1989

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Recommended Citation

3 Antitrust 28 (1989)

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The Admissibility of Evidence Protected by Noerr-Pennington

by Michael E. Lewyn

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

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

This passage from Pennington has been interpreted to mean that Noerr-Pennington evidence shall be evaluated under Federal Rule of Evidence 403, which requires exclusion of evidence if its probative value is substantially outweighed by its prejudicial effect. United States Football League v. National Football League, 634 F. Supp. 1155, 1171 (S.D.N.Y. 1986), aff'd, 842 F.2d 1335, 1373-75 (2d Cir. 1988). In practice, the application of the balancing test excludes Noerr-Pennington evidence in almost any case where it is needed to establish a violation. Although this appears peculiar, it may be consistent with the view that because Noerr-Pennington evidence is insufficient to support a finding of conspiracy, the district court granted summary judgment for defendants. Id. at 461.

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

"by its very nature chills the exercise of First Amendment rights . . . [it] is properly viewed as presumptively prejudicial." United States Football League, 634 F. Supp. at 1181. 2

Absence of Other Probative Evidence

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

In Weit, plaintiffs argued that the trial court erroneously excluded evidence of defendant's lobbying activities. The court had found that plaintiffs' evidence of conspiracy (other than defendants' parallel pricing) was "so insubstantial . . . as to preclude a verdict for plaintiffs." Id. at 466. As conscious parallelism alone held that the probative value of the evidence was outweighed by its prejudicial quality:

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

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

Similarly, in Bright v. Moss Ambulance Services, Inc., 824 F.2d 819 (10th Cir. 1987), plaintiff, an ambulance service, alleged that a competitor had attempted to monopolize the county

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Plaintiff's most credible evidence of market power was a study showing that defendant had an eighty-five percent market share in the county. However, since most of defendant's business arose from a franchise that was granted by a city, activity related to the franchise was protected by Noerr-Pennington. Thus, the court held, defendant's "enjoyment of the market share devolved from the protected activity cannot support allegations of market power." Id. at 824. As plaintiff had presented no other probative evidence of market power, the court affirmed summary judgment for defendant.

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

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

Where Other Evidence Exists: Discretion to Admit

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

Numerous cases have admitted evidence of protected activity under the Pennington "purpose and character" rule. And, in contrast, other cases have held evidence of protected activity inadmissible on the basis that such evidence was "cumulative" or "corroborative." 4

There is no clear pattern within individual circuits. The Fifth and Eighth Circuits both have admitted Noerr-Pennington evidence under the "purpose and character" rule and, on other occasions, have excluded such evidence as cumulative. No case addressing admissibility has attempted to distinguish or discredit cases on the other side of the issue. Furthermore, a look at some typical cases offers little guidance to practitioners.

For instance, in Household Goods Carriers Bureau v. Terrell, 452 F.2d 152 (5th Cir. 1971), a manufacturer of highway mileage guides alleged that a competitor and a movers' trade association conspired to monopolize the market. After defendant introduced a government memorandum accusing the plaintiff of misrepresentation, plaintiff responded with evidence of lobbying by the defendant. Although plaintiff already had introduced an allegedly libelous letter by one of the defendants, the court admitted evidence of defendants' lobbying to show "the 'purpose and character of the transactions under scrutiny, ' to rebut the insinuations put into evidence by the defendants, and to prove the existence of a conspiracy..." 452 F.2d at 157-58. Although a libelous letter suggests the existence of "insinuations" as surely as does evidence of lobbying, the court did not consider the possibility that the latter evidence might be cumulative.

In contrast, in U.S. Football League, plaintiff sought to introduce evidence of defendant's lobbying between 1961 and 1966 with respect to sports-related legislation, in order to prove that such lobbying was "part of a long-standing conspiracy to monopolize the market in professional football." 634 F. Supp. at 1171. The court held that, "As evidence of the NFL's state of mind in the 1980's, it [evidence of lobbying] is weak, since the lobbying occurred from fifteen to twenty years before the events at issue in this case took place" and "to whatever extent such conduct evidences monopolistic intent, it is cumulative to other evidence that plaintiffs have cited to Court." Id. Accordingly, the court excluded the lobbying evidence under Rule 403 because its probative value was outweighed by unfair prejudice to defendant's First Amendment interests. The Second Circuit wholly endorsed the district court's reasoning on this issue. U.S. Football League, 842 F.2d at 1374.

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

It appears, therefore, that a principled
distinction between cases admitting evi-
dence of protected activity and those ex-
cluding such evidence as cumulative
cannot be found. There are, however,
several hypotheses that might explain the
differences between the two groups of
cases. For instance, evidence of pro-
tected activity arguably may be excluded as
cumulative only where plaintiff pre-
vails, or such evidence may be admitted
only to clarify an ambiguous record, or
where evidence of protected activity is
of a different type than other evidence in
the record.

Unfortunately for those in search of
an analytical framework, none of the hy-
potheses stands up to analysis based on
an examination of two roughly contem-
poraneous circuit court decisions, Alex-
ander v. National Farmers Organization,
687 F.2d 1173 (8th Cir.), cert. denied,
461 U.S. 937 (1983); and City of Cleve-
land v. Cleveland Electric Illuminating,
734 F.2d 157 (6th Cir. 1984).

Alexander admitted evidence of pro-
tected activity, while City of Cleveland
excluded such evidence, yet the cases seem
indistinguishable factually. In City of Cleve-
land, a city that had owned a
defunct utility brought suit against a pri-
vate utility for monopolization and at-
tempts monopolization. At trial,
defendant admitted that it intended to
eliminate competition. Furthermore,
defendant’s conduct (which included so-
litigation by plaintiff in a
price-fixing conspiracy, a “displacement
program” aimed at displacing the city
utility, and delaying or refusing inter-
connection whenever possible) was cir-
sumstantial evidence of anticompetitive
intent. City of Cleveland, 734 F.2d at
1164.

Plaintiff attempted to introduce a joint
stipulation that defendant had induced a
third party to file suit to prevent a gov-
ernment-owned interconnection between
the utilities. The court affirmed exclu-
sion of this evidence, holding that as
other evidence of anticompetitive intent
existed, evidence of defendant’s activity
“was simply cumulative in its effect.”
Id.

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

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

The plaintiff’s other evidence was more
than adequate, however. For instance,
defendants tried to pressure plaintiff’s
customers into buying all their milk from
defendants. Such conduct was termed an
“unequivocal illustration of predatory
conduct aimed at coercing buyers” to buy
from defendants and “blatantly preda-
atory.” Id. at 1196. The court concluded
that the “purpose and intent” of such con-
duct was to get customers to buy only
from defendants, and that such conduct
“tends to show an unlawful intent” be-
hind similar conduct directed at plaintiff.
As to another buyer, similar conduct was
termed “plainly predatory.” Id. at 1198.
The court held that defendant’s price dis-

offs were “the strongest evidence of an
unlawful purpose.” Id. at 1197. Such con-
duct was “predatory on its face” and an
examination of the underlying evidence
“only confirms that an inference of un-
lawful purpose must be drawn.” Id. at
1199. Other condemned conduct in-
cluded threats of litigation against cus-
tomers of plaintiff, refusals by defendant
to acknowledge customer terminations,
destruction of evidence by a defendant,
and admissions of predatory motive by
defendants’ officials.

Another hypothesis which might ex-
plain the divergence between cases ad-
mitting Noerr-Pennington evidence and
those refusing to do so is that the evi-
dence may be admitted only to clarify an
otherwise ambiguous record—that is,
to reveal the unlawful character of seen-
ingly innocent conduct. The facts of City

“... when courts use terms such as “cumulative” and
corroborative,” they are merely balancing probativeness
and prejudice.”
F.2d at 1164. Similarly, in Alexander, predatory motive was admitted in documents, 687 F.2d at 1207, and could also be inferred from defendants' acts. Under the hypothesis, both courts should have ruled similarly on admissibility. In fact, the court in City of Cleveland excluded Noerr-Pennington evidence while in Alexander it was admitted.

Testing the hypotheses against the Alexander and City of Cleveland decisions shows that there is no logical basis for distinguishing cases excluding Noerr-Pennington evidence as "cumulative" from those admitting such evidence. The only way to reconcile the two groups of cases is to recognize that when courts use terms such as "cumulative" and "corroborative," they are merely balancing probativeness and prejudice. Therefore, the split in authority may be more apparent than real. Thus, if other significant evidence of antitrust violations is found, the admissibility of Noerr-Pennington evidence involves no fixed legal criteria other than a weighing of probative value and prejudicial impact. Therefore, practitioners are well advised to take nothing for granted in evaluating the admissibility of Noerr-Pennington evidence.

Conclusion

The admissibility of Noerr-Pennington evidence will depend on the availability of other evidence of antitrust violations. Where no evidence of antitrust violations is available, or where the only evidence is legally insufficient to prove a violation, Noerr-Pennington evidence has been excluded. In contrast, where a great deal of evidence of illegality exists, courts often admit Noerr-Pennington evidence despite the fact that it may not be needed to prove a violation. Although admission is disfavored, no specific rule binds judges, who, it appears, may admit or exclude Noerr-Pennington evidence without any analytical framework to guide their decisions.

Thus, plaintiffs seeking to admit Noerr-Pennington evidence face a "Catch-22": where evidence is truly necessary to the development of a case it will not be admitted, and where it is admissible it usually will be superfluous.

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

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

Id. at 411.

3 See, e.g., MCI Communications v. AT&T, 708 F.2d 1081, 1160 (7th Cir.), cert. denied, 464 U.S. 891 (1983) (admissibility briefly noted); Alexander v. National Farmers Org., 687 F.2d 1173 (8th Cir.), cert. denied, 461 U.S. 937 (1983) (in addition to engaging in protected activity, defendant liable for numerous independent violations); Webb v. Utah Tour Brokers Ass'n, 568 F.2d 670, 672 (10th Cir. 1977) (lobbying evidence held to have "evidentiary value" although liability found based on group boycott unrelated to lobbying); Household Goods Carriers' Bur. v. Terrell, 452 F.2d 152 (5th Cir. 1971) (evidence of lobbying admitted to prove anticompetitive intent, although allegedly libelous letter also admitted).


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

Other authorities hold that the "overall scheme" theory relates to the protected status of political activity rather than its admissibility. See, e.g., ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 615 (2d ed. 1984); Scott v. City of Sioux City, Iowa, 1982–83 Trade Cas. (CCH) 56,203 at p. 71,847 (N.D. Iowa 1982) ("Where legitimate lobbying is combined with illegal actions, the Noerr-Pennington exemption has no application"). As such an "overall scheme" exists only where other evidence of antitrust violations exists, the difference between this theory and Rule 403's analysis is of no practical importance.