The *Noerr-Pennington* Doctrine and the Sherman Act: A Look at Recent Developments and Potential Strategy when Petitioning Activity is Part of an Overall Scheme

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Introduction

For good reason, the Sherman Act does not reach the legitimate exercise of constitutionally protected petitioning activity even if such activity would otherwise violate antitrust laws. This construction of the Act is known as the *Noerr-Pennington* doctrine.[1] This doctrine is not without its limits, however. Petitioning activity is properly subject to liability under the Act where it is a "sham" – *i.e.*, a subterfuge intended to injure competition by its process rather than from the result of the petition. Where the only anticompetitive act at issue is the petitioning activity itself, the analysis is relatively straightforward and the case law is well developed.

The result is far less certain when the petitioning activity is one of several anticompetitive acts giving rise to an antitrust action. The legal community is currently all over the map concerning how to treat such situations. On one extreme, some courts hold that, when the petitioning activity is merely one of several tools implemented as part of an "overall scheme" to injure competition, *Noerr-Pennington* has no application. This construction accepts that abuse of the government process is a cheap and effective way to acquire market power and restrain trade,[2] and, therefore, when part of a large scheme to restrain trade, the legitimacy of petitioning activity wanes. Other courts compromise and hold that, while petitioning activity cannot itself give rise to antitrust liability, such conduct can be admitted for the limited purpose of establishing that other, non-petitioning acts violated the Sherman Act. On the other extreme is the defense bar, which is currently seeking to transform the *Noerr-Pennington* shield into a sword by arguing the total exclusion of evidence of such activity – irrespective of whether the petitioning activity is otherwise relevant. In so doing, counsel seeks to turn a rule for construing the Sherman Act into an evidentiary privilege.

The authors believe the compromise solution – in accordance with which non-sham petitioning activity can be admitted to prove other violations of the Sherman Act – strikes the appropriate balance. If a plaintiff can establish independent relevance, evidence of petitioning activity should be admitted with a limiting instruction. An award of damages cannot be based upon a defendant's non-sham petitioning activity, but can be considered as proof of other elements of a claim, *e.g.*, as proof of a conspiracy or its continuation. While arguments can be made that allowing the jury to draw any adverse inference from non-sham petitioning activity unduly interferes with constitutionally protected activity, existing Supreme Court precedent indicates that the *Noerr-Pennington* doctrine does not mandate the wholesale exclusion of defendant's petitioning activity from the jury's consideration.

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Changes in the regulatory landscape make an evaluation of *Noerr-Pennington's* reach more pertinent than ever. We are witnessing a concerted public push for greater supervision of economically important industries to mitigate future boom and bust cycles. As new regulations are promulgated and older ones enforced more vigorously, market participants will need to enmesh themselves with their regulators. Antitrust attorneys must be prepared to counsel their clients and advocate in court concerning the extent to which these interactions can be used as evidence in a Sherman Act lawsuit.

Limitations of the Noerr-Pennington *Doctrine*

Set forth below are three exceptions to the *Noerr-Pennington* doctrine that often arise in instances where the defendant's petitioning activity is a part of a larger scheme. The first briefly describes the "sham" exception, which has been clearly defined and uniformly applied. The second outlines the overall scheme exception, in accordance with which some courts have recently held that, where petitioning activity is part of a broader overall scheme to stifle competition, *Noerr-Pennington* does not apply. Finally, we set forth the authorities that hold evidence of petitioning activity can be admissible as circumstantial evidence that other, non-petitioning activities violated the Sherman Act.

Sham Petitioning as Basis for Antitrust Relief

Evidence of petitioning activity is admissible to establish antitrust liability – in spite of the *Noerr-Pennington* doctrine – where that activity qualifies as a "sham." In these cases, claimants can proceed with antitrust claims based on petitioning activities irrespective of whether they are part of a broader scheme. The "sham" exception originated in *Noerr*, which notes that where petitioning and lobbying activity that "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor[,] the application of the Sherman Act would be justified."[3]

The dimensions of the "sham" exception have been largely established. Over the last four decades, courts have disagreed as to whether objectively reasonable petitioning activity was nevertheless a "sham" if it was instituted with anticompetitive intent. The Supreme Court resolved this question with a resounding "no" in *Professional Real Estate Investors, Inc. v. Columbia Pictures (PREI)*. In *PREI*, the Court set forth a two part test, which included both an objective and subjective component, to admit petitioning evidence as a "sham" over the *Noerr-Pennington* doctrine. First, the claimant must adequately allege that the action is "objectively baseless" such that "no reasonable litigant could realistically expect success on the merits."[4] Second, the claimant must allege a subjective component, *i.e.*, that the action "conceals an attempt to interfere directly with the business relationship of a competitor."[5] Only where the claimant meets its burden of proof that an action is "objectively baseless" does the trier of fact ever consider the defendant's intent.[6]

While the *PREI* Court discussed the "sham" exception, it did not decide whether the facts gave rise to any other exceptions to the *Noerr-Pennington* doctrine.[7] In his concurrence, Justice Stevens noted that the Court applies "less definite rules" where

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the allegedly anticompetitive conduct consists of more than a single petition.[8] Stevens wrote that "a simple rule may be hard to apply when there is evidence that the judicial process has been used as part of a larger program to control a market."[9] In other words, at least in the eyes of the concurrence, *PREI* did not extinguish the possibility of an overall scheme exception in which the petitioning was one part of a broader anticompetitive scheme.

Petitioning Activity as a Basis for Relief When a Part of an Overall Scheme

There currently is a split among the circuits as to whether otherwise protected petitioning activity can be subject to antitrust liability where said activity is only one of several anticompetitive acts that together constitute an overall scheme to restrain trade. With little discussion, some circuit courts automatically disregard the constitutional protections afforded otherwise legitimate petitioning activity when the petitioning activity is one part of a larger, overall scheme to violate antitrust laws. Still other courts reject such an overall scheme exception to the *Noerr-Pennington* doctrine without even considering whether evidence of the defendant's petitioning activity could have relevance independent of liability.

After the Supreme Court decided both *Noerr* and *Pennington*, the Ninth Circuit, citing *Kobe v. Dempsey Pump*, recognized an overall scheme exception to otherwise protected petitioning activity in *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau.*[10] In *Clipper Exxpress*, a freight forwarder sued trucking companies and their rate bureau for antitrust violations. The freight forwarder alleged that the trucking companies colluded to engage in a rate fixing conspiracy by, inter alia, repeatedly and unfairly protesting lower rates proposed to their regulator, the Interstate Commerce Commission, and by agreeing amongst themselves to charge their customers supracompetitive rates.

The trucking companies moved for summary judgment arguing, among other things, that their conduct before the ICC was constitutionally protected petitioning activity not subject to antitrust liability. In opposition, the freight forwarder made three arguments: (1) for application of the sham exception; (2) that immunity should not apply because the trucking companies submitted fraudulent information to the ICC; and (3) that the petitioning activity was part of a larger overall scheme to violate the antitrust laws. The district court granted the trucking companies' motion and the freight forwarder appealed. In reversing the district court's holding, the Ninth Circuit ruled that there existed questions of fact as to whether the trucking companies' activities were a sham, and that antitrust liability could rest on the submission of fraudulent information to a regulatory body outside the patent context.

The *Clipper Exxpress* court also upheld the overall scheme exception. The court noted that "[w]hen . . . the petitioning activity is but a part of a larger overall scheme to restrain trade, there is no overall immunity" for non-petitioning acts in furtherance of the conspiracy.[11] The *Clipper Exxpress* court held "that when there is a conspiracy prohibited by the antitrust laws, and the otherwise legal litigation is nothing but an act in furtherance of that conspiracy, general antitrust principles apply, nothwithstanding *Noerr* immunity."[12] "An antitrust violation does not enjoy

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immunity simply because an element of that violation involves an action which itself is not illegal."[13]

Two recent district court decisions also authorized antitrust claims based in part on petitioning to go forward as part of an "overall scheme." In *ID Security Systems Canada v. Checkpoint Systems*, a manufacturer of radio frequency tags sued a manufacturer of electronic article surveillance systems in the Eastern District of Pennsylvania.[14] The plaintiff alleged that the defendant violated the Sherman Act by monopolizing and attempting to monopolize the market for radio frequency tags used in conjunction with electronic article surveillance systems.[15] Plaintiff introduced evidence that the defendant interfered with plaintiff's supply chain and that defendant had brought lawsuits against other potential market competitors. After a jury verdict for the plaintiff, the defendant filed post-trial motions and argued that its prior petitioning activity was protected by the *Noerr-Pennington* doctrine and should have been excluded. The district court held that the evidence was properly admitted because the petitioning activity was part of an overall scheme to gain a business advantage.[16]

Applying the law of the Federal Circuit in a patent infringement case, the Northern District of California recently admitted evidence under the overall scheme theory.[17] In *Hynix Semiconductor, Inc. v. Rambus, Inc.*, the court noted that the Federal Circuit had not decided whether to recognize the overall scheme exception to *Noerr-Pennington*. After reviewing the standards set forth by the various circuits, the *Hynix* court ruled that the Federal Circuit and Supreme Court would recognize an overall scheme exception and allow liability and damages arising from otherwise protected petitioning activity. The court held that plaintiff need only show that the petitioning activity was "causally connected" to the anticompetitive harms caused by the other acts in furtherance of the scheme. The *Hynix* court noted that allowing damages to be awarded based on such petitioning activity was critical to fairly compensate the victim of anticompetitive conduct:

> [W]here the patent litigation is used to further the harm caused under a "more traditional antitrust theory," a plaintiff should be allowed a full recovery. In many antitrust cases, proposed damages calculations are too speculative to award. In those situations, one of the few ways to adequately compensate an injured firm is by trebling its litigation expenses. By including litigation that furthers other exclusionary practices amongst the monopolist's anticompetitive scheme, the law ensures that an injured plaintiff can recover a "workable minimum" of damages where the damages from other harms may be too difficult to calculate.[18]

The Federal Trade Commission has also argued for the application of the overall scheme exception.[19] In settling restraint of trade claims against a pharmaceutical company, the FTC noted that the company's "overall course of conduct," including repeated lawsuits and baseless submissions to the Food and Drug Administration, constituted "a clear and systematic pattern of anticompetitive misuse of the government process." The FTC contended that this entire course of conduct is

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exempted from *Noerr-Pennington* immunity even apart from the "sham" exception explicitly recognized in *California Motor*.[20]

Other courts refuse to recognize an overall scheme exception. In *In re Burlington Northern, Inc.*, the trial court ordered the defendants to produce documents concerning prior petitioning activity (that otherwise would be protected by the attorney-client privilege or the work product doctrine) on the grounds that the activity could be relevant as part of a broader conspiracy to restrain trade.[21] On appeal, the Fifth Circuit held that the trial court erred in allowing discovery on an overall scheme theory.[22] The court remanded the case to the trial court with instructions to allow discovery into prior petitioning activity only upon a showing that such activity constituted a "sham."[23] Similarly, the Second and Fourth Circuits have rejected attempts to assign antitrust liability to nonfrivolous actions – regardless of other anticompetitive activity also at play.[24]

The broad reading of the overall scheme exception imposes an unacceptable burden on constitutionally protected activity and probably would not withstand close constitutional scrutiny. While lawsuits and lobbying efforts may be relevant to elements of a Sherman Act violation other than liability, these constitutionally protected acts should not themselves be subject to antitrust liability unless they are a sham. As the Supreme Court noted, the right to petition the government is "among the most precious of the liberties safeguarded by the Bill of Rights."[25] The overall scheme exception could easily swallow the *Noerr-Pennington* doctrine itself given that clever plaintiffs could almost always purport to prove a larger scheme where, in reality, the petitioning activity is the true basis for the lawsuit. The Areeda-Hovenkamp treatise also warns against the application of this exception.[26]

In any event, for the overall scheme exception to apply, at least some component of the scheme must involve non-petitioning activity. Even those courts that do recognize this exception do so only in instances in which the protected petitioning activity was part of a broader scheme that included activity not protected by *Noerr-Pennington*.[27] For example, the Fifth Circuit in *Coastal States Marketing, Inc. v. Hunt*, avoided deciding whether to recognize the overall scheme exception where the only conduct at issue was litigation and related conduct[28]

Petitioning Activity as Circumstantial Evidence of Antitrust Violation

Many courts admit evidence of petitioning activity for purposes other than antitrust liability, including as evidence of the defendant's intent, purpose and character. The evidence is admitted with a limiting instruction that, absent proof that the conduct was a sham, it is constitutionally protected and cannot be considered by the jury as proof of liability or in the award of damages. Courts following this course typically rely upon footnote 3 in the *Pennington* decision that notes that, while evidence of petitioning activity cannot be used to establish a violation of the Sherman Act, trial courts have discretion to admit the evidence in accordance with the:

> established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it

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> tends reasonably to show the purpose and character of the particular transactions under scrutiny.[29]

In its 2002 *Telecor Communications* decision, the Tenth Circuit allowed the introduction of evidence regarding a utility's participation in regulatory activities for purposes other than establishing antitrust liability.[30] The defendant, Southwestern Bell, attempted to exclude on *Noerr-Pennington* grounds all evidence relating to statements it made to the Oklahoma Corporation Commission ("OCC") regarding attempts to lock up pay telephone customers.[31] Southwestern Bell argued that "what we told the Corporation Commission can't support any inference in the case and ought not come in at all."[32] The district court rejected this broad approach to *Noerr-Pennington* and allowed plaintiffs to question Southwestern Bell witnesses regarding the company's statements to the OCC. The district court addressed Southwestern Bell's concerns not by wholesale exclusion of evidence, but by giving the jury the following cautionary instruction:

> Every citizen, including the plaintiffs and Southwestern Bell, has a right under the Constitution to petition the government and be heard on issues pertaining to rule-making proceedings like that at the Corporation Commission. The exercise of that right is immune from scrutiny under the antitrust laws. Therefore, I instruct you that Southwestern Bell Telephone Company's exercise of its right to petition by participating in rule-making proceedings and advocating any position it chose at the Oklahoma Corporation Commission did not violate the antitrust laws.[33]

The trial court also instructed the jury that "it may consider the purpose or intent of the anti-competitive act (*i.e.*, the lock up efforts), and its pretextual nature, in assessing its legality."[34] The jury was also instructed that it could "consider this evidence if you find it tends to show the purpose and character of the transactions under scrutiny."[35] The Tenth Circuit upheld the trial court's rulings, noting that: "This rationale for the evidence's admission falls within the scope of *Pennington*'s footnote three. Whether or not the jury would have found the evidence persuasive on this point, such an inference certainly would have been permissible."[36]

Other federal courts have likewise admitted evidence of petitioning activity for purposes other than establishing antitrust liability. For example, in *MCI Communications Corp. v. American Tel. & Tel. Co.*,[37] defendant AT&T argued that *Noerr-Pennington* required exclusion of evidence and a jury instruction because "virtually every liability issue found adversely to AT&T by the jury involved conduct subject to regulation and the Bell System's participation in the regulatory process." AT&T also maintained on appeal that plaintiff MCI had "pointed to many instances of AT&T's participation in the administrative process as evidence of bad faith and anticompetitive intent." The Seventh Circuit disagreed with AT&T's argument, noting that "'[e]vidence of activity that is protected by the *Noerr* doctrine may be admitted to show the purpose and character of other activities if doing so is not overly prejudicial to the defendants.'"[38]

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More recently, a district court in Idaho rejected a defendant's efforts exclude evidence at trial relating to communications with the Environmental Protection Agency.[39] The defendant had previously made statements to the EPA concerning the migration of herbicide by windblown dust. The district court held that these statements were pertinent to, inter alia, the defendant's knowledge and were therefore admissible "[s]o long as plaintiff's use [the statements] for relevant purposes other than imposing liability" on the defendant for the statements themselves.[40] The district court concluded that this evidence, like any other, is subject to exclusion under Federal Rule of Evidence 403.

Evidence of petitioning activity is, of course, subject to exclusion under Rule 403 if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, delay and juror confusion. Some contend that evidence of petitioning activity is "presumptively prejudicial" under this rule. In commenting on the admissibility of lobbying evidence, the District Court for the Southern District of New York noted that:

> the exclusion of "purpose and character" evidence consisting of conduct clearly embraced by *Noerr-Pennington* should be the rule rather than the exception in an antitrust case. Although Rule 403 requires that evidence should be excluded only if its probative value is "substantially outweighed" by its prejudicial effect, evidence which by its very nature chills the exercise of First Amendment rights . . . is properly viewed as presumptively prejudicial.[41]

On appeal, the Second Circuit affirmed the district court's Rule 403 exclusion of evidence of petitioning activity.[42]

The Areeda-Hovenkamp treatise emphasizes that admitting such evidence risks chilling constitutionally-protected activity.[43] The treatise also notes that such evidence lacks substantial probative value in that an intention to harm competition through petitioning does not establish an intention to harm competition through other means. Apart from proving intent, however, evidence of petitioning activity can shed light on the contours of the conspiracy itself. Evidence that a group of companies combined to oppose regulatory action benefiting their competitors would not be admissible as a violation of the Sherman Act nor would it be particularly pertinent in proving that members of the group intended to harm their competitors. Nonetheless, this evidence is relevant to establish that a conspiracy exists and helps define the target of the conspiratorial conduct.

Of course, evidence of petitioning activity should be admitted as circumstantial evidence of a violation only where the jury is instructed that the right to petition is guaranteed by the Constitution and that such evidence cannot, in and of itself, violate the Sherman Act. The Tenth Circuit approved such an instruction in *Telcor Communications*, which is discussed above.[44] While there is serious concern as to whether jurors respect limiting instructions,[45] the law assumes that such instructions are effective.[46]

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Conclusion

Application of the *Noerr-Pennington* doctrine is relatively simple in cases in which the petitioning activity is the only anticompetitive act being challenged. In these cases, evidence of petitioning is admitted and is a basis for liability if and when it is a "sham" – *i.e.*, objectively unreasonable and brought with the intent to harm competition. However, the analysis becomes more complicated where the petitioning activity is one of several anticompetitive acts. Some courts hold that petitioning activity can be the basis for liability where the acts are part of an overall scheme to destroy competition. This exception is ill advised. Other courts hold that petitioning activity should be admitted not as a basis for liability but to establish that the defendant's other, non-petitioning conduct violates the Sherman Act. This final approach best balances the interests of protecting the freedom to petition and the risks associated with anticompetitive behavior.

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[1] The doctrine takes its name from two seminal Supreme Court cases: *Eastern Railroad 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).
[2] *See* Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, Cheap Exclusion, 72 ANTITRUST L.J. 975, 977–87, 990–92 (2005) (abuse of government process is an low cost way to engage in exclusionary conduct); Robert H. Bork, The Antitrust Paradox 357 (1978) ("very little (if any) predation is accomplished through pricing, while a good deal is achieved through litigation").
[3] *Noerr*, 365 U.S. at 144.
[4] *Professional Real Estate Investors*, 508 U.S. 49, 60 (1993).
[5] 508 U.S. at 60.
[6] 508 U.S. at 61 ("This two-tiered process requires the plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability.").
[7] Further, the *PREI* decision pertains solely to whether a single petition can constitute a sham. Subsequent opinions have held that a series of actions can constitute a sham regardless of the merit of any component act examined in a vacuum. *See USS-POSCO Industries v. Contra Costa County Bldg. & Const. Trades Council, AFL-CIO*, 31 F.3d 800, 810–811 (9th Cir. 1994) ("*Professional Real Estate Investors* provides a strict two-step analysis to assess whether a single action constitutes sham petitioning . . . [other authority] deals with the case where the defendant is accused of bringing a whole series of legal proceedings.").
[8] 508 U.S. at 72–73 (Stevens, J., concurring).
[9] 508 U.S. at 73 (Stevens, J., concurring).
[10] 690 F.2d 1240, 1263–65 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).
[11] *Id.* at 1263.
[12] *Id.*
[13] *Id.*
[14] 249 F.Supp.2d 622 (E.D. Penn. 2003).

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[15] 249 F.Supp.2d at 631.
[16] 249 F.Supp.2d at 656. Significantly, however, the *ID Security Systems* court did not specifically reach the issue of whether petitioning activity, admitted pursuant to an overall scheme exception, could give rise to a damage award. The court ultimately concluded that the defendant's conduct may have damaged the plaintiff but could not have harmed competition and that the plaintiff, therefore, failed to articulate an antitrust injury. *Id.* at 663–64.
[17] *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 527 F.Supp.2d 1084 (N.D. Cal. 2007).
[18] 527 F.Supp.2d at 1097 (citing Herbert Hovenkamp, Mark D. Janis, & Mark A. Lemley, IP AND ANTITRUST § 6.3 (2005)).
[19] *See* Analysis to Aid Public Comment, FTC Dkt. No. C-4076 (2003) <http://www.ftc.gov/os/2003/03/ bristolmyersanalysis.htm> (*California Motor* "supports the application of a pattern exception for BMS's alleged pattern of conduct, and thus provides a separate reason to reject *Noerr* immunity here").
[20] *See also Nat'l Farmer Org. v. Associated Milk Producers, Inc.*, 687 F.2d 1173, 1196 (8th Cir. 1982) (noting that "the pattern of government contacts are not actionable alone or as an element of the larger scheme").
[21] 822 F.2d 518, 523 (5th Cir. 1987).
[22] 822 F.2d at 526 ("The holding in *Pennington* requires attention to the narrow petitioning activity at issue.").
[23] 822 F.2d at 534. On remand the district court found the petitioning activity to be a sham and ordered the production of documents otherwise protected by the attorney-client privilege and work product doctrine based upon the crime-fraud exception.
[24] *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872, 882–883 (2d Cir. 1971) ("Whatever other anticompetitive activity the patentee may be guilty of, the patent laws would seem to authorize him to bring such a nonfrivolous suit."); *see also Hosp. Bldg Co. v. Tr. of Rex Hosp.*, 691 F.2d 678, 687–88 (4th Cir. 1982) (trial court erred when it instructed the jury that petitioning activity was not immune from antitrust liability where it was part of a "larger conspiracy").
[25] *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).
[26] 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 212 at 335 (3d ed. 2009) ("care must be taken not to allow proof of a vague 'overall scheme' on the basis of the protected activities alone").
[27] *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1371 n. 42 (5th Cir. 1983) ("[T]here is no record evidence supporting the existence of any overall scheme to restrain trade *apart* from the litigation and related conduct. Thus, the case does not present us with the necessity of considering the 'overall scheme' exception.") (emphasis in original).
[28] *Id.* (noting that, while some courts recognize overall scheme exception, it did not apply there where only alleged anticompetitive conduct was protected, petitioning conduct).
[29] 381 U.S. at 670 n3 (citations and quotations omitted). The Court also held that the nonunionized claimant could not seek damages for injuries suffered as a result of government action and that the trial court erred when it failed to instruct the jury not to include such damages in its award.
[30] *Telecor Communications, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1138 (10th Cir. 2002).
[31] 305 F.3d at 1138.
[32] *Id.*
[33] *Id.*

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[34] *Id.*
[35] *Id.*
[36] *Id.* at 1139.
[37] 708 F.2d 1081, 1159 (7th Cir. 1983),
[38] 708 F.3d at 1159–160 (*quoting Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 543 n7 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979)); *see also Alexander v. Nat'l Farmer's Org.*, 687 F.2d 1173, 1196 (8th Cir. 1982) (the "district court's findings are noteworthy because they show [defendants] acting in concert with the specific intent to block [plaintiff] from competing as a qualified cooperative. While not illegal because of the exemption, this conduct does have evidentiary value as to the purpose and concerted character of these co-ops' contemporaneous non-exempt activities."); *Schachar v. Amer. Acad. of Ophthalmology, Inc.*, 1988 U.S. Dist. LEXIS 1826, *12 (Feb. 25, 1988, N.D. Ill.) ("even if the activities would be protected by the *Noerr-Pennington* doctrine, evidence of such activity is not necessarily inadmissible at trial" and may be "admitted to show the purpose and character of other activity if doing so is not overly prejudicial to the defendants").
[39] *Adams v. United States*, Civ. No. 03-0049-E-BLW, 2009 WL 1259019, *2, Memo. Decision & Order Re Dupont's Omnibus Motion in Limine, (D. Idaho, May 3, 2009).
[40] *Adams*, Civ. No. 03-0049-E-BLW, 2009 WL 1259019, *2.
[41] *U.S. Football League v. Nat'l Football League*, 634 F.Supp. 1155, 1181 (S.D.N.Y. 1986) (*citing Feminist Women's Health Center*, 586 F.2d at 543 n. 7).
[42] *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1375 (2nd Cir. 1988).
[43] 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 212 at 334 (3d ed. 2009); *see also City of Cleveland v. Cleveland Elec. Illuminating Co.*, 734 F.2d 1157, 1165 (6th Cir. 1984) (upholding exclusion of evidence of petitioning activity under Rule 403); *Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1503 (5th Cir. 1985) ("Inferences of monopolistic conduct from" negotiations with government agency are "not available, however, because such conduct is protected by *Noerr-Pennington.*").
[44] 305 F.3d at 1138.
[45] *Nash v. United States.*, 54 F.2d 1006, 1007 (2nd Cir. 1932) (Judge Learned Hand noting that a limiting instruction "is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else."); *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962) ("if you throw a skunk into the jury box, you can't instruct the jury not to smell it"); 21A Fed. Prac. & Proc. Evid.2d § 5066 (2009) (collecting studies questioning the effectiveness of limiting instructions).
[46] Federal Rule of Evidence 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."); 21A Fed. Prac. & Proc. Evid.2d § 5066 (2009) (noting that judges assume limiting instructions are effective); *Manuel v. City of Chicago*, 335 F.3d 592, 597 (7th Cir. 2003) ("We assume that jurors follow the instructions they are given.").

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