of the affected governmental body. A legislature generally acts in a political context. Nevertheless, the fact that there is an effort to influence the legislature should not end the inquiry, for *Noerr* should not be read to protect activities such as blackmail, coercion, bribery, and the like,[89] because such activities are not legitimately political. Simi-

[81] 404 U.S. at 513.
[82] 516 F.2d at 228.
[83] *Id. See generally* ILL. REV. STAT. ch. 24, § 11 (Supp. 1975).
[84] *Id.*
[85] *See* 365 U.S. at 135-36, 140-41.
[86] 516 F.2d at 229.
[87] 404 U.S. at 512-13.
[88] 365 U.S. at 137-38.
[89] Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 440 F.2d 1096, 1099 (9th Cir. 1971) (threats, coercion, and intimidation are not the type of communication protected in *Noerr); cf.* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) (proof that patent office was defrauded was sufficient to strip defendant of exemption from antitrust laws); Rangen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851, 857 (9th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966) (bribery of state purchasing agent can result in a violation of the antitrust laws). *But see* Cow Palace Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696 (D. Colo. 1975) which concluded that the legality of the means used to influence the political branches of government is irrelevant to the *Noerr* analysis because the conduct is political. *Id.* at 705.

larly, the concern in *California Motor* for abuses of governmental process cannot rationally be limited to the judicial system.[90] Whether particular conduct *amounts* to an abuse will depend on whether the governmental body is acting politically or non-politically. In *Metro Cable,* the court appears to have concluded that a legislative body necessarily acts in a political context.[91] However, no such firm characterization is possible. A legislature may act in an administrative or quasi-judicial capacity; it may carry out certain ministerial duties in which political considerations and discretion are absent.[92] Wholly legitimate efforts to influence the legislature in its political functions may prove intolerable in the context of these activities.

Nonetheless, the court in *Metro Cable* was correct in concluding that the issuance of the cablevision franchise was an action political, rather than adjudicative, in nature. The principle that the granting of franchises is a political function is fairly well settled.[93] The Illinois courts have found that "[t]he granting of franchises by municipalities to utility companies or private persons to use the streets in the public interest constitutes an exercise of the city's legislative authority."[94] Despite the public hearing rules promulgated by the Federal Communications Commission, cable television franchising appears to remain a political/legislative function. Until recently, the franchising and regulation of cable television were strictly under local control. Gradually, however, the FCC has assumed responsibility for regulating the communications aspects of cable television, leaving regulation of "local incidents" to local authorities.[95] Local incidents include, among other things, parties, duration, and coverage.[96] The FCC felt that local authorities should retain discretion in franchising, in a form of dual jurisdiction. "[L]ocal governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters. . . . Under the circumstances, a deliberately structured dualism is indi-

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[90] In fact it is arguable that the judicial system, in making a record, is better able—through the contempt, perjury, and appeals processes—to protect against abuses than are the executive or legislative branches.

[91] 516 F.2d at 228.

[92] *See In re* Clement, 2 Ohio App. 2d 201, 207 N.E.2d 573 (1965); Floyd Stamps Rambler, Inc. v. Planning & Zoning Commission, 119 Ohio App. 249, 188 N.E.2d 185 (1963) (per curiam); Wright v. DeFatta, 129 So.2d 614 (Ct. App. La. 1961).

[93] *See* 12 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 34.22 (3d ed. 1970). "Legislative" and "political" function are often used interchangeably. *See* Rubin v. W.H. Hinman, Inc., 253 A.2d 708, 711 (Me. 1969).

[94] People *ex rel.* Better Broadcasting Council, Inc. v. Keane, 17 Ill. App. 3d 1090, 1097 (1st Dist. Ct. 1973). The court denied plaintiff's petition for mandamus to the City Council of Chicago because mandamus will not lie against a city council engaged in a legislative matter. *Id.*

[95] *See* Barnett, *State, Federal, and Local Regulation of Cable Television,* 47 NOTRE DAME LAWYER 685 (1972).

[96] *Id.* at 685.

cated; the industry seems uniquely suited to this kind of creative federalism."[97]

The FCC prescribed certain minimum standards as to the franchising of cable television and decided to administer those standards through a certification process.[98] In regard to franchising, the FCC noted:

> We *expect* that franchising authorities will publicly invite applications, that all applications will be placed on public file, that notice of such filings will be given, that where appropriate a public hearing will be held to afford all interested persons an opportunity to testify on the qualifications of the applicants, and that the franchising authority will issue a public report setting forth the basis for its action. Such public participation in the franchising process is necessary to assure that the needs and desires of all segments of the community are carefully considered.[99]

If these expectations were converted to *requirements*, either by the FCC or the State, then the franchising of cable television would more closely resemble an adjudicative process, in which case serious doubt would be cast on *Metro Cable* since the court avoided interpreting *California Motor* only by invoking the legislative-adjudicative distinction. At this point, however, it seems clear that the FCC has left discretion to local authorities to make a political decision: the "needs and desires of all segments of the community,"[100] which are the focus of the FCC franchising suggestions, are usually determined in a political manner.[101] Indeed, in a case decided with the FCC regulations in effect, a state court held: "The power of the governing body of a city to grant or refuse to grant a franchise is essentially legislative in nature requiring the exercise of judgment and discretion, and courts may not inquire into the motives which prompt a municipality's legislative body to enact an ordinance which is valid on its face."[102]

Because the grant of a cable television franchise is essentially a political decision, CATV's activities in influencing that decision process would be protected political activity under *Noerr*, except where illegal or abusive of the political process. The importance of the court's characterization of the alleged bribe as a campaign contribution is therefore strikingly evident. Bribery is not legitimate political activity and should not be protected under *Noerr*. On the other hand, a cam-

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[97] FCC, Cable Television Service; Cable Television Relay Service, 37 Fed. Reg. 3252, 3276 (1972).

[98] 47 C.F.R. § 76.31 (Supp. 1974). See also note 10 *supra*.

[99] FCC, Cable Television Service; Cable Television Relay Service, 37 Fed. Reg. 3252, 3276 (1972) (emphasis added).

[100] *Id.*

[101] *See* Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109 (1949).

[102] Capitol Cable, Inc. v. City of Topeka, 209 Kan. 152, 161, 495 P.2d 885, 892-93 (1972).

paign contribution is legitimate political activity, as is extensive lobbying, and is therefore not subject to antitrust liability. Thus, accepting the court's characterization, the decision in *Metro Cable* was correct.

C. *The Sham Exception*

Metro Cable applied the *California Motor* test to determine the presence of a sham even though the court had concluded earlier that *California Motor* was intended to be applied only in an adjudicative setting.[103] Despite language to the contrary, the court may have felt that *California Motor's* sham test should be extended to a legislative setting. In any case, the court held that Metro had not alleged a sham under that test.[104]

California Motor retained from *Noerr* the essential element of the sham analysis—a sham exists where there is an attempt to injure a competitor directly, rather than a genuine effort to influence government.[105] Justice Douglas could simply have held that the defendants' activities in *California Motor* fell within the *Noerr* sham exception as an attempt to directly injure competitors. This approach was taken by the concurring judges in *California Motor,* who disagreed with the majority's First Amendment discussion,[106] but nevertheless felt that defendants' acts constituted a *Noerr* sham.[107] The majority, however, seemed to add to the sham doctrine the notion that a sham exists—at least in an adjudicative context—if the manner of exercise of the right of petition and association, when considered with the defendant's other activities against competitors, indicate a true intent to injure them directly rather than an effort to influence government action.[108] Thus defendants in *California Motor* were found to have directly injured plaintiffs by acting to effectively deny them access to agencies and courts—access required in order to gain otherwise publicly available operating rights.[109] Furthermore, the intent to directly injure was gleaned from defendants' unyielding and undiscriminating opposition to plaintiffs' applications.[110]

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[103] 516 F.2d at 228.

[104] *Id.* at 232.

[105] *California Motor,* 404 U.S. at 511-12; *Noerr,* 365 U.S. at 144.

[106] 404 U.S. at 516 (Stewart, J., concurring). Justice Stewart, joined by Justice Brennan felt that the majority's discussion of antitrust liability stemming from the exercise of First Amendment rights "retreats from *Noerr*, and in the process tramples upon important First Amendment values." *Id.* The concurring justices evidently felt that under the majority's analysis, *Noerr* would not protect defendants' activities even if a sham were not proven; the exercise of First Amendment rights in an abusive manner would preclude *Noerr* protection. For a detailed analysis of the relation between the Constitution and antitrust laws, see Note, *The Quagmire Thickens: A Post-California Motor View of the Antitrust and Constitutional Ramifications of Petitioning the Government,* 42 U. CIN. L. REV. 281 (1973).

[107] 404 U.S. at 518 (concurring opinion).

[108] *Id.* at 514-15.

[109] *Id.* at 509-10.

[110] *Id.* at 515.

This same test should be equally applicable to a political setting: the nature of the defendant's acts may be examined to determine the presence of an intent to injure competitors directly through abusive efforts to influence the political process. The post-*California Motor* sham exception, thus viewed, appears to subject to Sherman Act liability *all* petitions to the government which are a "mere pretext" for inflicting direct harm.[111]

The court in *Metro Cable* concluded that Metro had not shown a sham under the *California Motor* test. "Plaintiff's injury was caused by the governmental action which defendants genuinely attempted to secure and succeeded in securing."[112] Defendants' acts were not "a pretext for inflicting on plaintiff an injury not caused by any governmental action."[113] The court further concluded that, unlike the total denial of access in *California Motor,* the "denial" of hearings on Metro's franchise application did not constitute a sham.[114] It is submitted that despite the court's effective extension of *Noerr* protection to undeserving activity—bribery disguised as campaign contributions—its failure to find a sham exercise of defendants' constitutionally protected rights to petition and lobby, once the companion activity was deemed legitimate, was correct. In *Metro Cable*, the effective denial of access which was the alleged illegal result of CATV's actions,[115] in fact occurred through the City Council's failure to grant a hearing, whereas in *California Motor,* the defendants *themselves* acted to deny access by making the costs of that access prohibitory.[116] CATV could not have effected a denial of access absent Council acquiescence. Because whatever denial of access that occurred was the immediate result of governmental acts, CATV's efforts to influence the Council did not constitute a pretext for inflicting direct harm and thus were not a sham. However tenuous the distinction may be in terms of ultimate effect, it is one which appears intended by the Supreme Court, and, indeed necessary in order to preserve the operation of the *Noerr* doctrine.

CONCLUSION

Metro Cable is an important case because it is the first decision analyzing a *Noerr* problem in a political setting within the post-*California Motor* framework, and thus will likely influence the future direction of the *Noerr* doctrine. Though it did apply the liberal *California Motor* sham exception test, *Metro Cable* read the basic *Noerr* protection expansively. A better result would be achieved by reading *Noerr* and *California Motor* together, avoiding separate rules for each

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[111] 516 F.2d at 229.
[112] *Id.* at 232.
[113] *Id.* at 229.
[114] *Id.* at 232.
[115] *Id.*
[116] 404 U.S. at 511.

branch of government. The test should focus on the nature of the alleged conspirators' acts—whether there was a genuine exercise of First Amendment rights or political activity. This in turn may be judged only in the context of the *type* of government function—political or adjudicative—sought to be influenced. The sham exception should be broad enough to allow an examination of the alleged political activity and exercise of the right to petition in order to determine whether the intent of the parties was to influence governmental action, or whether it was to injure the competitor directly through an abuse of governmental function. The former is protected public activity; the latter essentially unprotected private action.

The mere presence of government in the picture cannot end the inquiry. The wide-ranging involvement of "governmental units" in business-related activities suggests that in order for the policies of the antitrust laws to be effectuated, the *Noerr* doctrine must be defined more clearly; it is political activity and First Amendment rights which are to be protected, not anti-competitive *business* activity.[117] At the same time, acts such as bribery should never be immune under *Noerr*, as they are not protected political activity or exercise of First Amendment rights.

Unfortunately, *Metro Cable* is less than instructive in this confusing area. The court did not read plaintiff's complaint as alleging a bribe and thus avoided reaching any conclusion as to whether the presence of an official co-conspirator—as an abuse of governmental process—would remove *Noerr* protection. The court merely held that "campaign contributions" did not make the mayor and alderman co-conspirators. It is thus still an open question whether the presence of an official co-conspirator would remove the *Noerr* protection.[118]

STEPHEN R. LAMSON

Labor—Effect of Negotiating Impasse on an Employer's Right to Withdraw From a Multi-Employer Bargaining Association—*NLRB v. Beck Engraving Co.*[1]— Respondent, Beck Engraving Company, was a member of the Allied Printing Employer's Association (the Association),[2] a multi-employer bargaining unit. As an Association member,

[117] *See* Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1296-97 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

[118] Metro did not apply to the Supreme Court for a writ of certiorari. In fact, an attorney for Metro, when queried, stated that the case had been dropped. Conversation with Richard M. Calkins, Burditt & Calkins, Chicago, Ill., March 23, 1976. CATV, on the other hand, is required by the FCC to come into compliance with federal regulations by 1977. CATV of Rockford, Inc., 38 F.C.C. 2d 10, 14-15 (1972), *petition for reconsideration denied*, 40 F.C.C. 2d 493 (1973). It is possible that Metro may be awaiting a failure by CATV to comply before renewing its challenge.

[1] 522 F.2d 475, 90 L.R.R.M. 2089 (3d Cir. 1975).

[2] *Id.* at 477, 90 L.R.R.M. at 2090.