THE *NOERR-PENNINGTON* DOCTRINE

Chapter VI

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CHAPTER VI

WHAT DO WE MEAN BY "GENERALLY IMMUNE"? THE EXCEPTIONS TO THE IMMUNITY

Not all activities relating to "petitioning" the government—even among those activities genuinely aimed at seeking some government action—qualify for *Noerr-Pennington* protection. Instead, the Supreme Court in *Allied Tube & Conduit Corp. v. Indian Head*[1] cautioned that "the applicability of *Noerr* immunity varies with the context and nature of the activity" at issue.[2] *Noerr-Pennington* is not a seamless blanket of protection that covers all contact with the government. Courts, commentators, and the Federal Trade Commission (FTC) have identified holes or exceptions, or situations simply not reached by *Noerr-Pennington*, based on the "source, context, and nature"[3] of the particular circumstances in question. This chapter considers the exceptions and exclusions from *Noerr-Pennington* protection.

A. The "Misrepresentation" or Corruption Exception

One possible area for exceptions to antitrust immunity for efforts to influence the government can be found in those efforts that are tainted by deception, corruption, or other misconduct. The Supreme Court has made it clear that the First Amendment, itself, does not insulate one from claims for libel, slander, and other intentional falsehoods.[4] But, from its inception, the *Noerr* doctrine has never been circumscribed by a universal exception for misconduct.

When the Supreme Court first articulated antitrust immunity in *Noerr* for "petitioning" activity aimed at influencing the government, the specific conduct in question involved "unethical and deceptive

1. 486 U.S. 492 (1988).
2. *Id.* at 499.
3. *Id.*
4. *See, e.g.*, McDonald v. Smith, 472 U.S. 479, 482-85 (1985); Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

methods."[5] Even though the defendants in *Noerr* had "deliberately deceived the public and public officials," the Court later observed, "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned," at least in the situation at issue.[6] Following the pattern set in *Noerr*, the Court in *City of Columbia v. Omni Outdoor Advertising*[7] declined to recognize a conspiracy exception to *Noerr* immunity for collusion between private actors and representatives of the government whom they were seeking to influence.[8] In *Allied Tube*, the Court rejected an "improper means" test as an alternative basis for invoking the "sham" exception to *Noerr* immunity.[9] Finally, in *Professional Real Estate Investors v. Columbia Pictures Industries (PRE),*[10] the Supreme Court expressly declined to decide "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations."[11]

The Supreme Court has made clear, however, that it does not uniformly and universally reject an exception to *Noerr* immunity for misrepresentations, corruption, or other misconduct. For example, not long after *Noerr*, the Court observed in *California Motor Transport v. Trucking Unlimited*,[12] that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."[13] As the Court later explained in *Allied Tube*, any exception—including an exception for misrepresentations or corruption—will depend upon the setting and the nature of the conduct and governmental processes in question:

> [T]he applicability of *Noerr* immunity varies with the context and nature of the activity. A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods . . . . But in less

5. Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492, 499-500 (1988) (citing E. R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 140-41 (1961)).
6. City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 383-84 (1991) (quoting *Noerr*, 365 U.S. at 145).
7. 499 U.S. 365 (1991).
8. *Id.* at 382-84.
9. *Allied Tube*, 486 U.S. at 507 n.10.
10. 508 U.S. 49 (1993).
11. *Id.* at 61 n.6.
12. 404 U.S. 508 (1972).
13. *Id.* at 513.

> political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.[14]

In fact, "[a]lthough Supreme Court law remains unsettled, the weight of lower court authority, spanning more than thirty years, has recognized that misrepresentations may preclude application of *Noerr-Pennington* in less political arenas than the legislative lobbying at issue in *Noerr* itself."[15]

1. The Distinction Between "Judicial" and "Legislative" Processes: Questions of "Deconstruction" and Political Versus Less Political Arenas

Often, the availability of the misrepresentation exception has been cast in terms of legislative settings (as in *Noerr*), where it does not apply, versus judicial settings, where it does apply.[16] As the Supreme Court's language in *Allied Tube* implies, however, a more useful approach might focus on where a particular governmental process falls on a spectrum between the "political" and "non-political," with the legislative and judicial functions occupying the two ends of that spectrum. As *Noerr* itself demonstrates, in a purely "political" setting, there will be no misrepresentation exception to the doctrine; in "less political arenas," such as in courts or in administrative proceedings that more closely resemble a judicial setting, a misrepresentation exception is more likely to be recognized.

The reasons for this distinction are many. They begin with the somewhat cynical but pragmatic recognition that "[m]isrepresentations

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14. *Allied Tube*, 486 U.S. 493 at 499-500 (internal citation omitted).
15. *In re* Union Oil Co., 138 F.T.C. 1, 25 (2004). [hereinafter *Unocal*]. *See generally* I PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶¶ 203a-f (3d ed. 2006); C. Douglas Floyd, *Antitrust Liability for the Anticompetitive Effects of Governmental Action Induced by Fraud*, 69 ANTITRUST L.J. 403 (2001).
16. *See, e.g.*, Mercatus Group LLC v. Lake Forest Hospital, 528 F. Supp. 2d 797, 804-07 (N.D. Ill. 2007) (discussing application of sham exception to adjudicatory as distinguished from legislative process). See also ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1293-94 (6th ed. 2007) ("Misrepresentations designed to influence 'legislative functions' tend to qualify for *Noerr* immunity, while those designed to influence adjudicatory functions do not.").

are a fact of life in politics"[17] in that "rough and tumble" arena, legislative bodies are fully capable of dealing with those matters and sorting out such "contending political forces."[18] Of at least equal significance is the reluctance of courts in antitrust cases to delve into the causes or motivations behind legislative or "political" actions, a reluctance pointedly expressed by the Supreme Court in *Omni*: "This would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid."[19] As a practical matter, "in the legislative [or political] context, . . . no one can say what combination of facts, arguments, politics, or other factors produced the legislation."[20] Perhaps more importantly from a policy perspective—and this appears to have been the primary concern of the Supreme Court in *Omni*— allowing plaintiffs or courts to "look behind the actions of state sovereigns" to pursue or review antitrust claims would undermine effective governmental decision making and raise serious questions of federalism.[21]

In the judicial context, by contrast, the reasons for government action should be transparent, often recited or self-evident from the record before the court. Moreover, while legislative bodies may perform their own investigations and inquiries, seeking such information as they deem appropriate from whatever sources they like, courts must base their determinations upon the limited information provided by the parties before them, and they must rely upon the veracity and candor of the litigants; misrepresentations, therefore, may rob such an adjudicatory or nonpolitical process of its legitimacy.[22]

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17. Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056, 1062 (9th Cir. 1998).
18. AREEDA & HOVENKAMP, *supra* note 15, ¶ 203e at 175.
19. *Omni*, 499 U.S. at 377.
20. I AREEDA & HOVENKAMP, *supra* note 15, ¶ 203f3 at 186.
21. *See Omni*, 499 U.S. at 379; *Unocal*, 138 F.T.C. at 21, 35.
22. *See* Liberty Lake Invs. v. Magnuson, 12 F.3d 155, 159 (9th Cir. 1993); Clipper Express v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240, 1261 (9th Cir. 1982) ("[I]nformation supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these [entities] and does not deserve immunity from the antitrust laws."). *See also* FEDERAL TRADE COMM'N, ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE: AN FTC STAFF REPORT at 23-24 (2006) [hereinafter FTC STAFF REPORT].

But what of executive and administrative processes that lie more in the middle of the spectrum, not obviously legislative or adjudicative, but instead a process that is a hybrid of both? Here again, the Supreme Court's admonition in *Allied Tube*—that the applicability of *Noerr* immunity "varies with the context and nature of the activity"—guides the way. In these circumstances, a court must evaluate both the conduct of the private actor and the nature of the governmental process and place each on the political/legislative end of the spectrum or the nonpolitical/judicial end of the spectrum. Only after this analysis can a court determine whether, and to what extent, *Noerr* immunity should apply:

> There certainly is no privilege for misrepresentations to administrative agencies that base their decisions on information provided by the parties. Moreover, there is no reason here to differentiate for these purposes between adjudication and rule making or between rules grounded exclusively in a hearing record and those grounded in less formal procedures.[23]

In sum, then, the applicability of *Noerr* immunity should in every instance be determined by the particular "context and nature of the activity" and governmental processes in question, and not simply by the legislative, administrative, or adjudicatory labels applied to those activities and processes.

2. The Contours of a Misrepresentation Exception

Even in those "less political arenas" in which a misrepresentation exception to *Noerr* immunity is recognized, there remains the question what the "nature" of the misrepresentation must be in order to trigger the exception. Certainly, not every erroneous statement even to a court will strip a party of his or her *Noerr* immunity. But, for example, must the statement be knowingly made and intentionally false? How significant to the government's action or decision must the statement be? Some

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23. I AREEDA & HOVENKAMP, *supra* note 15, ¶ 203e at 178; *Unocal*, 138 F.T.C. at 16-17 & nn.16-30 (collecting cases). *See also* Caldon, Inc. v. Advanced Measurement & Analysis Group, Inc., 515 F. Supp. 2d 565, 574 (W.D. Pa 2007) (denying motion to dismiss because Noerr-Pennington immunity does not apply where misrepresentations "not only made in regulatory submissions, but were made to private entities within the nuclear industry.").

courts have required that in order to negate *Noerr* immunity, misrepresentations must be intentional and infect "the very core" of the proceeding such as to deprive the proceeding of its legitimacy.[24]

The Federal Trade Commission (FTC), in both an enforcement proceeding and in a staff report examining the *Noerr-Pennington* doctrine, recently has undertaken a comprehensive analysis of the misrepresentation exception to *Noerr* immunity.[25] Having examined the approaches to the misrepresentation exception followed by courts across the country, the FTC concluded that, in order to trigger an exception to *Noerr* immunity, misrepresentations made in an appropriately "less political arena" must fulfill three criteria:

> [I]n order to lose *Noerr* protection, the misrepresentation or omission must be: (1) deliberate (something more than mere error is necessary); (2) subject to factual verification; and (3) central to the legitimacy of the affected governmental proceeding.[26]

Leading commentators have agreed essentially with this formulation,[27] and it therefore appears to be a useful yardstick by which

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24. *See, e.g., Liberty Lake Invs.*, 12 F.3d at 159; Cheminor Drugs v. Ethyl Corp., 168 F.3d 119, 122-24 (3d Cir. 1999). *But see* Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hosp., 185 F.3d 154, 161-64 (3d Cir. 1999) (citing *Omni* and holding that misrepresentations in the context of a campaign to block the issuance of a state certificate for a hospital were protected).
25. *See Unocal*, 138 F.T.C. at 14-37; FTC STAFF REPORT, *supra* note 22, at 22-28, 37-38.
26. FTC STAFF REPORT, *supra* note 22, at 27.
27. *See, e.g.*, I AREEDA & HOVENKAMP, *supra* note 15, ¶ 203f at 182. Professors Areeda and Hovenkamp reached largely the same conclusions as did the FTC, noting that "[t]he possible offense is confined to 'known' falsity for several reasons. There is no policy ground to impose antitrust punishments on those who make innocent errors in their dealings with governments." *Id.*, ¶ 203f1 at 183. Further, "[i]f false information is to be actionable in an antitrust suit, the falsity must be clear and apparent with respect to particular and sharply defined facts," *i.e.*, it must be readily subject to verification. *Id.*, ¶ 203f2 at 185. Finally, to negate *Noerr* immunity, "the falsity [must] make a significant difference to the government's decision or have a significant effect on competition[.] Even with knowing falsity established, there is no antitrust offense without a material connection between the falsity and some impairment of competition." *Id.*, ¶ 203f3 at 185-86.

to measure whether a particular misrepresentation will abrogate *Noerr* immunity in a given situation.

3. The Strange Case of Walker Process: Is it a "Misrepresentation" Case?

In one instance, the Supreme Court unequivocally has held a party to be subject to antitrust liability because of its misrepresentations to the government. In *Walker Process Equipment v. Food Machine & Chemical Corp.*,[28] a patent holder filed suit for infringement. The defendant counterclaimed, arguing not only that the patent was invalid, but also that the plaintiff illegally sought to monopolize commerce by fraudulently obtaining its patent and attempting to enforce that patent by threats and by litigation. The Court agreed with the counterclaimant, concluding that where a patent holder "obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office"—that is, by "intentional fraud"—and then proceeded to attempt to enforce that fraudulently obtained patent with knowledge of the fraud, this "would be sufficient to strip [the patent holder] of its exemption from the antitrust laws," and subject it to liability, if the other elements necessary for Sherman Act liability (such as requisite power in a relevant market) are present.[29]

Standing alone, *Walker Process* seems unremarkable, a logical step in protecting the public interest in the processes by which government-sanctioned "monopoly" of patents is effectuated.[30] What renders the decision curious is that, although the conduct in question—persuading the Patent and Trademark Office (PTO) to issue a patent and then enforcing that patent in the courts—seems clearly to fall within the realm of "petitioning" activity covered by *Noerr*, the Supreme Court never mentioned *Noerr* in its *Walker Process* opinion.[31] Obviously, therefore, the Court gave no guidance about whether, or on what basis, the rule

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28. 382 U.S. 172 (1965).
29. *Id.* at 177-79.
30. *See id.* at 177.
31. The Supreme Court's decision in *Noerr* had been issued about four years earlier. *See* E. R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 127 (1961). The Court's follow-up decision in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)—also not mentioned in *Walker Process*—had been issued only months before the *Walker Process* opinion.

announced in *Walker Process* should be construed as an exception to *Noerr* immunity. Further, the Court has declined the opportunity in later decisions to clarify the issue. In *PRE*, for example, the Court cited *Walker Process*, but reserved ruling on its specific interaction with *Noerr* principles.[32]

Consensus has long since coalesced in the lower courts, however, that *Walker Process* effectively embodies an exception to *Noerr* immunity, although questions linger about the scope of that exception (that is, whether it should extend to settings other than patents fraudulently obtained and enforced) and the nature of the conduct necessary to trigger that exception (whether one must demonstrate "intentional fraud" as in *Walker Process* itself, or whether some lesser form of misrepresentation or corruption will suffice).[33]

For example, the Federal Circuit in *Nobelpharma AB, Inc. v. Implant Innovations*,[34] declared that *Walker Process* is an exception to *Noerr* immunity that stands on equal ground with the "sham" exception explicated by the Supreme Court in *PRE*:

> *PRE* and *Walker Process* provide alternative legal grounds on which a patentee may be stripped of its immunity from the antitrust laws; both legal theories may be applied to the same conduct. Moreover, we need not find a way to merge these decisions. Each provides its own basis for depriving a patent owner of immunity from the antitrust laws; either or both may be applicable to a particular party's conduct in obtaining and enforcing a patent. The Supreme Court saw no need to merge these separate lines of cases and neither do we.[35]

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32. *PRE*, 508 U.S. at 61 n.6. *See also* FTC STAFF REPORT, *supra* note 22, at 23 n.92 ("To date, the Court has not . . . explained the relationship, if any, between its *Walker Process* holding and the *Noerr* doctrine.").
33. *See* III PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 706 at 251. *See also Unocal*, 138 F.T.C. at 15-17 (citing *Walker Process*, and finding that "[a]lthough Supreme Court law remains unsettled, the weight of lower court authority, spanning more than thirty years, has recognized that misrepresentations may preclude application of *Noerr-Pennington* in less political arenas than the legislative lobbying at issue in *Noerr* itself").
34. 141 F.3d 1059 (Fed. Cir. 1998).
35. *Id.* at 1071. *See also* Morton Grove Pharms., Inc. v. Par Pharms. Cos., 2006 WL 850873, at **4-13 (N.D. Ill. 2006) (applying *Walker Process* and *PRE* tests in denying motion to dismiss).

Further, some courts have begun to apply *Walker Process* and its principles outside the strict confines of intentional fraud upon the PTO.[36] Likewise, the FTC has sought to extend "the *Walker Process* exception" to *Noerr* immunity beyond the PTO and beyond the "intentional fraud" that was the cornerstone of the Supreme Court's original decision.[37] Consequently, although *Walker Process* may have been born in a context devoid of *Noerr* analysis, it has become very much a part of *Noerr* jurisprudence, at least in the lower courts, and promises to be a source of continuing controversy and development in the years to come.

B. The "Commercial" Exception: Must "Redress" Be in Some Sense "Political"?

What about situations in which the government or an agency functions like any private participant in the marketplace, such as when it purchases supplies or services? Should anticompetitive efforts to influence the government in those circumstances be considered protected "petitioning," insulated from antitrust liability by *Noerr* immunity? Or, stated another way, is there or should there be a "commercial" exception to *Noerr*, covering attempts to influence the government when it acts in a proprietary fashion?

Several Supreme Court decisions after *Noerr* suggested that, at least in some circumstances of this sort, *Noerr* would not apply. For example, in *California Motor Transport*, the Supreme Court noted that "bribery of a public purchasing agent" likely would not be protected by *Noerr*.[38] Later, in *Omni*, the Court discussed a "possible market participant exception," observing that "immunity does not necessarily obtain where

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36. *See, e.g.*, *In re* Buspirone Patent Litig., 185 F. Supp. 2d 363, 373-75 (S.D.N.Y. 2002); III AREEDA & HOVENKAMP, *supra* note 33, ¶ 706 at 251 (collecting cases).

37. *See, e.g.*, *In re* Union Oil Co. of Cal., F.T.C. Dkt. No. 9305, App. Br. of Counsel Supporting Complaint, at 22-41 (Jan. 14, 2004), *available at* http://www.ftc.gov/os/adjpro/d9305/040114ccappealbrief.pdf [hereinafter Br. of FTC *Unocal* Compl. Counsel] (arguing that there is "no principled reason why *Walker Process* should be limited solely to the patent context"); Timothy J. Muris, *Clarifying the State Action and* Noerr *Exemptions*, 27 HARV. J.L. & PUB. POL'Y 443, 455 (2004) (arguing for extension of the *Walker Process* exception to *Noerr-Pennington* immunity beyond the Patent and Trademark Office context to analogous non-political proceedings).

38. *Cal. Motor Transp.*, 404 U.S. at 513.

the State acts not in a regulatory capacity, but as a commercial participant in a given market."[39]

The Court later applied these principles to reach its holding in *FTC v. Superior Court Trial Lawyers Ass'n (SCTLA)*.[40] In *SCTLA*, a group of lawyers who traditionally accepted court appointments to represent indigent defendants banded together to refuse any further appointments until the District of Columbia raised their compensation for those services. The Court found this to be "a classic restraint of trade," and then—although the lawyers' conduct plainly was undertaken with the goal of influencing the government—the Supreme Court rejected the lawyers' plea of *Noerr* immunity.[41] Specifically, the Court invoked language from its prior opinion in *Allied Tube* to find that "[h]orizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government" are not immunized "on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms."[42]

Nevertheless, most commentators and many courts have stopped short of recognizing a monolithic "commercial exception" to *Noerr*, applicable whenever the government acts in any proprietary capacity.[43] Instead, these authorities have observed, even where the government acts in a commercial or proprietary role, the availability of *Noerr* immunity will depend upon the nature of the conduct in question—both by the private actor and by the governmental entity or representative—and upon all of the circumstances there at issue; *Noerr* applicability will vary with the degree to which the government, although pursuing a generally "commercial" endeavor, also engages in traditional governmental political or policy-making activity in connection with that endeavor. As the Fifth Circuit has explained:

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39. *Omni*, 499 U.S. at 374-75, 379.
40. 493 U.S. 411 (1990).
41. *Id.* at 422, 424-25.
42. *Id.* at 425. *See also* Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 789 (1962) (rejecting *Noerr* immunity related to "commercial activity" of foreign government entity).
43. *See* I AREEDA & HOVENKAMP, *supra* note 15, ¶ 209. Some courts have flatly rejected a "commercial exception" to *Noerr* immunity. *See, e.g.*, Greenwood Utils. Comm'n v. Miss. Power Co., 751 F.2d 1484, 1505 (5th Cir. 1985). Others have been more open to such an exception. *See, e.g.*, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, 424 F.2d 25, 33 (1st Cir. 1970).

> We reject any notion that there should be a commercial exception to *Noerr-Pennington*, because although such a distinction may be intuitively appealing it proves difficult, if not impossible, of application in a case . . . where the government engages in a policy decision and at the same time acts as a participant in the marketplace.[44]

For example, the government's decision to purchase a new type of military aircraft is in a large sense "commercial" or "proprietary," but it is also laden with the types of policy decisions that are customarily the role of government.[45] So, the applicability of *Noerr* to immunize efforts to influence governmental activity at each end of the spectrum—from purely proprietary on one end to purely political or policy making on the other—may be fairly easy to predict. As the governmental conduct moves toward the middle of the spectrum with a mixture of proprietary and political function, gauging the applicability of *Noerr* becomes more difficult.

Still, some principles appear to emerge: first, *Noerr* immunity will rarely be appropriate when the government is the object or victim of the alleged anticompetitive activity, as opposed to the situation (as in *Noerr* itself) where the private actor seeks to have the government affect some anticompetitive result.[46] For example, *Noerr* immunity was rejected in *SCTLA* for the trial lawyers' boycott of the District of Columbia in an effort to coerce higher payments from the government.[47] Second, as two leading commentators have observed, "*Noerr* immunity becomes increasingly appropriate as (a) the resulting government decision reflects a policy choice rather than capitulation to the economic pressure of the private firm; and (b) anticompetitive injury to others is caused by the government decision rather than the private restraint seeking to compel that decision."[48]

So, while *Noerr* immunity plainly is more suspect in circumstances where the government acts in a commercial role, the applicability and operation of the doctrine to each individual set of circumstances must be judged by the *Allied Tube* test; that is, it will depend upon "the source, context and nature of the anticompetitive restraint at issue."[49]

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44. *Greenwood Utils.*, 751 F.2d at 1505.
45. *See* I AREEDA & HOVENKAMP, *supra* note 15, ¶ 209a at 306.
46. *See id.*, ¶ 209 at 306-07.
47. *SCTLA*, 493 U.S. at 425.
48. I AREEDA & HOVENKAMP, *supra* note 15, ¶ 209a at 307.
49. *Allied Tube*, 486 U.S at 499 (1988).

C. Can and/or Should There Be an "FTC" Exception?

For some time, the FTC and its representatives have warned against unduly broad interpretation of exemptions to the antitrust laws.[50] Overly liberal application of the *Noerr* doctrine has been of particular concern to the FTC and commentators.[51] In addition to speaking in favor of an expanding "misrepresentation" exception to the *Noerr* doctrine, described above, and extension of the *Walker Process* exception to situations beyond the PTO, the FTC has argued for what amounts to an "FTC exception" to *Noerr* immunity—or, stated more accurately, it has contended that *Noerr* immunity simply does not extend to Section 5 of the FTC Act.[52]

In 2003, the FTC launched an enforcement action against Unocal under Section 5 of the Act, based in large measure upon allegations that Unocal had misled the California Air Resources Board and two private industry groups in connection with their adoption of regulations and standards relating to auto emissions and reformulated gasoline.[53] Unocal defended primarily by arguing that its conduct and representations to the governmental and private standard-setting bodies were protected by *Noerr* immunity.[54] FTC Complaint Counsel disputed Unocal's fulfillment of *Noerr*'s requirements, but went a step further.[55] Contending that *Noerr* immunity "is a narrow, statute-specific exception to Sherman Act liability," Complaint Counsel argued that the *Noerr* doctrine, with all its permutations as it had developed through the years, simply does not apply to the FTC's ability to proceed against "unfair competition" under Section 5 of the FTC Act.[56]

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50. *See, e.g.*, FTC STAFF REPORT, *supra* note 22, at 3-4.
51. See, e.g., John T. Delacourt, *Restoring Rationality to Petitioning Immunity*, 17 ANTITRUST 36 (2003); John T. Delacourt, *Protecting Competition by Narrowing* Noerr*: a Reply*, 18 ANTITRUST 77 (2003).
52. 15 U.S.C. § 45.
53. *In re* Union Oil Co. of Cal., FTC Dkt. No. 9305, Compl. (Mar. 4, 2003), *available at* http://www.ftc.gov/os/adjpro/d9305/030304unocaladmin-cmplt.pdf.
54. *See* Answering Br. of Union Oil Co. of Cal., at 10-50 (Feb. 27, 2004), *available at* http://www.ftc.gov/os/adjpro/d9305/040227unocals-answeringbrief.pdf.
55. Br. of FTC *Unocal* Compl. Counsel, *supra* note 37, *at* 13-39.
56. *Id.* at 42, 41-46.

Instead, Complaint Counsel argued, Section 5 enforcement actions regarding conduct such as that alleged against Unocal should be constrained only by the requirements of the First Amendment, which can be considerably narrower than *Noerr*, particularly where the conduct at issue involves allegations of misrepresentation or corruption.[57] Because the *Unocal* enforcement proceeding ended in a consent decree, neither the FTC itself nor any court reached a conclusion about the proposed FTC Act exemption.

The argument that *Noerr* immunity does not extend to actions brought under Section 5 of the FTC Act is grounded in the idea that the *Noerr* doctrine derives from a statute-specific analysis of the interaction between the Sherman Act and the First Amendment right to petition, and that such an analysis will, of necessity, vary when applied to another statute, such as the FTC Act.[58] Those favoring such an approach point, for example, to *BE & K Construction Co. v. NLRB*,[59] in which the Supreme Court gave a nod to *Noerr* jurisprudence but evaluated the conduct in question based upon the interaction between the First Amendment and "the NLRA rather than the Sherman Act."[60] Supporters of this argument describe what they contend to be the significant differences between the FTC Act and the Sherman Act, including the limitation of the former to enforcement actions by the FTC, that seek only forward-looking cease and desist orders, rather than treble damages remedies.[61] Finally, they note that neither the Supreme Court nor any lower court has expressly ruled upon the question whether *Noerr* immunity applies to enforcement proceedings under the FTC Act or whether, instead, such proceedings are constrained only by First Amendment bounds, much as the Supreme Court decided with respect to the National Labor Relations Act in *BE & K Construction Co.*

While it is true that no court has decided directly and definitively whether Section 5 enforcement actions by the FTC are subject to the *Noerr* doctrine, numerous courts and other authorities have long assumed that *Noerr* does apply to the FTC Act proceedings. In *SCTLA*, for example, the Supreme Court rejected the defendants' *Noerr* defense in an FTC Act enforcement proceeding; in so doing, the Court applied *Noerr*

57. *Id.*
58. *Id.*
59. 536 U.S. 516 (2002).
60. *Id.* at 526, 524-33.
61. *See, e.g.*, Br. of FTC *Unocal* Compl. Counsel, *supra* note 37, at 43-46.

principles and precedents, rather than questioning whether that doctrine pertained at all or applying only First Amendment principles instead.[62] Similarly, the Supreme Court has observed (in *dicta*) both in *Omni* and *PRE* that the doctrine applies to "antitrust laws"[63] generally and to establish that those "who petition government are generally immune from antitrust liability"[64]—without limiting those concepts to the Sherman Act. In fact, there is broad consensus that *Noerr* immunity applies not only to "antitrust laws," but also to other federal statutes and even to state common law claims, such as tortious interference with contract.[65] So, even though the question has not been directly and authoritatively determined by the courts, proponents of an "FTC Act exception" to *Noerr* immunity find themselves swimming against a tide of indirect and inferential authority that presumes *Noerr* applicability not only to the FTC Act, but to numerous other claims as well.

Finally, the suggestion that *Noerr* does not apply to FTC Act enforcement actions presents something of a logical and practical problem. If *Noerr* immunity does not extend to FTC enforcement proceedings, then the same conduct would be immunized in a case brought by a private litigant, or even by the Department of Justice, but could nevertheless subject an antitrust defendant to liability in a proceeding brought by the FTC under the FTC Act. Such inconsistent treatment, predicated solely upon the identity of the complaining party or prosecuting agency and not upon anything within the control of the antitrust defendant, seems difficult to justify.

Nevertheless, those who argue against *Noerr*'s applicability to FTC Act proceedings claim legitimate support in the Supreme Court's approach to cases like *BE & K Construction*. The question will remain open until some court—and perhaps until the Supreme Court—directly addresses and disposes of the matter.

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62. *SCTLA*, 493 U.S. at 414, 424-25.
63. *Omni*, 499 U.S. at 380.
64. *PRE*, 508 U.S. at 56.
65. *See, e.g.*, Cheminor Drugs. v. Ethyl Corp., 168 F.3d 119, 128-29 (3d Cir. 1999) (collecting authorities applying *Noerr* to claims such as malicious prosecution, tortious interference, unfair competition, and the like). *But see* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885, 889 (10th Cir. 2000) (en banc) (ruling that *Noerr* immunity applies only to antitrust claims, while First Amendment principles govern non-antitrust settings).