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# Petition without Prejudice: Against the Fraud Exception from the Toxic Tort Perspective

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Petition without Prejudice: Against the Fraud Exception to *Noerr-Pennington* Immunity from the Toxic Tort Perspective.

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## I.

### INTRODUCTION

By prohibiting laws “abridging the right of the people . . . to petition the government for redress of grievances” the petition clause of the First Amendment<sup>2</sup> of the United States Constitution gives safe harbor to all genuine efforts to influence government decisions. Those words forbid Government from outlawing or punishing its citizen’s petitions; so while the Government may reject a petitioner’s argument, it may never sanction him for making it. Under

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<sup>1</sup> The author is a senior associate in Gibson, Dunn & Crutcher, LLP’s Environmental and Natural Resources Practice Group, where he has worked on multiple large toxic torts, other assorted environmental litigations, and corporate transactions with environmental components. He became interested in the intersection of the First Amendment petition clause with toxic torts after both defending a lobbyist and opposing efforts to predicate punitive damages on a defendant’s historical petitioning activities.

This article was only possible with the loving tolerance of my wife, Georgia Sabovich, and with the support and guidance of other attorneys within my practice group. Robert Loewen, in particular, often loaned his extensive toxic tort experience to this effort. My fellow associates Sarah Schlosser and Thomas Manakides were invaluable as sounding boards and in offering journal insights.

<sup>2</sup> U.S. Const., 1st Amend (“Congress shall make no law . . . abridging the right of the people . . . to petition the government for redress of grievances”); Cal. Const. Art. I, § 3 (“The people have the right to . . . petition government for redress of grievances”).

the *Noerr -Pennington* doctrine<sup>3</sup> the petition clause also forecloses private parties from invoking government’s coercive power to do the same through the tort system.

The *Noerr-Pennington* doctrine accomplishes this by stating, generally, that one cannot be held civilly liable for genuine attempts to influence government action. Similar protections are also afforded in most states by statutory or case law privileges against liability for statements made in official proceedings.<sup>4</sup>

History teaches that protection of First Amendment freedoms requires considerable vigilance, especially against restrictions aimed conforming speech to popular belief or prejudice. The petition clause, after all, only narrowly survived restrictions aimed at limiting politically unpopular abolitionist lobbying which was argued to be illegal.<sup>5</sup> Today, a movement is afoot to create a sweeping “fraud exception” to petition immunity, thereby revoking it in the common circumstance where opposing viewpoints attribute deceit to each other.

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<sup>3</sup> The protection was first set out in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). Throughout this article, *Noerr-Pennington* immunity, petition immunity, and political speech immunity are used interchangeably to refer to *Noerr’s* protection.

<sup>4</sup> *Infra*, Part II.B.

<sup>5</sup> Stephen A. Higginson, *A Short History of the Right To Petition Government for the Redress of Grievances*, 96 Yale L. J. 142, 160 (1986) (discussing the right to petition crisis over abolition, including “gag” rules against abolitionist petitioning in Southern states, and arguments that such petitions were unlawful).

The need for vigilance in the protection of the right to petition is demonstrated in the area of toxic torts.<sup>6</sup> Born of Agent Orange and the pharmaceutical cases of the 1960's and 1970's, the modern toxic tort is often typified by powerful political interests on both sides, billion-dollar stakes, entrepreneurial sophistication, and broad social implications, all to a degree beyond that found in typical personal injury lawsuits.<sup>7</sup> The toxic tort's core allegation is that some misconduct by defendants caused plaintiffs to be exposed to a substance which then brought on some ailment.<sup>8</sup> In environmental toxic torts, this is often coupled with claims that defendant knew it was contaminating the air or the groundwater, but misrepresented that information to regulators.<sup>9</sup> I refer the subject of to such allegations as "site-specific lobbying." In the case of more general lobbying, plaintiff alleges that the defendant downplayed the danger of its

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<sup>6</sup> Because the term "toxic tort" refers to cases in which the plaintiff alleges injury from some exposure, it technically includes everything from an isolated case of food poisoning at a local restaurant to massive, industry-wide litigation over breast implants. *Henry v. Dow Chem. Co.*, 473 Mich. 63, 67 (2005) ("In an ordinary 'toxic tort' case of action, a plaintiff alleges he has developed a disease because of exposure to a toxic substance negligently released by the defendant."). In discussing toxic torts, this article refers more to the large, high-stakes types of lawsuits epitomized by the latter of these.

<sup>7</sup> *Infra*, Part.VI.

<sup>8</sup> Dore, M., 1 L. of Toxic Torts § 2:1 (2006); Margie Searcy-Alford, 1-1 Guide to Toxic Torts § 1.02 (2006); *Cottle v. Superior Court*, 3 Cal.App.4th 1367, 1371 (1992). The major components of the toxic tort, and hence whether the energies of plaintiff and defense counsel are correspondingly devoted, are the company's handling of chemicals (conduct), showing that the defendant's chemicals reached the plaintiff in small or large quantities (fate and transport) and establishing that those chemicals did or did not bring about whatever ailments the plaintiff claims (causation). Jonathan Mosher, *A Pound Of Cause For A Penny Of Proof: The Failed Economy Of An Eroded Causation Standard In Toxic Tort Cases*, 11 N.Y.U. Env'tl. L.J. 531, 586 (2003).

<sup>9</sup> See e.g., David Lazarus, *PG&E Cast as Villain in New 'True-Story' Movie*, San Francisco Chronicle, A-1 (March 16, 2000).

substance to regulators. To separate this from its more limited remediation counterpart, I call the subject of such allegations “legislative lobbying” allegations.

Both types of allegations seek to impose tort liability for political speech, that is, behavior aimed at affecting government decisions, so they conflict with *Noerr-Pennington*. The name of the clash is the “fraud exception” to *Noerr-Pennington* which goes that, in certain circumstances the petition alleged to be deceptive does not deserve protection.<sup>10</sup> If narrowly interpreted, most lobbying activity will remain protected against civil liability; if broadly interpreted, the exception threatens to largely swallow petition immunity for environmental lobbying. After examining the cases that have fashioned the fraud exception, this article argues there should be no such exception, or it should be narrowly drawn because tying immunity to an opponent’s view of the petitioner’s veracity will only chill political speech. Instead, as is currently the prevailing view, communications genuinely meant to influence government action should be immune from tort liability without regard to allegations of fraud in the information communicated.

## II.

### TORT IMMUNITY FOR PETITIONS TO GOVERNMENT

The First Amendments of the United States and California Constitutions guarantee the right to “petition government for redress of grievance.”<sup>11</sup> This has formed two distinct

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<sup>10</sup> *Infra*, Part II.A.ii.

<sup>11</sup> U.S. Const., 1st Amend (“Congress shall make no law . . . abridging the right of the people . . . to petition the government for redress of grievances”); Cal. Const. Art. I, § 3 (“The people have the right to . . . petition government for redress of grievances”). This paper focuses on federal and California law because the author is a California lawyer. Because

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protections, each of which immunizes lobbying activity: *Noerr-Pennington*<sup>12</sup> and Official Proceeding immunity.<sup>13</sup>

**A. The *Noerr-Pennington* Doctrine and Free Speech in Politics**

The right to petition was first protected from tort liability in business cases alleging that defendant-induced government action harmed its plaintiff competitor.<sup>14</sup> In *Noerr Motor Freight*, multiple trucking companies and trade associations brought suit against their railroad counterparts, alleging that the railroads had conspired to monopolize the long-distance freight for themselves to the exclusion of truckers. "The gist of the conspiracy alleged was that the railroads had . . . conduct[ed] a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business," a practice the complaint described as "vicious, corrupt, and fraudulent."<sup>15</sup> Although Defendants alleged a similar counter-claim against the truckers, the trial court found that only the railroad's campaign had violated the Sherman Act. While it "disclaim[ed] . . . any purpose to

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other jurisdictions have similar protections for free speech, however, the principles discussed here should have general applications, and decisions from other jurisdiction will be cited for that reason.

<sup>12</sup> *Infra*, Part.II.A.

<sup>13</sup> *Infra*, Part.II.B.

<sup>14</sup> *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). While *Noerr Motor Freight* is old and was decided before the emergence of modern toxic torts, its rules have endured and been extended. See Part.II.A. Its precise holding has become even more relevant with time because its facts, including involving publicity campaigns, has become common in modern times.

<sup>15</sup> *Id.* at 129-130.

condemn as illegal mere efforts on the part of the railroads to influence the passage of new legislation or the enforcement of existing law," the trial court nonetheless found tort liability because the railroads' campaign had a maliciously anti-competitive purpose in that their "deceiving of [the] authorities [was] to bring about the destruction of the truckers as competitors."<sup>16</sup> Because the publicity campaign had sought "the destruction of the truckers' goodwill, among both the general public and the truckers' existing customers," the trial court also found that the railroad's campaign "injured the truckers in ways unrelated to the passage or enforcement of law."

A unanimous United States Supreme Court reversed the trial court, finding the alleged conduct to be protected by the right to petition afforded by the First Amendment. It began by underscoring the importance of guarding "the ability of the people to make their wishes known to their representatives" which is both necessary to a representative democracy and guaranteed by the First Amendment.<sup>17</sup> Against this backdrop the Court chastised the trial court's reliance on the railroad's malicious intent: "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly

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<sup>16</sup> Plaintiffs alleged and offered evidence that the railroads used the "third-party technique" of having seemingly independent persons and civic groups make statements critical of the trucking industry, "when, in fact, it was largely prepared and produced by [the railroad's public relations firm] and paid for by the railroads." *Id.*

<sup>17</sup> *Id.* at 132 ("In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.")

be made to depend upon their intent in doing so."<sup>18</sup> So while "the railroads' fraudulent communications" may have fallen "far short of the ethical standards generally approved in this country . . . [i]t does not follow, however, that the use of the technique in a publicity campaign designed to influence governmental action constitutes a violation of the Sherman Act."<sup>19</sup>

Nor did the fact that the publicity campaign's "[c]irculars, speeches, newspaper articles, editorials, magazine articles, [and] memoranda . . ." were not exclusively directed at government officials take those communications outside the immunity.<sup>20</sup> Instead, this "mean[t] no more than that the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen." Since incidental influence inevitably results from efforts to influence government behavior, it could not itself make a campaign illegal.

In 1972, the Supreme Court extended *Noerr Motor Freight's* holding to cover "the approach of citizens . . . to administrative agencies . . . and to courts."<sup>21</sup> Now it protects attempts to influence the legislature,<sup>22</sup> any federal, state or local regulatory agencies,<sup>23</sup> the executive

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<sup>18</sup> *Id.* at 137-38. This same issue of intent arose five years later in *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965), when the trial court instructed its jury that defendants' ". . . approach to the Secretary of Labor was legal unless part of a conspiracy to drive small operators out of business . . ." Based on its holding in *Noerr Motor Freight*, the Supreme Court reversed, thus giving rise to the term *Noerr-Pennington* immunity.

<sup>19</sup> *Id.* at 140.

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

<sup>21</sup> *California Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

<sup>22</sup> *Noerr Motor Freight*, 365 U.S. 127.

branch<sup>24</sup> and the state and federal courts<sup>25</sup> by conduct or communication.<sup>26</sup> Its application does not depend on the speech fitting within a particular category:<sup>27</sup> Speech or conduct is protected even if it has a commercial or unabashedly self-interested purpose "as long as the intent is genuinely to induce government action rather than to frustrate or deter a third party simply by the use of the governmental process."<sup>28</sup> Qualifying communications are absolutely immune from tort liability<sup>29</sup> from any cause of action<sup>30</sup> except malicious prosecution<sup>31</sup> and libel and slander,<sup>32</sup> which already incorporate First Amendment protections within their elements.

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<sup>23</sup> *King v. Borges*, 28 Cal.App.3d 27, 34 (1972).

<sup>24</sup> *Pennington*, 381 U.S. 657.

<sup>25</sup> *Hi-Top Steel Corp. v. Lehrer*, 24 Cal.App.4th 570, 576 (1994) ("the *Noerr-Pennington* doctrine applies in administrative and judicial as well as legislative contexts.")

<sup>26</sup> *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.*, 136 Cal.App.4th 464, 479 (2006) (applying *Noerr-Pennington* protection to claims for RICO and negligent misrepresentation).

<sup>27</sup> *Ludwig v. Superior Court*, 37 Cal.App.4th 8, 21-22 (1995) (holding that the right to petition "unquestionably applies to commercial speech and competitive activity--even *anticompetitive* activity.")

<sup>28</sup> *Id.* at 22.

<sup>29</sup> *Mann v. Quality Old Time Service, Inc.*, 120 Cal.App.4th 90, 108 (2004); *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1134 (1990) ("[T]he *Noerr-Pennington* doctrine suggests that the right to petition is of such paramount stature that it would prohibit tort liability in the absence of some claim that the petition was a sham."); *Ludwig v. Superior Court*, 37 Cal.App.4th 8, 21-22 (1995) (quoting *Real Estate Investors v. Columbia Pictures*, 508 U.S. 49 (1993)) ("Those who petition the government are generally immune from . . . liability.").

<sup>30</sup> *Hi-Top Steel Corp.*, 24 Cal.App.4th at 577-78 ("[T]he principle of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity [should be applied], regardless of the underlying cause of action asserted by the

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**i. The Sham Exception: Sensibly Denying Immunity to Disinterested Petitioners.**

The only well-defined exception to *Noerr-Pennington* immunity is for sham petitions.

First mentioned in *Noerr Motor Freight*<sup>33</sup> and subsequently fleshed-out<sup>34</sup> and applied in

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plaintiffs.' [Citation.] '[T]o hold otherwise would effectively chill the defendants' First Amendment rights.' [Citation.]")

- <sup>31</sup> *Padres L.P. v. Henderson*, 114 Cal.App.4th 495 (2003) (holding that *Noerr-Pennington* does not preclude a claim for malicious prosecution because "as with the sham exception to the *Noerr -Pennington* doctrine, malicious prosecution permits recovery only for petitioning activity that is shown to be both frivolous and malicious."); *see also Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1135 (1990) ("Although this court has not spoken on the precise issue, we have been guided by the constitutional right to petition for relief of grievances in interpreting the reach of the cause of action for malicious prosecution."); *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1080 (8th Cir. 1999) ("The *Noerr-Pennington* framework essentially mirrors the first two elements of malicious prosecution under Minnesota law. A lawsuit lacking in probable cause and pursued without a reasonable belief of possible success is simply an objectively baseless or "sham" lawsuit, and a lawsuit brought with malicious intent is one that is subjectively motivated by bad faith."); *Hydranautics v. FilmTec Corp.*, 70 F.3d 533, 536-537 (9th Cir. 1995) ("The antitrust claim attacks the patent infringement lawsuit itself as the wrong which furnishes the basis for antitrust damages. This is somewhat analogous to a civil claim for malicious prosecution.").
- <sup>32</sup> *McDonald v. Smith*, 472 U.S. 479, 481 (1985) (holding that *Noerr-Pennington* immunity prevent libel claim by government official because the elements of that cause of action already incorporated First Amendment protection).
- <sup>33</sup> *Id.* ("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. But this certainly is not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices.").
- <sup>34</sup> *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (finding that allegations of conduct intended to "to harass and deter respondents in their use of administrative and judicial proceedings," rather than to influence government action, would not be prohibited by the *Noerr-Pennington* doctrine.).

California,<sup>35</sup> it is not so much a true exception as an argument that the petitioner who does not genuinely seek to influence government action never not qualifies for immunity to begin with.<sup>36</sup> To invoke it, a party challenging immunity must generally show that the petition was undertaken without any real hope of securing favorable government action and that the petition was objectively baseless.<sup>37</sup> It is a difficult burden to meet,<sup>38</sup> particularly when the defendant was successful.<sup>39</sup> Since toxic tort plaintiffs would generally attempt to fault the defendant for securing favorable government action – whether it is a less expensive remediation or a higher

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<sup>35</sup> *Hi-Top Steel Corp.*, 24 Cal.App.4th at 580 (“[W]e see no impediment to applying the sham exception in California; it is not inconsistent with the California Constitution. Additionally, there is no reason not to apply it; defendants should not be protected from liability for their torts if they are not engaged in a genuine exercise of their constitutional rights but merely “shamming” exercise of those rights in order to injure their competitors.”)

<sup>36</sup> *Id.* at 578 (“[t]he sham exception . . . reflects a judicial recognition that not all activity that appears as an effort to influence government is actually an exercise of the first amendment right to petition. At times this activity, disguised as petitioning, is simply an effort to interfere directly with a competitor. In that case, the ‘sham’ petitioning activity is not entitled to first amendment protection, because it is not an exercise of first amendment rights.”) *quoting* *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982); *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991) (the sham exception “encompasses situations in which persons use the governmental *process*--as opposed to the *outcome* of that process--as an anticompetitive weapon.”).

<sup>37</sup> *Ludwig v. Superior Court*, 37 Cal.App.4th 8, 22 (1995). *Ludwig* applied the refined sham pleading exception set forth in *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 61 (1993) to tort immunity under California’s anti-SLAPP statute. *Id.*

<sup>38</sup> *Id.* at 23 (Plaintiff must show “that no reasonable person could have expected the action taken to lead to governmental results.”).

<sup>39</sup> *People ex rel. Gallegos v. The Pacific Lumber Co.*, 158 Cal. App. 4th 950, 966 (2008) (noting that defendant “achieved the very outcome it petitioned for” in finding that the sham exception did not apply.).

permissible level of a given chemical in drinking water, known as a Maximum Contaminant Level (“MCL”) – a pure sham exception is unlikely to apply.<sup>40</sup>

**ii. The Fraud Exception: Blurring the Bound of Petition Immunity.**

“The trouble with privileges is that they are granted to good and bad alike.”<sup>41</sup> This has proven the case with *Noerr-Pennington* immunity, and the temptation to strip immunity from “bad” petitions genuinely meant to influence government action has proven irresistible for some courts. Consequently, in addition to the sham exception, there exists a “fraud exception,”<sup>42</sup> which can sometimes defeat immunity when the petition involves misrepresentations in judicial or administrative proceedings.<sup>43</sup> Originally offered as an outgrowth of the sham exception, it has differentiated from its roots such that a deceptive but genuine petition can under certain circumstances lose its protection.

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<sup>40</sup> *Id.*; see also *infra*, Part.III.

<sup>41</sup> *Hawkins v. Harris*, 141 N.J. 207, 213 (N.J. 1995) (discussing litigation privilege).

<sup>42</sup> See Daniel Davis, *The Fraud Exception to the Noerr-Pennington Doctrine in Judicial and Administrative Proceedings*, 69 U. Chi. L. Rev. 325, 334 (comment) (Winter 2002); *Baltimore Scrap Corp. v. David J. Joseph Co.*, 81 F. Supp. 2d 602, 616 (D. Md. 2000)

<sup>43</sup> *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1061 (9th Cir. 1998) (applying fraud exception to misrepresentations made to the Washington Department of Health).

The fraud exception arguably began<sup>44</sup> with *California Motor Transport Company*<sup>45</sup> when the Supreme Court drew an illustrative distinction between false statements in the political and judicial arenas, stating that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process" and that "actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'"<sup>46</sup> From then until the Supreme Court's 1993 decision in *Professional Real Estate Investors*<sup>47</sup> it seemed settled that allegations of fraud, at least in the judicial context, defeated petition immunity.<sup>48</sup> But then the Supreme Court implied that the issue remained open,<sup>49</sup> but offered no guidance.

The Ninth Circuit decision of *Liberty Lake Investments*<sup>50</sup> formulated the currently existing fraud exception, although it initially used fraud on the part of the petitioner as a means

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<sup>44</sup> Before the emergence of the fraud exception, the sham exception was often expansively applied to remove immunity from disagreeable conduct. Marina Loa, *Reforming The Noerr-Pennington Antitrust Immunity Doctrine*, 55 Rutgers L. Rev. 965, 967 (2003) (observing that "[t]his malleable sham concept often became a catchall for whatever petitioning methods courts deemed improper and unworthy of antitrust immunity, even when the petitioner was genuinely seeking to persuade the government."); Stanley E. Crawford, Jr. & Andy A. Tschoepe, II, *The Erosion of the Noerr-Pennington Immunity*, 13 St. Mary's L.J. 291 (1981) (reviewing the expansion of the sham exception).

<sup>45</sup> *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

<sup>46</sup> *California Motor*, 404 U.S. at 512-13.

<sup>47</sup> *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 61 (1993).

<sup>48</sup> *Supra*, fns. 31-35.

<sup>49</sup> *Professional Real Estate Investors*, 508 U.S. at 61 fn. 6 ("We need not decide here whether and, if so, to what extent Noerr permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations.").

<sup>50</sup> *Liberty Lake Inv.*, 12 F.3d 155 (9<sup>th</sup> Cir. 1993).

of establishing a sham, and not as a stand-alone exception. In *Liberty Lake* a commercial property owner, fed up with constant “community” environmental challenges to his proposed developments, alleged that his competitor had been instigating the challenges, and sued the competitor in anti-trust.<sup>51</sup> The Ninth Circuit began by citing one of its prior opinions, *Columbia Pictures*,<sup>52</sup> for the sham exception’s criteria that the underlying suit be both “objectively baseless” and not intended to influence government action. The freshly decided *Professional Real Estate Investors*, it observed, had adopted “a similar, two-part test for the sham litigation exception to *Noerr-Pennington*.”<sup>53</sup> Then, after deciding that sham exception did not apply because defendant’s action “was not so objectively baseless that no reasonable litigant could realistically expect success on the merits,” it addressed plaintiff’s argument that an abuse of process – including defendant using straw parties for the litigation -- constituted an alternative justification for imposing the sham exception.

The Ninth Circuit bite. *Professional Real Estate Investors*’ footnote reserving the fraud exception had cited the 1965 *Walker Process*<sup>54</sup> patent case that had held, without any consideration of petition immunity, that a defendant could be liable in anti-trust when it sued its competitors for infringement of a patent that defendant had “procured by intentional fraud on the

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<sup>51</sup> *Id.* at 156.

<sup>52</sup> *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525 (9th Cir. 1991).

<sup>53</sup> *Liberty Lakes*, 12 F.3d at 157.

<sup>54</sup> *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

Patent Office.”<sup>55</sup> *Liberty Lakes* read *Professional Real Estate Investors*’ reservation and citation to *Walker Process*, together, as leaving open the possibility that “a party’s knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy,” so as to defeat immunity without meeting the sham exception’s two prong test.<sup>56</sup>

It stuck. In *Hydranautics* the possibility of a stand-alone fraud exception became an accepted alternate test,<sup>57</sup> and soon other circuits and state courts followed by holding that fraud in the judicial context, if it was serious enough, could defeat immunity regardless of whether the petitioner subjectively intended to prompt government action.<sup>58</sup> There is currently a split

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<sup>55</sup> *Professional Real Estate Investors*, 508 U.S. at 61; *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

<sup>56</sup> *Liberty Lakes*, 12 F.3d at 158.

<sup>57</sup> *Hydranautics v. FilmTec Corp.*, 70 F.3d 533, 538 (9th Cir. 1995) (“We now are faced with deciding whether the dictum in *Liberty Lake* is good law, and we conclude that it is, at least where the fraud is intentional, not “technical fraud.”); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056 (9th Cir. 1998) (holding that “in the context of a judicial proceeding, if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed a sham if ‘a party’s knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.’”) quoting *Liberty Lake Inv., Inc. v. Magnuson*, 12 F.3d 155, 158 (9th Cir. 1993)).

<sup>58</sup> *Whelan v. Abell*, 310 U.S. App. D.C. 396, 48 F.3d 1247 (D.C. Cir. 1995) (disallowing a *Noerr-Pennington* defense in an action for common law torts when the defendants had made material misrepresentations to state securities regulators.); *Baltimore Scrap Corp. v. David J. Joseph Co.*, 81 F.Supp.2d 602, 616 -617 (D. Md. 2000) (adopting *Liberty Lake*’s rendition of the fraud exception); *Carolinas Cement Co. v. Riverton Inv. Corp.*, 53 Va. Cir. 69, 73 (Va. Cir. Ct. 2000) (following *Liberty Lakes* such that “intentional misrepresentations to either this Court or to the Board of Zoning Appeals (BZA) would not be protected by the *Noerr-Pennington* doctrine.”); *Gunderson v. University of Alaska*, 902 P.2d 323, 329 (Alaska 1995) (“We find the Ninth Circuit’s reading of *Columbia Pictures* persuasive. Allegations of fraud and misrepresentation in the judicial process will only block *Noerr-Pennington* immunity when such allegations go “to the core of a lawsuit’s legitimacy.”); see also *St. Joseph’s Hospital, Inc. v. Hospital Corp. of America*, 795 F.2d 948, 955 (11th Cir. 1986) (“The

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between the Circuits: the Ninth and D.C. Circuits recognize the fraud exception, while the Third and Federal Circuits,<sup>59</sup> and California,<sup>60</sup> have criticized and rejected it.

Limited by *California Motor Transport's* statement that "misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process,"<sup>61</sup> courts that accept the fraud exception only apply it if the fraudulent petition was made in an "adjudicatory process." Whether a proceeding is adjudicatory is a relative inquiry that depends on whether the

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plaintiff here has alleged misrepresentations before a governmental agency. When a governmental agency such as SHPA is passing on specific certificate applications it is acting judicially. Misrepresentations under these circumstances do not enjoy Noerr immunity.") *but see Lockheed Martin Corp. v. Boeing Co.*, Case No. 6:03-cv-796-Orl-28KRS, 2005 U.S. Dist. LEXIS 15365, 6-7 (D. Fla. Mar. 21, 2005) (applying the fraud exception but noting that the Supreme Court decision in *Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991) "arguably casts doubt on the continued viability of *St. Joseph's*"); *Potters Medical Center v. City Hospital Asso.*, 800 F.2d 568, 580 (6th Cir. 1986) ("the knowing and willful submission of false facts to a government agency falls within the sham exception to the Noerr-Pennington doctrine.").

<sup>59</sup> *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.*, 185 F.3d 154, 160 (3d Cir. 1999) (criticizing *Kottle* and holding that judicial misrepresentations do not fall within the sham exception to *Noerr-Pennington*); *see also City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 381-382 (1991) ("California Motor Transport involved a context in which the conspirators' participation in the governmental process was itself claimed to be a "sham," employed as a means of imposing cost and delay . . . [t]he holding of the case is limited to that situation."); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 123 (3d Cir. 1999) (responding to the argument that "Noerr-Pennington immunity does not apply at all to petitions containing misrepresentations" by stating "we decline to carve out a new exception to the broad immunity that Noerr-Pennington provides."); *Nobelpharma Ab v. Implant Innovations*, 141 F.3d 1059, 1071 (Fed. Cir. 1998) (reversing district court's reliance on fraud exception because *Professional Real Estate* sham exception and *Walker Process* rule of not immunizing suits based on fraudulently obtained patents need not be merged).

<sup>60</sup> *People ex rel. Gallegos v. The Pacific Lumber Co.*, 158 Cal. App. 4th 950, 966 (2008).

<sup>61</sup> *California Motor Transport*, 404 U.S. at 512-13.

challenged proceedings more resemble litigation or politics.<sup>62</sup> This, in turn, depends on the extent to which the official's discretion is constrained by rule or statute:<sup>63</sup> the greater the discretion, the more likely the proceeding to be political, while the proscribed and regimented decision is likely from a judicial process.<sup>64</sup> Petitioning State Department officials<sup>65</sup> and a local permitting board and a redevelopment agency<sup>66</sup> have been considered political, while petitions to the Securities and Exchange Commission,<sup>67</sup> the Federal Maritime Administration,<sup>68</sup> and the Patent and Trademark Office have been deemed judicial processes in which a fraud exception could apply.<sup>69</sup>

Although an individualized determination affecting only the petitioner, such as a contested decision on a Notice of Violation, could potentially be considered judicial, most of the site specific lobbying that a toxic tort plaintiff might seek to turn against a defendant is likely to be political. There are two reasons for this. First, to be useful to a plaintiff, the proceeding must

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<sup>62</sup> *Kottle*, 146 F.3d at 1061 ("[T]his circuit has generally shaped the sham exception according to our estimation of whether the executive entity in question more resembled a judicial body, or more resembled a political entity.").

<sup>63</sup> *Id.* at 1062.

<sup>64</sup> *Id.*

<sup>65</sup> *Amarel v. Connell*, 102 F.3d 1494 (9th Cir. 1996).

<sup>66</sup> *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 896 (9th Cir. 1988).

<sup>67</sup> *Whelan v. Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995).

<sup>68</sup> *Assigned Container Ship Claims, Inc. v. American President Lines, Ltd.*, 784 F.2d 1420 (9th Cir. 1986).

<sup>69</sup> *Hydranautics v. Filmtec Corp.*, 70 F.3d 533, 538 (9th Cir. 1995).

affect the community -- arguably the subject of all political speech.<sup>70</sup> Second, environmental investigation and remediation proceedings often involve community outreach, public participation, and coordination with elected officials.<sup>71</sup> Again, the broad input points toward a political proceeding. Legislative lobbying is, by definition, political and so should never be subject to a fraud exception.

Courts employing the fraud exception generally build in procedural safeguards and set the materiality bar for the alleged misrepresentation high,<sup>72</sup> so the circumstances under which the fraud exception could properly support a judgment based on defendant's petitioning are limited. Even so, the two fact specific tests that determine whether the fraud exception applies, whether the fraud is so material as to deprive the litigation of its legitimacy and whether the proceeding is judicial,<sup>73</sup> leaves the immunity for many petitions uncertain.

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<sup>70</sup> *Boone*, 841 F.2d at 896 (noting that "a redevelopment plan and its amendments obviously involve a large area and affects virtually every member of the community," in finding that the fraud exception did not apply).

<sup>71</sup> See e.g., California Department of Toxic Substances Control, Public Participation Policy and Procedures Manual, (Oct. 2001) publicly available at <http://www.dtsc.ca.gov/LawsRegsPolicies/Policies/PPP/PublicParticipationManual.cfm>; (last visited 10/18/07); *Infra*, Part.V.C. (discussing CERCLA public participation provisions).

<sup>72</sup> *Balt. Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 404 (4th Cir. 2001) ("A broad fraud exception would allow federal collateral litigation over conduct in state courts that never affected the core of a state judgment.").

<sup>73</sup> At least one district court, *Warner Lambert Co. v. Purepac Pharm. Co.*, Case No. 98-02749, 2000 U.S. Dist. LEXIS 22559, 19-20 (D.N.J. Dec. 20, 2000), has added yet another inquiry by holding that immunity depends on whether the agency in question performs independent verification of information submitted.

When the fraud exception to *Noerr-Pennington*, as defined by most courts that recognize it is applied to toxic torts, most site-specific lobbying and all legislative lobbying, should fall outside the exception and therefore should be immune from liability. Nevertheless, language in certain cases injects uncertainty.

## **B. Official Proceeding Immunity**

In addition to *Noerr-Pennington* immunity, 48 states have litigation, or “official proceeding” privileges, of varying scopes, protecting participants in truth seeking proceedings.<sup>74</sup> Six states use statutes, all similar, to immunize any statement made in a “legislative or judicial proceeding or in any other official proceeding authorized by law,”<sup>75</sup> while the remaining 42 states rely on case law for their litigation privilege.<sup>76</sup>

The official proceeding privilege extends to all “truth seeking” inquiries -- even external communications designed to spur an agency to action.<sup>77</sup> And unlike *Noerr-Pennington*, the

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<sup>74</sup> T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 Pepp. L. Rev. 915, 917 (2004).

<sup>75</sup> Cal. Civ. Code 47(b); Mont. Code Ann. 27-1-804(2); N.D. Cent. Code 14-02-05(2); Okla. Stat. Ann. tit. 12, 1443.1; tit. 21, 772; S.D. Codified Laws 20-11-5(2); Utah Code Ann. 45-2-3(2).

<sup>76</sup> *Supra*, Anenson, n. 7; e.g., *Hawkins v. Harris*, 141 N.J. 207, 213 (1995) (“A statement made in the course of judicial, administrative, or legislative proceedings is absolutely privileged and wholly immune from liability. That immunity is predicated on the need for unfettered expression critical to advancing the underlying government interest at stake in those settings.”).

<sup>77</sup> *King v. Borges*, 28 Cal.App.3d 27, 34 (1972).

immunity is, in many jurisdictions,<sup>78</sup> without exception.<sup>79</sup> Although initially addressed to claims of defamation, official proceeding immunity guards against "virtually all other torts"<sup>80</sup> and cannot be avoided by packaging the allegations in a parasitic cause of action such as unfair competition.<sup>81</sup>

Cases apply this immunity broadly, both in terms of the type of proceedings covered and the statements protected. It applies to any official "truth-seeking inquiries,"<sup>82</sup> including local city council and city planning commission proceedings,<sup>83</sup> statements made in or relating to

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<sup>78</sup> Jurisdictions vary on whether an absolute or qualified privilege applies to extra-judicial and extra-legislative communications, such as those to law enforcement to initiate a proceeding. Most jurisdictions give a qualified privilege. *Fridovich v. Fridovich*, 598 So. 2d 65, 67 (Fla. 1992) (surveying jurisdictions and stating that "it appears that a majority of states that have addressed this issue have embraced a qualified privilege."). Other courts hold this privilege to be absolute. *Williams v. Taylor*, 129 Cal.App.3d 745 (1982).

<sup>79</sup> Section 47.5 does create an exception to the immunity imparted by Section 47(b). Cal. Civ. Code § 47.5. However, it only applies to a peace officer bringing a defamation action against an individual who files false charges with the officer's employing agency. *Id.* The tort of malicious prosecution could also be considered an exception to Section 47(b). *Crowley v. Katleman*, 8 Cal 4th 666, 695 (1994) (holding that it is "well settled . . . that the litigation privilege does not apply to the tort of malicious prosecution.").

<sup>80</sup> *Crowley*, 8 Cal. 4th at 695.

<sup>81</sup> *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 182 (1999) (holding that "plaintiff may thus not 'plead around' an 'absolute bar to relief' [of Section 47] simply "by recasting the cause of action as one for unfair competition.") (internal quotations omitted).

<sup>82</sup> *Crowley*, 8 Cal. 4th at 695.

<sup>83</sup> *Cayley v. Nunn*, 190 Cal.App.3d 300, 303-304 (1987)

environmental impact proceedings,<sup>84</sup> and reporting alleged theft to law enforcement.<sup>85</sup> No case has yet decided whether agency oversight of an environmental investigation or remediation constitutes an "official proceeding." But, at least in California, it almost certainly does as such proceedings are similar to environmental impact proceedings where the litigation privilege has been applied.<sup>86</sup>

### III.

#### LOBBYING ALLEGATIONS IN TOXIC TORTS

Toxic tort plaintiffs commonly allege liability for site specific lobbying.<sup>87</sup> For example, it is routinely claimed that toxic tort defendants misled the public when they denied

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<sup>84</sup> *Gallegos v. The Pacific Lumber Co.*, 158 Cal. App. 4th 950, 958 (2008); *Mission Oaks Ranch, Ltd. v County of Santa Barbara*, 65 Cal.App.4th 713, 727 (1998) overruled on other grounds *Briggs v. Eden Council For Hope & Opportunity*, 19 Cal. 4th 1106, 1123 (1999);

<sup>85</sup> *Williams v. Taylor*, 129 Cal.App.3d 745, 753 (1982). Consistent with *Noerr-Pennington*, *Williams* held that the Section 47(b) immunity could not be overcome by a showing of malice.

<sup>86</sup> *Supra*, fn. 94.

<sup>87</sup> *Quemado v. Exxon Mobile Corp.*, Case No. No. Civ.A.DR-03-CA-19-OG 2005 WL 3591912, \*4 (W.D.Tex. March 31, 2005) (toxic tort case alleging that defendant "had prior knowledge of leaks in the UST systems and actively concealed their knowledge, and that such conduct constitutes fraud and/or negligent misrepresentation."); *The Town of Bolton v. Chevron Oil Co.*, 919 So. 2d 1101, 1103 (Miss. Ct. App. 2005) (plaintiffs alleged that "[t]he landowners further alleged that Chevron had willfully concealed the harmful effects of TENORM from the landowners, the public, and regulatory authorities, which amounted to fraud, fraudulent concealment, and fraudulent misrepresentation."); *Gates et al. v. Rohm & Haas Co. et al.*, No. 06-CV-01743, complaint filed (E.D. Pa. Apr. 25, 2006), ¶ 43, 15-3 Mealey's Emerg. Toxic Torts 10 (2006) (complaint alleging "Defendants also intentionally misrepresented the true extent of the groundwater plum in their submissions to the IEPA.") *Baker et al. v. Chevron USA Inc. et al.*, No. 05-227, amended complaint filed (S.D. Ohio Feb. 11, 2006), 24 No. 5 Andrews Toxic Torts Litig. Rep. 5 (fraud on agency allegations in case claiming injury from gasoline contamination of groundwater).

responsibility for, or downplayed the risk of, environmental contamination to agencies. One article by a toxic tort plaintiff practitioner, for example, cites “an important trend in pollution cases to plead fraud where the polluter has manipulated its system to the detriment of its neighbors who or which have been waiting for cleanup.”<sup>88</sup> While such claims fall squarely within the protections of *Noerr-Pennington* and Official Proceeding Immunity, courts and counsel often miss the issue entirely, or they fail to recognize the scope of protection afforded to such activities. In *Boughton v. Cotter Corp.*,<sup>89</sup> toxic tort plaintiffs sought to depose defendant's counsel regarding allegedly false statements he "made to the public, the media, and various governmental agencies with regard to the construction, licensing, operation and environmental impact of the [defendant's uranium] [] mill,"<sup>90</sup> on the grounds that this showed fraud and "was essential to their claims for punitive damages."<sup>91</sup> But despite the obvious *Noerr-Pennington* issue, the Court denied the request without mentioning the right to petition.

Given that toxic torts often ride on the coat-tails of environmental investigations or remediations, there is generally ample site specific lobbying for a toxic tort plaintiff to choose from.<sup>92</sup> A voluminous file, much of which would qualify as petitions, will accompany most sites. Even when the toxic tort precedes site characterization and remediation operations, there

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<sup>88</sup> Allan Kanner, *Toxic Tort Litigation in a Regulatory World*, 41 Washburn L.J. 535, 547 (2002).

<sup>89</sup> *Boughton v. Cotter Corp.*, 65 F.3d 823 (10<sup>th</sup> Cir. 1995).

<sup>90</sup> *Id.* at 829.

<sup>91</sup> *Id.* at 831. Although the Tenth Circuit affirmed the protective order, the *Noerr-Pennington* issue was not raised.

<sup>92</sup> See e.g., *Gates*, ¶ 46 (relying on defendant's agency submissions).

will be routine inspections by any number of regulatory agencies, whether under RCRA,<sup>93</sup> CERCLA,<sup>94</sup> the Clean Water Act,<sup>95</sup> the Clean Air Act<sup>96</sup> or by local agencies, ranging from fire departments to regional water quality control boards.<sup>97</sup> In all but the rarest instances the agencies will have issued at least occasional notices of violation, resulting in corresponding negotiation between the agency and company over the remedy or fine.

The more common scenario is that the toxic tort will follow years or decades of environmental investigation and remediation overseen by government agencies.<sup>98</sup> Investigation and remediation could easily have resulted in hundreds of reports, proposals, assessments, comments, letters, analytical results, records and memoranda being sent to the involved agencies, much of which could provide the documentary fodder for an ensuing toxic tort.<sup>99</sup>

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<sup>93</sup> 42 U.S.C. § 6927(a).

<sup>94</sup> 42 U.S.C. § 9604(b).

<sup>95</sup> 33 U.S.C. § 1318(a).

<sup>96</sup> 42 U.S.C. § 7414(a)(2).

<sup>97</sup> Margie Searcy-Alford, *Guide to Toxic Torts*, 1-1 Guide to Toxic Torts § 1.04 (LexisNexis Pub. 2006) (stating that government reports are publicly available and "can be extremely helpful in proving the toxic tort case.").

<sup>98</sup> *Id.* ("For example, in a release action, the EPA or a state agency may have investigated to ascertain whether any laws or regulations have been violated, or whether governmental remediation is necessary.")

<sup>99</sup> See <http://www.epa.gov/earth1r6/6sf/filestru/nd.htm#39.06:Description> (last visited 10/18/2007) (stating that one of the EPA's purposes behind its Superfund Document Management System is to "preserve case development materials, such as, affidavits or depositions taken during legal actions for . . . toxic tort suits.").

**A. Remediation/Compliance Lobbying Allegations in Environmental Toxic Torts**

Companies receiving information demands as potentially responsible parties (“PRPs”) may initially deny having contaminated while attempting to ascertain what happened. After the facts have been ascertained, the PRP may admit a role in the contamination, which unless protected, could be used to raise the inference that the PRP lied in its initial report. Similarly, during the actual investigation or remediation, a PRP’s submissions typically contain the company's views at environmental conditions on the site along with favored clean-up plans.<sup>100</sup> Plaintiffs in a follow-on toxic tort suit might produce experts who disagree with the PRP’s characterizations and proposals and on that basis allege that the PRP had been untruthful.

Logically all such communications are protected speech because they seek to "influence governmental action,"<sup>101</sup> and the recent case of *Gallegos v. The Pacific Lumber Company*<sup>102</sup> comes very close to directly holding so. In *Pacific Lumber Company* a County District Attorney (DA) brought suit against defendant alleging it submitted false data during “[a]n exhaustive three-year administrative review” under the California Environmental Quality Act (CEQA) over which the California Department of Forestry and Fire Prevention (CDF) presided.<sup>103</sup> Defendant’s aim, plaintiff alleged, was to increase the amount of lumber CDF would permit it to

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<sup>100</sup> *Infra*, Part.V.A.

<sup>101</sup> *Noerr Motor Freight*, 365 U.S. at 140; *Ludwig*, 37 Cal.App.4th 8 at 21-22.

<sup>102</sup> *Supra*, fn. 38.

<sup>103</sup> *Id.* at 955-56.

harvest, and ensure decreased environmental mitigation requirements when it did so, after it sold the subject property to the State. Defendant did submit the corrected data, but the plaintiff alleged the correction was purposefully delayed and misdirected.<sup>104</sup>

The Court of Appeal applied the litigation privilege and *Noerr-Pennington* to affirm the dismissal of the complaint. Since the State’s action was premised on “allegedly fraudulent conduct in communicating information to government agencies during the CEQA administrative proceedings,” both immunities applied, and plaintiff could pierce neither.<sup>105</sup> Plaintiff’s lack of involvement with the underlying CEQA proceeding did not defeat the litigation privilege,<sup>106</sup> and since it could not be said that “no reasonable litigant could realistically expect success on the merits,” when defendant had already succeeded, the sham exception to *Noerr-Pennington* did not apply either.<sup>107</sup>

While it is true that this decision was not in the exact context remediation of contaminants, the distinction should not matter. Whether evaluating the prospective environmental impact of proposed actions under CEQA, or proposed actions to mitigate past environmental impacts, the petitions are “[d]esigned to secure approval” from agencies empowered to grant it,<sup>108</sup> and therefore come within *Noerr-Pennington* immunity.

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<sup>104</sup> *Id.* at 956.

<sup>105</sup> *Id.* at 958, 964.

<sup>106</sup> *Id.* at 960-61.

<sup>107</sup> *Id.* at 966, 968, fn. 9.

<sup>108</sup> *Id.* at 965.

The same result follows when defendants have reached a settlement or consent decree with their lead agency prior to the toxic tort lawsuit. These can be complex, sometimes involving the construction of waste treatment facilities,<sup>109</sup> or a protracted time-frame for remediation,<sup>110</sup> either of which a toxic tort plaintiff may find attractive for jury presentations. *Noerr-Pennington* would cover a defendant's actions both in the negotiation of the settlement and its actions pursuant to the settlement. In *Sanders v. Lockyer*,<sup>111</sup> plaintiff smokers sued cigarette manufacturers for entering a Master Settlement Agreement which created a "cartel" that allegedly allowed them to "dramatically increase the price of cigarettes."<sup>112</sup> The manufacturers moved to dismiss, contending that all efforts to influence the Master Settlement Agreement or its implementing legislation were immunized under the *Noerr-Pennington* doctrine. Plaintiffs agreed that *Noerr-Pennington* covered negotiation of the settlement, but challenged that there was no immunity for later acting in accordance with it.<sup>113</sup> The Court disagreed, holding that *Noerr-Pennington* immunity would mean nothing if a petitioner "were then subjected to . . .

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<sup>109</sup> See e.g., 10-14 Mealey's Emerg. Toxic Torts 13 (2001) (meat packer defendant agreed to construct additional wastewater treatment facilities as part of a settlement with the EPA).

<sup>110</sup> *State of New Jersey, Dept. of Environmental Protection v. Gloucester Environmental Management Services Inc.*, No. 84-0152, Case No. 92-3860, 18-9 Mealey's Poll. Liab. Rep. 1 (D. N.J. May 11, 2005) (settlement providing for 30 year remediation of a landfill discharging low-level radionuclides into two municipal water treatment systems.)

<sup>111</sup> *Sanders v. Lockyer*, 365 F. Supp. 2d 1093, 1102 (N.D. Cal. 2005).

<sup>112</sup> *Id.* at 1096. Plaintiffs sought restitution from defendant manufactures under California's Unfair Business Practices statutes, California Business and Professions Code § 17200, *et. seq.* *Id.* at 1097.

<sup>113</sup> *Id.* at 1102-1103 ("Plaintiff contends that while *Noerr-Pennington* applies to the manufacturers' activities in negotiating and achieving the MSA, there is no immunity for 'the subsequent operation of an anticompetitive restraint.'").

liability for his success [in petitioning]."<sup>114</sup> Thus, "the manufacturer defendants are immune from suit for their operation under the settlement agreement and implanting legislation."<sup>115</sup> Logically, the same immunity would protect a toxic tort defendant from allegations of malfeasance in either negotiating an agency settlement or acting pursuant to one.

## **B. Legislative Lobbying Allegations In Toxic Torts**

Toxic tort plaintiffs sometimes also seek to impose tort liability for a defendant's legislative lobbying, generally with allegations that the defendant lied to the government by claiming the substance at issue in its particular toxic tort, such as lead,<sup>116</sup> MTBE,<sup>117</sup> wood treatment chemicals,<sup>118</sup> breast implants<sup>119</sup> or a particular pharmaceutical<sup>120</sup> to be less dangerous

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<sup>114</sup> *Id.* at 1103 quoting *Greenwood Utilities Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1505 (5th Cir. 1985).

<sup>115</sup> *Id.*

<sup>116</sup> In *City of Philadelphia v. Lead Industries Ass'n, Inc.*, 994 F.2d 112, 116 (3rd Cir. 1993), plaintiff alleged that "[t]hrough vigorous lobbying, it also misled legislative bodies considering regulating or banning lead paint. All of the defendants were members of the LIA at some point, though at different times and for different lengths of time."

<sup>117</sup> In an MTBE toxic tort the court granted an anti-SLAPP motion as to several defendants because "the claims against these defendants were based on their exercise of their right to petition the government as protected by the United States and Maine Constitutions." *Millett v. Atlantic Richfield Co.*, No. Civ.A. CV-98-555 2000 WL 359979, \*4 (Me. Super. March 2, 2000); *Cambria Community Services District v. Chevron Corp., et. al.*, Case No. 321622, 1-10 Mealey's Litig. Rep. MTBE 2 (2001) (alleging that defendants participated in a scheme to "conceal the known hazards of MTBE and TBA, and to mislead the public and government agencies as to those hazards . . .").

<sup>118</sup> *Andrew Hunt, et. al. v. American Wood Preservers Institute, et. al.*, Case No. IP02-C-0389-M/S, 11-8 Mealey's Emerg. Toxic Torts 8 (S.D. Ind. 2002) (alleging that defendant provided false and fraudulent information – namely scientific assessments with which plaintiffs

[Footnote continued on next page]

than plaintiffs allege it to be. In *Morgan v. Brush Wellman, Inc.*,<sup>121</sup> for example, toxic tort plaintiffs alleged they suffered beryllium sensitivity because defendants "[I]obb[ied] governmental and international regulatory agencies" and "[e]ngaged in public relations campaigns designed to minimize the perception of beryllium's toxicity" as part of "a 50-year conspiracy to keep the actual dangers of beryllium exposure secret."<sup>122</sup> The Court sustained defendants' demurrer, but did not address the issue of *Noerr-Pennington* immunity.

*Lynn v. Amoco Oil Company*<sup>123</sup> is currently the only published decision on point. In *Lynn*, adjacent property owners accused defendant oil companies of conspiracy to avoid cleanup responsibilities for leaking underground storage tanks by, *inter alia*, influencing relevant state regulations and legislation. According to plaintiffs, defendants sought "to enact a remediation scheme . . . which allowed the oil companies to evade cleaning up leaking underground storage

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[Footnote continued from previous page]

disagreed -- to the U.S. EPA when the EPA was developing its policy on chromate cooper arsenate-treated wood.).

<sup>119</sup> *Goldrich v. Natural Y Surgical Specialties*, 25 Cal.App.4th 772, 782-783 (1994) (breast implant toxic tort alleging that defendant misrepresented to the general public that breast implants were safe.).

<sup>120</sup> *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 548 (S.D.N.Y. 2004) ("Dr. Bell's report offers extensive commentary on FDA labeling regulations and criticisms of Warner-Lambert's adherence to those regulations with respect to the Rezulin label. The report is replete also with comments to the effect that Warner-Lambert misled the FDA by providing incomplete or erroneous information.").

<sup>121</sup> *Morgan v. Brush Wellman, Inc.*, 165 F.Supp.2d 704 (E.D. Tenn. 2001)

<sup>122</sup> *Id.* at 719-21.

<sup>123</sup> *Lynn v. Amoco Oil Co.*, 459 F. Supp. 2d 1175 (N.D. Ala. 2006).

tank sites and remediating the consequences of contamination"<sup>124</sup> then "came together in a group . . . to influence state legislation and regulation that enabled them to reduce or avoid clean-up costs."<sup>125</sup> Defendants moved for summary judgment on the grounds that the activities at issue were protected by *Noerr-Pennington*, to which plaintiff rejoined that *Noerr-Pennington* did not protect defendants' conduct because their motivation was to save money on remediation.<sup>126</sup> The Court rejected plaintiff's distinction, observing that "[c]ommon sense indicates that only rarely will commercial enterprises lobby government for laws or regulations that . . . are not in their commercial interest," and applied *Noerr-Pennington* to immunize the petitioning activity.<sup>127</sup>

*Smith, et. al. v. Lead Industry Association, et. al.* is another correctly decided *Noerr-Pennington* toxic tort case. In that unpublished Maryland case, six juveniles alleged lead poisoning from household paint against those involved with the paints' manufacture and sale.<sup>128</sup> Defendants moved for summary judgment based on plaintiffs' failure to identify the offending product and produce evidence that defendants' failure to warn regarding surface preparation caused them any harm. Plaintiffs responded by recasting their claim as one for civil conspiracy, alleging that defendants "used . . . trade associations as vehicles to conspire and conceal the

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<sup>124</sup> *Id.* at 1179-80. Plaintiffs also alleged that defendants made "false public statements regarding the scope of the UST crisis and their response, and . . . to fail to notify potentially impacted land owners of conditions at individual sites." *Id.* at 1179. Thus, the allegations in *Lynn* could be considered site specific lobbying as well.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Reginald Smith, Jr., et. al. v. Lead Industries Association, Inc.*, Case No. 24-C-99-004490, 11-17 Mealey's Emerg. Toxic Torts 16 (Dec. 2002) (Opinion 14-021204-103Z).

hazards of lead paint."<sup>129</sup> Specifically, plaintiffs claimed that defendants "engaged in a [nation-wide] civil conspiracy beginning in the 1940's to avoid warning of the dangers of residential paint health risks," which included to unlawfully influence permissible levels of lead.<sup>130</sup>

As proof, plaintiffs offered internal trade association memos and minutes, many of them callous-sounding, discussing defendants' concerns over existing and proposed lead regulations. An internal memo discussed plans to oppose tougher lead standards because "if similar regulations [to those in California] are adopted in other states they will constitute a burden on the industry."<sup>131</sup> There were also memos and minutes discussing the "negative publicity on lead poisoning that has affected the paint industry,"<sup>132</sup> and how it would be best to "pay less attention to the problem of lead poisoning [so] it will soon be forgotten by the public."<sup>133</sup> Other internal documents stated that "[l]ead poisoning, or the threat of it . . . means thousands of items of unfavorable publicity every year. This is particularly true since most cases of lead poisoning today are in children, and anything sad that happens to a child is meat for the newspaper editors and is gobbled up by the public . . . [this] means that we are often subjected to unnecessarily onerous regulations . . ."<sup>134</sup>

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<sup>129</sup> *Id.* at 3.

<sup>130</sup> *Id.* at 11, 18.

<sup>131</sup> *Id.* at 18-19.

<sup>132</sup> *Id.* at 22.

<sup>133</sup> *Id.* at 24.

<sup>134</sup> *Id.* at 24-25.

The Court recognized the statements were "socially insensitive and if presented to a jury would possibly assist Plaintiffs in their quest to attach liability to the Defendants." But since the statements were "lobbying efforts by the trade associations that are protected under the First Amendment and the *Noerr-Pennington* doctrine," all were non-actionable.<sup>135</sup>

An unpublished Illinois MTBE decision, *Frances Misukonis, et al. v. Atlantic Richfield Company, et al.*, came out incorrectly and illustrates the threat to political speech posed by the fraud exception.<sup>136</sup> These plaintiffs accused defendants of "concealing the dangers of MTBE . . . from the government . . ." and of making corresponding false statements to Congress and the EPA.<sup>137</sup> Defendants demurred, correctly invoking petition immunity. But the trial court strung together citations addressed to the fraud exception in the judicial context to hold that "[w]here a group of manufacturers engages in a broad effort to misrepresent and conceal the dangers of their product from . . . the government, they cannot shield this conduct behind an alleged right to petition the government."<sup>138</sup>

This holding is a rather dramatic example of tort liability being used to deter political speech on a significant social issue. In particular, it illustrates the dangers of a fraud exception, with its broad name and poorly defined bounds, being invoked to punish, and potentially chill,

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<sup>135</sup> *Id.* at 23, 26.

<sup>136</sup> *Frances Misukonis, et al. v. Atlantic Richfield Company, et al.*, Case No. 01-L-1472, 2-9 Mealey's Litig. Rep. MTBE 8 (Apr. 2002) (Order available 40-020510-010R).

<sup>137</sup> *Id.* at 8.

<sup>138</sup> *Id.* at 10. *Misukonis* also held that *Noerr-Pennington* did not apply because the conduct was not intended to influence the government. The unpublished order, however, lacks sufficient detail to tell why the court made this statement. *Id.* at 11-12.

views opposed to the ones espoused by plaintiffs. MTBE is not unique: in toxic torts plaintiffs and defendants virtually always disagree on the “dangers” of the substance at issue. Plaintiffs and defendants have differed over silicone’s ability to cause broad autoimmune disease, Bendectin’s teratogenic effect, and disease from mold<sup>139</sup> and cell phones,<sup>140</sup> and will continue to do so as new substances become the subjects of toxic tort litigation. It is similarly true that the substances in toxic torts are, as matters of social concern, the subjects of a great deal of political speech. Some will argue the “dangers” are high, others will disagree, and regulators or legislators will decide.

It is true that *Misukonis* comes out incorrectly due to loose reasoning. The legislative proceedings at issue in *Misukonis* were unquestionably political, and thus could never be subject to a fraud exception even in Circuits that recognize it because they apply the exception only to adjudicatory processes.<sup>141</sup> And the primary case the Court relied upon, *Smith*, is inapplicable outside the context of defamation actions.<sup>142</sup> The point, however, is not to criticize an incorrectly decided trial court opinion, but rather to highlight that the fraud exception, as complex, broad, poorly defined, and with multiple relativity based thresholds, is particularly prone to being invoked whenever a toxic tort plaintiff claims the defendant lied. The result of a

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<sup>139</sup> *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 239 (2002) (applying *Daubert* standard to exclude opinion that exposure to mold caused brain damage); *but see New Haverford P'ship v. Stroot*, 772 A.2d 792, 799 (Del. 2001) (affirming trial court's acceptance of opinion that mold caused asthma and cognitive disorders under *Daubert* standard.)

<sup>140</sup> *Reynard v. NEC Corporation*, 887 F.Supp. 1500, 1503 (M.D. Fla. 1995) (excluding expert opinion that magnetic field from cellular phone increased the risk of brain cancer).

<sup>141</sup> *Supra*, Part.II.A.ii.

<sup>142</sup> *Supra*, Part II.A.i.

malleable exception is uncertainty as to its application, and the result of that, at least for a risk avoiding defendant, is chilled political speech.

## VI.

### TOXIC TORT, INC. VS. CORPORATE AMERICA: THE TWO SIDES OF TOXIC TORTS AND THE IMPLICATIONS FOR PETITION IMMUNITY

This section examines the characteristics of the modern toxic torts, including traits which have contributed to it being a battleground for petition immunity.

Although they only gained notoriety with Vietnam's Agent Orange,<sup>143</sup> toxic torts are not new. Their three ingredients -- disease, harmful exposures<sup>144</sup> and a system for assigning liability<sup>145</sup> have co-existed since ancient times. Arguably the Salem Witch Trials, in which the "victims" of exposure to witchcraft attributed a myriad of ailments to defendants' supernatural malfeasants, were the first notable toxic tort in this hemisphere.<sup>146</sup> Even the typical community exposure groundwater toxic tort case can trace its lineage back to least 1929.<sup>147</sup>

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<sup>143</sup> Coffee, John C., Jr., *Class Wars: The Dilemma of the Mass tort Class Action*, 95 Colum. L. Rev. 1343 at 1363 (1995).

<sup>144</sup> Nriagu, Jerome O., *Saturnine Gout among Roman Aristocrats: Did Lead Poisoning Contribute to the Fall of the Empire?*, New England Journal of Medicine, 308.11 (March 17, 1983): 660-3 (discussing Roman use of lead and knowledge of its toxic properties).

<sup>145</sup> Madden, Stuart, *Graeco-Roman Antecedents of Tort Law*, 44 Brandeis L.J. 865, 882 (Spring 2006) (discussing Greco-Roman tort compensation for personal injury victim).

<sup>146</sup> The infamous Salem witch trials were not the result of lynch mob action, but were actually formal trials based on testimony given by expert witnesses. *Devereaux v. Abbey*, 263 F.3d 1070, 1091 (9th Cir. 2001) (Kleinfeld, J., dissenting). The hunt began when a physician, unable to treat the apparent hysterical symptoms exhibited by a ministers' daughters, told the

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Despite such early previews, the modern toxic tort is a relatively recent phenomenon. It is part of a small class of cases that can be characterized as high stakes,<sup>148</sup> lawyer driven litigation.<sup>149</sup> Given the stakes, resources devoted, and the often pre-meditated construction of the lawsuits, the toxic tort defendant can expect far more aggressive discovery and use of indirect prejudicial evidence than in ordinary torts. Proponents argue that such a system maximizes representation of those harmed,<sup>150</sup> while detractors fault it for encouraging lucrative (for the

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father "that the girls 'were under the evil hand.'" *Id.* The trials were heavy with credentialed experts testifying to "behaviors that the experts had ordained [from experience] to be causally related to witchcraft." Moriarty, J., *Wonders of the Invisible World: Prosecutorial Syndrome And Profile Evidence In The Salem Witchcraft Trials*, 26 VT. L. REV. 43 (2001).

<sup>147</sup> *Pennsylvania R. Co. v. Lincoln Trust Co.*, 91 Ind.App. 28 (1929) (case alleging that exposure to sewage in drinking water caused typhoid fever); *see also Urie v. Thompson*, 337 U.S. 163, 195 (1949) (Silica causing silicosis).

<sup>148</sup> Lester Brickman, *Toxic Torts: Issues Of Mass Litigation, Case Management, And Ethics*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243, 251 (2001) (observing that, because of the large number of plaintiffs and punitive damages demands, toxic torts frequently present "bet-the-company" scenarios for a defendant).

<sup>149</sup> Part.VI.A

<sup>150</sup> Elihu Inslbuch, *Contingent Fees And Tort Reform: A Reassessment And Reality Check*, 64-SUM Law & Contemp. Probs. 175, 175 (2001) ("Many consumer organizations, public advocates, labor unions, and plaintiffs' lawyers view the United States' system of contingent fees as nothing less than the average citizen's "key to the courthouse door," giving all aggrieved persons access to our system of justice without regard to their financial state. Others, including some defense counsel and academics funded by or speaking for corporations and their insurers, view them as the bane of our legal system, the source of frivolous and expensive litigation that lines the pockets of the claimants' lawyers with unwarranted and extravagant fees."); David A. Root, *Attorney Fee-Shifting In America: Comparing, Contrasting, And Combining The "American Rule" And "English Rule,"* 15 Ind. Int'l & Comp. L. Rev. 583, 593 (2004).

lawyers) but often frivolous claims.<sup>151</sup> Regardless of the view to which one subscribes, the modern toxic tort, in the words of one university attorney testifying at a legislative hearing to address the toxicity of chromium six, is "not between David and Goliath but between two Goliaths, both of whom stood a chance to either gain hundreds of millions of dollars . . . ." <sup>152</sup>

Toxic torts almost always raise *Noerr-Pennington* issues because the subjects involved, such as the toxicity of a given chemical, are commonly the subject of lobbying by both the plaintiff and defense side. The significance of this trait is further magnified because the resulting government action is sometimes legitimate evidence in the toxic tort, thus giving plaintiffs' side an extra-political opportunity to both shape the evidence in their own lawsuit and advance their own political interest by deterring the defendant's lobbying with the prospect of increased toxic tort liability.

#### **A. David Becomes Goliath**

In the vast majority of spontaneous torts cases, meaning those where the demand for the lawsuit is not lawyer generated, the stakes are generally not high enough to incentivize plaintiff to develop prejudicial evidence on a defendant's lobbying activity, and so no threat to political speech emerges. In a typical car crash case, for example, a plaintiff would look to the offending driver, possibly the driver's employer, and the vehicle's manufacturer as defendants. All

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<sup>151</sup> Paula Batt Wilson, *Attorney Investment in Class Action Litigation: The Agent Orange Example*, 45 Case W. Res. L. Rev. 291, 297 n.35 (1994) ("Contingent fees are banned in most foreign countries to avoid frivolous litigation . . .").

<sup>152</sup> Possible Interference in the Scientific Review of Chromium VI Toxicity: Hearing Before the California Senate Health and Human Services Com, p. 27. (April 2, 2003).

defendants may have lobbied in some relevant fashion – the speeding driver perhaps by hypocritically complaining to authorities of others speedy motorists, the employer may have commented on proposed OSHA regulations for drivers, and the manufacturer likely advocated the safety of its vehicle to regulators. But the stakes of the case, which are not magnified by the economies of scale seen in the toxic tort, do not justify an inquiry into those activities.

Toxic torts, in contrast, have the stakes, economies of scale, and structure to make the inquiry worthwhile. Since the 1970's, the way toxic torts are formed and litigated has changed dramatically, as have the stakes and corresponding incentives of the lawyers, claimants, and defendants involved. Toxic torts have morphed from a variation on the typical personal injury case, where the harm happens to come from a chemical, to sophisticated, lawyer-initiated business ventures<sup>153</sup> akin to large scale securities or class action litigation,<sup>154</sup> fueled by the lure

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<sup>153</sup> MARCIA ANGELL, *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND LAW IN THE BREAST IMPLANT CASE 203* (W.W. Norton & Co. 1997) ("[t]he practice of paying lawyers contingency fees in tort cases . . . means that plaintiffs' attorney's can mass-produce lawsuits of very little merit with almost no risk to themselves."). Commentators generally agree that in mass torts, including class actions, plaintiffs' attorneys "operate, in reality, as independent entrepreneurs guided by self-interest," but differ on the social utility of this. Myriam Gilles, *Exploding The Class Action Agency Costs Myth: The Social Utility Of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 164 (2006) (acknowledging this, but arguing that "[a]ll that matters is whether the practice causes the defendant-wrongdoer to internalize the social costs of its actions." Cf. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 7-8 (1991); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 882-83 (1987); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 7-8 (1991).

<sup>154</sup> See e.g., *In re Molson Coors Brewing Co. Sec. Litig.*, 233 F.R.D. 147, 149, fn. 4 (D. Del. 2005) ("After going over the parties' submissions and counter-submissions, which, including

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of potentially astronomical pay-outs.<sup>155</sup> For defendants, orchestrated toxic torts can bankrupt even industrial giants.<sup>156</sup> Individual lawsuits often include hundreds of plaintiffs<sup>157</sup> while in consolidated Multi-District Litigation the number can be in the tens of thousands.<sup>158</sup>

They have even gone international with the recent wave of DBCP plaintiffs imported from Central and South America either litigating claims<sup>159</sup> or attempting to enforce foreign toxic tort judgments in this country.<sup>160</sup>

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appendices, run to hundreds of pages in length, it strikes me that this exercise is simply a business investment for the lawyers.

<sup>155</sup> Lester Brickman, *Toxic Torts: Issues Of Mass Litigation, Case Management, And Ethics*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243, 244 (2001) ("the single most important factor accounting for the rise of the mass tort claim in recent decades is the enormous financial incentives that lawyers have structured and courts have condoned for bringing aggregative actions . . . [t]hese fees frequently amount to thousands and tens of thousands of dollars an hour and even as much as hundreds of thousands of dollars an hour."); *see also* Bailey, Glenn W. "Asbestos Litigation Monster Rewards Plaintiffs' Lawyers While Devouring Jobs and Economic Growth," Legal Backgrounder 24 (August 28, 1992): 1-4 (estimating \$5,000 per hour for plaintiffs' asbestos work in 1992 and describing an asbestos case where two lawyers received a \$125 million contingency);

<sup>156</sup> *In re Corning, Inc. Sec. Litig.*, 349 F. Supp 2d 698, 712 (S.D.N.Y. 2004) (discussing the bankruptcy of Dow Corning); Stephen J. Carroll, *et al.*, *Asbestos Litigation*, 107-17 (RAND Corp) (2005) (discussing bankruptcies attributable to asbestos litigation).

<sup>157</sup> *See e.g., In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563, 567 (D. Tex. 2005) (hereinafter "*In re Silica*").

<sup>158</sup> *Id.* (consolidating nearly 10,000 silica cases); *see also In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1100 (J.P.M.L. 1992) (ordering consolidation of pending and future breast implant cases); Richard B. Schmitt, Panel of Experts to Study Silicone Breast Implants, Wall St. J., June 3, 1996, at B6 (indicating that over 21,000 breast implant claims were pending in the Multi-District Litigation before Judge Sam Pointer); *Lockheed Martin Corp. v. Superior Court*, 109 Cal.App.4th 24, 28 (2003) (opinion on statute of limitations in a case where "nearly 800 persons for personal injuries as a result of exposure to toxic contaminants in the Redlands water supply.") *review dismissed* 96 P.3d 29 (2004)

*In re Silica Products Liability Litigation*, although largely a misconduct case,<sup>161</sup> provides a rare look at the machinery behind the large toxic tort. The O'Quinn firm, one of the country's preeminent toxic tort concerns,<sup>162</sup> and renowned for obtaining the largest breast implant verdict in history,<sup>163</sup> along with several lesser known plaintiffs' firms, had brought over ten thousand individual silica claims, many of which were ultimately consolidated in the multi-district litigation in United States District Court for the Southern District of Texas. Although the facts varied, the discovery into plaintiff recruitment revealed that the diagnosis of silicosis typically began with screening companies, which had been "initially established to meet law firm demand

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- <sup>159</sup> *Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719, 721 (D. La. 2002) (overruling defendants' forum non conveniens challenge to Costa Rican DBCP plaintiffs bringing suit in Louisiana); Noaki Schwarz, *Lawyer: Pesticide Left Workers Sterile*, Assoc. Press (Oct. 10, 2007) (discussing suit by Nicaraguan DBCP plaintiffs pending in Los Angeles Superior Court.).
- <sup>160</sup> *Dow Chemical Co. v. Calderon*, 422 F.3d 827 (9th Circ. 2005) (discussing judgments obtain under a special Nicaraguan law, which presumes causation and forces DBCP defendants to post a \$20 million dollar bond to
- <sup>161</sup> *In re Silica* is primarily a fact specific misconduct case, faulting attorneys, experts and screening companies on the plaintiffs' side for shirking ethical responsibilities by "manufactur[ing] [lawsuits] for money," *id.* at 635, when no medical basis for them existed. While it did mention considerations common to modern toxic torts in general, such as advertising and recruitment, the financial relationship between experts and plaintiffs' counsel and contingency fee incentives, it does not fault any of these in the abstraction. *Id.* at 634 ("It is important to emphasize that this discussion and this Order should not be taken as a criticism of the right of impaired individuals to seek redress through the courts."). Indeed, in a later welding fumes case, where plaintiffs' firms had employed a similar overall structure to
- <sup>162</sup> Max Boot, King John's Guide to Breast Implant Riches, WALL ST. J., June 19, 1996 at A21 (criticizing litigation tactics of John O'Quinn); FORTUNE, Oct. 16, 1995, at front cover (discussing leading breast implant plaintiffs' attorney John O'Quinn).
- <sup>163</sup> Amy Singer, *Look Over Here: How John O'Quinn Directed A Jury's Attention Toward the Strongest Elements of His Case - And Won The Largest Verdict Ever In A Breast Implant Suit*, Am. Law., March 1993.

for asbestos cases."<sup>164</sup> When plaintiffs' firms switched their focus to silica cases, the screening companies began diagnosing "the law firms' 'existing inventory' of asbestos plaintiffs" with silicosis.<sup>165</sup> To generate additional claimants, the law firms also advertised mass screenings, which the screening companies, themselves financially depend on the law firms, would customize to fit the law firm's wishes.<sup>166</sup> In some instances, the screening company's compensation was dependent on a positive diagnosis and a successful referral to the firm.<sup>167</sup> Operations in the breast implant,<sup>168</sup> asbestos,<sup>169</sup> welding fumes litigation,<sup>170</sup> DBCP,<sup>171</sup> and, to a more varying extent, community exposure cases,<sup>172</sup> have reportedly been structured similarly.

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<sup>164</sup> *In re Silica*, at 597.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 598

<sup>167</sup> *Id.* at 601 ("If the patient was not diagnosed with silicosis or did not sign-up with [the law firm], [the screening company] was paid nothing.").

<sup>168</sup> Max Boot, Queen of Torts, Wall St. J., May 16, 1996, at A14; *see also* Max Boot, A Tale of Silicone City, Wall St. J., Nov. 29, 1995, at A14.

<sup>169</sup> Stephen J. Carroll, *et al.*, *Asbestos Litigation*, 23 (RAND Corp) (2005) (discussing the use of screening companies and advertising in asbestos litigation); Victor E. Schwartz, *et al.*, *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets*, 31 Pepp. L. Rev. 271, 278 (2003) (the "increase in filings by unimpaired claims may result from mass screenings conducted by plaintiffs' law firms and their agents to identify and recruit potential clients. Such screenings are frequently conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos. As Senior United States District Court Judge Jack Weinstein and Bankruptcy Court Judge Burton Lifland recently explained: 'Claimants today are diagnosed largely through plaintiff-lawyer arranged mass screening programs targeting possibly asbestos-exposed workers and attraction of potential claimants through the mass media.'").

<sup>170</sup> *In re Welding Fume Prods. Liab. Litig.*, Case No. 1:03-CV-17000, 2006 U.S. Dist. LEXIS 16407, \*36-37 (D. Ohio April 5, 2006).

Thus the modern toxic tort does not fit the typical model of the powerless victim seeking out the lawyer for redress. Instead, they are frequently conceived of by powerful interests, *i.e.*, plaintiffs' firms, who are themselves repeat players in a given class of toxic tort. These characteristics make it more likely that, as a group, toxic torts defendants will encounter plaintiffs seeking out and attempting to use their lobbying against them: as ostensibly large business ventures with the potential of large losses or enormous contingency fees, plaintiffs' counsel have a strong incentive, far beyond what exists in garden variety torts, to construct a case so as to maximize the defendant's exposure to them, and hence, their return on investment.

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<sup>171</sup> Christian Miller, *Plantation Workers Look for Justice in the North*, L.A. Times (May 27, 2007)

<sup>172</sup> Lester Brickman, *Toxic Torts: Issues Of Mass Litigation, Case Management, And Ethics*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243, 244 (2001) (Increased litigation activity is also facilitated by widespread solicitation of potential claimants by use of mass advertising, '800' phone numbers, and websites; close association with union officials in a position to steer large numbers of claimants to specific lawyers; the formation of victim support groups that are overtly or surreptitiously underwritten by lawyers; the formation of networks of lawyers specialized to particular product claims . . ."); Leon Jaroff, *Erin Brockovich's junk science: Her new suit against oil companies and Beverly Hills has little scientific grounding*, Time Online (Jul. 11, 2003 publicly available at <http://www.time.com/time/columnist/jaroff/article/0%2C9565%2C464386%2C00.html> ("The resulting two-part TV series caused widespread concern, if not panic, among Beverly Hills high school students, parents and graduates. Six hundred people attended a meeting hosted by Brockovich at the posh Beverly Hills Hotel to recruit potential litigants, who were asked to fill out questionnaires to document their illnesses."); David Caruso, *Oil Contamination Fuels Brooklyn Residents' Lawsuit*, AP at A-10 (Mar. 5, 2006) ("The families are represented by a California law firm that has brought in activist Erin Brockovich to recruit more plaintiffs."); Hugo Martin, *Lawyers Solicit Clients for Suit Against Mobil*, Los Angeles Times at p. 4 (Jul. 23, 1989) (reporting on plaintiffs' lawyers sending 10,000 post cards bearing a skull and crossbones to residence in an effort to "sign up residents as plaintiffs in a class-action suit that would allege that the refinery's emissions have injured the health of hundreds.").

Given this, along with the significant resources notable plaintiffs' firms bring to their cases, discovery and use of defendants' potentially unpopular lobbying to increase that exposure becomes more likely.

## **B. Politics, Perception and Causation Toxic Torts**

In addition to the mechanistic efficiency that allows larger and more profitable lawsuits to be brought, which in turn can support inquires into prejudicial lobbying, modern toxic torts also implicate *Noerr-Pennington* in that they are matters of public concern influenced by and themselves influencing politics. Both the Bendectin and Breast implant litigations illustrate this, and both, in retrospect, underscore the danger of allowing a toxic tort plaintiff to use a defendant's political speech as a basis for liability.

Much has been said about the now debunked Bendectin<sup>173</sup> and Breast Implant litigations,<sup>174</sup> and my aim is not to repeat it or imply that causal allegations in toxic torts are always false since the ones in those cases were. Rather, it is to use these well-studied toxic torts to illustrate that a fraud exception whereby a toxic tort plaintiff could deter a defendant's counter-veiling petitions is harmful in that it chills necessary political discourse on weighty

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<sup>173</sup> Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 53 (Nov. 1993) ("Sanders"); Michael D. Green, *Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation*, 215 (1996) ("Green"); Gary Edmond, *Whigs in Court: Historical Problems with Expert Evidence*, 14 YALE J.L. & HUMAN 123, 160 (2002) ("Almost all scholarly accounts describe the Bendectin litigation as an extreme example of legal pathology . . ."); Bernstein, *supra*, 460.

<sup>174</sup> David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457 (1999).

social questions. These litigations continue to be important because, while the substances at issue have changed in later toxic torts, many of the legal, social, and political dynamics remain.

**i. Bendectin**

Bendectin litigation has been called the epitome of tort pathology, “the single most criticized piece of large-scale litigation of all time.”<sup>175</sup> It seemed to begin legitimately enough, but in retrospect, it was largely the byproduct of messianic conviction coupled with scientific fraud to buttress it.

When Betty Mekdeci’s<sup>176</sup> son was born in 1975 with limb and other birth defects, Ms. Mekdeci became consumed with finding the cause. Earlier, in 1972 medical researcher Dr. William McBride, the “father of teratology,” having reached international fame for discovering the link between thalidomide and reduced limb birth defects,<sup>177</sup> confidentially reported to authorities that he believed Bendectin had caused three birth defects. It leaked to the press which broadcast the allegation.<sup>178</sup> Of the dozen drugs Ms. Mekdeci had taken during her

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<sup>175</sup> “Almost all scholarly accounts describe the Bendectin litigation as an extreme example of legal pathology,” Gary Edmond, *Whigs in Court: Historical Problems with Expert Evidence*, 14 YALE J.L. & HUMAN 123, 160 (2002), and those that have studied it most say “Bendectin is the Taj Mahal of horror stories about the tort system.” *Id.*

<sup>176</sup> Green, 97.

<sup>177</sup> *McBride v. Merrell Dow & Pharmaceuticals*, 255 U.S. App. D.C. 183 (D.C. Cir. 1986) (“The alleged link between Bendectin and birth defects had begotten a widespread and heated public controversy over the drug's safety . . . McBride voluntarily entered this controversy, intending to influence its outcome . . . . As a world-renowned expert on birth defects -- he was prominent in discovering the dangers of Thalidomide and has been dubbed the "Father of Teratology" -- McBride occupied a central place in the Bendectin debate.”).

<sup>178</sup> *Another Birth Drug Suspect*, Sydney Morning Herald, April 19, 1972.

pregnancy, she settled on Bendectin as the source of her son's birth defects by process of elimination: she had taken only three drugs, Erythromycin, Bendectin, and Actifed, during the 24 to 36 day gestational period her son's defective limb was formed.<sup>179</sup> Of the three drugs, only Bendectin had case reports of pregnancy defects.<sup>180</sup> There was other tangential fodder for her conviction. When in 1976 Merrill Dow sought to reformulate Bendectin to remove a component controlled studies had found to be ineffective in treating nausea, she saw it as a cover-up, thus further indicting Bendectin.<sup>181</sup> She learned that Merrill Dow had been involved with thalidomide in Europe, implicating Bendectin by association.<sup>182</sup> At some point between 1976 and 1977, Ms. Mekdecibecame fanatical in her condemnation of Bendectin; believing "evidence pointing toward Bendectin's teratogenicity and discounting anything to the contrary."<sup>183</sup>

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<sup>179</sup> *Id.* at 99.

<sup>180</sup> *Id.* at 100.

<sup>181</sup> *Id.* at 101.

<sup>182</sup> *Id.* at 103.

<sup>183</sup> *Id.* The evidence proving Bendectin's lack of teratogenicity was weak in the late 1970's with the three existing epidemiological studies all being subject to valid criticisms. *Id.* at 104-6. But it far outstripped that which Mekdeci drew her conviction from. One was a Canadian registry noting that three women taking Bendectin had babies with reduced limb defects. *Id.* at 106. The data is of course meaningless unless the percentage of women taking Bendectin is known. *Id.* She relied on the similarly meaningless existence of 86 reports of birth defects for women taking Bendectin. For, as was explained to Mekedci by Dr. Janerich of the New York Department of Health, "without information on the total number of pregnant women exposed to Bendectin over all the time it has been marketed, it is impossible to evaluate the occurrence of 130 cases of congenital malformation. Bendectin was on the market when the thalidomide tragedy occurred." *Id.*

Politically, she lobbied the FDA, CDC, state agencies, and even Congress against Bendectin.<sup>184</sup> She convinced famed personal injury attorney Melvin Belli to bring a toxic tort for her. The litigation was an isolated incident until October of 1979 when the National Enquirer published a story it received from Melvin Belli, and prominently featuring Dr. McBride, blaming the morning sickness pill for birth defects.<sup>185</sup> Following the National Enquirer article the first Bendectin trial, Betty Mekdeci's, took place in Orlando in 1980 amid great publicity.<sup>186</sup> McBride, already seen as "one of the leading critics" of Bendectin testified.<sup>187</sup>

The litigation controversy prompted FDA hearings in which McBride testified that Bendectin "is not safe and that it caused birth defects."<sup>188</sup>

The issue of political speech immunity arose early. A *Science* writer covered the FDA hearing with a marginally unflattering account of McBride's testimony, including mentioning (arguably overstating) his high trial testimony rate, that he was associated with Mr. Belli in the Bendectin litigation, and that Dr. McBride's testimony before the FDA was unimpressive. In 1981 McBride sued Dow Merrill, its officers and directors, the author and publisher alleging they were responsible for the article which, he claimed, Merrill Dow used "as part of its scheme to

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<sup>184</sup> *Id.* at 106-8.

<sup>185</sup> *Id.*; David Bernstein, *The Breast Implant Fiasco*, 87 CALIF. L. REV. 457, 460 (1999); *New Thalidomide-Type Scandal--Experts Reveal . . . Common Drug Causing Deformed Babies*, NAT'L ENQUIRER, Oct. 9, 1979, at 20.

<sup>186</sup> *McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 540 F. Supp. 1252, 1254 (D.D.C. 1982)

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

silence plaintiff, indoctrinate the scientific community and avoid or stall access to the courts for maimed babies.”<sup>189</sup> The allegations predicated on McBride’s performance at the FDA hearing were dismissed under official proceeding immunity<sup>190</sup> while those invoking his association with Mr. Belli were judged “frivolous and verg[ing] on the preposterous.”<sup>191</sup> Still, despite the D.C. Circuit holding that McBride was a public figure due to him having “voluntarily entered this controversy [Bendectin], intending to influence its outcome,” his lawsuit remained five years later.<sup>192</sup>

Meanwhile, the tort suits proceeded. Ms. Mekdeci’s case did not go well.<sup>193</sup> However, the economies of 30% of pregnant women having taken Bendectin and five percent of all births having deformities promised a massive plaintiff pool, so more cases followed.<sup>194</sup> Around 40% of cases were consolidated, with the question of whether Bendectin causes birth defects tried

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<sup>189</sup> *McBride v. Merrell Dow & Pharmaceuticals*, 717 F.2d 1460, 1463 (D.C. Cir. 1983)

<sup>190</sup> *Id.* at 1465.

<sup>191</sup> *Id.* at 1464.

<sup>192</sup> In *McBride v. Merrell Dow & Pharmaceuticals*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) the D.C. Circuit reversed the district court’s dismissal based both in the district court denying discovery into defendant’s motives and on defendant’s failure to produce evidence of the rates charged by Dow Merrell’s experts, thus validating the comparison. *McBride v. Merrell Dow & Pharmaceuticals*, 800 F.2d 1208, 1212-13, (D.C. Cir. 1986).

<sup>193</sup> The *Mekdeci* case was complicated by the mother having taken other drugs during her pregnancy and the child having unilateral deformity inconsistent with Dr. McBride’s causation theory. The result was a \$20,000 verdict compared to out-of-pocket legal expenses of \$150,000. *Marcus*, 235.

<sup>194</sup> *Id.* at 236.

separately to a defense verdict.<sup>195</sup> Still, individual cases proceeded to trial in jurisdictions all over the country, generally presenting the same evidence through the same experts.

Plaintiffs lacked causation evidence,<sup>196</sup> and by the late 1980's it was becoming increasingly obvious that Dr. McBride who "occupied a central place in the Bendectin debate," including as a frequent plaintiffs' expert,<sup>197</sup> had deliberately falsified his research<sup>198</sup> so as to

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<sup>195</sup> *Id.* at 239.

<sup>196</sup> One early court found "no reasonable jury could find on the basis thereof that this infant plaintiff's birth defects were more likely than not to have been caused by her intrauterine exposure to Bendectin; alternatively, even if such a finding were reasonable, it is nevertheless so clearly contrary to the weight of the evidence that the case must be retried." *Richardson v. Richardson-Merrell, Inc.*, 649 F. Supp. 799, 799-800 (D.D.C. 1986); *Hull v. Merrell Dow Pharmaceuticals, Inc.* 700 F. Supp. 28, 29 (D. Fla. 1988) (granting summary judgment for the defense because "[t]he body of scientific literature demonstrating the safety of Bendectin is extensive and overwhelming. More than thirty human epidemiological studies have been done and none have concluded that Bendectin is teratogenic.").

<sup>197</sup> *McBride v. Merrell Dow & Pharmaceuticals*, 230 U.S. App. D.C. 403 (D.C. Cir. 1983) ("Dr. McBride, who filed the complaint for defamation, is a citizen of Australia and a research physician well-known for his work in the field of teratology. Among other accomplishments, he played a role in showing that thalidomide could cause birth defects."); Michael Green, *Expert Witnesses And Sufficiency Of Evidence In Toxic Substances Litigation: The Legacy Of Agent Orange And Bendectin Litigation*, 86 Nw. U.L. Rev. 643, 699, n. 68 (1992). He served widely as a causation expert for Bendectin plaintiffs, Joseph Sanders, *From Science To Evidence: The Testimony On Causation In The Bendectin Cases*, 46 STAN. L. REV. 1, 34 (1993), until investigations into him altering results to obtain research findings against Bendectin undercut his credibility. *Id.*; Norman Swan, *The Man Who Stopped Thalidomide Accused of Fraud*, Sydney Morning Herald, p. 1 (Dec. 14, 1987);.

<sup>198</sup> Harry Gibbs, *Report of Committee of Inquiry Concerning Dr. McBride* (Sydney Foundation 41, 1988) (investigating allegations of falsification of results for a studying involving thalidomide and finding that "Dr. McBride was lacking in scientific integrity."); Frank Wells, *Fraud and Misconduct in Medical Research*, Br. J. Clin. Pharmacol. 1997:43:3-7 (opining that Dr. McBride developed a "'messianic' complex" after reaching international fame for describing thalidomide toxicity. "He then went on to indict Debendox (known in Australia as Bendectin) as a drug which had the same teratogenic effects as thalidomide, but without any evidence to support the indictment. In fact, he falsified the experimental data to imply

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link the active ingredient in Bendectin to limb birth defects. Indeed, the same year the Supreme Court's *Daubert v. Merrill Dow*<sup>199</sup> decision unofficially closed out the Bendectin litigation with the introduction of judicial gatekeeping, McBride was disbarred from medicine for having falsified Bendectin research.<sup>200</sup> With his pre-existing prestige, and being one of only two plaintiffs' Bendectin experts to have published on that substance,<sup>201</sup> Dr. McBride was highly significant to the rise and fall of Bendectin litigation.<sup>202</sup>

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that teratogenicity had occurred when it had not because his blind belief in the dangers of Debendox was so great that he consciously changed the data 'in the long term interest of humanity.'").

<sup>199</sup> *Daubert v. Merrell Dow Pharms*, 509 U.S. 579, 590 (1993).

<sup>200</sup> Margaret Scheikowski, *Thalidomide Doctor Back After Fraud*, The Daily Telegram (Sydney, Australia) (Nov. 10, 1998) (reporting that in 1993 Dr. McBride was "[s]truck off the medical register for falsifying research data in the Debendox [(Bendectin)] case," had his application rejected in 1996, then was readmitted after he "apologised, admitted the deliberate fraud and said his continued attempts to self justify the paper had been wrong.").

<sup>201</sup> Robert L. Brent, *Bendectin: Review of the Medical Literature of a Comprehensively Studies Human Nonteratogen and the Most Prevalent Tortogen-Litigen*, Rep. Tox. 1995:9:337-349 (stating that "[o]nly two of the plaintiffs experts have published their views on Bendectin" and "McBride's teratology research using scopolamine was the subject of an investigation at Foundation 41, in Australia, the site of his research activities and later by a Medical Tribunal of New South Wales, Australia. His research was judged to be fraudulent, the committee concluding that ' . . deliberate falsification did occur . . . .'). The only other plaintiff expert to publish was Dr. Newman, whose work was limited to in vitro (test tube) studies. *Id.* at 344.

<sup>202</sup> *Supra, McBride v. Merrell Dow & Pharmaceuticals*, 255 U.S. App. D.C. 183 (D.C. Cir. 1986).

Despite this, plaintiffs won jury verdicts, including seven and eight figure amounts,<sup>203</sup> in the same proportion as plaintiffs generally win in products liability cases.<sup>204</sup>

History eventually cleared Bendectin. Legally, no Bendectin verdict withstood appeal.<sup>205</sup> Politically, the FDA has courted pharmaceutical companies to reintroducing Bendectin.<sup>206</sup> Socially, what began with a self-taught teratologist and a world-famous but misguided one<sup>207</sup> has been a net harm. Up to 80% of mothers-to-be experience nausea during

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<sup>203</sup> Joseph Sanders, *From Science To Evidence: The Testimony On Causation In The Bendectin Cases*, 46 STAN. L. REV. 1, 5 (1993); *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 791 F. Supp. 1042, 1057 (D.N.J. 1992)); *Merrell Dow Pharms. v. Havner* 953 S.W.2d 706, 709 (Tex. 1997) (reversing jury verdict for \$3.75 million in actual and \$30 million in punitive damages); *Blum v. Merrell Dow Pharms., Inc.*, 564 Pa. 3, 5(Pa. 2000) (reversing \$19.2 million dollar jury verdict.)

<sup>204</sup> Marcus, 237; W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 584 (2000) ["[T]he wave of Bendectin litigation ultimately cost manufacturers so much that they stopped marketing the product. Although no jury verdict that Bendectin causes birth defects has ever been upheld on appeal, plaintiffs have received a favorable verdict in approximately 36% of the cases that have gone to trial."].)

<sup>205</sup> W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 584 (2000).

<sup>206</sup> The FDA took the unusual step of issuing an unsolicited finding in August of 1999 that Bendectin was not withdrawn for safety reasons. 64 FR 43190, \*43190 (Aug. 9, 1999). The move has been seen as the agency soliciting the re-introduction of Bendectin, Susan Lundine, *Ground Zero in a New Bendectin Battle?* Orlando Bus. J. (Feb. 9, 2001), and drew renewed threats from dated Bendectin plaintiffs' lawyers.

<sup>207</sup> Supra, Frank Wells (stating that Dr. McBride's "blind belief in the dangers of Debendox was so great that he consciously changed the data 'in the long term interest of humanity.'"). Betty Mekdeci was sincere in her belief as her organization, Birth Defect Research for Children, Inc., ("BDRC") still, long after the litigation has dried up, actively argues to the public and government agencies that Bendectin causes birth defects. BDRC, Bendectin: How a Commonly Used Drug Caused Birth Defects (<http://www.birthdefects.org/Research/bendectin1.htm>); BDRC Presentation to NIEH, 8-14

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pregnancy,<sup>208</sup> and Bendectin was and is the only prescription drug approved by the FDA to treat that condition.<sup>209</sup> Withdrawal of Bendectin from the U.S. market<sup>210</sup> appears to have produced “an increase in hospitalizations for hyperemesis gravidarum, a severe form of morning sickness that requires medical intervention, often by intravenous rehydration.”<sup>211</sup> An in-depth story by the New York Times revealed American women driving to Canada to get Bendectin and that, “[i]n desperation, a few doctors say they tell women essentially to make their own Bendectin.”<sup>212</sup>

## ii. Breast Implant Litigation

The Breast Implant litigation had its origins in regulatory petitioning too, only its corollaries to Betty Mekdeci a pro-regulatory, anti-industry activist group (\_\_\_\_), Public Citizens Health Research Group (“Public Citizen”) --and Representative Ted Weiss, were more

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(slides purporting to show an increase in birth defects among children of mothers who took Bendectin).

<sup>208</sup> Quinla JD, Hill DA, *Nausea and Vomiting of Pregnancy*, AM. FAM. PHYS. 2003 Jul 1:68(1):121-8

<sup>209</sup> P. Mazzota, *et. al.*, *Attitudes, management and consequences of nausea and vomiting of pregnancy in the United States and Canada*, Intl. J. GYNACOL. OBSTET. 2000 Sept 70(3):359:65.

<sup>210</sup> In interviews by the New York Times, a company lawyer reported that a large part of the reason for the withdraw was the cost of insurance “[b]efore they finally pulled it off the market, the insurance was going to cost them more per year than the amount they sold -- not the profit but the amount they sold,” he recalled. Gina Kolata, *Controversial Drug Makes A Comeback*, N.Y. TIMES, Sept. 26, 2000, at F..

<sup>211</sup> Green, 336 (1996)

<sup>212</sup> Gina Kolata, *Controversial Drug Makes a Comeback*, N.Y. TIMES, Sept. 26, 2000, at F.

successful.<sup>213</sup> In November of 1988 Public Citizen called for a ban on breast implants based on a dubious rat study implying a cancer risk.<sup>214</sup> The bid failed.<sup>215</sup> But in December of 1990, Connie Chung, then of NBC, aired an inflammatory special on breast implants, calling silicone “an ooze of slimy gelatin that could be poisoning women.”<sup>216</sup> Representative Ted Weiss, who had ties to Public Citizen, held congressional hearings a week later along similar lines,<sup>217</sup> which were used as a springboard to lobby the FDA to ban implants based on cancer risk. FDA resisted, but ultimately buckled in 1992 when presented with embarrassing internal Dow Corning documents obtained through litigation.<sup>218</sup>

The 1992 FDA moratorium touched off an explosion of breast implant litigation such that by December of that year 3,558 suits were pending and quadruple that number a year later.<sup>219</sup> Less than five years after the litigation began, Dow Corning was bankrupt.<sup>220</sup>

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<sup>213</sup> David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457, 467 (1999) (hereinafter “Bernstein”)

<sup>214</sup> Rats implanted with globs of silicone, which developed fibrosarcoma, a form of cancer. *Id.* at 465. However, as Bernstein explains, it is well known that rats, unlike humans, develop this cancer in response to any large smooth object being implanted in them. *Id.*

<sup>215</sup> *Id.* at 466, fn. 36.

<sup>216</sup> David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457, 467 (1999).

<sup>217</sup> *Id.* at 468.

<sup>218</sup> *Id.* at 474.

<sup>219</sup> *Id.* at 477, 479

<sup>220</sup> *In re Corning, Inc., Sec. Litig.* 349 F. Supp. 2d 698, 712 (D.N.Y. 2004).

As with Bendectin, plaintiffs lacked evidence of causation.<sup>221</sup> By 1994, “a large, rigorous, and well controlled epidemiological study” proved plaintiffs’ allegations of autoimmune disease wrong.<sup>222</sup> By the close of the century, over twenty-five studies found that women with breast implants did not have a significantly increased risk of autoimmune disease.<sup>223</sup> In 1996, Judge Pointer of the Central District of Alabama, who was then presiding over all consolidated breast implant cases, assigned the question of causation to a National Science Panel, pursuant to Rule 706. It found “that there is no meaningful or consistent association between breast implants or silicone gel-filled implants and any of the conditions studied.”<sup>224</sup> Within a year, the National Academy of Science confirmed that “there was not ‘even suggestive evidence’ that silicone breast implants caused systemic disease,”<sup>225</sup> which largely ended the litigation.

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<sup>221</sup> *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1406 (D. Or. 1996) (excluding expert opinion based on re-analysis, case reports and animal studies for breast implants); *Allison v. McGhan Med. Corp.* 184 F.3d 1300, 1315 (11th Cir. 1999) (same); *Kelley v. American Heyer-Schulte Corp.* 957 F. Supp. 873, 879 (D. Tex. 1997) (same).

<sup>222</sup> *In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1227 (D. Colo. 1998).

<sup>223</sup> Debora L. Worthington, *et. al.*, *Hindsight Bias, Daubert, and the Silicone Breast Implant Litigation*, 8 PSYCHOL. PUB. POL’Y & L. 154, 167; *Grant v. Bristol-Myers Squibb*, 97 F. Supp. 2d 986, 990 (D. Ariz. 2000).

<sup>224</sup> *Norris v. Baxter Healthcare Corp.*, 397 F. 3d 878, 881 (10th Cir. 2005).

<sup>225</sup> *Id.* quoting COMMITTEE ON THE SAFETY OF SILICONE BREAST IMPLANTS, INSTITUTE OF MEDICINE, *Safety of Silicone Breast Implants*, 432 (1999).

V.  
**THE POLITICAL SPEECH LESSONS OF TOXIC TORTS: WHY A  
FRAUD EXCEPTION BEGETS FOLLY**

*Noerr-Pennington* immunity is premised on the recognition that the specter of tort liability for petitioning is a powerful and undesirable deterrent.<sup>226</sup> The longstanding constitutional edict in the United States is that an atmosphere of freedom to petition, on the whole, is a societal good,<sup>227</sup> while systematic inhibitors of petitioning are a detriment.<sup>228</sup>

There are, I believe, two lessons relevant to political speech to be taken from the Bendectin and breast implant litigation, and one other from site specific lobbying. First, neither the causative allegations nor verdicts in toxic torts are particularly good indicators of scientific truth. We, as a society, would be foolish to allow either to set the bound of our political discourse. Second, the toxic tort is politicized such that it influences, and is itself influenced by regulatory and legislative determinations. This is to be expected, but becomes problematic if a fraud exception to *Noerr Pennington* immunity allows one side to be systematically deterred from participating in the political process. It is undemocratic and contrary to *Noerr-Pennington* for any tort allegation or finding to circumscribe political debate, but those of the toxic tort are

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<sup>226</sup> *First Nat'l Bank v. Marquette Nat'l Bank*, 482 F. Supp. 514, 525 (D. Minn. 1979) (holding that *Noerr-Pennington* should apply to all causes of action because "to hold otherwise would effectively chill the defendants' First Amendment rights.").

<sup>227</sup> See e.g., *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139-140 (1961) ("A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.").

<sup>228</sup> Cal. Code Civ. Proc. 425.16(a).

uniquely unsuited to do so because each party can potentially enhance its litigation position through political success. Lastly, a fraud exception to petition immunity undermines site specific lobbying by a stifling needed communication between potentially responsible parties and agencies with the threat of voyeuristic fraud claims.

#### **A. Freewheeling Causation and Guarded Speech**

The heart of toxic torts, and consequently much of the controversy around them, is their causative pronouncement that a given exposure or exposures brings about some compensable injury.<sup>229</sup> Without it, the components it links – exposure and disease – are separately unremarkable as human existence has always been accompanied by both.<sup>230</sup> Thus, there is no shortage of commentary on causation standards in toxic torts. Most commentators on the subject criticize traditional tests of causation as too onerous for what are argued to be the unique considerations of toxic torts.<sup>231</sup> Although, many writers seem to reach this assessment by

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<sup>229</sup> Law reviews and journals are heavily populated with articles arguing that standard requirements of causation fail in the toxic tort context, and proposing various alternatives. See Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L.Rev. 851, 855 (1984).

<sup>230</sup> *Supra*, fn. 149-50.

<sup>231</sup> Examples include Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 Colum. L. Rev. 2117, 2117 (1997) ("The causation model is blind to the realities of scientific uncertainty and corporate behavior, and is inconsistent with notions of moral responsibility underlying tort law."); Shelly Brinker, Comment, *Opening the Door to the Indeterminate Plaintiff: An Analysis of the Causation Barriers Facing Environmental Toxic Tort Plaintiffs*, 46 UCLA L. Rev. 1289, 1291 (1999); Danielle Conway-Jones, *Factual Causation in Toxic Tort Litigation: A Philosophical View of Proof and Certainty in Uncertain Disciplines*, 35 U. Rich. L. Rev. 875, 876 (2002) ("While exposure to toxic substances has become the norm, findings of culpability against those responsible for creating the exposure and any ensuing harm seem to be nonexistent. Gerald W. Boston, *Toxic Apportionment: A Causation and Risk Contribution Model*, 25 Env'tl. L.

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presuming factual causation then faulting the law for failing to find it,<sup>232</sup> there is little disagreement that toxic torts – particularly those involving more dubious theories of harm – often push the bound of scientific consensus.

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549, 551-53 (1995) (arguing that "[i]n a typical toxic tort case, the plaintiff or the plaintiff's property suffers some harm as a result of exposure to one or more sources of a toxic substance," but that current causation standards create an improper "all-or-nothing" approach).

<sup>232</sup> Carin Cardinale, *The Long Island Breast Cancer Study: Results Of An Epidemiological Study Cause Considerable Barriers To Legal Relief*, 9 Alb. L. Envtl. Outlook 147, 149 (2004) (arguing "that *Annunziato* demonstrates the difficulty in proving both the general and individual causation of a harmful substance that caused injury in a toxic tort case."). Eric Wilson, *Hope for Hanford Downwinders?: the Ninth Circuit's Ruling in In Re Hanford Nuclear Reservation Litigation*, 82 Or. L. Rev. 581, 622 (2003) (arguing that "delays are particularly troubling because most of the injuries In re Hanford plaintiffs sustained occurred more than fifty-five years ago."); Michel Baumeister & Dorothea Capone, *Expert Admissibility Symposium: Reliability Standards--Too High, Too Low, Or Just Right?: Admissibility Standards as Politics--The Imperial Gate Closers Arrive!!!*, 33 Seton Hall L. Rev. 1025, 1027 (2003) ("[M]any of these toxins became the subject of civil lawsuits brought by persons exposed to these substances who were suffering from chronic illnesses or diseases, or the families of those who died as a result of their exposure."); Shelly Brinker, *Opening the Door to the Indeterminate Plaintiff: An Analysis of the Causation Barriers Facing Environmental Toxic Tort Plaintiffs* (Comment), 46 UCLA L. Rev. 1289, 1296 (1999) ("The common-law tort system, however, is not particularly amenable to plaintiffs in their efforts to recover for the devastating personal injuries that often result from exposure to environmental toxic substances."); see also Alani Golanski, *General Causation at a Crossroads in Toxic Tort Cases*, 108 Penn St. L. Rev. 479, 480 (2003) (arguing that "[t]he abolitionists [of causation] both presuppose the very general causation finding that their proposal inveighs against, and depreciate the current system.")

The Bendectin<sup>233</sup> and breast implant litigation<sup>234</sup> pioneered the technique for bringing in large compensatory verdicts without winning causation<sup>235</sup> by trying the defendant without proving the injury. A post-mortem analysis of Bendectin trials found generally that, saddled with a weak causation case, plaintiffs' counsel attempted to commingle elements, thus bolstering causation with more compelling and emotional proof of bad conduct.<sup>236</sup> The same was true of breast implant litigation, where commentators note that in an early, pattern-setting case, "[t]he plaintiff had no valid scientific evidence linking breast implants with her disease, so her attorney

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<sup>233</sup> W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 584 (2000) ("[T]he wave of Bendectin litigation ultimately cost manufacturers so much that they stopped marketing the product. Although no jury verdict that Bendectin causes birth defects has ever been upheld on appeal, plaintiffs have received a favorable verdict in approximately 36% of the cases that have gone to trial.").

<sup>234</sup> David Bernstein, 87 CAL. L. REV. 483 (1999); Peter J. Goss, *et. al.*, *Clearing Away the Junk: Court-Appointed Experts, Scientifically Marginal Evidence, and the Silicone Gel Breast Implant Litigation*, 56 FOOD & DRUG L. J. 227, 239; *see also* *Meister v. Med. Eng'g Corp.* 347 U.S. App. D.C. 361 (D.C. Cir. 2001) (affirming j.n.o.v. vacating verdict for \$10 million); *3M v. Atterbury*, 978 S.W.2d 183, 186 (1998) (reversing jury verdict of \$1.5 million because plaintiffs' evidence was inadmissible); *Toole v. Baxter Healthcare Corp.* 235 F.3d 1307, 1311 (11th Cir. 2000) (jury verdict of six million dollars); *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1482 (1998) (finding "substantial evidence" to support \$4.1 million verdict).

<sup>235</sup> David E. Bernstein's *The Breast Implant Fiasco*, 87 CAL. L. REV. 457 (1999) analyzes the litigation from the perspective of the phantom risk and the factors determinative of success in such litigations. *Id.* at 459-60. From this and other litigations, he distills four factors for phantom litigation to take hold "1) sensationalistic media coverage; (2) actions by politically motivated individuals and organizations that result in the downplaying of objective scientific inquiry; (3) public outrage at reports of corporate irresponsibility; and (4) financial incentives that encourage attorneys and their clients to pursue claims that have a dubious scientific basis." *Id.*

<sup>236</sup> Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 53 (Nov. 1993).

emphasized the allegedly irresponsible behavior of the defendant."<sup>237</sup> Verdict results and psychological research bear out the effectiveness of this approach. Forensic analysis found that, despite the lack of causation evidence, Bendectin plaintiffs won jury verdicts in the same proportion as plaintiffs generally win in products liability cases.<sup>238</sup> Most strikingly, the wins were evenly distributed even though by the later cases a scientific consensus largely existed that Bendectin did not cause birth defects.<sup>239</sup>

Two psychological constructs explain this. First, empirical research on bifurcation bears out that jurors do use evidence of misconduct to compensate for weak causation. In a landmark study by Irwin Horowitz and Kenneth Bordens, researchers presented a simulated toxic tort trial, including evidence of bad conduct, causation and damages, to mock juries.<sup>240</sup> When juries

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<sup>237</sup> Bernstein, 464; *see also* Amy Singer, *Look Over Here: How John O'Quinn Directed A Jury's Attention Toward the Strongest Elements of His Case - And Won The Largest Verdict Ever In A Breast Implant Suit*, Am. Law., March 1993; *cf. Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545, 1551 (D. Colo. 1990) ("proof that Martin committed reprehensible acts coupled with evidence of injury is not enough to prevail on a tort claim. Plaintiffs must prove that the reprehensible acts caused, or increased the likelihood of, the alleged injuries.")

<sup>238</sup> W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 584 (2000) ("[T]he wave of Bendectin litigation ultimately cost manufacturers so much that they stopped marketing the product. Although no jury verdict that Bendectin causes birth defects has ever been upheld on appeal, plaintiffs have received a favorable verdict in approximately 36% of the cases that have gone to trial.")

<sup>239</sup> Sanders, 12.

<sup>240</sup> Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 Law & Hum. Behav. 269, 274-78 (1990). The "trial" was made up of opening statements, initial instructions, conduct evidence, causation evidence, damages, closing statements and final jury instructions. *Id.*

heard all the evidence, 87.5% found causation.<sup>241</sup> With only causation evidence presented, the number dropped to 25%.<sup>242</sup> This proved to be the case in bifurcated Bendectin and breast implant cases, where the considerations of causation evidence without accompanying evidence of bad conduct almost universality resulted in what is now accepted as the correct finding: no causation.<sup>243</sup> The second construct is the heuristic of culpable causation, or the natural tendency to assume that blameworthy conduct is of greater causal importance than morally neutral actions.<sup>244</sup> So, even when actions are of equal causal significance, such as speeding motivated by blameworthy drug dealing on the one hand or a commendable desire to surprise a spouse on an anniversary, on the other hand, jurors will consistently assume that the former played a greater role in an accident.<sup>245</sup>

This use of conduct to compensate for missing causation continues and is even defended by commentators.<sup>246</sup> For example, in commenting on the scientifically controversial<sup>247</sup> *Erin*

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<sup>241</sup> *Id.* at 278.

<sup>242</sup> *Id.*

<sup>243</sup> Plaintiffs lost every Bendectin trial where causation was tried separately from conduct, and, likely appreciating this, the lead counsel in the MDL litigation opted most of his cases out of the trial. Michael D. Green, *Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation*, 215 (1996).

<sup>244</sup> Mark D. Alicke, *Culpable Causation*, 63 *J. Personality & Soc. Psychol.* 368 (1992).

<sup>245</sup> *Id.*

<sup>246</sup> See e.g., Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 *Colum. L. Rev.* 2117, 2147 (1997) (arguing in favor of eliminating causation to deter social harm and proposing a model “consistent with the jurors’ intuition in the Bendectin cases that irresponsible corporate behavior should be penalized.”).

*Brockovich* case, lead trial lawyer Walter Lack observed, “[j]urors reacted against the behavior of PG&E. PG&E officials knew about the contamination, didn’t disclose the problem to the water board, and then lied about it. So? A jury faced with those kind of facts generally will look past a difficult causation issue.”<sup>248</sup>

Nevertheless, for free speech purposes, it matters little whether one considers causation an unfortunate tripping stone or indispensable pillar of tort law. Either way, it remains true that the toxic torts causative allegations, and the resulting determinations, are often factually wrong. This has significance for political speech in two ways. First, allegations that the defendant has made misrepresentations to the government can form the basis of alleged bad conduct that may persuade a jury to “look past a difficult causation issue.” Second, because we know that juries sometimes find causation in the absence of scientific proof, the fraud exception to *Noerr-Pennington* may be invoked where the defendant has accurately argued to government agencies that there is no causal link between its product and a particular disease.

Take a scenario where plaintiff has alleged that silicone caused her autoimmune disease. Her lawyer also argues that defendant falsely argued to FDA that such implants did not cause autoimmune disease. History shows that many juries, for reasons other than scientific truth, accepted the causal assertion. Having done so, the jury could easily believe defendant’s contrary petition – that breast implants do not cause autoimmune disease -- to be false, and thus

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<sup>247</sup> Michael Fumento, *Erin Brockovich Exposed*, Wall St. J., Mar. 28, 2000 (discussing the lack of scientific evidence that chromium 6 caused the illnesses alleged).

<sup>248</sup> Walter J. Lack, *Three Trial Attorneys*, Loyola Lawyer (Winter 2001).

potentially subject to the fraud exception to petition immunity. If plaintiff's theory is allowed to go to the jury, defendants would be chilled from advocating, on a significant societal question, a position we now know to be true. Meanwhile, those advocating the ban of breast implants remain free to voice their position to the government, leading to a one-sided (and false) debate on the issue. Government action dependent on whether breast implants do cause autoimmune disease – from bans to funding additional research – is then affected by the artificially lopsided petitioning.

It is of course possible to cite instances where defendants disputed a causal truth both in the courtroom and in politics. This only makes my point: many toxic tort juries found that smoking did not cause lung cancer,<sup>249</sup> but it is unthinkable that such findings should limit political discourse on tobacco. In the end, it is better that socially significant causative determinations be informed by any who wish to participate, from the selfless and the selfish alike. The fraud exception, by injecting tort liability into the process, undermines this and ought to be rejected.

#### **B. Hearing Only One Side of the Special Interests**

Bendectin and the breast implant litigation illustrate the political character of the modern toxic tort, being alternatively a product of, and itself feeding, politics. In each litigation plaintiffs, or plaintiffs' affiliated entities, sought bans. Their success with breast implants then spawned additional cases and strengthen plaintiffs litigation position. More recently, plaintiffs' counsel involved in a high profile chromium 6 cases have actively encouraged the conservative

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<sup>249</sup> Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 *Stan. L. Rev.* 853 (1992) (reviewing unsuccessful waves of tobacco tort lawsuits from the 1950s to 1991).

regulation of that chemical,<sup>250</sup> and used documentary fodder from toxic tort litigation to do so.<sup>251</sup> The same is true with perchlorate.<sup>252</sup> As with breast implants, much of the lobbying and public relations campaigning for plaintiff friendly environmental laws comes from non-profit environmental groups.<sup>253</sup> The extent to which these groups coordinate with plaintiffs' lawyers is controversial.<sup>254</sup> But motive is unimportant. The fact is that environmental groups routinely

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<sup>250</sup> Possible Interference in the Scientific Review of Chromium VI Toxicity: Hearing Before the California Senate Health and Human Services Com. (Feb. 28 and April 2, 2003), supra, fn. []. This hearing included an opening by Erin Brockovich and a presentation by counsel involved in the now-settled follow on to *Anderson v. P.G. & E.*, *Aguayo v. P.G. & E.*, charging P.G. & E. with manipulating the Blue Ribbon Panel established to evaluate the carcinogenicity of chromium 6. See also, David Egilman, *Corporate Corruption of Science – the Case of Chromium (IV)*, 12 Int. J. Occup. Environ Health 169 (2006) (citing evidence from chromium 6 litigation to argue that "[a]s a result of corporate manipulation of science, effective regulation of chromium (VI) in California and New Jersey (and elsewhere) has already been delayed for about a decade. Corporations faced with multi-million-dollar litigation or regulatory actions do not naturally deserve our trust, neither do the paid professionals who help them achieve their goals.").

<sup>251</sup> *Id.*

<sup>252</sup> Jennifer Sass, *U.S. Department of Defense and White House Working Together to Avoid Cleanup and Liability for Perchlorate Pollution*, 10 Int. J. Occup. Environ Health 333 (2004). Ms. Sass cites documents from perchlorate toxic tort litigation to argue that defendants had used "science-for-hire" experts to influence NAS perchlorate findings. Interestingly, the author also notes that plaintiffs' counsel spoke at the same NAS hearing but did not level the same criticisms at them.

<sup>253</sup> See supra, notes 164 and 166.

<sup>254</sup> Conservative and pro-tort reform organizations often make this assertion. Bonner R. Cohen, *The Environmental Working Group Peddlers of Fear*, Capital Research Center, 4 (Jan. 2004) (publicly available at <http://www.capitalresearch.org/pubs/pdf/x3800748694.pdf>) (noting, *inter alia*, "EWG research topics dovetail nicely with InjuryBoard.com solicitations."); American Tort Reform Association, *A Look at the Environmental Working Group: The Facts About Who's Really Profiting From the Nonprofit* (2005) (publicly available at <http://www.atra.org/reports/ewg/>) (claiming that "[t]he EWG's irresponsible publicity campaigns effectively create the public anxiety and hysteria needed for personal injury lawyers to solicit plaintiffs and file an onslaught of reckless lawsuits.").

petition government to adopt positions that benefit toxic tort -- whether it is the regulatory assessment of perchlorate,<sup>255</sup> arsenic in wood treatment,<sup>256</sup> increases in asbestosis,<sup>257</sup> PCB's in Salmon,<sup>258</sup> benzene in soda,<sup>259</sup> or Acrylamide in fried foods.<sup>260</sup> Engaging in such political speech is, of course, their right, but government cannot do its job if the other side of the debate is chilled from arguing its position by fear of having its communications made into a potential liability in toxic tort litigation.

This is all the more true because, to be responsive, a defendant must often frame its petitions in terms of risk assessment. While proponents of absolute environmental prohibitions

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<sup>255</sup> 19 No. 8 Andrews Toxic Chemicals Litig. Rep. 10, Group Calls for Higher Standards After Rocket Fuel Toxin Found in Water (Aug. 10, 2001) (EWG petitioning for a perchlorate standard of 4.3 ppb); Environmental Working Group, *44 Million Women at Risk of Thyroid Deficiency From Rocket Fuel Chemical* (October 4, 2006) publicly available at <http://www.ewg.org/issues/perchlorate/20061004/release.php>.

<sup>256</sup> Sara Hoffman, *Arsenic-Treated Wood Linked To Increased Cancer Risk*, CPSC Says, 39-MAY Trial 87 (Association of Trial Lawyers of America ("ATLA")) (May 2003) (discussing EWG's petitions on arsenic regulation)

<sup>257</sup> Sara Hoffman, *Protecting Asbestos Victims*, 40-JUL Trial 12 (ATLA) (July 2004) (discussing ATLA funding of an EWG study which was "widely distributed to the media and members of Congress, recommends that the U.S. government ban asbestos immediately and establish a policy that will ensure care for future victims.").

<sup>258</sup> Environmental Working Group, *PCBs in Farmed Salmon: Factory Methods, Unnatural Results*, publicly available at <http://www.ewg.org/reports/farmedPCBs/es.php>.

<sup>259</sup> Environmental Working Group, *Children's Drinks Contain Ingredients That Can Form Benzene* FDA silent despite knowledge of the problem (Feb. 28, 2006) publicly available at <http://www.ewg.org/issues/toxics/20060228/index.php> (discussing EWG request that "the FDA [] immediately issue a statement telling consumers which ingredients in foods and drinks can combine to form benzene.").

<sup>260</sup> Center for Science in the Public Interest, *New Tests Confirm Acrylamide in American Foods* (June 25, 2002) publicly available at <http://www.cspinet.org/new/200206251.html> ("CSPI today urged the FDA to inform the public of the risks from acrylamide in different foods.")

do exist,<sup>261</sup> regulatory decisions are predominately based on assessing risk, then the balancing of that against attendant costs.<sup>262</sup> An MCL for a potential carcinogen, for example, is based not on the proposition that the chemical is dangerous and therefore ought to be entirely removed, but rather by determining the level that “does not pose any significant risk to health”<sup>263</sup> and adjusting for “technological and economic feasibility of compliance.”<sup>264</sup> The predominance of risk assessment carries forward to site specific remediations as well. There, the standard is not that of absolute removal, but rather of using risk assessment procedures to determine the necessity and level of remediation,<sup>265</sup> including consideration of costs in selecting remedies.<sup>266</sup>

So whether engaged in legislative or site-specific lobbying, a petitioning defendant generally must speak in terms of risk assessment and cost / benefit analysis to be responsive to the agency decision at hand. But by being responsive he potentially creates tort liability, for legal history and juror studies show the regulatory language of risk assessment to have poor jury

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<sup>261</sup> See e.g., Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 Iowa L. Rev. 1405 (April 2005) (lamenting that “cost-benefit analysis is increasingly becoming the standard of choice in environmental law” and instead advocating environmental absolutes as a means of addressing power imbalance.).

<sup>262</sup> *Id.* at 1408; Viscusi at 547 (“Balancing of risk and cost lies at the heart of standard negligence tests and policy analysis approaches to government regulation.”).

<sup>263</sup> Cal. Heath & Saf. Code § 116365(c)(1)

<sup>264</sup> Cal. Heath & Saf. Code § 116365(b)(3)

<sup>265</sup> US EPA, *Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies*, 5-1 (1991) (“The risk assessment also may show that the baseline risks are acceptable and that remediation is not needed . . . . The second major purpose of the Baseline Risk Assessment is to help determine remediation goals for the site contaminants.”); 40 C.F.R. § 300.430(e)(7).

<sup>266</sup> Cal. Heath & Saf. Code § 116365(e).

appeal. Such evidence, even when the risk assessment is perfectly sound, is reported to have a significant enhancing effect on mock juror punitive damage awards.<sup>267</sup>

Suppose, for example, that industry responsible for environmental contamination with chemical X wishes to argue to EPA that it should adopt a maximum contaminate level (MCL) of 50 – meaning that environmental clean-up is not required where the amount of X in the environment is below 50.<sup>268</sup> Non-profit environmental groups advocate as MCL of 5 or less. Because EPA determines MCLs based in part on its own standards risk assessment,<sup>269</sup> industry must argue that scientific data demonstrates a risk to human health of “only one in a million.” But industry could be chilled from arguing its side of the debate if its submissions to the government were subject to being inserted into a toxic tort lawsuit against it, for researchers have found that jurors view corporate risk assessment as bad conduct. Viscusi, for example, conducted an experiment where mock jurors evaluated five case scenarios, three of which involved a corporate risk assessment.<sup>270</sup> He found that corporate risk analysis both significantly increased the probability of punitive damages and increased the damage award by 50% on

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<sup>267</sup> Viscusi at 554.

<sup>268</sup> *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1290 (D.C. Cir. 2000) (describing EPA’s responsibilities under the Safe Drinking Water Act and holding an MCL of zero for chloroform to be arbitrary and capricious when a higher MCL would not have created a significant risk).

<sup>269</sup> *Id.* at 1289 (discussing EPA setting cleanup levels “based on an assumption that chloroform poses a risk of cancer at any dose, but that 6 ppb would yield an acceptable cancer risk of one-in-a-million.”).

<sup>270</sup> Indeed performing the analysis correctly and placing a higher value on human life actually increased punitive awards, thus placing “companies . . . in the bizarre position of risking greater liability if they place more weight on consumer safety.” Viscusi, 558.

average.<sup>271</sup> Historical high verdict automobile and pharmaceutical tort cases where punitive damages were predicated on corporate risk assessment<sup>272</sup> suggest he is right.

Toxic torts First Amendment setting is thus that both sides make petitions,<sup>273</sup> but potential toxic tort defendants are more likely to be chilled by adoption of a fraud exception to *Noerr-Pennington*.

So too do both sides have a litigation incentive to deter the other. Plaintiffs' counsel has a strong financial incentive to chill a defendants' legislative lobbying that might lessen the profitability of the lawyer's present or anticipated toxic tort actions. Those with a heavy investment in groundwater chromium six actions, for example, have much to lose if regulating agencies conclude that chromium six does not present a significant cancer risk through the ingestion route.<sup>274</sup> They are thus incentivized to both undertake their own legislative lobbying

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<sup>271</sup> *Id.* at 556-58. John MacCoun, *The Costs and Benefits of Letting Juries Punish Corporations: Comment on Viscusi*, 52 *Stan. L. Rev.* 1821, 1828 (2000) criticizes some of Viscusi's reasoning, but ultimately bolsters his conclusion by explaining his results as byproducts of risk assessment establishing foreseeability and intent and evoking the taboo of trading life for dollars. *Id.* at 1825-28.

<sup>272</sup> Viscusi discusses several automobile defective design cases, including the famous Ford Pinto case, *Grimshaw v. Ford Motor Co.*, as well as the pharmaceutical examples of the DPT vaccine and Bendectin, in relation to his results and describes how in each corporate risk assessment took a prominent place in plaintiffs' jury presentation. *Id.* at 558-80.

<sup>273</sup> See Stephanie Tai, *Three Asymmetries of Informed Environmental Decision Making*, 78 *Temp. L. Rev.* 659, 673-75 (2005) (discussing various lobbying efforts by regulated entities to influence agency regulations).

<sup>274</sup> Chromate Toxicity Review Committee, *Scientific Review of Toxicological and Human Health Issues Related to the Development of a Public Health Goal for Chromium(VI)* (2001), p. 3 publicly available at [http://www.oehha.ca.gov/public\\_info/facts/pdf/CrPanelRptFinal901.pdf](http://www.oehha.ca.gov/public_info/facts/pdf/CrPanelRptFinal901.pdf) ("We found no basis

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and undermine the defendants' petitions. The toxic tort defendant, conversely, stands to lose both in terms of tort liability and response cost if the opposite conclusion is reached. These competing incentives parallel those in *Noerr Motor Freights*,<sup>275</sup> and the rule that emerged from that case and its progeny both anticipates and protects self-interested petitions.<sup>276</sup> Thus, in *Noerr Motor Freights* both the trucking and railroad companies made their self-interested petitions, and neither could use tort law as a vehicle for deterring the other from doing so. Private deterrence of political speech, which the fraud exception facilitates, should not be permitted in toxic torts either.

One article has directly proposed otherwise.<sup>277</sup> It recommends that toxic tort plaintiffs' lawyers police defendants' petitions for any "attempt to manipulate inappropriately a state or federal agency risk assessment or standard setting process applicable to the agent"<sup>278</sup> and

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in either the epidemiological or animal data published in the literature for concluding that orally ingested Cr(VI) is a carcinogen, and a relatively large number of negative studies by the oral route of exposure, even at concentrations in excess of current MCLs.”).

<sup>275</sup> *Supra*, Part.II.A.

<sup>276</sup> *Id.*

<sup>277</sup> Thomas O. McGarity, *Proposal For Linking Culpability And Causation To Ensure Corporate Accountability For Toxic Risks*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 1, 55 (2001). Although unquestionably proposing a rule that would hold a defendant liable for non-actionable political petitions, thus reversing *Noerr Motor Fright* and the forty years of jurisprudence applying it, Professor McGarity does not mention the right to petition.

<sup>278</sup> Under the system proposed by Professor McGarity, a plaintiff could establish culpability by “(1) a significant violation by the defendant of existing state or federal regulatory requirements governing the sale, distribution, use or disposal of the agent; (2) a serious attempt to manipulate inappropriately a state or federal agency risk assessment or standard setting process applicable to the agent; or (3) a successful attempt to mislead at-risk members

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receive, as their bounty for finding it, a presumption of causation.<sup>279</sup> While personal ideology may sanction such a rule, the First Amendment does not. As *Noerr-Pennington* recognizes, the best antidote for speech with which we disagree is counter-speech, not legal retribution. It is axiomatic under settled First Amendment principals that the government and the people it represents, are never if only one side of an argument is heard.<sup>280</sup>

Further, the moderate middle is the group most likely to be deterred by potential liability, thus leading to more extreme decisions. Although not a valid response to *Noerr-Pennington* immunity, it can be argued that companies with a massive stake in the outcome of a legislative decision will lobby no matter what the tort liability risks. Possibly. But the same cannot be said of less invested entities -- namely those holding a view at odds with plaintiffs' side but having little financial stake in the outcome of the decision. Take a medium sized entity that has under mostly finished remediating a trichloroethylene site, weighing whether to comment on proposed agency guidance on such remediations. As part of the remediation the entity amassed knowledge of the chemical and has opinions on issues the EPA is considering. But, since the risk assessment will not have much effect on its remediation cost, it has little financial incentive to comment. Unless civic duty overwhelms financial sensibilities, the company is unlikely to gamble that plaintiffs' lawyers, themselves having a stake in trichloroethylene litigation, would

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of the public (including the plaintiff) with respect to the nature and magnitude of the risk posed by the agent.”

<sup>279</sup> Under Professor McGarity’s proposal, causation would be satisfied by a regulatory assessment finding an association, which, as is currently the case, interested parties could comment upon. *Id.*

<sup>280</sup> *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961).

perceive its petition as benevolent. So, despite having an opinion and information to contribute, the company abstains. Aggregating this, the input of those with a view, but not enough of a stake to brave the potential tort liability of voicing it, is taken from government decision-makers. The ultimate government action is the worse off and less democratic for it.

It can also be argued in favor of the fraud exception that the truthful petitioner will not ultimately suffer liability for his actions. Given the track record of verdicts in the Bendectin and breast implant litigation, one cannot blame industry for not being sanguine that truth will always be a successful defense. Moreover, unlike the current system where immunity for genuine petitions is absolute and comes at the pleading stage,<sup>281</sup> immunity that depends on disproving the facts of fraud could take years of costly litigation to even apply. A rational corporation or individual, particularly a moderate one without a financial stake in the politics at issue, could well decide that lobbying is simply not worth the risk. Or, in situations where an entity's circumstances require petitions on an issue likely to be controversial, it might hedge the manner in which it communicates with the government, making its speech less effective. Either way, political speech is chilled.

Some may nevertheless argue that petitions by the defense side are categorically less worthy than their plaintiff-side counterparts.<sup>282</sup> While the proposition may be emotionally

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<sup>281</sup> Cal. Code Civ. Proc. § 425.16 (setting out California's strategic lawsuit against public participation procedures for challenging actions at the pleading stage)

<sup>282</sup> Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 Iowa L. Rev. 1405, 1437-38 (April 2005), takes essentially this position in arguing that “disputants contains two axes of power imbalance, both weighted in the same direction: against the interest in environmental protection,” thus requiring the government decision

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appealing to many, its premise -- that a constitutional right as elemental as to petition one's government may properly be made to depend on negative stereotypes -- harkens back to shameful times in American history and would hopefully be accepted by few. Some petitions are more fashionable than others, but history bears out that popularity is not necessarily a proxy of justice.<sup>283</sup> So while it is certainly the case that some petitions are both scientifically wrong and morally loathsome,<sup>284</sup> the solution dictated by the First Amendment is not to prohibit or deter such speech, but to counter it with the truth.<sup>285</sup>

### **C. Lawyers Over Engineers: The Danger Of Tort Liability For Site Specific Lobbying**

Environmental investigations and remediations are a product of interaction between the government, typically in the form of a federal, state or local environmental agency on the one hand, and the entities financially responsible for the cleanup on the other hand.

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making process to “essentially put[] a thumb on the scale in favor of the weaker party, and thus counteracting power imbalance.” But she draws her premise of imbalance by framing the contest as between “average citizen” and the “powerful, monied, corporate interests.” *Id.* at 1410. Nowhere does she account for the role played by activist organization, the media or those with an ideological or financial interest in conservative regulation. Beyond this, it is fundamentally undemocratic for government decisions to be systematically structured to accommodate stereotypes of which side has more “power.”

<sup>283</sup> In his dissent in *Devereaux v. Abbey*, 263 F.3d 1070, 1090 (9th Cir. 2001), Justice Kleinfeld observed that the Salem Witch trials were very much a choreographed legal proceeding, rather than the lynch mob phenomena often attributed to them.

<sup>284</sup> Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559, 560 (Spring 2000) (discussing politics of anti-miscegenation statutes)

<sup>285</sup> Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 Yale L.J. 359, 361 (1972).

Every environmental remediation has legal and environmental engineering components. The legal component involves allocation of responsibility for remediating the contamination, while the engineering phase is determining and executing the optimum method for cleaning up the environmental contamination. The first is the exclusive province of lawyers. A company may, for example, dispute liability under the Comprehensive Environmental Response, Compensation, and Liability Act<sup>286</sup> by arguing that it is not an owner,<sup>287</sup> operator<sup>288</sup> or arranger,<sup>289</sup> or it may attack the response costs as either unnecessary<sup>290</sup> or not complying with the National Contingency Plan.<sup>291</sup> Similarly, it may undertake to spread response costs among

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<sup>286</sup> 42 U.S.C. § 9607, *et seq.*

<sup>287</sup> *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988) (absentee owner of warehouse contending that he was not an "owner" under CERCLA).

<sup>288</sup> *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (defendant corporation arguing that it was not an "operator" of a facility run by its subsidiary).

<sup>289</sup> *General Electric Co. v. Aamco Transmissions, Inc.*, 962 F.2d 281, 284 (2nd Cir. 1992) (defendant automotive companies arguing that they were not "arrangers" of the disposals carried out by their franchisees).

<sup>290</sup> See William B. Johnson, *What Are "Necessary Costs Of Response" Within Meaning Of § 107(A)(4)(B) Of Comprehensive Environmental Response, Compensation, And Liability Act (CERCLA) (42 U.S.C.A. § 9607(A)(4)(B))*, 113 A.L.R. Fed. 1 (2006) (discussing cases evaluating whether certain costs were "necessary" under section 107.).

<sup>291</sup> *County Line Inv. Co. v. Tinney*, Case No. 88-C-550-E, 1989 U.S. Dist. LEXIS 11358 (D. Okla. June 15, 1989) (Defendant successfully arguing that plaintiff failed to establish that their metal detector survey and trenching and sampling event were an remedial investigation/feasibility study meeting the requirements of the NCP.).

others PRPs.<sup>292</sup> Each is the lawyers' realm, and not surprisingly, legal commentary on all abound.<sup>293</sup>

While attorneys are involved<sup>294</sup> in remediations, the company will typically engage technical environmental consultants to actually carry out the remediation.<sup>295</sup> Indeed, with the stretching of agency personnel, it is often the case that the agency and the remediating company are both represented by environmental consultants.<sup>296</sup>

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<sup>292</sup> *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 160-161 (2004) (famously holding that "a private party who has not been sued under § 106 or § 107(a) may [not] obtain contribution under § 113(f)(1) from other liable parties.").

<sup>293</sup> See e.g., Jeannette Paull, *Neither Innocent Nor Proven Guilty: The Aviall Services v. Cooper Industries Dilemma*, 13 Buff. Env'tl. L.J. 31, 32 (2005) (discussing *Aviall* and CERCLA liability framework).

<sup>294</sup> Justice Robie, *et al.*, Cal. Civ. Prac. Envir. Litig., § 3:85 (2006) (noting that "[t]he determination of cleanup standards is a subjective process and requires negotiations on a case-by-case basis . . ."). But even then the actual risk assessment will likely be performed by technical consultants. Stephen Jones, *et al.*, *How to Develop a Brownfield*, 12 NO. 5 Env'tl. Compliance & Litig. Strategy 4 (observing that the process of negotiating over cleanup standards ("usually requires the involvement of environmental risk and technical consultants capable of accurately assessing safe risk-based cleanup standards and promoting efficient and cost-effective remediation techniques."))

<sup>295</sup> Environmental Protection Agency, *Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA* (1988), A-9 (hereinafter "1988 Guidance") ("PRPs usually procure the services of consultants to conduct the required RI/FS activities.").

<sup>296</sup> John F. Seymour, *Liability of Government Contractors for Environmental Damage*, 21 PUB. CONT. L.J. 491, 495 (1992) (citing a statement made by the Office of Technology Assessment (OTA) that "[t]o a large extent, the U.S. Environmental Protection Agency's Superfund program attempts to manage environmental cleanups by managing contractors" and a DOE five-year plan detailing DOE operations as evidence of the fact that most federal remediation projects are conducted by private contractors); Todd I. Zuckerman, *Informal Discovery Strategies for Environmental Coverage Litigation*, 5-48 Mealey's Litig. Rep. Ins. 9 (1991) ("Frequently, the lead governmental agency will retain their own consultant to

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Unlike fights over liability and allocation, the cleanup itself is ideally more a collaboration between engineers than a contest between lawyers<sup>297</sup> with success evaluated by the physical mitigation of contaminants. Procedures and nomenclature can vary in state remediations, but the heart of a CERCLA cleanup is a two-phased site investigation known as an "RI/FS."<sup>298</sup> The "remedial investigation" assesses on-site contamination while the "feasibility study" evaluates various remedial alternatives.<sup>299</sup> For superfund sites, carrying-out an RI/FS is governed by EPA guidance.<sup>300</sup> The actual work is done by environmental consultants,<sup>301</sup> whom the EPA reserves the right to reject if it believes they lack the required technical expertise.<sup>302</sup> The PRP submits a Statement of Work, and must convince the EPA that it has the technical,

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oversee the work of the PRPs' consultant. If the U.S. EPA is the lead agency, the firm of Camp, Dresser and McKee ("CDM") is often the overseeing consultant.").

<sup>297</sup> Environmental Protection Agency, *Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies* (1991), 1-7 (hereinafter "PRP Guidance") (chart of "Oversight Resources" indicating that the Department of Justice provides "direct assistance" on "Pre-RI/FS Negotiations," but not on the remediation.

<sup>298</sup> Susan M. Cooke, *The Law of Hazardous Waste: Management, Cleanup, and Litigation*, 13-20 (2005).

<sup>299</sup> *Id.*

<sup>300</sup> Environmental Protection Agency, *Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA* (1988).

<sup>301</sup> *Id.* at A-9 ("PRPs usually procure the services of consultants to conduct the required RI/FS activities.").

<sup>302</sup> *Id.* ("EPA will reserve the right to review the PRPs' proposed selection of consultants and will disapprove their selection if, in EPA's opinion, they either do not possess adequate technical capabilities or there exists a conflict of interest.").

managerial and financial wherewithal to undertake the work proposed.<sup>303</sup> The PRP's entitlement to manage the remediation, and thus control its costs, hinge on the agency believing that the PRP's past actions have been in good faith.<sup>304</sup> The PRP must also develop Project Plans, including a Sampling and Analysis Plan, a Health and Safety Plan and a Community Relations Plan, all of which must also be approved.<sup>305</sup> Even if all the foregoing is approved, the agency will still require constant reports and updating, and likely additional approvals.<sup>306</sup>

The remediation process is technically challenging,<sup>307</sup> expensive<sup>308</sup> and has been troubled by perceived ineffectiveness, inefficiency and agency indifference almost from its

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<sup>303</sup> 1988 Guidance at A-8.

<sup>304</sup> *Id.* at A-2, A-4.

<sup>305</sup> *Id.* at 2-16.

<sup>306</sup> *Id.* at A-14.

<sup>307</sup> As observed by Reilly, *A Management Review of the Superfund Program*, EPA (June 1989) (hereinafter "1989 Review"), one of the difficulties with remediation is its technical challenge, especially when compared to the relative success of reducing air emissions under the Clean Air Act. 1989 Review at 1 ("In the fight to control conventional pollutants in air and water, EPA was able to apply proven technologies to produce fast results. With Superfund no such resource was available."). The problem persists: to this day science cannot reliably find the location of DNAPL, or dense non-aqueous phase liquids, such as pure solvents, which can sit on the bottom of an aquifer and feed a groundwater plume indefinitely. Mark L. Kram, *DNAPL Characterization Methods and Approaches, Ground Water Monitoring and Remediation*, 21:109–123 ("The current lack of appropriate methods for detecting and delineating widely dispersed microglobules of DNAPL product has been identified as one of the most significant challenges limiting effective cleanup of sites contaminated with these pollutants.").

<sup>308</sup> *High Cost of Permanent Superfund Cleanups To Result in Interim Actions, Porter Says*, 1 *Toxics L. Rep.* 451 (1986) (director of EPA's Office of Waste Programs Enforcement states that heightened cleanup standards will increase costs from an average of \$9 million per site to between \$30 and \$50 million.).

inception.<sup>309</sup> The difficulties are not just technical or a question of management because a remediation is not the sum of those things. While based on engineering and technology, a remediation is a profoundly human endeavor. It understandably draws visceral reactions not only from the affected community, but also from the PRP upon whom the coercive power of the government extracts great sums of money without any need of fault or even causation.<sup>310</sup> Communication is essential because the most technologically savvy remediation cannot be a success if the community distrusts it, and because the government, which lacks the resources to conduct all cleanups, must engage PRPs. Thus, reforms have included the technical and practical, such as the increased use of operable units<sup>311</sup> and encouraging the use of innovative technologies,<sup>312</sup> to engendering better communication and cooperation with stakeholders, including the affected public<sup>313</sup> and PRPs.<sup>314</sup> Public Participation programs are now an integrated component of cleanups<sup>315</sup> with most significant decisions subject to public

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<sup>309</sup> 1989 Review at 1-6 (discussing existing concerns with Superfund).

<sup>310</sup> 42 U.S.C. § 9601(35).

<sup>311</sup> 40 C.F.R. § 300.430(a)(ii)(A) ("Sites should generally be remediated in operable units when early actions are necessary or appropriate to achieve significant risk reduction quickly.").

<sup>312</sup> 40 C.F.R. § 300.430(a)(ii)(E) ("EPA expects to consider using innovative technology when such technology offers the potential for comparable or superior treatment performance.").

<sup>313</sup> 1989 Review at 5-1 (discussing the need for aggressive community involvement).

<sup>314</sup> 1989 Review at 7 ("PRPs choosing to undertake cleanup, even under threat of enforcement action, can expect close cooperation from EPA to move from planning to field remediation as quickly as possible.").

<sup>315</sup> 40 C.F.R. § 300.430(f)(3)(i).

comment.<sup>316</sup> Similarly, the policy of the stick and the carrot are used to gain PRP engagement. The stick is increased enforcement,<sup>317</sup> while the carrot "reward[s] capable and cooperative PRPs by reducing oversight where quality work [is] being performed."<sup>318</sup> As part of the latter, EPA "directs Regions to focus on efforts to engage in open dialogues with PRPs that have settlements with EPA as a means to promote appropriate oversight that ensures the development and implementation of protective cleanups."<sup>319</sup> Settlement is encourage by giving those who do so "the opportunity to discuss oversight expectations and to provide suggestions on possibilities for conducting oversight in an efficient and effective manner while achieving timely and protective cleanups."<sup>320</sup>

An environmental cleanup is, at both its human and engineering core, an exercise in political speech. Whether it is the resident incensed over a work delay, or the PRP's consultant advocating a particular soil gas sampling plan, communications with the overseeing agency are prerequisites for success.

The danger posed by a sweeping fraud exception to *Noerr-Pennington* immunity is that the necessary communications can be frustrated by interested outsiders not subject to the

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<sup>316</sup> 40 C.F.R. § 300.430(c)(2)(ii)(A) (EPA shall "[e]nsure the public appropriate opportunities for involvement in a wide variety of site-related decisions, including site analysis and characterization, alternatives analysis, and selection of remedy.").

<sup>317</sup> 1989 Review at 2-1.

<sup>318</sup> Stephen Luftig, *Interim Guidance on Implementing the Superfund Administrative Reform on PRP Oversight*, 1 (2000).

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 3.

regulatory process. Take a hypothetical cleanup being conducted by a PRP aware that it cuts a tempting toxic tort figure (deep pocks, subject to personal jurisdiction in plaintiff friendly venues, a track record of paying large settlements, etc.), but whom EPA, the overseeing agency, regards as responsible and technically competent. Following guidance, EPA should seek a relationship of open communication and general cooperation between it and the PRP. This would be in the company's best interest too: by building trust and communicating directly with the agency, it lessens the chances of adverse unilateral action by the agency and hopefully earns less oversight, thus lowering its overall costs. The PRP may willingly engage in the public participation processes with the affected public. This, after all, can improve its standing with the agency and give the PRP the chance to dispute public opinions it disagrees with while capitalizing on favorable ones. With effective public relations, it may even be able to influence public opinion, and then leverage this to sway the agency towards its point of view.

But these interests de-align when the PRP must guard against having third party tort claimants turn its words against it with a fraud exception.<sup>321</sup> Now the well-intentioned PRP cannot engage in direct communication with the agency or the public on potentially controversial

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<sup>321</sup> Although it does not appear to involve attempts to hold a defendant liable for lobbying contrary to plaintiffs' position, the currently pending case of *Allgood v. General Motors Corp.*, Case No. 1:02-cv-1077-DFG-TAB, 2006 WL 2669337 (S.D. Ind. Sept. 18, 2006) displays this tension. In that PCB toxic tort plaintiffs' primary property claim sought the recovery of \$78 million, approximately 20 times the value of their properties, *id.* at \*43, for a "hypothetical" cleanup much more intensive than the one then ordered by the EPA. *Id.* at \*\*1-3. As part of this, plaintiffs advocated a different risk assessment methodology, *id.* at \*12, to argue for "clean-up going well beyond the government agencies demands of 1.8 ppm in the soil. Plaintiffs claim to want a clean-up to a standard of 4 parts per trillion . . ." *Id.* at \*3. In such a case, absent solid *Noerr-Pennington* immunity, a plaintiff could collaterally attack the defendant's site specific lobbying, and in doing so, actual bolster his own cause of action.

technical or human considerations without correspondingly increasing its tort liability. Good environmental engineers may genuinely believe that available analytical and geological data justifies focusing future testing on a particular portion of the site to the exclusion of others. Or, based on the risk being acceptable per agency risk assessment guidelines, that a less extensive, and hence less expensive, cleanup is appropriate. From a cleanup perspective, whether ultimately correct or not, these views ought to be directly expressed.<sup>322</sup> And since EPA guidance recommends "[w]ork[ing] directly with PRP contractors and encourage[ing] information exchanges between EPA oversight contractors and PRP contractors,"<sup>323</sup> probably from one environmental engineer to another. But the same communications that would be beneficial to the remediation could be smoking guns in the toxic tort: the PRP may be ultimately wrong about the location of contaminants, or even if entirely correct, will have taken the non-populist position of arguing for less testing. With juries are notoriously unfriendly towards corporate risk assessments,<sup>324</sup> even a textbook risk assessment would likely prejudice a toxic tort jury against a corporation if presented as a basis for liability.

If *Noerr-Pennington* immunity is perforated with a broad fraud exception, then these risks become too serious to ignore, especially since the well-advised PRP knows that given the difficulties in causation,<sup>325</sup> the existence of "bad documents" can be determinative of whether a toxic tort is brought or successful. Open engineer to engineer communication may produce the

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<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 7.

<sup>324</sup> Viscusi, 588.

<sup>325</sup> *Supra*, Part.V.A.

technically better cleanup decision, but those communications will necessarily lack the heavy caveating and disclaiming of communications crafted by lawyers to avoid “fraud” allegations -- most notably securities disclosures. This harms not only the PRP, who must self-censor, but the EPA and the affected public: the first, through no fault of its own and due to influences it has no ability to control, could exchange a direct and cooperative PRP for a coy, tight-lipped one or one that floods it with extraneous information so as to avoid allegations of having “concealed” anything.<sup>326</sup> The public too loses direct communication, and with the PRP’s tort lawyers screening the interactions of environmental engineers for jury appeal, the odds are that the public will get a less effective cleanup.

An emotionally appealing counterargument is that a defendant should not be able to get away with deceiving the government. But this argument over-states *Noerr-Pennington* immunity. Deceitful petitions, even if wholly motivated by a desire to influence a government decision, are commonly censured by the wronged agency.<sup>327</sup> Take a garden-variety *Noerr-Pennington* situation of an individual filing a false police report against a neighbor he dislikes.

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<sup>326</sup> Although addressed to federal preemption, not the right to petition, the Courts’ discussion in *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 348 (2001) of the conflict between FDA’s responsibility for approving devices and state law theories predicated tort liability on alleged fraudulent statements to the FDA is illustrative. In finding that this same tension supported preemption, the Court observed “fraud-on-the-FDA claims would also cause applicants to fear that their disclosures to the FDA, although deemed appropriate by the Agency, will later be judged insufficient in state court. Applicants would then have an incentive to submit a deluge of information that the Agency neither wants nor needs, resulting in additional burdens on the FDA’s evaluation of an application.” *Id.* at 351.

<sup>327</sup> *Accord Balt. Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 403 (4th Cir. 2001) (declining to apply fraud exception because “[i]f [defendant] did indeed misrepresent facts to the court, the proper remedy here is through Maryland law, whether it be through the sanctioning process of the state bar, the state Rules of Civil Procedure, or another similar process.) (internal citations and quotations omitted).

Barring an actual prosecution and acquittal, the falsely accused neighbor cannot sue in tort.<sup>328</sup> But the reporting neighbor can unquestionably be criminally prosecuted for filing the false police report.<sup>329</sup> Environmental law is no different, and there are already abundant deterrents to dishonesty in remediation. The PRP who is caught lying risks his relationship with the agency and criminal liability;<sup>330</sup> deceit to regulators is specifically criminalized in the major environmental statutes such as the Clean Air Act,<sup>331</sup> the Clean Water Act,<sup>332</sup> RCRA,<sup>333</sup> and the Toxic Substances Control Act<sup>334</sup> as well as in applications or reports to state agencies.<sup>335</sup> At the

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<sup>328</sup> *Supra*, Part.II.A.

<sup>329</sup> Cal. Penal Code § 148.5(a) ("[e]very person who reports to any peace officer listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33, the Attorney General, or a deputy attorney general, or a district attorney, or a deputy district attorney that a felony or misdemeanor has been committed, knowing the report to be false, is guilty of a misdemeanor.").

<sup>330</sup> 18 U.S.C. § 1001 (providing that "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully-- . . . falsifies, conceals, or covers up by any trick, scheme, or device a material fact . . . makes any materially false, fictitious, or fraudulent statement or representation; or . . . makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry. . . shall be fined under this title, imprisoned not more than 5 years . . .").

<sup>331</sup> 40 CFR 70.11.

<sup>332</sup> 33 U.S.C. § 1319(c)(4).

<sup>333</sup> 42 U.S.C. § 6928(d)(3).

<sup>334</sup> *See e.g.*, Cal. Health & Saf Code § 25186(d), providing for the revoking of a permit for "[a]ny misrepresentation or omission of a significant fact or other required information in the application for the permit, registration, or certificate, or in information subsequently reported to the department or to a local officer or agency authorized to enforce this chapter pursuant to subdivision (a) of Section 25180."

very least misrepresentations can result in permits necessary to a company's operations being denied or revoked.<sup>336</sup>

But these punishments should not necessarily deter open communication: unlike post hoc allegations of fraud made by third-parties, the PRP can have some confidence that the punishment will not be invoked unless the agency believes it was actually deceived.<sup>337</sup> *Pacific Lumber Company*, although involving a governmental third party, is illustrative this difference between agency and third party allegations of deceit. There defendant interacted extensively with one agency, CDF, for three years to have its environmental impact report approved.<sup>338</sup> It apparently submitted one report with inaccurate data, but corrected it before a decision was made.<sup>339</sup> A petitioner, at this point, could reasonably conclude there was no issue of deceit, and if the agency indicated otherwise, could have responded within the context of the three-year proceedings. Had CDF found actual deceit, which seems highly unlikely on the facts of *Pacific Lumber Company*, it could have levied severe sanctions, up to the summary denial of the

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[Footnote continued from previous page]

<sup>335</sup> Cal Health & Saf. Code § 25189(a) ("Any person who intentionally or negligently makes any false statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with this chapter, shall be liable for a civil penalty not to exceed twenty-five thousand dollars (\$25,000) for each separate violation or, for continuing violations, for each day that violation continues.").

<sup>336</sup> *Id.*

<sup>337</sup> *Supra*, *Buckman Co.*, 531 U.S. at 348.

<sup>338</sup> *Supra*, fn. 113.

<sup>339</sup> *Id.* at 971.

company's application.<sup>340</sup> Under this framework, known to both the petitioner and the agency, the petitioner can reasonably predict and mitigate concerns over a particular petition being misleading, so speech is not chilled.

The situation is far different when a fraud allegation comes from a third party, which, dissatisfied with the administrative result, culls the record for a "misrepresentation" with which to impugn it. In *Pacific Lumber Company*, it was a county district attorney, presumably concerned with effects of the agency's determination on the residents of his county, and not the CDF, that claimed the CDF was deceived. The quality of the allegations reflected this. Plaintiff could not cleanly allege that incorrect data had even been considered by the CDF,<sup>341</sup> the timing of the petition did not work, and the favorable determination plaintiff complained of followed traditionally lobbying, not the submission of the incorrect data.<sup>342</sup> So unlike allegations from the agency itself, it is not reasonable for a petitioner to expect that third-party allegations of deceit will be limited to instances when the agency is actually deceived.

A broad fraud exception to *Noerr-Pennington*, in sum, is a net harm to effective environmental remediations. By creating uncertainty as to whether a given petition will be granted immunity, the risk-balancing PRP is necessarily more guarded with its petitions, thus frustrating the goal of open communication between the agency and the PRP. Society gains no benefit for this price. Agencies already have tremendous power to punish PRPs for fraud,

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<sup>340</sup> 14 CCR 898.2(c)

<sup>341</sup> *Pacific Lumber Co.*, *supra*, fn. 113, at 970.

<sup>342</sup> *Id.* at 971.

making it unlikely that the prospect of potential liability to private third-party would add much deterrence against those who seek to mislead agencies.

#### **IV. CONCLUSION**

Under longstanding Constitutional principles, citizens cannot deter each other from petitioning their government with the threat of tort liability, regardless of the popularity of their respective positions or the type of claim made. Currently, that rule is in good stead, but the threat of it being undermined by a sweeping fraud exception exists.

If simple allegations of fraud, ubiquitous in modern pleading, can defeat petition immunity, then the immunity effectively ceases to exist. The modern toxic tort illustrates the danger. Political speech on important social issues can be forced, under threat of tort liability, to conform to litigation allegations and findings. Whether the allegation is site specific deception or taking positions contrary to plaintiffs' side on legislative issues, if permitted by an immunity swallowing fraud exception, the overall effect will be the deterrence of open communication with the government when it is most needed. Environmental cleanups benefit greatly from the relationships, ideas, and cooperation that free communication between the agency, public, and remediating companies engender. Conversely, the prospect of third-parties, with their own financial interests, trolling those communications for litigation fodder can only hamper them. So too is the public harmed when one side of an environmental debate can quiet his opponents' voice with the fear of tort liability.

The law, as it should, still sharply favors free political speech. There remains, however, an undercurrent to reverse this by allowing freely dispensed fraud allegations to defeat petition

immunity. But to be moved by it is to accept private punishment as a consequence of petitioning, which cannot be free political speech.

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