



TRADE ASSOCIATIONS: BOUNDARIES IN ANTITRUST LITIGATION (PART II)

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Introduction

Part One of this article, which was published in the Spring 2006 edition of the *Antitrust Litigator*, began by asking you, as trade association counsel, or an executive charged with managing the association, to envision the nightmare scenario in which the trade association itself is named as a defendant in a lawsuit in which the plaintiffs allege that members of the association engaged in a conspiracy to violate the antitrust laws. That unpleasant occurrence has become an all too commonplace reality whenever members of the association are accused of antitrust violations. It seems that antitrust plaintiffs now almost routinely allege that an illicit cartel has used its industry trade association to conceal an antitrust conspiracy and then, as an almost inevitable consequence, the plaintiffs include the trade association as a defendant in the action. What is your defensive strategy should the worst happen, and, probably more importantly, what proactive steps can you take now to help reduce the risk that this may someday happen to you?

In Part One, we examined the contours of the associational privacy doctrine and the First Amendment petitioning privilege. In particular, Part One explored the extent to which courts have recognized the potential “chilling effect” of civil discovery on the public policy advocacy activities of trade associations, and how trade associations can use the First Amendment and the associational privacy doctrine to bar, or limit, requests for information and

documents, including minutes and other records that contain the viewpoints expressed by members during internal debate and deliberations. Here, we will focus on antitrust litigation liability issues and the principal defenses available to trade associations to obtain pretrial dismissal of antitrust claims. In addition, at the end of this part of the article, we provide a checklist of best practices for trade association counsel, first, as a matter of preventive law to help avoid litigation as an initial matter, and, second, to help manage litigation once the trade association is a defendant. Indeed, there appears to be a heightened need for counsel to have a better understanding of these issues and their practical implications. Underscoring the importance of *Noerr-Pennington* as an issue of current concern and relevance, on November 2, 2006, the Federal Trade Commission released a report that provides the staff’s views on how best to apply the doctrine to conduct that imposes a risk to competition but does not further the First Amendment and government decision-making principles that underlie the doctrine. *Enforcement Perspectives on the Noerr-Pennington Doctrine*, An FTC Staff Report (2006), available at: <http://www.ftc.gov/opa/2006/11/noerr.htm>

Noerr-Pennington Immunity

The *Noerr-Pennington* doctrine developed in the context of two United States Supreme Court cases decided during the 1960s, *Eastern R.R.*

Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). The doctrine is rooted in the First Amendment, which guarantees the right of the people “to petition the Government for a redress of grievances.”¹ It also reflects the idea that the antitrust laws were designed to “regulate business activity, not political activity.”² The *Noerr-Pennington* doctrine is an affirmative defense that renders “the antitrust laws inapplicable to individual or group action intended to influence legislative, executive, administrative, or judicial decision-making . . .”³ Further, the doctrine applies to lobbying efforts regardless of intent or purpose and even if those efforts result in legislation, or a decision or policy, which limits economic competition.⁴

In *Eastern R.R. Presidents Conference v. Noerr*, plaintiffs, a group of trucking operators and their trade association, alleged that defendants, including a group of railroads, engaged in a publicity campaign against the plaintiffs in an effort to foster the adoption and retention of legislation destructive of the trucking industry and in violation of the Sherman Act.⁵ The defendants filed a counterclaim and argued that the truckers sought to establish a monopoly through similar political activities.⁶ The Supreme Court found that violations of the antitrust laws cannot be “predicated upon mere attempts to influence the passage or enforcement of laws.”⁷ The Court further found that the “Sherman

Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly.”⁸

In *United Mine Workers of America v. Pennington*, a group of large mining companies and a union allegedly worked together to persuade the Secretary of Labor to set minimum wages.⁹ The Supreme Court extended *Noerr* to attempts to influence governmental administrative processes, and thus found that this activity did not violate the Sherman Act.¹⁰ The Court explained that *Noerr* confirmed that lobbying efforts not only could not constitute a violation of law, but also could not constitute evidence of an act in furtherance of a conspiracy: “*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.”¹¹

The *Noerr-Pennington* doctrine applies to petitioning activity by a trade association itself, and by its members, including individuals and entities. The *Noerr-Pennington* doctrine is important in the context of antitrust litigation because it means that a trade association cannot be held liable under the antitrust laws for influencing the government through legitimate First Amendment lobbying activity. A primary function of trade associations is to define public policy goals, and formulate and implement public policy advocacy strategies, messages, and tactics on behalf of their members and their industries, including by lobbying legislators and regulators. The doctrine allows trade associations and their members to exercise their First Amendment right to associate and

petition the government without fear that their conduct could somehow violate the antitrust laws.

Despite the fact that the *Noerr-Pennington* doctrine immunizes genuine lobbying activity, plaintiffs still sue trade associations and their members for alleged violations of antitrust laws. The next section will explore, by way of example, two antitrust cases involving application of the *Noerr-Pennington* doctrine to activities of a trade association.

Examples of Cases Applying the *Noerr-Pennington* Doctrine to a Trade Association’s Activities

In a number of cases, courts have found that trade associations are immune from antitrust liability under the *Noerr-Pennington* doctrine. For instance, in *GF Gaming Corp. v. City of Black Hawk*, 405 F.3d 876 (10th Cir. 2005), the Tenth Circuit Court of Appeals found that an association’s activities consisting of lobbying government officials fell within the ambit of the *Noerr-Pennington* doctrine.¹² In *GF Gaming*, plaintiffs, business and property owners in the Colorado city of Central City, alleged that the neighboring City of Black Hawk and a number of other defendants, including several casinos and a casino owners’ association, engaged in a conspiracy to monopolize trade in the gaming industry to block plaintiffs’ petition to annex certain property.¹³ The district court granted defendants’ motion to dismiss because the complaint did not state sufficiently specific allegations of antitrust injury and because some of the defendants were immune from antitrust liability under the *Noerr-Pennington* doctrine.¹⁴ On appeal, the Tenth Circuit held that plaintiffs’ allegations that certain defendants, including the association, conspired with Black Hawk officials to block plaintiffs’ access road was “essentially an allegation that defendants met with city officials and urged them to take

anticompetitive action” and, therefore, “amount[ed] to nothing more than lobbying of government officials, which is immune from Sherman Act liability under the *Noerr-Pennington* doctrine.”¹⁵ The court further observed that it was of no consequence that defendants allegedly engaged in the conspiracy solely for the purpose of restraining trade because “*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.”¹⁶

Another example of a case applying the *Noerr-Pennington* doctrine to activities of a trade association is *Racetrac Petroleum, Inc. v. Prince George’s County*, 601 F. Supp. 892 (D. Md. 1985). In *RaceTrac*, the plaintiff, a gasoline retailer, who applied for a zoning special exception, alleged that defendants, including a local trade association of gasoline retailers and a former officer of the trade association, engaged in an antitrust conspiracy to restrain trade in violation of Section 1 of the Sherman Act, and to monopolize the sale of gasoline in violation of Section 2 of the Sherman Act, by opposing plaintiff’s zoning application.¹⁷ Both the zoning hearing examiner and District Council had denied plaintiffs’ application.¹⁸ On a motion for summary judgment, the association defendants argued that they were immune from antitrust liability based on the *Noerr-Pennington* doctrine.¹⁹ The court concluded that the *Noerr-Pennington* doctrine protected the association defendants from antitrust liability.²⁰ The court reasoned that “plaintiff will be able to prove at best that the Association Defendants conspired with Association members to oppose and defeat a number of zoning applications,” including the application filed by plaintiff.²¹ The court held that “[b]ecause all of the Association Defendants’ actions were aimed at persuading the District Council to affirm the Examiner’s decision to deny plaintiff’s application,

the Association Defendants' conduct is protected activity under the *Noerr-Pennington* doctrine, notwithstanding the allegedly anticompetitive purpose of the defendants' opposition."²²

Thus, the *Noerr-Pennington* doctrine is a valuable tool in the context of litigation involving a trade association because it can be used to argue that a trade association cannot be held liable for engaging in permissible lobbying activity. Indeed, state and federal courts have uniformly held that the *Noerr-Pennington* doctrine immunizes trade associations from liability for genuine lobbying activities.²³ There is, however, an exception to the doctrine, which is explored in the next section.

The "Sham" Exception

The *Noerr-Pennington* doctrine does have limitations. As the Court observed in *Noerr*, immunity from antitrust laws based on petitioning activity does not extend in cases where the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . ."²⁴

In *City of Columbia v. Omni Outdoor*

Adver., Inc., 499 U.S. 365 (1991), the United States Supreme Court further explained that petitioning activity may be considered a "sham" only where the defendant uses "the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon."²⁵ In that case, the plaintiff claimed that the defendant corporation and the City of Columbia engaged in an antitrust conspiracy by advocating enactment of zoning ordinances that would restrict billboard construction, including construction by the plaintiff.²⁶ The Court found that the sham exception did not apply, and the defendant had immunity, because "[a] 'sham' situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all . . . not one who genuinely seeks to achieve his governmental result, but does so through improper means."²⁷ The Court concluded that the sham exception to antitrust immunity did not apply even though the defendants intended to disrupt plaintiff's business, because "they sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but through the ultimate product of that lobbying and consideration, viz., the zoning

ordinances."²⁸ Thus, the sham exception is applicable when "persons use the government process – as opposed to the outcome of that process – as an anticompetitive weapon."²⁹

In *California Motor Transport Co. v. Trucking Unlimited*, the United States Supreme Court further explained the sham exception to the *Noerr-Pennington* doctrine in the context of adjudicatory proceedings. In *California Motor Transport*, plaintiffs contended that defendants conspired to monopolize the trucking business in California and elsewhere by attempting to block plaintiffs' applications to obtain operating rights as highway carriers. Defendants instituted federal and state court and administrative actions purportedly designed to harass and deter the plaintiffs from having "free and unlimited access" to agencies and courts.³⁰ The district court dismissed the complaint for failure to state a cause of action.³¹ The Ninth Circuit Court of Appeals reversed.³² The Supreme Court, in affirming the Ninth Circuit's decision, ruled that "a pattern of baseless, repetitive claims . . . effectively barring respondents from access to the agencies and courts" would not qualify for immunity under the "umbrellas of 'political expression'."³³ The Court explained that, if the allegations that petitioners combined to "harass and deter their competitors from having 'free and unlimited access' to the agencies and courts," and "to defeat that right by massive, concerted and purposeful activities" are demonstrated as facts, "a violation of the antitrust laws [will have] been established," and it is immaterial "that the means used in violation may be lawful."³⁴ Thus, the Court held that the allegations in the complaint fell within the sham exception to *Noerr-Pennington* immunity.³⁵

Courts have applied the sham exception to cases involving a trade association or its members' conduct

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that constituted “purely private action, not genuinely aimed at prompting governmental action.”³⁶ For example, in *Wilk v. Am. Med. Ass’n*, 895 F.2d 353 (7th Cir. 1990), plaintiffs were licensed chiropractors who alleged that the American Medical Association (“AMA”) and other defendants engaged in an antitrust conspiracy to refuse to deal with plaintiffs and other chiropractors.³⁷ Plaintiffs claimed that the association defendants implemented the conspiracy by using former Principle 3 of the AMA’s Principles of Medical Ethics, which prohibited medical physicians from associating professionally with “unscientific practitioners.”³⁸ Plaintiffs further contended that the AMA labeled the plaintiffs “unscientific practitioners,” and then advised its members that it was unethical for medical physicians to associate with chiropractors.³⁹ The AMA argued that its activities were protected under the *Noerr-Pennington* doctrine.⁴⁰ The court found that AMA’s activities were “aimed at medical physicians and hospitals, cautioning them that it was unethical and indeed dangerous . . . to associate professionally with chiropractors.”⁴¹ Thus, the court concluded that the association’s activities were not aimed at obtaining legislative action, and therefore, were not protected under the *Noerr-Pennington* doctrine.⁴²

Likewise, in *Agritronics Corp. v. Nat’l Dairy Herd Ass’n, Inc.* 914 F. Supp. 814 (N.D. N.Y. 1996), private corporations engaged in the milk testing and farm dairy record-keeping business alleged that various associations comprised of dairymen refused to permit anyone other than their own employees to perform dairy records processing services.⁴³ Plaintiffs claimed that, as a result, they were prevented from competing in the dairy records processing market.⁴⁴ At the summary judgment stage, the association defendants argued that the *Noerr-Pennington* doctrine immunized them

from antitrust liability because they entered into cooperative agreements with the United States Department of Agriculture.⁴⁵ The association defendants asserted that their contact with government entities constituted “attempts to influence governmental administrative actions” or “lobbying efforts” protected under the *Noerr-Pennington* doctrine.⁴⁶ The court, however, held that the association defendants’ asserted contact with government entities did not constitute lobbying efforts to influence governmental decision-making.⁴⁷ The court reasoned that plaintiffs’ primary complaint was that defendants prohibited private testers from competing in the ‘official’ dairy records market.⁴⁸ The court concluded that “[t]he *Noerr-Pennington* doctrine has been applied only to situations involving direct actions made to influence government decisionmaking . . . *Noerr-Pennington* immunity should not extend to actions occurring in an essentially private context.”⁴⁹

In sum, the *Noerr-Pennington* doctrine does not apply to activities of a trade association that are used as anticompetitive weapons, rather than legitimate attempts to influence the outcome of the government process. In other words, the doctrine applies to an association’s activities genuinely aimed at achieving governmental action. The next section examines the extent to which *Noerr-Pennington* provides immunity from antitrust liability in the context of petitioning foreign governments.

The *Noerr-Pennington* Doctrine and Petitioning Foreign Governments

There appears to be a limited number of decisions that have discussed whether the *Noerr-Pennington* doctrine applies to petitioning foreign governments. The majority view is that the *Noerr-Pennington* doctrine *does* apply to petitioning foreign

governments.⁵⁰ In *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983), for example, the court held that petitioning immunity could apply to litigation brought in foreign courts. In *Coastal States*, the Libyan Government had granted one of the defendants a concession, meaning the exclusive right to “search for . . . bore for and extract petroleum” from an area within a portion of Libya, and “to use, process, store, export and dispose” of the petroleum.⁵¹ This defendant then assigned half of their interest in the concession to another defendant.⁵² Later, the Libyan Government nationalized the defendants’ interests in the concession and assigned their interests to a government-owned company.⁵³ The plaintiff contracted with this government-owned company to purchase oil.⁵⁴ Shortly thereafter, the defendants joined together in a publicity campaign in an effort to claim ownership over the petroleum.⁵⁵ They also instituted a number of lawsuits claiming title over the oil.⁵⁶ The plaintiff filed a lawsuit and contended that the defendants’ activities of engaging in publicity campaigns and lawsuits in the United States and abroad constituted a secondary boycott.⁵⁷

On appeal, the plaintiff argued that petitioning immunity does not apply to litigation instituted in foreign courts because petitioning immunity is based solely upon the First Amendment.⁵⁸ The Fifth Circuit, however, rejected plaintiff’s argument that “petitioning immunity extends only so far as the First Amendment and then ends abruptly.”⁵⁹ The court explained: “The Sherman Act, as interpreted by *Noerr*, simply does not penalize as an antitrust violation the petitioning of a government agency. We see no reason why acts that are legal and protected if done in the United States should in a United States court become evidence of illegal conduct because performed abroad.”⁶⁰ Thus, the court held that

petitioning immunity applies to efforts to influence foreign governments.⁶¹ Other courts have also recognized that the *Noerr-Pennington* doctrine extends to lobbying foreign governments and officials.⁶²

On the other hand, some courts have held that the doctrine does not apply to petitioning foreign governments. For example, in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), plaintiffs, holders of offshore oil concessions granting them the right to explore, develop, and exploit petroleum reserve, alleged that the defendants, also holders of offshore oil concessions, conspired to deprive plaintiffs of their offshore oil concession in the Persian Gulf.⁶³ The plaintiffs claimed that the defendant “induc[ed] and procure[d] assorted executive acts by foreign states,” including decrees from foreign governments about the ownership of plaintiffs’ concession area.⁶⁴ The defendants argued that the *Noerr-Pennington* doctrine applied to its asserted efforts to petition foreign governments.⁶⁵ The court held that the rationales of *Noerr* “do not readily fit into a foreign context.”⁶⁶ First, the court explained: “One of the roots of the *Noerr* decision was a desire to avoid a construction of the antitrust laws that might trespass upon the First Amendment right of petition. The constitutional freedom ‘to petition the Government’ carries limited if indeed any applicability to the petitioning of foreign governments.”⁶⁷ The court also explained: “A second basis of *Noerr* is a concern with insuring that ‘[i]n a representative democracy such as this,’ law-making organs retain access to the opinions of their constituents, unhampered by collateral regulation. *Noerr* has been held inapplicable to situations in which this relationship has not been deemed threatened.”⁶⁸ Thus, the court held that the doctrine did not extend to

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defendants’ petitioning conduct of foreign governments.⁶⁹

If a plaintiff brings a lawsuit against a trade association alleging that the trade association violated the antitrust laws by lobbying foreign governments, counsel for the trade association should determine whether the court in the applicable jurisdiction has applied the doctrine to such activity. In the next section, we discuss examples of cases in which the plaintiff named a trade association as a defendant in an antitrust conspiracy action and how the courts applied some of the legal principles described in this article.

Trade Associations And Antitrust Liability

As corollary to the rule that trade associations are immune from antitrust liability if they engage in legitimate petitioning activities, it is also well-established that trade associations do not violate the antitrust laws simply because they gather and disseminate information that is not commercially sensitive on behalf of their members. To the contrary, the United States Supreme Court, in *Maple Flooring Mfrs.’ Ass’n v. U.S.*, 268 U.S. 563 (1925), recognized that the antitrust laws permit the dissemination of information among competitors because the “natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce and its consequent effect in establishing production and price, can hardly be deemed a restraint of commerce or . . . an unreasonable restraint, or in any respect unlawful.”⁷⁰ In fact, disseminating information promotes the purpose of the antitrust laws because “[c]ompetition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.”⁷¹

In *Biljac Assocs. v. First Interstate Bank of Oregon*, 218 Cal. App. 3d 1410 (1990), plaintiffs alleged that a number of banking institutions and their trade associations conspired to fix the prime rate of interest charged by banks.⁷² In support of their conspiracy claim, plaintiffs asserted that loan pricing and interest rates were the subject of trade association panel discussions, publications, meetings, and symposia.⁷³ Plaintiffs also pointed to evidence that corroborated the fact that those discussions took place, including letters from members of one of the association’s committees citing “appropriate pricing policies.”

“differential pricing,” and credit trends as possible topics for inclusion on the agendas at the committee meeting of the trade association.⁷⁴

In support of their separate motion for summary judgment, the trade associations “submitted declarations showing that they are not banks, do not lend money, charge, have or set prime rates, do not participate in setting members’ rates, and exist as banking industry organizations that foster education, legislation, and the dissemination of economic and regulatory information among their members, regulators and the public through a range of forums, including regular meetings and publications.”⁷⁵ The California Court of Appeal concluded that “the facts [were] overwhelmingly consistent with the legitimate dissemination and use of information, not conspiracy in the antitrust sense.”⁷⁶ The court observed that “the trade association defendants presented undisputed evidence that they did not have or set interest rates,” and “[s]ince liability can only be predicated on fostering and encouraging a bank conspiracy for which no reasonable inference was raised,” concluded that the trial court properly granted summary judgment to the trade association defendants.⁷⁷ In so ruling, the Court of Appeal in *Biljac* explained that “[i]n general, trade association activities tend to promote competition and are lawful.”⁷⁸ Moreover, the court recognized that the antitrust laws permit the dissemination of information through trade associations.⁷⁹

Two years later the District Court of Minnesota in *The Five Smiths, Inc. v. Nat’l Football League Players Ass’n*,⁸⁰ analyzed the sufficiency of allegations in a complaint in order for a plaintiff to withstand a trade association’s motion to dismiss. In *Five Smiths*, the National Football League and its member clubs asserted that the defendant, the National Football

League Players Association (“NFLPA”), engaged in a conspiracy with players’ agents to fix player compensation.⁸¹ The complaint contained only one specific factual allegation of purportedly unlawful concerted action: “the player-agents, with the approval and assistance of the NFLPA, have regularly exchanged compensation information and information about current offers among themselves, in furtherance of the NFLPA’s unlawful activity.”⁸²

In an attempt to avoid dismissal of their claim, plaintiffs argued that in addition to the allegation concerning the exchange of salary information, the complaint alleged that the defendants developed a price-fixing scheme to further the conspiracy.⁸³ The court held that plaintiffs’ allegations were insufficient to state an antitrust claim as a matter of law and dismissed the complaint. The court reasoned that other than the allegation concerning the salary exchange, the complaint did not contain any specific facts that indicated “what acts the NFLPA took to fix prices, what agreements were entered into, with whom such agreements were made or how the goals of the conspiracy were accomplished.”⁸⁴ The court rejected plaintiffs’ argument that any allegations concerning the acts of the NFLPA were sufficient to support an allegation of concerted action or agreement between the association and the agents simply because the association is a “voluntary association of competing agents and players.”⁸⁵ The court stated: “A trade association is not a ‘walking conspiracy’ of its members.”⁸⁶ To the contrary, the mere exchange of information or relationships between alleged conspirators will therefore not support a conspiracy allegation.⁸⁷ In fact, “the exchange of price and other market information is generally benign conduct that facilitates efficient economic activity.”⁸⁸

Thus, a trade association can successfully defend itself against an antitrust conspiracy claim if it shows that the plaintiff failed to allege and demonstrate that the trade association engaged in concerted action, including that it knew of, participated in, or assisted with, the alleged conspiratorial conduct. However, the mere exchange of information among a trade association and its members, without more, will not support an antitrust conspiracy claim.

Conclusion

Trade associations advocate for public policies that affect their industries and members. As illustrated above, genuine lobbying activity of a trade association and its members is protected under the *Noerr-Pennington* doctrine. Counsel representing a trade association should be familiar with this doctrine because it may be applied to protect an association and its members from antitrust liability. It is equally important that counsel for a trade association be familiar with the fact that a trade association does not engage in an antitrust conspiracy merely because it gathers and disseminates non-commercially sensitive information on behalf of its members. The case examples discussed above illustrate the type of trade association activities courts deem protected by the First Amendment versus what activities constitute a “tipping point” for proof of antitrust violations.

The Checklist

As you periodically review your association’s antitrust compliance program, consider the following sample list of action items and best practices for reducing the risk of a potential compliance failure, and managing the defense of antitrust litigation. This list is not exhaustive, and you should plan to supplement it as you identify additional items.

Preventative Measures

- Make sure the association has an up-to-date written antitrust compliance policy.
- Set up a schedule to review and update the policy on a periodic basis.
- Publicize the policy on the association website and in written materials distributed at association meetings.
- Implement web-based and face-to-face antitrust compliance training for association staff and members who participate in association meetings.
- Have counsel present at association meetings and remind attendees of the association's antitrust compliance policy at the beginning of all meetings.
- The association should prepare agendas in advance of its board of directors, committees and other meetings. Counsel should review the agendas, and other background materials distributed in advance of the meetings, to identify potential antitrust concerns.
- The association's meetings should follow the prepared agendas.
- Minutes of the meetings should be kept. The minutes should indicate whether antitrust counsel attended the meetings and reminded attendees about the association's antitrust compliance policy.
- Keep confidential minutes, agendas, background materials, and other documents containing discussion of proposed or actual public policy advocacy strategies, messages, and tactics. Remind recipients that association documents are confidential.
- Describe in writing (for example, on the association website) all of the association's public service activities, and the various ways in which it sponsors studies, surveys, academic research, and disseminates information that is

not commercially sensitive to its members, regulators, legislators, and the public at large, including through its public policy advocacy and public service announcements.

Pretrial Litigation Management

- Determine whether the complaint contains specific factual allegations of conduct by the trade association and consider whether to move to dismiss the complaint.
- Determine whether the plaintiff's allegations amount to nothing more than an attack on the public policy advocacy efforts of the trade association and its members and consider whether to assert *Noerr-Pennington* immunity in support of a motion to dismiss (or whether it will be necessary to wait until a motion for summary judgment).
- Determine whether the plaintiff's allegations against the association concern activities involving petitioning foreign governments. Be sure to research cases in the applicable jurisdiction to determine whether the *Noerr-Pennington* doctrine may apply to immunize such activities.
- Include associational privacy and First Amendment as grounds for designating documents "confidential" under any stipulated protective order negotiated by the parties and approved by the court in the action.
- Analyze whether the associational privacy doctrine and First Amendment petitioning privilege protect documents responsive to plaintiffs' discovery requests from discovery and whether to file a motion for a protective order. At a minimum, identify those documents that should be designated "confidential" under the protective order.
- Solicit the views of lead counsel for the other defendants, and then take leadership of association

discovery and litigation strategy issues and provide guidance to members of your association that are defendants in the action.

- Review court decisions in the relevant jurisdiction involving application of the sham exception to the *Noerr-Pennington* doctrine to anticipate possible arguments by plaintiffs.
- Demonstrate (on a motion to dismiss or summary judgment) that the association engages in legitimate trade association activities that are procompetitive as a matter of law. In particular, emphasize how the association disseminates information for the benefit of its members and the public, including by describing its academic and scientific research, public policy advocacy activities, and public service programs.
- Provide examples (on a motion to dismiss or summary judgment) of the association's public policy advocacy activities and explain that these activities are protected by the *Noerr-Pennington* doctrine.

If you review potential antitrust litigation discovery and liability issues early enough and become familiar with the particular activities of the association you represent, you may be able to more effectively defend your client, and even prevent some lawsuits before they are ever filed. ■

ENDNOTES

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¹ U.S. Const., 1st Amendment. The First Amendment is applicable to the states by operation of the Fourteenth Amendment. *Id.*, 14th Amendment. See also *RRR Farms, Ltd v. Am. Horse Prot. Ass'n, Inc.*, 957 S.W.2d 121, 126-27, n. 4. (1997).

² *Ehlinger & Assocs. v. Louisiana Architects Ass'n*, 989 F. Supp. 775, 785 (E.D. La. 1998).

³ WILLIAM C. HOLMES, ANITRUST LAW HANDBOOK (2006) § 8:8 at 812; see also *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (extending *Noerr-Pennington* doctrine to judicial and adjudicatory actions).

⁴ *Pennington*, 381 U.S. at 670. See also *Horsemen's Benevolent and Protective Ass'n, Inc. v. Pennsylvania Horse Racing Comm'n*, 530 F. Supp. 1098, 1109 (E.D. Pa. 1982).

⁵ *Noerr*, 365 U.S. at 129.

⁶ *Id.* at 132.

⁷ *Id.* at 135.

⁸ *Id.* at 136.

⁹ *Pennington*, 381 U.S. at 660-61.

¹⁰ *Id.* at 670.

¹¹ *Id.*

¹² 405 F.3d at 884.

¹³ *Id.* at 879-80.

¹⁴ *Id.* at 881-82.

¹⁵ *Id.* at 883-84.

¹⁶ *Id.* at 884, citing *Pennington*, 381 U.S. at 670.

¹⁷ 601 F. Supp. 892 at 895-96, 898, *aff'd per curiam* 786 F.2d 202 (4th Cir. 1986).

¹⁸ *Id.* at 898.

¹⁹ *Id.* at 908.

²⁰ *Id.* at 912.

²¹ *Id.* at 910.

²² *Id.* at 910-11.

²³ See, e.g., *Ehlinger & Assocs.*, 989 F. Supp. at 784-85 (finding that state action and *Noerr-Pennington* doctrines precluded associations' liability on antitrust claims); *Christian Mem'l Cultural Center, Inc. v. Michigan Funeral Directors Ass'n*, 998 F. Supp. 772, 778 (E.D. Mich. 1998) (defendant trade association and its director's legislative and administrative lobbying protected under *Noerr-Pennington* doctrine); *RRR Farms*, 957 S.W.2d at 131 (affirming trial court's decision in favor of defendant association based on *Noerr-Pennington* doctrine); *Massachusetts School of Law at Andover, Inc. v. Am. Bar Ass'n*, 937 F. Supp. 435, 444-46 (E. D. Pa. 1996), *aff'd* 107 F.3d 1026 (3d Cir. 1997) ("Publication of an association's views, without more, is protected speech" and "Such expression is protected under the First Amendment and cannot be the basis for Sherman Act liability."); *Hamilton v. Acu-Tek*, 935 F. Supp. 1307, 1321 (E.D. N.Y. 1996)

(lobbying activities of associations protected under *Noerr-Pennington* doctrine); *King v. Idaho Funeral Serv. Ass'n*, 862 F.2d 744 (9th Cir. 1988) (association's activities protected by *Noerr-Pennington* doctrine); *Horsemen's Benevolent and Protective Ass'n*, 530 F. Supp. at 1110 ("The members of the [jockey's] Guild, in the exercise of their First Amendment rights of association and to petition the government, may jointly submit a proposal to increase jockey fees to the Horse Racing Commission."); *First Am. Title Co. of South Dakota v. South Dakota Land Title Ass'n*, 541 F. Supp. 1147 (D. S.D. 1982), *aff'd* 714 F.2d 1439 (8th Cir. 1983) (allegation against association of land title abstractors violated Sherman Act by engaging in litigation and attempts to influence enactment of statutes barred by *Noerr-Pennington* doctrine).

²⁴ *Noerr*, 365 U.S. at 144.

²⁵ 499 U.S. at 380 (emphasis in original).

²⁶ *Id.* at 367-69.

²⁷ *Id.* at 380-81 (internal quotations and citations omitted; emphasis in original).

²⁸ *Id.* at 381 (emphasis in original).

²⁹ *Id.* at 380 (emphasis in original).

³⁰ *California Motor Transport*, 404 U.S. at 508.

³¹ *Id.* at 509.

³² *Id.*, citing *Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755 (9th Cir. 1970).

³³ *Id.* at 513.

³⁴ *Id.* at 515-16.

³⁵ *Id.* at 516.

³⁶ *Wilk v. Am. Med. Ass'n*, 895 F.2d 353, 357 (7th Cir. 1990), citing *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

³⁷ 895 F.2d at 355.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 357.

⁴¹ *Id.* at 358.

⁴² *Id.*

⁴³ 914 F. Supp. at 818-19.

⁴⁴ *Id.* at 819.

⁴⁵ *Id.* at 823.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* (citation and quotations omitted).

⁵⁰ *Friends of Rockland Shelter Animals, Inc. v. Mullen*, 313 F. Supp. 2d 339, 344 (S.D. N.Y. 2004) ("The only case that even arguably supports [the position that the doctrine does not apply to petitioning a foreign government] is *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.* wherein the court held that the *Noerr-Pennington* doctrine does not apply when the

defendant petitions a foreign government. *Occidental Petroleum* appears, however, to be the minority view.")

⁵¹ 694 F.2d at 1360.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 1362.

⁵⁸ *Id.* at 1364.

⁵⁹ *Id.* at 1366.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 256 F. Supp. 2d 249, 266 (S.D. N.Y. 2003) ("lobbying of foreign governments, whether performed at home or abroad, is protected from antitrust liability under *Noerr-Pennington*"); *Amarel v. Connell*, 102 F.3d 1494, 1520 (9th Cir. 1997) ("Plaintiffs also accused defendants of petitioning State Department officials and Korean officials in an effort to influence rice exports to Korea. In our view, defendants' efforts to influence various American and Korean officials - from State Department officials to members of Congress - was legitimate private action in response to defendants' suspicions of bribery. The *Noerr-Pennington* doctrine shields from antitrust liability efforts to influence legislators and members of the executive branch.")

⁶³ 331 F.Supp. at 95, *aff'd per curiam on other grounds*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

⁶⁴ 331 F. Supp. at 107.

⁶⁵ *Id.*

⁶⁶ *Id.* at 107-08.

⁶⁷ *Id.* at 108 (citation omitted). Likewise, in *Australia/Eastern U.S.A. Shipping Conference v. U.S.*, 537 F. Supp. 807, 812 (D.C. Cir. 1982), the United States District Court for the District of Columbia noted that "the first amendment was not intended to protect the right to petition foreign governments."

⁶⁸ *Id.* at 108.

⁶⁹ *Id.*

⁷⁰ 268 U.S. at 584-85.

⁷¹ *Id.* at 585.

⁷² 218 Cal. App. 3d at 1416-17.

⁷³ *Id.* at 1430.

⁷⁴ *Id.* at 1432.

⁷⁵ *Id.* at 1434.

⁷⁶ *Id.* at 1433.

⁷⁷ *Id.* at 1435.

⁷⁸ *Id.* at 1430.

⁷⁹ *Id.*, quoting *Maple Flooring*, 268 U.S. at 584. See also *Aguilar v. Atlantic Richfield Co.*, 92 Cal.

Rptr. 2d 351, 404 (2000), *aff'd Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826 (2001), is to the same effect: "There is a strong policy that disseminating competitive information, even pricing information, through trade association activities is condoned by antitrust law." (citation omitted).

⁸⁰ 788 F. Supp. 1042 (D. Minn. 1992).

⁸¹ *Id.* at 1044.

⁸² *Id.* at 1046.

⁸³ *Id.* at 1047.

⁸⁴ *Id.* at 1048.

⁸⁵ *Id.* at 1049, n. 5.

⁸⁶ *Id.* at 1040, n. 5 (citations omitted).

⁸⁷ 788 F. Supp. at 1049, n. 5.

⁸⁸ *Id.* at 1052-53 (citations omitted). A number of other cases have recognized that the antitrust laws permit the dissemination of information through trade associations. See *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 864 (2001) ("motive, opportunity, and means to enter into an unlawful conspiracy . . . is not enough. Such evidence merely allows speculation about an unlawful conspiracy. Speculation, however, is not evidence."); *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery*, 185 F.3d 606, 621-22 (6th Cir. 1999) (no conspiracy between association and its members because plaintiff

failed to introduce evidence to exclude possibility that association acted independently); *Hilo v. Exxon* (C.D. CA, April 13, 1995) (regular contact between industry associations and members is not itself evidence of conspiracy); *Alvord-Polk v. Schumacher*, 37 F.3d 996, 1009 (3d Cir. 1993) (association's actions satisfy concerted action requirement only when taken in group capacity); *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 443 n. 16 (1978) ("The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."); *Sugar Institute v. U.S.*, 297 U.S. 553, 598 (1936) ("dissemination of information is normally an aid to commerce."); *Maple Flooring*, 268 U.S. at 584 ("We do not conceive that the members of trade associations become such conspirators merely because they gather and disseminate information, such as is here complained of, bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses.").