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\*28 THE ADMISSIBILITY OF EVIDENCE PROTECTED BY NOERR-PENNINGTON

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Although political activity is protected from antitrust liability under the Noerr-Pennington doctrine, evidence of such activity is at times admissible to prove other antitrust violations. Such evidence, if admissible, could be used to prove anticompetitive intent, or as a 'plus factor' to prove conspiracy where the only other evidence of conspiracy is parallel conduct. However, the standard of admissibility adopted by most courts yields an interesting result: where Noerr-Pennington evidence is most necessary to prove a violation, it is least likely to be admitted, and where such evidence is admitted, it usually is superfluous.

Pennington itself established that 'Noerr-Pennington evidence' is admissible under some circumstances. There, the court stated in dicta that the trial judge may admit evidence of protected activity 'if he deemed it probative and not unduly prejudicial.' *United Mine Workers v. Pennington*, 381 U.S. 657, 670 n.3 (1965). The Court invoked the common law rule that evidence that is 'barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.' *Id.*

This passage from Pennington has been interpreted to mean that Noerr-Pennington evidence shall be evaluated under Federal Rule of Evidence 403, which requires exclusion of evidence if its probative value is substantially outweighed by its prejudicial effect. *United States Football League v. National Football League*, 634 F. SUPP. 1155, 1171 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335, 1373-75 (2d Cir. 1988). [FN1] In practice, the application of the balancing test excludes Noerr-Pennington evidence in almost any case where it is needed to establish a violation. Although this appears peculiar, it may be consistent with the view that because Noerr-Pennington evidence 'by its very nature chills the exercise of First Amendment rights . . . it is properly viewed as presumptively prejudicial.' *United States Football League*, 634 F. Supp. at 1181. [FN2]

#### Absence of Other Probative Evidence

Whether Noerr-Pennington evidence is admissible depends in part on whether other evidence of antitrust violations exists. Where the only probative evidence of a violation relates to protected activity, such evidence generally will be inadmissible. For instance, where the only probative evidence of conspiracy (other than parallel conduct) is Noerr-Pennington evidence, such evidence is inadmissible. *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir.), *cert. denied*, 455 U.S. 988 (1982).

In *Weit*, plaintiffs argued that the trial court erroneously excluded evidence of defendant's lobbying activities. The court had found that plaintiffs' evidence of conspiracy (other than defendants' parallel pricing) was 'so insubstantial . . . as to preclude a verdict for plaintiffs.' *Id.* at 466. As conscious parallelism alone is insufficient to support a finding of conspiracy, the district

court granted summary judgment for defendants. *Id.* at 461.

The court of appeals affirmed the district court's exclusion, holding that although an inference of conspiracy could be drawn from the evidence, 'it more directly suggests an agreement to influence legislators.' *Id.* at 466. The court held that the probative value of the evidence was outweighed by its prejudicial quality:

Given the lack of any substantial evidence of an antitrust conspiracy in the instant case, the threat of prejudice from admission of this evidence is considerable. The lack of other probative evidence of conspiracy would serve to focus the jury's attention on the lobbying evidence. This could easily result in a finding of antitrust liability for engaging in the First Amendment right to petition which Noerr-Pennington protects.

*Id.* at 467. *Weit* stands for the proposition that where conscious parallelism is alleged and no 'plus factors' exist other than protected activity, such evidence should be excluded as more prejudicial than probative.

Similarly, in *Bright v. Moss Ambulance Services, Inc.*, 824 F.2d 819 (10th Cir. 1987), plaintiff, an ambulance service, alleged that a competitor had attempted to monopolize the county \*29 ambulance market. Plaintiff's most credible evidence of market power was a study showing that defendant had an eightyfive percent market share in the county. However, since most of defendant's business arose from a franchise that was granted by a city, activity related to the franchise was protected by Noerr-Pennington. Thus, the court held, defendants' 'enjoyment of the market share devolved from the protected activity cannot support allegations of market power.' *Id.* at 824. As plaintiff had presented no other probative evidence of market power, the court affirmed summary judgment for defendant.

Although it did not directly address admissibility, *Bright* also stands for the proposition that evidence of protected activity generally is either useless or inadmissible where no other probative evidence exists.

Based on an analysis of the *Weit* and *Bright* cases, it would appear that where Noerr-Pennington evidence is most necessary to prove an antitrust violation, its probative value is outweighed by its prejudicial impact.

#### Where Other Evidence Exists: Discretion to Admit

Where plaintiff has submitted significant evidence of antitrust violations other than activity protected by Noerr-Pennington, the case law is split as to whether such evidence should be admitted.

Numerous cases have admitted evidence of protected activity under the Pennington 'purpose and character' rule. [FN3] And, in contrast, other cases have held evidence of protected activity inadmissible on the basis that such evidence was 'cumulative' or 'corroborative.' [FN4] There is no clear pattern within individual circuits. The Fifth and Eighth Circuits both have admitted Noerr-Pennington evidence under the 'purpose and character' rule and, on other occasions, have excluded such evidence as cumulative. No case addressing admissibility has attempted to distinguish or discredit cases on the other side of the issue. Furthermore, a look at some typical cases offers little guidance to practitioners.

For instance, in *Household Goods Carriers Bureau v. Terrell*, 452 F.2d 152 (5th Cir. 1971), a manufacturer of highway mileage guides alleged that a competitor and a movers' trade association conspired to monopolize the market. After defendant introduced a government memorandum accusing the plaintiff of misrepresentation, plaintiff responded with evidence of

lobbying by the defendant. Although plaintiff already had introduced an allegedly libelous letter by one of the defendants, the court admitted evidence of defendants' lobbying to show 'the purpose and character of the transactions under scrutiny,' to rebut the insinuations put into evidence by the defendants, and to prove the existence of a conspiracy. . . .' 452 F.2d at 157-58. Although a libelous letter suggests the existence of 'insinuations' as surely as does evidence of lobbying, the court did not consider the possibility that the latter evidence might be cumulative. In contrast, in *U.S. Football League*, plaintiff sought to introduce evidence of defendant's lobbying between 1961 and 1966 with respect to sports-related legislation, in order to prove that such lobbying was 'part of a long-standing conspiracy to monopolize the market in professional football.' 634 F. Supp. at 1171. The court held that, 'As evidence of the NFL's state of mind in the 1980's, it [evidence of lobbying] is weak, since the lobbying occurred from fifteen to twenty years before the events at issue in this case took place' and 'to whatever extent such conduct evidences monopolistic intent, it is cumulative to other evidence that plaintiffs have cited to Court.' *Id.* Accordingly, the court excluded the lobbying evidence under Rule 403 because its probative value was outweighed by unfair prejudice to defendant's First Amendment interests. The Second Circuit wholly endorsed the district court's reasoning on this issue. *U.S. Football League*, 842 F.2d at 1374.

Cases excluding evidence of protected activity as 'cumulative' have done so \*30 under Rule 403. They have not explicitly defined the term, however, nor have they furnished practitioners with any guidance beyond that provided by Rule 403 itself. Moreover, they stand in stark contrast to those cases (such as *Household Carriers* and *Webb v. Utah Tour Brokers Association*, 568 F.2d 670 (10th Cir. 1977)) admitting evidence of protected activity without any consideration of 'cumulativeness.'

It appears, therefore, that a principled distinction between cases admitting evidence of protected activity and those excluding such evidence as cumulative cannot be found. There are, however, several hypotheses that might explain the differences between the two groups of cases. For instance, evidence of protected activity arguably may be excluded as cumulative only where plaintiff prevails, or such evidence may be admitted only to clarify an ambiguous record, or where evidence of protected activity is of a different type than other evidence in the record. Unfortunately for those in search of an analytical framework, none of the hypotheses stands up to analysis based on an examination of two roughly contemporaneous circuit court decisions, *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8th Cir.), cert. denied, 461 U.S. 937 (1983); and *City of Cleveland v. Cleveland Electric Illuminating*, 734 F.2d 157 (6th Cir. 1984).

*Alexander* admitted evidence of protected activity, while *City of Cleveland* excluded such evidence, yet the cases seem indistinguishable factually. In *City of Cleveland*, a city that had owned a defunct utility brought suit against a private utility for monopolization and attempted monopolization. At trial, defendant admitted that it intended to eliminate competition. Furthermore, defendant's conduct (which included soliciting participation by plaintiff in a price-fixing conspiracy, a 'displacement program' aimed at displacing the city utility, and delaying or refusing interconnection whenever possible) was circumstantial evidence of anticompetitive intent. *City of Cleveland*, 734 F.2d at 1164.

Plaintiff attempted to introduce a joint stipulation that defendant had induced a third party to file suit to prevent a government-owned interconnection between the utilities. The court affirmed exclusion of this evidence, holding that as other evidence of anticompetitive intent existed,

evidence of defendant's activity 'was simply cumulative in its effect.' Id.

Despite the court's finding that ample evidence of anticompetitive intent existed, the court affirmed a jury verdict for defendant. Thus, City of Cleveland supports the proposition that evidence may be excluded as 'cumulative' even where defendant prevails.

In *Alexander*, evidence of protected activity was admitted despite the fact that ample evidence of anticompetitive intent and conduct existed. In *Alexander*, plaintiff, a milk cooperative, filed suit against competitors for, inter alia, conspiracy to monopolize. Plaintiff submitted evidence that defendant, through letters and other contacts with government officials, had attempted to prevent plaintiff from participating in federal marketing orders. *Alexander*, 687 F.2d at 1195. The court admitted the evidence because it proved that defendants 'acted in concert with the specific intent of blocking competition.' Id.

The plaintiff's other evidence was more than adequate, however. For instance, defendants tried to pressure plaintiff's customers into buying all their milk from defendants. Such conduct was termed an 'unequivocal illustration of predatory conduct aimed at coercing buyers' to buy from defendants and 'blatantly predatory.' Id. at 1196. The court concluded that the 'purpose and intent' of such conduct was to get customers to buy only from defendants, and that such conduct 'tends to show an unlawful intent' behind similar conduct directed at plaintiff. As to another buyer, similar conduct was termed 'plainly predatory.' Id. at 1198. The court held that defendant's price discrimination and threatened supply cutoffs were 'the strongest evidence of an unlawful purpose.' Id. at 1197. Such conduct was 'predatory on its face' and an examination of the underlying evidence 'only confirms that an inference of unlawful purpose must be drawn.' Id. at 1199. Other condemned conduct included threats of litigation against customers of plaintiff, refusals by defendant to acknowledge customer terminations, destruction of evidence by a defendant, and admissions of predatory motive by defendants' officials.

Another hypothesis which might explain the divergence between cases admitting *Noerr-Pennington* evidence and those refusing to do so is that the evidence may be admitted only to clarify an otherwise ambiguous record--that is, to reveal the unlawful character of seemingly innocent conduct. The facts of *City of Cleveland* and *Alexander* do not support this explanation, however. In *Alexander*, the evidence of predatory intent and conduct was hardly unambiguous. Nevertheless, the court admitted evidence of protected activity. By contrast, defendant won a jury verdict in *City of Cleveland*.

Alternatively, it might be hypothesized that the evidence of protected activity is excluded where such evidence is of the same type as other evidence and admitted where it is of a different type. For instance, if other evidence is direct, *Noerr-Pennington* evidence would be admitted if circumstantial and excluded if direct. Again, the facts of *City of Cleveland* and *Alexander* lend no support to this hypothesis.

In both cases, evidence of anticompetitive intent (other than *Noerr-Pennington* evidence) included direct as well as circumstantial evidence. In *City of Cleveland*, the existence of anticompetitive intent was admitted at trial, and such intent could also be inferred from defendant's acts. *City of Cleveland*, 734 F.2d at 1164. Similarly, in *Alexander*, predatory motive was admitted in documents, 687 F.2d at 1207, and could also be inferred from defendants' acts. Under the hypothesis, both courts should have ruled similarly on admissibility. In fact, the court in *City of Cleveland* excluded *Noerr-Pennington* evidence while in *Alexander* it was admitted.

Testing the hypotheses against the *Alexander* and *City of Cleveland* decisions shows that there is

no logical basis for distinguishing cases excluding Noerr-Pennington evidence as 'cumulative' from those admitting such evidence. The only way to reconcile the two groups of cases is to recognize that when courts use terms such as 'cumulative' and 'corroborative,' they are merely balancing probativeness and prejudice. [FN5] Therefore, the split in authority may be more apparent than real.

Thus, if other significant evidence of antitrust violations is found, the admissibility of Noerr-Pennington evidence involves no fixed legal criteria other than a weighing of probative value and prejudicial impact. Therefore, practitioners are well advised to take nothing for granted in evaluating the admissibility of Noerr-Pennington evidence.

### Conclusion

The admissibility of Noerr-Pennington evidence will depend on the availability of other evidence of antitrust violations. Where no evidence of antitrust violations is available, or where the only evidence is legally insufficient to prove a violation, Noerr-Pennington evidence has been excluded. In contrast, where a great deal of evidence of illegality exists, courts often admit Noerr-Pennington evidence despite the fact that it may not be needed to prove a violation. Although admission is disfavored, no specific rule binds judges, who, it appears, may admit or exclude Noerr-Pennington evidence without any analytical framework to guide their decisions. Thus, plaintiffs seeking to admit Noerr-Pennington evidence face a 'Catch-22': where evidence is truly necessary to the development of a case it will not be admitted, and where it is admissible it usually will be superfluous.

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[FN1] See also *Cippolone v. Liggett Group, Inc.*, 668 F. Supp. 408, 411 (D.N.J. 1987) (balancing test adopted where plaintiff in products liability case sought to introduce Noerr-Pennington evidence) (dictum).

[FN2] See also P. AREEDA & H. HOVENKAMP, *ANTITRUST LAW* § 203.7 at 52 (Supp. 1987)(weighing of Noerr-Pennington evidence 'should lend to its exclusion, at least presumptively'); Fischel, *Antitrust Liability for Attempts To Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 121 (1977) ('courts have been properly reluctant to admit evidence of conduct lawful under Noerr'). However, in *Cippolone v. Liggett Group, Inc.*, 668 F. Supp. 408 (D.N.J. 1987), the court held that the presumption was inapplicable where 'the lobbying activity, though protected, is ethically questionable.' *Id.* at 411.

[FN3] See, e.g., *MCI Communications v. AT&T*, 708 F.2d 1081, 1160 (7th Cir.), cert. denied, 464 U.S. 891 (1983) (admissibility briefly noted); *Alexander v. National Farmers Org.*, 687 F.2d 1173 (8th Cir.), cert. denied, 461 U.S. 937 (1983) (in addition to engaging in protected activity, defendant liable for numerous independent violations); *Webb v. Utah Tour Brokers Ass'n*, 568 F.2d 670, 672 (10th Cir. 1977) (lobbying evidence held to have 'evidentiary value' although liability found based on group boycott unrelated to lobbying); *Household Goods Carriers' Bur. v.*

Terrell, 452 F.2d 152 (5th Cir. 1971) (evidence of lobbying admitted to prove anticompetitive intent, although allegedly libelous letter also admitted).

[FN4] See *United States Football League v. National Football League*, 634 F. Supp. 1155, 1171 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335, 1374-75 (2d Cir. 1988); *City of Cleveland v. Cleveland Elec. Illuminating*, 734 F.2d 1157, 1164 (6th Cir.), *aff'g* 538 F. Supp. 1344 (N.D. Ohio 1981), *cert. denied*, 469 U.S. 884 (1984) (as other probative evidence available, evidence of lawsuit by defendants 'simply corroborative'); *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 543 n.7 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979) (evidence of medical society resolution supporting defendants' litigation excluded as cumulative regarding drafter's intent, where drafter was already defendant at time of resolution).

[FN5] Areeda suggests that evidence of protected activity also may be introduced to prove an anticompetitive 'overall scheme.' P. AREEDA & H. HOVENKAMP, *supra* note 1, at ¶203.7. However, other authorities do not view the 'overall scheme' theory as a separate basis for admissibility. In *Cippolone v. Liggett Group, Inc.*, 668 F. Supp. 408 (D.N.J. 1987), plaintiff sought to introduce Noerr-Pennington evidence as part of 'a continuing course of deceptive conduct.' *Id.* at 411. The court held that '[w]hether such evidence is admissible requires a balancing of its probative value against undue or unfair prejudice.' *Id.* Thus, according to *Cippolone*, the 'overall scheme' theory is merely a means of ascertaining the probative value of evidence under Rule 403.

Other authorities hold that the 'overall scheme' theory relates to the protected status of political activity rather than its admissibility. See, e.g., ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 615 (2d ed. 1984); *Scott v. City of Sioux City, Iowa*, 1982-83 Trade Cas. (CCH) ¶65,203 at p. 71,847 (N.D. Iowa 1982) ('Where legitimate lobbying is combined with illegal actions, the Noerr-Pennington exemption has no application'). As such an 'overall scheme' exists only where other evidence of antitrust violations exists, the difference between this theory and a Rule 403 analysis is of no practical importance.