Notes

COASTAL STATES V. HUNT: NOERR-PENNINGTON GOES ABROAD

I. Introduction

United States antitrust laws are designed to preserve the traditional economic fabric of the country by effectuating a policy advocating competition as the most efficient and effective means of promoting trade. As the "Magna Carta" of our economic freedom, the Sherman Act stands as a comprehensive charter aimed at promoting "free and unfettered competition as the rule of trade." Addressing the interplay between the Sherman Act and participation in a democratic government which may be motivated by economic self-interest, the Supreme Court established petitioning immunity under the Noerr-Pennington doctrine which shields from antitrust scrutiny joint efforts to lobby or petition the government. This immunity extends to bona

2. See United States v. Topco Assocs., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.").
3. 15 U.S.C. §§ 1-7 (1976). Section Section 1 provides, in part: "Ever contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Section 2 provides, in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with the trade or commerce among the several States, or with foreign nations, shall be deemed guilty. . . ." The Sherman Act of 1890, named after the senator who sponsored it, grew out of the strong public hostility towards large business trusts in the late 1800s. See generally State of Mo. v. National Org. of Women, Inc., 620 F.2d 1301, 1304-09 (8th Cir.), cert. denied, 449 U.S. 842 (1980).
5. In National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978), the Supreme Court stated:
   Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute of its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.
   Id. (footnotes omitted).

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fide efforts to influence any branch of government regardless of anticompetitive intent.8

While the Supreme Court has held that United States antitrust laws can apply to activities beyond our borders which may effect commerce within the United States,9 the question whether the Noerr-Pennington doctrine has any application to the petitioning of foreign governments remains unanswered.10 As one commentator has expressed, the Supreme Court "has not clarified whether Noerr-Pennington is based on the principle that the first amendment must prevail in any conflict with the Sherman Act or on an absence of a general congressional intent to regulate political activity . . . by means of the Sherman Act."11 To the extent that the doctrine is constitutionally based, it is doubtful that the immunity would be available to protect the solicitation of foreign governments.12 Given the magnitude of United States involvement in international commerce, the question is crucial.13

The First Circuit Court of Appeals recently addressed this question directly in Coastal States Marketing v. Hunt14 and concluded, inter alia, that petitioning immunity not only reflects first amendment concerns, but also represents a restriction on the scope of the Sherman Act and thus applies to the petitioning of foreign governments.15 Declin-

8. However, the attempts to influence government action must not be a "sham" masking a true purpose to restrain a competitor's business. See infra note 31 and accompanying text.
9. See United States v. Sisal Sales Corp., 274 U.S. 268 (1927). The application of antitrust laws to foreign activities is beyond the scope of this comment.
10. See Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 473 F. Supp. 680, 690 n.3. (S.D.N.Y. 1979) ("It is an open question whether that doctrine, which protects legitimate attempts to petition the United States government, has any application to the lobbying of foreign governments.").
13. See Note, Corporate Lobbyists Abroad: The Extraterritorial Application of Noerr-Pennington Antitrust Immunity, 61 CAFL. L. REV. 1254 (1973) [hereinafter cited as Note, Corporate Lobbyists Abroad].
14. 694 F.2d 1358 (5th Cir. 1983), reh'g and reh'g en banc denied, 699 F.2d 1163 (1983).
15. Id. at 1364. See infra notes 63-88 and accompanying text.
ing to follow the only other case on point,\textsuperscript{16} the Fifth Circuit has now sent \textit{Noerr-Pennington} abroad.

II. Background

\textbf{A. Development of the Noerr-Pennington Doctrine}

In \textit{Eastern Railroad President’s Conference v. Noerr Motor Freight, Inc.},\textsuperscript{17} the Supreme Court first addressed attempts to influence government action in terms of antitrust laws. This litigation was an outgrowth of the competition between the railroads and the growing trucking industry, each attempting to secure greater portions of the profitable long-distance freight hauling business.\textsuperscript{18} The complaint charged that the defendants had conspired to restrain trade and to monopolize in violation of the Sherman Act by orchestrating a publicity campaign designed to foster the adaptation and retention of laws and law enforcement practices destructive to the trucking industry.\textsuperscript{19} Evidence showed that the campaign was highly successful and that defendants had persuaded the governor of Pennsylvania to veto a legislative measure favorable to the truckers.\textsuperscript{20} The district court found for the plaintiffs on grounds that the campaign was malicious and fraudulent.\textsuperscript{21} The court also noted that one of the important purposes of the defendant’s actions was the destruction of the trucker’s goodwill and, as such, caused injury which was unrelated to the passage or enforcement of laws.\textsuperscript{22} The court of appeals affirmed in every respect.\textsuperscript{23}

Noting that the Sherman Act was not intended to apply to valid state action,\textsuperscript{24} the Supreme Court found it clear that the Sherman Act


\textsuperscript{17} 365 U.S. 127 (1961).

\textsuperscript{18} \textit{Id.} at 128-29.

\textsuperscript{19} \textit{Id.} at 129-30. The defendants employed the services of a public relations firm to actually conduct the campaign, a maneuver normally called the third party technique. The Supreme Court described this as “giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups.” \textit{Id.} at 140.

\textsuperscript{20} \textit{Id.} at 130. The measure would have increased the weight allowances permitted trucks.

\textsuperscript{21} \textit{Id.} at 133.

\textsuperscript{22} \textit{Id.} The lower court found that attempts to influence the government did not make out a violation of the Sherman Act.

\textsuperscript{23} 273 F.2d 218 (3d Cir. 1959).

\textsuperscript{24} \textit{See} Parker v. Brown, 317 U.S. 341, 351 (1943) (the Act has no application to restraints or monopolizations resulting from government action). \textit{See also} \textit{City of Lafayette v. Louisiana Power & Light Co.}, 435 U.S. 389, 400, 408-12 (1978).
"does not prohibit 2 [sic] 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 a monopoly."25 Not only are there essential dissimilarities between joint actions taken to influence governmental action and combinations normally held violative of the Sherman Act,26 but consideration of this inconclusive factor along with notions of representative government and first amendment concerns precluded application of the Act:

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. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.27

Thus, the Court concluded that despite the intent to destroy the competitive position of the truckers28 and the unethical methods

25. Noerr, 365 U.S. at 136. One commentator believes that the state action rationale in Noerr rests on an assumption that the democratic process assures balanced, well-considered decisions in areas affecting the American economy despite anticompetitive lobbying efforts. This rationale would not support application of the doctrine where other forms of government are involved. See Note, Corporate Lobbyists Abroad, supra note 13, at 1275.

26. Noerr, 365 U.S. at 136. "[C]ombinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through . . . price-fixing agreements, boycotts, market-division agreements, and other similar arrangements." Id. (footnote omitted). One writer points out that this reasoning is contrary to precedent and unpersuasive. See Fischel, supra note 12, at 83. But see Davis, supra note 11, at 411 n.72 (dissimilarity noted was between direct interference with trade and seeking government action).

27. Noerr, 365 U.S. at 137-38. For a criticism of the Court's overall reasoning in Noerr, see Fischel, supra note 12, at 83-84.

28. The Supreme Court stated:

It is inevitale, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be
employed the Sherman Act did not apply to the activities of the railroads "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." The Court did, however, establish the basis of an exception to the immunity and stated that application of the Sherman Act would be proper when actions taken to influence governmental action are a "mere sham" masking what is clearly "an attempt to interfere directly with the business relationship of a competitor." It is worth noting that even though the Court found that an application of the Sherman Act to political contacts with the government would raise important constitutional questions it stated that it was unnecessary to reach defendant's affirmative defense that their actions were protected under the first amendment "because of the view we take of the proper construction of the Sherman Act." The second in this line of cases is United Mine Workers v. Pennington. This case considered the anticompetitive actions of the mine workers

the infliction of some direct injury upon the interests of the party against whom the campaign is directed. . . . To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

Noerr, 365 U.S. at 143-44.

29. See supra note 19. In the court's words: Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity. . . . Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities. . . . All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involved conduct that can be termed unethical.

Noerr, 365 U.S. at 140-41. Lower courts have interpreted this language differently. Compare Cow Palace Ltd. v. Associate Milk Producers, Inc., 390 F. Supp. 696 (D. Colo. 1975) (holding that illegal lobbying tactics are irrelevant for purposes of the Sherman Act) with Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 440 F.2d 1096 (9th Cir.) (finding that Noerr was not intended to protect illegal means of influencing government representatives), cert. denied, 404 U.S. 826 (1971).


31. Id. at 144. The Court found that the activities of the railroads did not constitute a sham but found the nature of the case to be a "no-holds-barred fight" between competing industries, each of whom appeared "to have utilized all the political powers it could muster. . . ." Id. at 144-45 (footnote omitted).

32. See supra note 30 and accompanying text.

33. Noerr, 365 U.S. at 132 n.6. The Noerr decision appears to rest solidly on a construction of the Sherman Act. But see Note, Corporate Lobbyists, supra note 13, at 1258 n.31 (referring to the relative indecisiveness of Noerr). See also Fischel, supra note 12, at 84, where the writer feels that the only valid basis for the Noerr decision was on the first amendment grounds which the Court failed to reach.

34. 381 U.S. 657 (1965).
union and several large mine owners who, in an attempt to drive small mine operators out of business, approached the Secretary of Labor to request that he establish a high minimum wage on TVA coal contracts.35 Admonishing the lower courts for failing to take proper notice of their decision in Noerr, the Supreme Court reversed and announced that "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."36

The third case in the initial development of the immunity doctrine is California Motor Transport Co. v. Trucking Unlimited.37 There, defendant highway carriers were charged with conspiring to put their competitors out of business by instituting meritless state and federal proceedings to resist and defeat plaintiff’s applications to acquire, register, or transfer operating rights.38 The district court dismissed the action for failing to state a cause of action and the Ninth Circuit reversed.39

Referring to notions of representative government and first amendment concerns expressed in Noerr,40 the Supreme Court expanded the scope of petitioning immunity to include concerted attempts to petition all branches of government:

The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.41

35. Id. at 660-61. The defendants also requested that the TVA curtail its purchases on the spot coal market which was exempt from minimum wage provisions. One writer has criticized what he feels is an extension of Noerr to apply to solicitations of a commercial nature. See Fischel, supra note 12, at 85-86. But see Davis, supra note 11, at 396 n.5. "It is fairly well established in lower court opinions that Noerr-Pennington immunity does not extend to the solicitation of governmental actions of a commercial nature."

36. United Mine Workers, 381 U.S. at 670. "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." Id.

38. Id. at 509.
39. Id. The Ninth Circuit reversed on grounds that Noerr applied only to petitioning of the executive or legislative branch and that the activities of the defendants fell within the sham exception to Noerr. See Trucking Unlimited v. California Motor Transp. Co., 432 F.2d 755, 760, 763 (9th Cir. 1970).
40. See supra note 30 and accompanying text.
Further, the Court expanded the rationale of *Noerr-Pennington* to include the right of association and emphasized the constitutional underpinnings of the doctrine. The emphasis on first amendment rights continued as the Court considered allegations that the defendant carriers had acted to deny plaintiffs free and meaningful access to the courts:

[Defendants], of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right . . . is part of the right of petition protection by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws . . . First Amendment rights may not be used as the means or the pretext for achieving "substantive evils. . . ."

Finally, the Court found that the defendant's actions fell within the sham exception to *Noerr* and affirmed the court of appeals.

B. Subsequent Treatment

One authority has suggested:

[t]he principal weakness of the *Noerr-Pennington* line of cases

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42. We conclude that it would be destructive of the rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors. *California Motor Transp. Co.*, 404 U.S. at 510-11.

43. *Id.* at 511.

44. *Id.* at 513, 515 (citations omitted). The constitutional basis of this opinion is considered by some to mark the true basis of petitioning immunity. *See Fischel, supra* note 12, at 86-88; *Note, Corporate Lobbyists Abroad, supra* note 13, at 1258.

45. *California Motor Transp. Co.*, 404 U.S. at 516. In discussing the sham exception, the Court distinguished the standards applicable to the regulation of ordinary political activity from the higher standards required of litigants and those appearing before administrative bodies: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. . . . Insofar as the administrative and judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" *Id.* at 513. One commentator has noted that the courts do not make or enforce laws but only apply them. This commentator questions this distinction on the basis of *Noerr*. *See Fischel, supra* note 12, at 87. Another authority states that judges and administrators must depend almost entirely upon the honesty of those appearing before them, while legislators have access to other information in passing laws or establishing policy. *See Note, Corporate Lobbyists Abroad, supra* note 13, at 1258.
is the Court's failure to unambiguously articulate the basis for exempting certain lobbying from the reach of the antitrust laws. *Noerr* suggests that the exemption is based on construction of the Sherman Act. *California Motor Transport* indicates that the exemption is predicated upon the first amendment.46

Court opinions subsequent to *Noerr* have engendered confusion47 which is currently reflected in the lower courts.48 The Eighth Circuit recently described the problem as stemming from "the shift in focus from the *Noerr* holding that the railroads' activities are beyond the intent of Congress, insofar as the Sherman Act is concerned, to the *Noerr* statement that there are serious constitutional questions involved also."49 As mentioned earlier, the question is crucial to a view of petitioning immunity in a foreign context.50

The Supreme Court considered international petitioning in *Continental Ore Co. v. Union Carbide & Carbon Corp.*51 where the defendants were charged with conspiring to restrict and monopolize vanadium

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46. Fischel, *supra* note 12, at 94 (footnotes omitted). Beyond the extraterritorial application of *Noerr-Pennington*, the question whether actions unprotected by the first amendment may be beyond the scope of antitrust laws is crucial in certain cases.


50. See *supra* notes 12 & 13 and accompanying text.

trade in the United States in violation of the Sherman Act. Plaintiffs offered evidence to prove that the defendant's Canadian subsidiary, which had been appointed by the Canadian government as exclusive agent for purchasing vanadium for Canadian industries, had conspired with defendants to exclude plaintiffs from the Canadian market. The Ninth Circuit affirmed the lower court verdict for the defendants and ruled, in part, that since the defendant's subsidiary had acted as an arm of the Canadian government, under Noerr, the defendant's efforts to influence the foreign government were beyond the scope of the Sherman Act.

The Supreme Court reversed, finding that Noerr did apply since the defendants "were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." Since the Court did not reverse on grounds that Noerr was inapplicable to the petitioning of foreign governments, this decision has been viewed as supporting by negative implication the position that petitioning immunity is not restricted to the domestic political arena.

Prior to Coastal States, only one case addressed the issue directly. In Occidental Petroleum Corp. v. Buttes Oil & Gas Co., defendants were charged with inducing and procuring assorted executive acts from an Arab sheikdom which directly interfered with plaintiffs' right to exploit their concession relating to development of oil reserves. Failing to find any support for application of petitioning immunity under the Continental Ore decisions, the court found that the rationale underlying Noerr "do[es] not readily fit into a foreign context."

52. Id. at 693-95.
53. Id. at 695-96, 704. See 289 F.2d 86, 94 (9th Cir. 1961), rev'd, 370 U.S. 690 (1962).
54. Continental Ore Co., 370 U.S. at 707. See supra note 35. The court also found that the actions of the subsidiary could not be considered those of the Canadian government. Id. at 706.
57. Id. at 107.
58. Id. at 108. The court eventually dismissed the suit on grounds of the act-of-state doctrine. In essence, this doctrine holds that the courts of one country will
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. 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. . . . The persuasion of Middle Eastern states alleged in the present case is a far cry from the political process with which Noerr was concerned.59

Finally, in 1977, the United States Department of Justice, Antitrust Division, issued the Antitrust Guide for International Operations.60 In what was described as the most controversial issue in the Guide,61 the Department took the position that the Noerr-Pennington doctrine applied to the petitioning of foreign governments.62

Within this context arose the facts of the present case.

III. The Coastal States Decision

In 1957 the Libyan government granted to the defendant Hunt brothers a concession for the exclusive discovery and extraction of petroleum reserves located within a province of that county. The defendants later assigned a fifty percent interest in that concession to BP Exploration Company, Ltd., a subsidiary of the British Petroleum Company (together referred to as BP). Oil was discovered in 1961 and the find developed into the Sarir oil field. By 1967, the Hunts and


59. Occidental Petroleum Corp., 331 F. Supp. at 108 (footnotes omitted). One commentator asserts that the reasoning in Occidental is persuasive only if one admits that Noerr rests on the first amendment right to petition. See Fischel, supra note 12, at 120-21.


62. See Antitrust Guide, supra note 55, Case N. at E-17, E-18: "While the Noerr case turns in part on U.S. domestic constitutional considerations, the Department does not consider it to be limited to the domestic area. The Supreme Court's discussion in Continental Ore Co. v. Union Carbide & Carbon Corp. implies as much." Id. (footnotes omitted).
BP were exporting and marketing Sarir crude oil. In 1971, the Libyan government nationalized BP’s interests and assigned them to the government-owned Arabian Gulf Exploration Company (AGEC). BP responded by notifying selected oil dealers of its legal claim and initiating lawsuits in various countries. AGEC subsequently entered into a purchase agreement with plaintiff Coastal States for the sale of Sarir crude. In 1973 the Libyan government nationalized the Hunts’ interests. BP notified the defendants and suggested that they join together to protect their respective rights. The Hunts subsequently issued notices to crude oil dealers worldwide claiming title to Sarir crude, joined in twenty-one of the lawsuits filed by BP and attempted to investigate the movements of Sarir crude from Libya. Defendants’ efforts included an attempt to attach the cargo of a ship employed by plaintiffs to transport Sarir crude to the United States and a campaign to frustrate potential sales by contacting Coastal’s customers during negotiations. By August of 1973, Coastal had been denied additional credit by its bankers and was forced to assign its rights in Sarir crude oil to another company.

Coastal filed this antitrust action in October 1974 contending that the publicity and lawsuits constituted a secondary boycott and intimidated its potential customers and bankers and claiming the loss of millions of dollars.

In November, BP settled its dispute with the Libyan government and dismissed its suits under that agreement. The Hunts continued to prosecute their actions against Libya until May 1975, when they settled the dispute, but continued their action against Coastal.

After the district court granted Coastal’s motion for summary judgment on the Hunts’ counterclaim for conversion, the Hunts moved

63. Coastal States, 694 F. 2d at 1361. Defendant’s efforts prompted the intended recipients to notify Coastal that they would not accept crude oil from the ship. The ship was then diverted to another port where a federal attachment proceeding failed in district court for lack of jurisdiction.

64. Id. The suit originally included BP whose motion to dismiss on grounds that the court lacked jurisdiction was granted by the district court. Earlier legal skirmishes included a conversion suit filed by the Hunts and BP against Coastal in the Texas state courts. Coastal counterclaimed for tortious interference with business relations. The trial court denied both parties recovery. The decision was affirmed by the state court of appeals and the supreme court. See Hunt v. Coastal State Producing Co., 570 S.W.2d 503 (Tex. Civ. App. 1978), aff’d, 583 S.W.2d 322 (Tex. 1979).

65. Interestingly, Coastal argues that the dismissal of these suits indicates that their sole purpose was to pressure Libya. See Coastal States, 694 F.2d at 1362 n.11.

66. Id. at 1361-62. This counterclaim was identical to the one litigated in the state courts. See id. at 1362.
repeatedly for summary judgment on the antitrust claim, asserting that their conduct was protected by petitioning immunity and relying on pretrial stipulations that the purpose of their actions was to establish legal title to the Sarir crude oil. The court dismissed the motions and the case went to trial.

While Coastal attempted to prove that the defendants instituted the litigation, investigations, and publicity in order to make Sarir crude unmarketable, the evidence introduced included testimony by the Hunts themselves that tended to show that their intent was to establish their legal title and to protect their interests. At the close of Coastal's case, the district court granted the defendants' motion for a directed verdict on grounds that the defendants' conduct was protected by petitioning immunity. Coastal appealed.

The circuit court noted earlier language setting forth the basic principle of petitioning immunity which assured "'uninhibited access to government policy makers.'" After an initial finding that immunity does extend to boycotts, the court addressed the contention that petitioning immunity does not apply to litigation brought in foreign courts since the immunity is based solely upon the first amendment right to petition.

Relying on the original holding of Noerr that "'mere solicitation' with respect to "'the passage and enforcement of laws" was beyond the purview of the Sherman Act, the court concluded that "'[p]etitioning immunity reflects not only first amendment concerns but also

67. See id. at 1362 n.13.
68. Id. at 1363. One document introduced by Coastal was a discussion draft prepared for a meeting of oil company representatives by an employee of the defendants in response to tax legislation proposed by Libya. A public relations campaign was suggested with one of the stated goals to "'[m]ake it clear to all that we intend to frustrate the sale of pirated oil.'" Id.
69. Id. at 1363 nn.14-15.
70. Defendants also appeal the summary judgment on their counterclaim. See id. at 1363.
71. See supra note 36. The language came from the Supreme Court's opinion in Pennington which rested firmly on a construction of the Sherman Act and did not address the constitutional concerns raised in many subsequent cases. See City of Lafayette, 435 U.S. at 399 n.17.
72. Coastal States 694 F.2d at 1363 (quoting George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 32 (1st Cir.), cert. denied, 400 U.S. 850 (1967)).
73. Coastal States, 694 F.2d at 1364.
74. Id. Coastal failed to raise this claim in the district court. The circuit court addressed this issue since it posed a pure question of law which, if unanswered, might result in a miscarriage of justice.
75. Id. at 1364 n.21. See supra note 27 and accompanying text.
a limitation on the scope of the Sherman Act."76 The court also found support for its position in the legislative history of the Act where Senator Sherman is recorded as stating that the Act "does not interfere in the slightest degree with voluntary associations made to affect the public opinion to advance the interests of a particular trade or association."77 The court also pointed out that the Noerr court expressly stated that it found no conflict between the Sherman Act and first amendment.78 However, the circuit court did acknowledge the constitutional concerns stressed in California Motor Transport79 but stated that "we do not view that opinion as overruling Noerr's clear holding that the Sherman Act simply does not extend to joint efforts to influence government officials."80 Further, the court joined those who find additional support in the negative implication of the Supreme Court's opinion in Continental Ore.81

Relying on the broad scope of Noerr, the court declined to follow Occidental Petroleum82 and rejected the notion that "petitioning immunity extends only so far as the first amendment right to petition and then ends abruptly."83 Additionally, it found "no reasons 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."84 The court also rejected the Occidental holding that the political character of the government involved affected the application of the doctrine.85

After concluding that threats of litigation were protected under

76. Coastal States, 694 F.2d at 1364.
77. Id. at 1364-65 n.21 (quoting Senator Sherman in 21 CONG. REC. 2562 (1890). See generally 1 P. AREEDA & D. TURNER, ANTITRUST LAW § 204, at 46 n.3 (1978) [hereinafter cited as AREEDA & TURNER]. Concerning the references to commercial activities, see supra note 35.
78. See Coastal States, 694 F.2d at 1364-65. See supra note 33 and accompanying text.
80. Coastal States, 694 F.2d at 1365. The circuit court noted several United States Supreme Court cases in support of its finding. However, as indicated, a broader overview of those cases indicates no clear position. See supra note 47 and accompanying text.
81. See Coastal States, 694 F.2d at 1365.
82. See Coastal States, 694 F.2d at 1366. See supra notes 56-59 and accompanying text.
83. Coastal States, 694 F.2d at 1366.
84. Id.
85. Id. at 1366-67 (the court emphasized that the political character of the government to which the petition is addressed should not tainted the right to enlist its aid). See supra note 59 and accompanying text; AREEDA & TURNER, supra note 77, § 239, at 274-75 (criticizing this aspect of Occidental). But see supra note 25.
petitioning immunity as "reasonably and normally attendant upon effective litigation," the court addressed the strength and contents of the stipulations introduced at trial and found that the district court did not abuse its discretion in holding the plaintiffs to their contents. In finding that the stipulations precluded a sham, the circuit court recognized a "significant motivating factor" test to be applied to litigants. Accordingly, the court of appeals affirmed the district court in favor of the defendants.

IV. AFTER COASTAL STATES

Courts and commentators are divided over whether Noerr-Pennington is based upon a construction of the Sherman Act or upon the first amendment right of petition. In this regard, the Coastal decision may have little impact since this issue does not affect the outcome of many cases presenting an immunity question within the United States.

Beyond the domestic arena, the decision should provide international corporations and investors with a greater degree of confidence in pursuing contacts with foreign governments and their agencies. This is because existing international immunity, specifically the act-of-state doctrine, is much narrower than Noerr-Pennington, which can affect the antitrust outcome in many cases. Moreover, the decision may

86. Coastal States, 694 F.2d at 1367.
87. Id. at 1372-73.
88. Id. at 1372. "A litigant should enjoy petitioning immunity from the antitrust laws so long as a genuine desire for judicial relief is a significant motivating factor underlying the suit." Id.
89. Id. at 1373. The court also affirmed the lower court's summary judgment on defendant's counterclaim.
90. See supra notes 46-49 and accompanying text; supra note 30; Davis, supra note 11, at 423; Fischel, supra note 12, at 96; McManis, supra note 12, at 140-41.
91. But see supra note 46.
92. See supra note 58.
93. For example, the validity and motivation of some foreign act-of-state must be questioned for the doctrine to apply, and thus the act of state doctrine would not extend immunity to unsuccessful attempts to petition action. See Davis, supra note 10, at 408-09. But see Areeda & Turner, supra note 11, § 239, at 274-75 (Noerr-Pennington applied to foreign contacts would seldom affect antitrust result due to act-of-state doctrine application).
promote the goals of the Sherman Act as predicted by those who feel that petitioning immunity should be extended to foreign contacts on grounds of comity, good foreign relations,\textsuperscript{94} and protecting United States economic interests.\textsuperscript{95}

V. Conclusion

In anchoring its holding firmly on a construction of the Sherman Act and extending \textit{Noerr-Pennington} on that basis, the Fifth Circuit has avoided arguments that the first amendment right to petition does not protect activities conducted outside the territorial United States, while supporting those commentators who point out that the immunity should be extended on grounds of international economic and political considerations. The result should be welcomed by those who now carry \textit{Noerr-Pennington} abroad with them.

\textit{Francis E. Hadden}

\textsuperscript{94} See Davis, \textit{supra} note 11, at 429-30; Graziano, \textit{supra} note 55, at 132.

\textsuperscript{95} See Note, \textit{Corporate Lobbyists Abroad}, \textit{supra} note 13, at 1277-79.