APPEALS TO THE ELECTORATE BY PRIVATE BUSINESSES: INJURY TO COMPETITORS AND THE RIGHT TO PETITION*

Efforts by business interests to secure favorable governmental treatment may inflict hardships upon competitors which cannot adequately be remedied through conventional forms of relief. Originally attempts to influence government took the form of buttonholing legislators, a technique known as direct lobbying.\(^1\) Recent developments in mass communications\(^2\) have added new grassroots or indirect lobbying techniques to the traditional direct methods.\(^3\) Public relations firms skilled in manipulating mass communications media\(^4\) now claim the ability to "engineer the consent" of constituents by creating the climate of public opinion desired by the firms' clients.\(^5\) But the modern public relations campaign may have two detrimental effects upon the competitors of the sponsoring business organization. By influencing governmental grants of


2. 1946 1959
   - Radio (number receivers) 60,000,000\(^a\) 146,000,000\(^b\)
   - Television (number sets) 1,720,780\(^c\) 52,000,000\(^d\)
   - Books (number copies) 487,216\(^e\) 959,595\(^e\)
   - Newspapers (daily circulation) 50,927,505\(^f\) 58,604,942\(^g\)
   - Periodicals (circulation) 384,688\(^t\) 449,285\(^t\)
   - Motion pictures (average weekly attendance) 90,000,000\(^j\) 40,000,000\(^k\)

Sources: \(^a\)1947 Britannica Book of the Year 638; \(^b\)1960 Britannica Book of the Year 577; \(^c\)Albig, Modern Public Opinion 51 (1956) (figure for 1949); \(^d\)World Almanac 704 (Hansen ed. 1960); \(^e\)1960 Statistical Abstract of the United States 523 (figures for 1947 and 1958 respectively); \(^f\)Albig, supra at 47; \(^g\)1960 Britannica Book of the Year 482 (six-month period); \(^h\)1960 Statistical Abstract, supra at 521 (figures for 1947 and 1954 respectively); \(^i\)Albig, supra at 51 (figure for 1949); \(^j\)1960 Britannica Book of the Year 450 (figure for 1958).

See also Albig, Modern Public Opinion 43-51 (1956).


For a historical survey of lobbying techniques, see H.R. Rep. No. 113, 63d Cong., 2d Sess. (1913); H.R. Rep. Nos. 3137-39, 3232-34, 3238, 81st Cong., 2d Sess. (1951); Hearings Before the Special Committee of the Senate To Investigate Political Activities, Lobbying, and Campaign Contributions, 84th Cong., 2d Sess. (1956); Comment, 56 Yale L.J. 304, 311-13 (1947); Schriftgiesser, op. cit. supra at 1-76.


monopolistic privileges for itself or imposition of burdensome restrictions on others, a firm can improve its market position at the expense of its rivals. And even if the attempt to influence government fails, the campaign to disenchanted public officials with competitors may impair the competitors' market position, by casting aspersions on their business reputation. Attempts to obtain judicial remedies for such injuries must contend both with the prospective defendant's right to petition the government and with the inadequacy of present statutory and common law actions for business defamation.

Past attempts to restrain lobbying campaigns, or to redress injuries caused by them, have been largely ineffective. To control direct lobbying, registration and disclosure statutes have been promulgated, on the theory that knowledge of the real party in interest is an aid in evaluating lobbyist-supplied information, and that public opinion, alerted by publicity of registration data, will control lobbying excesses. But these statutes are easily evaded and frequently not enforced; moreover, they do not comprehend modern grassroots lobbying methods. The common law, while it affords no protection against the injurious effects of direct lobbying, does provide a remedy against false propaganda disseminated in the course of a grassroots program. But this remedy, too, is seldom effective. The action for disparaging the quality of goods is discouraged by stiff requirements of proof. In addition to overcoming the presumption that the statements are true and establishing that they were made with an intent to disparage, plaintiff must prove special damages—loss of specific sales to particular customers. The action for libel or slander of a business reputation does not require such stringent standards of proof. But this action, as well as the disparagement action, is not available where a public relations campaign is conducted against a large number of business firms, because the injury to

7. BLAISDELL, op. cit. supra note 3, at 84.
9. Zeller, op. cit. supra note 3, at 224; Kennedy, supra note 8, at 555. But see suggestions that registration statutes be extended to cover indirect lobbying, Zeller, op. cit. supra note 3, at 238; U.S. President's Committee on Civil Rights, To Secure These Rights 164 (1947).
10. See 1 HARPER & JAMES, TORTS §§ 6.1-6.4 (1956) [hereinafter cited as HARPER & JAMES]; PROSSER, TORTS § 108 (2d ed. 1955) [hereinafter cited as PROSSER]; 3 Restatement, TORTS §§ 624-52 (1938) [hereinafter cited as Restatement].
11. 1 HARPER & JAMES § 6.1 at 481; PROSSER § 108 at 764; 3 Restatement § 634.
12. 1 HARPER & JAMES § 6.1 at 480 ("lack of privilege"); PROSSER § 108 at 765 ("intent to disparage"); 3 Restatement §§ 625, 628.
13. PROSSER § 108 at 765-67; 3 Restatement § 633. But see 1 HARPER & JAMES § 6.1 at 480 n.33.
14. 1 HARPER & JAMES § 6.1 at 481; 3 Restatement § 139 at 323.
each individual is presumed to be slight; recovery is denied even when the losses of the group as a whole can be shown.15

Apart from these private remedies, acts of business defamation are prescribed by section 5 of the Federal Trade Commission Act, which declares "unfair methods of competition" unlawful.16 Upon receipt of a private complaint, or on its own initiative,17 the Federal Trade Commission may investigate,18 hold hearings,19 and, if the conduct complained of is deemed violative of the Act, issue a cease and desist order.20 In the exercise of its authority to define unfair methods of competition, the Commission has ordered many business firms to cease and desist from disparaging their competitors.21 The Commission cannot act, however, unless a proceeding to curb the propaganda campaign is found to be "in the public interest." 22 Even where this requirement is met, private interests do not receive adequate protection, for the Commission is not authorized to award damages for injuries sustained,23 and the threat of the cease and desist order alone seems an ineffective deterrent to potential violators of the act.

Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference 24 marks the first attempt by a private group to invoke the Sherman Act against derogatory propaganda campaigns. Prior to 1955, the state of Pennsylvania was a centrally located barrier to the growth of long distance trucking in the eastern states; unlike the other states in the area, where trucks were permitted

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17. 16 C.F.R. §§ 1.11-1.15 (1960).
18. 16 C.F.R. §§ 1.31-1.42 (1960).
21. Chamber of Commerce v. FTC, 13 F.2d 673, 686 (8th Cir. 1926); Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941); Moretrench Corp. v. FTC, 127 F.2d 792, 795 (2d Cir. 1942); E. B. Muller & Co. v. FTC, 142 F.2d 511, 516 (6th Cir. 1944). But see Philip Carey Mfg. Co. v. FTC, 29 F.2d 49, 51 (6th Cir. 1928) (occasional disparaging statements not substantial evidence of an unfair method of competition); John Bene & Sons v. FTC, 299 Fed. 468 (2d Cir. 1924) (public has no interest in protecting product from truthful disparagement); Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941) (disparaging party only expressing an opinion not motivated by profit motive). For a summary of the Commission's action in disparagement complaints, see 2 TRADE REG. REP. ¶ 5055 (1960).
to operate at a maximum weight limit of 60,000 pounds, Pennsylvania had established a 45,000 pound limit,\textsuperscript{25} at which level long distance trucking could not operate at maximum efficiency. Despite this competitive disadvantage, the truckers' share of the long distance transportation market had been steadily increasing, largely at the expense of the railroads. Nevertheless, in 1951 the Pennsylvania Motor Truck Association (PMTA) sponsored a bill designed to increase the truck weight limit to 60,000 pounds.\textsuperscript{26} Determined to stem further inroads into the railroads' traditional share of the transportation market, the Eastern Railroad Presidents Conference (ERPC) employed Carl Byoir & Associates,\textsuperscript{27} a public relations firm, to conduct a propaganda campaign against the proposed legislation. The Byoir organization prepared propaganda materials—polls and surveys showing popular opposition to the bill, computations demonstrating that truckers did not bear their fair share of state and federal taxes, pictures of tragic highway accidents implying that truck drivers were reckless, and a motion picture illustrating the damage done to roads by heavy trucks. This material, in the form of ready-made editorials, articles, press releases, and speeches opposing the bill, was given to newspaper editors, magazine writers, radio and television commentators, civic leaders, and local officials. Similar materials were distributed to organizations such as the Pennsylvania State Association of Township Supervisors and the Pennsylvania Grange, who were persuaded to adopt the railroads' position. In most cases, Byoir utilized the third party technique, a device for distributing materials through dummy organizations to mask the true source of the propaganda.\textsuperscript{28} The PMTA responded with a public relations campaign of its own.

Despite these activities the weight limit proposal was accepted by the legislature during its 1952 session. But following an executive hearing, which was essentially a capsule presentation of both public relations campaigns, the governor vetoed the bill.

The trucking companies then sought judicial relief. Twenty-four eastern railroads, the ERPC, and Carl Byoir & Associates were joined as defendants.


28. Although the railroads themselves had used this technique since the 1930's, S. REP. No. 26, 77th Cong., 1st Sess., pt. 2, 67-69 (1941), public relations firms have become specialists in its use, Ross, op. cit. supra note 27, at 118, either in aiding their clients' efforts to receive favorable legislative treatment, see, e.g., Kelley, Public Relations and Political Power 79-82 (1956) (account of A.M.A.'s program against national health insurance), or to establish favorable relations with their business contacts, see, e.g., United States v. New York Great A. & P. Tea Co., 67 F. Supp. 626, 673 (E.D. Ill. 1946), aff'd, 173 F.2d 79 (7th Cir. 1949) (attempt to persuade agricultural producers to sell to defendant).
The truckers grounded their action on the theory that the public relations campaign violated sections 1 and 2 of the Sherman Act. Section 1 declares “Every contract, combination . . . , or conspiracy, in restraint of trade or commerce” illegal, and section 2 punishes “Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several states.” Strongly condemning defendants’ use of the third party propaganda technique, the district court found two violations of the Act—the destruction of “business good will of the long-distance truckers” with the shipping public, and the imposition of “burdensome governmental restrictions and taxes.” In addition to enjoining further use of the third party technique, the court also enjoined any attempt to disseminate material derogatory to the truckers, suggesting that destruction of good will violates the Sherman Act whether or not the relationship between the interested party and the propaganda is concealed. The injunction permitted the defendants to seek to influence legislation which would impose restrictions on plaintiffs’ business, but only if the support were openly made in the name of the railroads. The court awarded treble damages of eighteen cents to each trucker-plaintiff, and treble damages of $652,074 plus $200,000 for counsel fees to the PMTA. The Third Circuit, Chief Judge Biggs dissenting, affirmed the district court’s decision in a short per curiam opinion which merely reiterated the trial court’s conclusions of law. The Supreme Court has granted defendants’ petition for certiorari.

In discussing the first violation, the district court failed explicitly to define “business good will.” The accounting concept—an asset value representing profit-earning potential acquired in the purchase of a going concern—is not relevant in this context, since “good will” damages were awarded to only the

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34. PATON, ESSENTIALS OF ACCOUNTING 545 (1938). For a history of legal interpretations of good will, see YANG, GOOD WILL AND OTHER INTANGIBLES 26-29 (1927).
truckers' association, and an association of firms can have no self-generated, collective goodwill. By equating destruction of good will with injury to the truckers' public reputation the court appears to have meant defamation, which at common law would comprise the tort of disparagement. Prior to the Noerr decision, no appellate court had decided whether particular acts of defamation constituted a violation of the Sherman Act. Four district courts have considered this question, reaching conflicting results. Two courts denied a motion to dismiss for failure to state a claim; one reasoned that "concert of action" intended to reduce a competitor's business was sufficiently anticompetitive to constitute a violation, and the other interpreted disparaging newspaper advertisements as a "primary boycott" apparently because they dissuaded potential customers from doing business with plaintiff. In two other cases similar actions were dismissed, on the ground that plaintiff's injury was a "private wrong... remedial in some other court" and because defendant's conduct was no more than "'unfair competition' in the moral sense as defined in section 5 of the Federal Trade Commission Act..." But all four courts, unduly preoccupied with the usual forms of and remedies for business defamation, neglected to consider the real issue—whether all requisite elements of a Sherman Act violation had been alleged. While the Noerr court ignored these decisions, it did attempt to analyze the defamation charge in terms of Sherman Act requisites.

The court did not expressly indicate which section of the Sherman Act had been violated. Since there is no discussion in the opinion of section 2 considerations—relevant market, intent to monopolize, or a dangerous probability of monopoly—that the court considered section 2 violated is unlikely. Thus

35. Individual trucker plaintiffs stipulated that their only damages were those arising from the vetoed weight limit law, thus precluding individual relief for loss of good will. 155 F. Supp. at 818.
36. See Paton, Advanced Accounting 404-06 (1941).
38. See notes 10-13 supra and accompanying text.
39. Syracuse Broadcasting Corp. v. Newhouse, 236 F.2d 522, 526 (2d Cir. 1956). The Supreme Court has held that co-operative advertising by competitors is a trade association activity not ordinarily violative of the Sherman Act. Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 566 (1925); see Agnew, Cooperative Advertising by Competitors vii-viii (1926).
44. See Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 273 F.2d 218, 222 n.3 (3d Cir. 1959) (dissenting opinion).
46. But see 273 F.2d at 222 n.5. Even if the Noerr court had § 2 in mind, defendants' conduct was not a violation because there was neither evidence of sufficient monopoly
the decision must be grounded on a violation of section 1, which requires proof that a contract, combination, or conspiracy unreasonably restrains trade and causes private injury. In this event, however, it is probably incorrect. The multi-entity nature of defendants' activities satisfied the contract, combination, or conspiracy requirement of section 1. But no undue restraint (public injury) was present. While the court spoke in terms of increased costs to shippers, the record apparently fails to support this finding. Moreover, even if there had been a price increase, it probably would not have constituted a public injury; truck rates are controlled by a government commission rather than competitive market forces, and the Supreme Court has stated that the Sherman Act was intended only to prevent injury to competition. Furthermore, the Noerr court's finding of private injury, based on plaintiffs' expenditure on

47. VAN CISE, op. cit. supra note 45, at 5-10.
49. The test for an unreasonable restraint on trade is identical with the requirement that the public be injured. Compare Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940):

| The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury. |

Thus, when a restraint such as a group boycott is held unreasonable per se, the existence of a public injury may without proof be assumed to be a consequence of the restraint. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211-12 (1959); 1959 U. ILL. L.F. 1090, 1091.
50. While the Noerr court cited extensively to the record in support of its other findings, such references are conspicuously absent from its finding on this point. 155 F. Supp. at 818, 819.

public relations services designed to restore its good will,\textsuperscript{52} represents a departure from the conventional antitrust principle that private injury means loss of profits.\textsuperscript{53}

These shortcomings, however, are peculiar to the \textit{Noerr} case. In other situations, private antitrust actions could conceivably be of assistance to businesses injured by a defamatory conspiracy. Unlike the common law remedies, proof of private injury under the Sherman Act requires no showing of special damages.\textsuperscript{54} And unlike the FTC remedy, a private antitrust action would hold forth ample monetary relief; furthermore, it would not require a showing of "public interest" in order to bring suit.\textsuperscript{55} The greatest handicap in using the Sherman Act will be the necessity of proving unreasonable restraint on competition (public injury). Unless plaintiff can prove a reasonable probability that he, as a competitor, will be driven out of the market or that consumers will be injured,\textsuperscript{56} his cause of action will fail. The difficulty of assessing the

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\item\textsuperscript{52} 155 F. Supp. at 819-20.
\item\textsuperscript{53} Injury to a person's business or property, a requirement of private Sherman Act recoveries, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958), usually means loss of profits either due to decreased sales, Johnson v. Joseph Schlitz Brewing Co., 33 F. Supp. 176, 182 (E.D. Tenn. 1940), aff'd per curiam, 123 F.2d 1016 (6th Cir. 1941), or increased costs, Loder v. Jayne, 142 Fed. 1010 (E.D. Pa.), rev'd on other grounds, 149 Fed. 21 (3d Cir. 1906). See generally Bigelow v. RKO Radio Pictures, 327 U.S. 251, 262-66 (1946). But in \textit{Noerr} no lost profits were proved. While plaintiffs' public relations costs did increase, there was no evidence that the increases were required to maintain sales. Such expenditures, upon which recovery was based, could well have been directed toward influencing passage of a truck-weight-limit-increase bill.

Moreover, while an association engaged in a business does have a right to preserve its own business against unlawful anticompetitive practices, American Cooperative Serum Ass'n v. Anchor Serum Co., 153 F.2d 907, 912-13 (7th Cir. 1946), an association not engaged in business cannot recover for injuries to the individual business of members, Farmers Co-op Oil Co. v. Socony Vacuum Oil Co., 133 F.2d 101 (8th Cir. 1942); Alabama Independent Service Station Ass'n v. Shell Petroleum Corp., 28 F. Supp. 386 (N.D. Ala. 1939). Since in \textit{Noerr} plaintiff PMTA, an association acting as a mere conduit for members' public relations expenditures, had no business or property interest in the trucking industry's good will apart from the good will of each member, the Association had no standing to claim injury to itself.

\item\textsuperscript{54} See Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927).
\item\textsuperscript{55} See 2 \textit{TRADE REG. RaP. \textsuperscript{19009}} (June 6, 1960) (wherein elements of private Sherman Act action are summarized). Neither here, nor in the statute authorizing private enforcement, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 15 (1958), is there any public interest requirement.
\item\textsuperscript{56} See notes 46 supra and 78 infra; Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940).

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deleterious effects of business defamation might render this requirement a substantial bar to private antitrust suits.

A more satisfactory remedy, therefore, would be a cause of action which recognizes defamation itself as the wrong. Such actions could avoid the difficulties encountered by resort to remedies which, because they serve other policies, impose burdensome requirements on plaintiff unrelated to the merits of his basic claim to relief.

This might best be accomplished by allowing the private litigant a right of action under section 5 of the Federal Trade Commission Act. While that act does not explicitly authorize private civil litigation, amendment or judicial construction to allow private litigation seems necessary to achieve completely the policy embodied in the act's general declaration that unfair methods of competition are unlawful. Unless such litigation is permitted, the general declaration will be meaningless in all cases where the Federal Trade Commission cannot act because the public interest requirement is unfulfilled. The action could be based on the principles developed by the federal appellate courts in Federal Trade Commission cases interpreting disparagement as an unfair method of competition. As in the common law disparagement action, plaintiff would have to prove the falsity of defendant's statements; on the other hand, the common law requirement of proving special damages would probably be relaxed. And neither the public interest requirement, nor the Sherman Act's "public injury" requirement would complicate plaintiff's suit. Like the Sherman Act, however, compensatory or possibly punitive damages in suits by private litigants might be recoverable. 58

57. 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(1) (1958) ("Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.").


59. See note 21 supra.

60. The Federal Trade Commission has apparently assumed the burden of proving the falsity of defendants' disparaging statements, see, e.g., Federal Trade Commission complaint in Chamber of Commerce v. FTC, 13 F.2d 673, 686 (8th Cir. 1926). Application of Federal Trade Commission case law would exonerate defendant of liability if he proved his allegedly defamatory statements true, a defense apparently not available under the Noerr-Sherman-Act interpretation. Compare Philip Carey Mfg. Co. v. FTC, 29 F.2d 49, 52 (6th Cir. 1928) ("[Defendant's statement] was true, and we know of no standard of practice which forbids the telling of the truth, even about a competitor."), with Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 155 F. Supp. 768, 838 (E.D. Pa. 1957). But see Wolff, Unfair Competition by Truthful Disparagement, 47 Yale L.J. 1304 (1938).

61. The federal courts will probably follow some states in relaxing the requirement of proof of loss of specific sales by allowing plaintiff to show a general decline in his business unattended by causes other than defendant's disparagement. See 1 Harper & James § 6.1 at 480 n.33; e.g., Rochester Brewing Co. v. Certo Bottling Works, 80 N.Y.S.2d 925 (Sup.
dividuals or small groups could be made available. And while a trade association whose members had been disparaged could probably not recover damages for their individual injuries, the association could obtain an injunction against a continuing trade libel, a remedy not available in many common law jurisdictions.

As the second ground for its decision, the *Noerr* court found defendants' "fomentation of government restrictions and taxes" on plaintiffs' business a violation of the Sherman Act. Aside from the fundamental question whether lobbying as conducted in this case was an illegal activity, this decision was defective in two immediate respects. First, there was no proof of injury or threatened injury to plaintiffs, a requirement of the private Sherman Act action. The *Noerr* court itself apparently recognized this deficiency when it relied on the principle that a validly promulgated governmental act can cause no legal injury, although it awarded nominal damages, the award seems inconsistent with acceptance of this principle. Second, even if the court had found that the veto injured plaintiffs, it could not have imposed liability unless it also had found that defendants' propaganda activities caused the veto. To make this causal connection, however, the court would have had to examine the governor's motives for vetoing the bill; for if the governor had based his decision only upon facts and policies relevant to truck weight limits, defendants' defamatory lobbying caused no injury. The court must have found, therefore, that the governor was influenced by propaganda, and that he made a wrong decision, or at least a decision not based on all the facts. The district judge in *Noerr*, although later disavowing an examination of the governor's motives, initially suggested that such examination was permissible, relying heavily upon *Angle v. Chicago, St. P., M. & O. Ry.* In *Angle* plaintiff alleged injury on the ground that defendant's tortious conduct had caused the Wisconsin legislature to cancel a railroad-building contract and land grant. Defendant's conduct was divisible into two categories: its agents had destroyed plaintiff's ability to complete the contract by such acts as bribing his workmen and discouraging his financial supporters; second, they had communicated false information to the legislature. The Supreme Court, itself disavowing an exami-

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63. See note 53 *supra*.
64. Compare *Black & Yates v. Mahogany Ass'n*, 129 F.2d 227, 228-32 (3d Cir. 1941), *with id.* at 232-37 (3d Cir. 1942) (rehearing).
65. 166 F. Supp. at 172.
66. 155 F. Supp. at 834.
67. 166 F. Supp. at 173.
68. 155 F. Supp. at 822.
69. 151 U.S. 1 (1893).
nation of legislative motives under the rule of *Fletcher v. Peck*, made findings that both the destruction of plaintiff's business and the false representations had caused the government action. Defendant's wrong was described as "[placing plaintiff] in a position which apparently called for the action of the legislature," a form of words emphasized in the *Noerr* opinion.

In *Angle*, however, the causal connection between the government's act and defendant's torts was established by the virtual absence of an alternative governmental motive or intervening cause. Plaintiff's inability to perform his contract seems certain to have been a cause of the legislature's action, because, on the basis of conventional administrative and business considerations, legislatures generally revoke contracts when performance is not forthcoming. Even here, the existence of an intervening cause was not impossible; the legislature might have decided, coincidentally, that the railroad was unnecessary. But when the probabilities of causal effect are extremely high, the court may be justified in violating the sanctity of governmental motives, in recognition of the fact that some injurious governmental acts are a predictable and in many ways automatic response to situations created by private wrongs. The causal significance of defendant's false representations to the legislature must be assessed in the light of the unusual facts of the *Angle* case. The Court found that the erroneous information had been transmitted by bribed officers of the contractor and that "on the strength of these representations the legislature, without inquiry or hearing,... hurriedly passed an act forfeiting and revoking the grant." Although the effect of misleading information upon any governmental decision is perhaps too speculative to sustain judicial scrutiny, the apparent absence of contrary evidence before the legislature and the surface probity of the false representations created, in this case, a higher than normal probability of causal effect.

The false representation in *Angle* is perhaps analogous to the defamatory lobbying campaign in *Noerr*, but the probability of causal effect was far less. The entire campaign over truck weight limits was vigorously contested, and the governor acted only after an adversary hearing in which witnesses favorable to plaintiffs outnumbered those in opposition. Investigation of the governor's motives in such circumstances would be entirely speculative. Thus, the court could not reasonably find that the defamatory lobbying had had any causal connection to the governmental restrictions suffered by plaintiff.

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70. *Id.* at 18-19, quoting from *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).
71. 151 U.S. at 9, 24-25.
72. *Id.* at 20, quoted with emphasis in 155 F. Supp., at 821.
73. 151 U.S. at 9.
Moreover, the basic element of the “fomentation” violation—that defendants’ attempt to secure legislation injurious to competitors was unlawful—seems insupportable. The first amendment right of petition would seem to guarantee the right to lobby, subject only to the requirements of lobbying registration statutes. The manner in which the district court avoided this mandate is not clear. On the one hand, it seemed to invoke the illegal purpose doctrine, under which an act otherwise lawful is unlawful if done in furtherance of a conspiracy with an unlawful purpose. Reasoning that defendants’ ultimate purpose was “destruction” of the plaintiffs’ business, the court seemed to conclude that their lobbying activities were likewise unlawful. But the illegal purpose doctrine has been held inapplicable to lobbying activity. The Noerr court supported its conspiracy theory by reference to Sherman Act cases involving price-fixing, destruction of a competitor, and refusal to deal—traditional forms of anticompetitive behavior where defendants’ alleged purpose was to benefit from a monopoly established and maintained privately. The Noerr situation is fundamentally different, because defendants sought to benefit from a governmentally created monopoly. The power of the state to create monopolies cannot be challenged under the Sherman Act. Private efforts to bring about the exercise of this power have

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77. 155 F. Supp. at 809.

78. See, e.g., Fashion Originators’ Guild v. FTC, 312 U.S. 457, 467 (1940).

79. American Tobacco Co. v. United States, 328 U.S. 781 (1946) (circumstantial evidence of uniform pricing policies by three tobacco companies sufficient to prove monopolization).


simply been immunized. As the Supreme Court said in *American Banana Co. v. United Fruit Co.*, "it is a contradiction in terms to say that... it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper."\(^8\)

The court itself seemed to recognize this shortcoming. If illegal purpose were the critical factor in the lobbying violation, the proper relief would have been a decree enjoining all lobbying with the illegal purpose. Instead, the court enjoined only lobbying by means of the third party technique, expressly permitting defendants to campaign for antitrucker legislation if they did so under their own name.\(^8\) Thus the decree, and some portions of the opinion,\(^6\) suggest that lobbying for monopolistic privileges becomes a Sherman Act violation only when carried out anonymously.

Penalties visited upon indirect or grassroots lobbying because of its anonymity may represent an intrusion upon the first amendment rights of free speech and petition. The *Noerr* court likened indirect lobbying to picketing,\(^8\) limited

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\(^3\) *American Banana Co. v. United Fruit Co.*, 281 U.S. 302 (1930).


In the recent *Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co.*, 214 F.2d 413 (5th Cir. 1954), indistinguishable on its facts from *Noerr*, the Fifth Circuit affirmed this position, holding that defendant's use of various methods, including propaganda, to induce a state highway department to deny plaintiff permission to use a highway right of way for his powerlines was not a violation of the Sherman Act.

In *United States v. Rock Royal Co-op*, 307 U.S. 533, 558-60 (1939), the Supreme Court held that propaganda tactics by an association of dairies intended to influence the votes of milk producers in an election which resulted in an administrative order favorable to the association were not violative of the Sherman Act.

\(^8\) 166 F. Supp. at 172.

\(^9\) True, one phase of the activities was of a legislative nature—but a rather new approach to legislation, to say the least.

\(^8\) 155 F. Supp. at 814.


The *Noerr* court also relied on *Kansas City Star Co. v. United States*, 240 F.2d 643, 665, 666 (8th Cir. 1957), wherein defendant's local monopoly of news media was held a
governmental regulation of which has been held constitutional. But picketing is speech plus the act of patrolling the picket line, and may involve action irrespective of the ideas disseminated; this possibility of action justifies the regulation. The defendant railroads appealed to the public only by conventional forms of speech, without any act; thus, the court's specific analogy is inapplicable. In two instances the Supreme Court has avoided deciding whether governmental requirement of disclosure with respect to indirect lobbying is constitutional by construing disclosure or registration requirements to apply only in the case of direct or buttonhole lobbying. By implying that extension of the registration provisions of the Federal Registration of Lobbying Act to indirect lobbying would have been unconstitutional, a minority in the second of these cases, United States v. Harriss, suggests that there is a mantle of anonymity over indirect lobbying activities. The Noerr court of appeals decision, stating as a general rule that the third party technique is contrary to public policy, seems to have overlooked this objection.

Arguably, the indirect lobbyist should not be entitled to anonymity. A public informed of the sources of propaganda can better evaluate the facts and figures disseminated because the identity of the interest groups often indicates their reputation for veracity. A nom de plume which has a favorable connotation, such as "Citizens Foundation for Good Government," will induce the citizenry to attach an undeserved positive value to the propaganda. And even a neutral signature, like "Publius," will eliminate the negative value which might be attached to the propaganda were the reader aware of the pressure group's spon-

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88. Even union member solicitations, an activity factually analogous to organizational picketing, is held legally distinct from picketing, thereby invoking the first amendment's protection against state solicitor-registration requirements. Thomas v. Collins, 323 U.S. 516 (1945).

89. United States v. Rumely, 345 U.S. 41 (1953) (propaganda distributing official held not required to disclose names of purchasers to congressional committee); United States v. Harriss, 347 U.S. 612 (1954) ("indirect" lobbying registration requirements of Federal Regulation of Lobbying Act read to mean indirect direct lobbying, e.g., soliciting letters to Congressmen).

90. 347 U.S. 612, 631-33, 635, 636 (1954). See also Celler, Pressure Groups in Congress, Annals, Sept. 1958, p. 1, 8. The Court's distinction between direct and indirect lobbying is reasonable. Having close contact with legislators, the direct lobbyist is in a position to bribe or otherwise corrupt them and to misrepresent the identity and number of his backers. Cf. Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314 (1853). But the indirect lobbyist's efforts must first meet with public acceptance before they can be effective.


92. See note 98 infra.
But anonymity may be a substantial aid to the communication of ideas, especially where disclosure of their source would invoke unreasonable prejudices, causing indifference or premature rejection. Subsequent to Noerr and Harriss, the Supreme Court has recognized a right of anonymity in three nonlobbying cases, two protecting membership lists of minority group organizations from state disclosure requirements, the other striking down a municipal ordinance requiring that the names of leaflet writers or publishers appear on their products. The Court's theory in these cases was that a speaker's right to remain anonymous may be necessary to remove deterrents to free expression, such as the fear of reprisal. This theory may apply to indirect lobbying, for the same deterrents exist when persons seek to influence legislation. While the corporation pursuing its economic interest will have little to fear from reprisal and other external forces, the need to disclose identity may discourage expression by reducing the likelihood of a fair hearing. On balance, the disadvantage of anonymous propaganda is the unsure probative value of facts, a defect which can be remedied by consultation of alternative sources, given a model electorate inclined and willing to make the effort. The advantage gained would be to neutralize some of those prejudices which impair the electorate's ability to render a fair judgment of opinions.

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93. State court pronouncements of the constitutionality of statutes requiring that the names of persons responsible for election circulars appear on their publications are based on this reasoning. See State v. Freeman, 143 Kan. 315, 319, 55 P.2d 362, 365 (1936):

The estimate and regard or lack of regard in which the person or persons responsible for such publications are held by the public is often as effective in determining the result of an election as the substance of what is contained in the circular concerning the candidate.

See also Commonwealth v. Evans, 156 Pa. Super. 321, 40 A.2d 137 (1944); State v. Babst, 104 Ohio St. 167, 135 N.E. 525 (1922); People v. Arnold, 127 Cal. App. 2d 844, 273 P.2d 711 (Super. Ct. 1954). None of these state court holdings has as yet reached the Supreme Court. But see Talley v. California, 362 U.S. 60, 70 (1960) (dissenting opinion).


96. 362 U.S. at 65.

97. In Riss & Co. v. Association of Am. Rys., Trade Reg. Rep. ¶ 69736 (D.D.C. June 6, 1960), the Court held Talley's protection of anonymity not applicable to facts nearly identical to those of Noerr, reasoning that defendant railroads were in no "danger of intimidation or reprisal if their identities in connection with publicity are revealed."

The Talley Court did not say whether a right of anonymity covered commercial speech. See Talley v. California, 362 U.S. 60, 64 (1960). Compare Valentine v. Chrestensen, 316 U.S. 52 (1942) (police regulation on distribution of advertising handbills upheld), with Cammarano v. United States, 358 U.S. 498, 513 (1959) (Douglas, J. concurring) ("Those who make their living through the exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive.").

98. Compare Hays, "Full Disclosure": Dangerous Precedent, 168 NATION 121, 122 (1949) ("An idea should stand or fall on its own merits. The New Deal was not less desir-
If some surveillance of anonymous indirect lobbying is felt necessary, the efficacy of private efforts should not be discounted. Public relations excesses such as the use of misleading front organizations might be minimized if editors' or publishers' associations reported the financial backing of organizations responsible for frequent press releases in lists to be circulated among their members. Similarly, associations of public relations firms could work privately for more responsible use of anonymous propaganda.

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99. Since newspapers are peculiarly susceptible to publicity releases (the editors of Fortune estimated that nearly half the contents of the nation's better newspapers came from this source, Fortune, May 1949, p. 67, 69; see Turner, How Pressure Groups Operate, Annals, Sept. 1958, p. 63, 70), private efforts to inform editors of the sources of gratis releases would be worthwhile.

100. PEMLOTT, PUBLIC RELATIONS AND AMERICAN DEMOCRACY 245 (1951).