**STATE OF MINNESOTA** **DISTRICT COURT**

**COUNTY OF RAMSEY** **SECOND JUDICIAL DISTRICT**

**Case Type: Other Civil**

THE STATE OF MINNESOTA,

**COURT FILE NO. C1-94-8565**

BY HUBERT H. HUMPHREY, III,
ITS ATTORNEY GENERAL,

and

BLUE CROSS AND BLUE SHIELD
OF MINNESOTA,

Plaintiffs,

vs.

PHILIP MORRIS INCORPORATED,
R.J. REYNOLDS TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO CORPORATION,
B.A.T. INDUSTRIES P.L.C.,
LORILLARD TOBACCO COMPANY,
THE AMERICAN TOBACCO COMPANY,
LIGGETT GROUP, INC., THE COUNCIL FOR
TOBACCO RESEARCH - U.S.A., INC., and
THE TOBACCO INSTITUTE, INC.,

Defendants.

---

**MEMORANDUM IN OPPOSITION TO DEFENDANTS' CONSOLIDATED MOTION FOR SUMMARY JUDGEMENT BASED ON INABILITY TO PROVE CAUSATION:**

**"DEFENDANTS' RIGHT TO PETITION THE GOVERNMENT "**

## TABLE OF CONTENTS


**Page**

INTRODUCTION ..... 1

RECITAL OF DISPUTED FACTS AND STATEMENT OF SUPPORTING DOCUMENTS OF RECORD ..... 3

ARGUMENT ..... 3

I. The First Amendment Right to Petition the Government Is Not Absolute ..... 3

II. The First Amendment Does Not Confer A Constitutional Right to Disregard Promises or Undertakings ..... 5

III. Misrepresentations Made Under Oath At A Legislative Committee Hearing Are Not Protected By The Noerr-Pennington Doctrine ..... 7

IV. Illegal Conduct -- Including Making False Representations or Material Omissions Before Congress Even Though Not Under Oath -- Was Not Intended to Be Protected By the Noerr-Pennington Doctrine ..... 8

V. Re-broadcasting and Re-publication Constitutes Commercial Speech and Is Not Protected by First Amendment or Noerr-Pennington Immunity ..... 12

VI. Defendants' Conduct and Misrepresentations Before Government Authorities May Be Introduced As Evidence In This Case ..... 13

CONCLUSION ..... 14

The State of Minnesota and Blue Cross and Blue Shield of Minnesota respectfully submit this Memorandum in Opposition to Defendants' Consolidated Motion for Summary Judgment Based on Plaintiffs' Inability to Prove Causation and Based on Defendants' Right to Petition the Government. As part of their consolidated motion, defendants argue that "plaintiffs' damage claims must be dismissed to the extent they are predicated on the government action causal chain." As this presents a discrete legal issue, plaintiffs respond in this separate memorandum to the defendants' argument. ~~See~~ October 20, 1997 Order, ¶ 5.

## ~~INTRODUCTION~~

Defendants contend that "to the extent plaintiffs' causation case is based upon alleged misrepresentations or concealments made to legislatures or regulators, such activity is protected by the first amendment." Defs.' Mem., p.3. However, the most significant premise underlying defendants' argument -- the so-called "government action chain" -- is wrong. As plaintiffs have already stated, in open court, the causal chain upon which defendants' liability is based is predicated upon defendants' misconduct which caused smokers to begin and continue to smoke, thereby causing plaintiffs' losses. Ex. 1, p. 107. [1]

However, plaintiffs do anticipate that they will proffer relevant evidence at trial which relates to defendants' actions before governmental authorities, for example, misrepresentations made to Congress. Among other things, these misrepresentations were communicated to the public, including smokers, as part of defendants' ongoing fraud. In addition, defendants' actions before governmental authorities may be relevant impeachment evidence.

The law is clear that misrepresentations and material omissions made to, and concealed from, governmental authorities may properly be admitted into evidence without violating defendants' First Amendment rights. The First Amendment right to petition the government and corresponding ~~Noerr-Pennington~~ immunity are not absolute and are no broader than other First Amendment protections. As such, the First Amendment and the ~~Noerr-Pennington~~ doctrine do not operate to shield defendants for liability for breach of a duty voluntarily undertaken or for

failure to perform as promised. Similarly, the First Amendment right to petition the government and the ~~Noerr-Pennington~~ doctrine neither operate to protect certain illegal petitioning activity, such as lying under oath, nor do they operate to protect otherwise unprotected commercial speech.

Thus, defendants' contention that any and all expressions and representations made to Congress and the Minnesota Legislature are constitutionally protected, and therefore not actionable and not admissible, is in error. [1]

## ~~RECITAL OF DISPUTED FACTS AND STATEMENT OF SUPPORTING DOCUMENTS OF RECORD~~

Plaintiffs rely upon the facts set forth this memorandum and those found in Plaintiffs' Combined Recital of Disputed Facts ("Combined Recital"), which is incorporated herein.

## ~~ARGUMENT~~

### I. ~~The First Amendment Right to Petition the Government Is Not Absolute~~

The First Amendment provides, "Congress shall make no law . . . abridging the freedom . . . to petition the government for a redress of grievances." U.S.C.A. Const. Amend. 1. This First Amendment guarantee subsequently gave rise to the ~~Noerr-Pennington~~ doctrine which gives substance to the right to petition by protecting those who exercise the right from being penalized for doing so. ~~See~~ ~~Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.~~, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) and ~~United Mine Workers of America v. Pennington~~, 381 U.S 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).[2]

Plaintiffs do not dispute that the First Amendment and the ~~Noerr-Pennington~~ doctrine generally preclude the imposition of civil liability for "mere attempts to influence the legislative branch for the passage of laws or the executive branch for their enforcement." ~~California Motor Transport Co. v. Trucking Unlimited~~, 404 U.S. 508, 510, 92 S.Ct. 609, 611 (1972). However, the fundamental constitutional rights of individuals -- including those rights guaranteed by the First

---

[1] In addition to the First Amendment, defendants also raise issues relating to the separation of powers. Given the fact that defendants' purported "government action chain" is not at issue,

Amendment -- are not absolute, limitless, or unrestricted. ~~Konigsberg v. State Bar of California~~, 366 U.S. 36, 49, 81 S.Ct. 997 (1961), ~~rehearing denied~~, 368 U.S. 869, 82 S.Ct. 21 (1961). Consequently, ~~Noerr-Pennington~~ immunity is, likewise, not absolute. Three independent limitations to the guarantees of the First Amendment apply in this case:

~~First~~, parties may -- as defendants have done -- voluntarily undertake duties and promises, and, as the U.S. Supreme Court recently held, ". . . ~~Minnesota law simply requires those making promises to keep them~~" and ~~the First Amendment does not confer "a constitutional right to disregard promises that would otherwise be enforced under state law~~. . . ." ~~Cohen v. Cowles Media Co.~~, 501 U.S. 663, 671-72, 111 S.Ct. 2513, 2519 (1991) (emphasis added).

~~Second~~, certain activities, including lying under oath or employing other illegal means during petitioning, do not fall under any protection secured by the First Amendment and are therefore, not immunized by ~~Noerr-Pennington~~.

~~Third~~, false and misleading commercial speech enjoys no First Amendment protection.

## II. ~~The First Amendment Does Not Confer A Constitutional Right to Disregard Promises or Undertakings~~

Plaintiffs' Amended Complaint includes causes of action arising from defendants' voluntarily assumed duty and promises to conduct unbiased research into the health hazards of smoking, to cooperate closely with those whose task it is to safeguard the public health, and to communicate accurate and authenticated information concerning smoking and health. ~~See~~ Amended Complaint, Count 1 ("Undertaking a Special Duty") and Count 4 ("Consumer Fraud," including "false promises").

The misrepresentations and material omissions made to, or concealed from, governmental authorities constitute a breach of these undertakings and promises by the tobacco industry. Neither the First Amendment, nor ~~Noerr-Pennington~~ immunity, extends to protect defendants from civil liability for this breach.

The U.S. Supreme Court has held that First Amendment rights may be given up by

---

neither are their contentions regarding the separation of powers.

undertaking an obligation not to exercise them. In ~~Cohen v. Cowles Media Co.~~, 501 U.S. 663, 111 S.Ct. 2513 (1991) a newspaper was sued for breach of a promise (brought as a promissory estoppel claim under Minnesota law) not to publish the name of an informant who spoke only in exchange for a promise of confidentiality. Defendants argued that their First Amendment freedom of speech rights barred plaintiff's lawsuit. The Minnesota Supreme Court agreed, holding that the First Amendment right to free speech outweighed the state's interest in enforcing the promise of confidentiality. The U.S. Supreme Court disagreed and reversed.[3]

The U.S. Supreme Court held that "generally applicable laws do not offend the First Amendment simply because their enforcement . . . effects [conduct which is otherwise protected by the First Amendment]." ~~Id.~~ at 669, 111 S.Ct. at 2518. The Court then reasoned that the Minnesota doctrine of promissory estoppel is a law that is generally applicable to all of the citizens of Minnesota. The Court stated:

> ... ~~Minnesota law simply requires those making promises to keep them~~. The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information ~~are self-imposed~~.

~~Id.~~ at 671, 111 S.Ct. at 2519 (emphasis added).

The Court further stated that, "The First Amendment does not confer . . . a constitutional right to ~~disregard promises~~ that would otherwise be enforced under state law." ~~Id.~~ at 672, 111 S.Ct. at 2519 (emphasis added). ~~See also~~ ~~Food Lion Inc. v. Capital Cities, ABC Inc.~~, 887 F.Supp. 811, 822 (M.D.N.C. 1995), ~~citing~~, ~~Cohen v. Cowles Media Co.~~ (The First Amendment does not prohibit a plaintiff from recovering for a defendant's violation of generally applicable law.)

~~Cohen v. Cowles Media Co.~~ is controlling in this matter. In addition to "~~requiring those who make promises to keep them~~", ~~id~~. at 670, 111 S.Ct. at 2519, Minnesota statutory and common law require those who assume a duty to perform the duty. Accordingly, defendants' duties and obligations are self-imposed and may not be avoided by claiming immunity based

on First Amendment principles or the ~~Noerr-Pennington~~ doctrine.[2]

## III. ~~Misrepresentations Made Under Oath At A Legislative Committee Hearing Are Not Protected By The Noerr-Pennington Doctrine~~

In this case, defendants made numerous misrepresentations to, and/or concealed material facts from, Congress while providing testimony under oath. These misrepresentations and concealments are not protected by the ~~Noerr-Pennington~~ doctrine. As the U.S. Supreme Court noted in ~~Allied Tube & Conduit Corp. v. Indian Head, Inc.~~, 486 U.S. 492, 108 S.Ct. 1931 (1988), whether activity is entitled to ~~Noerr-Pennington~~ immunity depends not only on the ultimate aim of the activity (i.e. an intent to impact government decision making) but also on the context and nature of the activity. ~~Id.~~ at 504, 108 S.Ct. at 1939. The Court in ~~Allied Tube~~ noted:

> A misrepresentation to a court would not be entitled to the same . . . immunity allowed deceptive practices in the political arena . . . nor for that matter would ~~misrepresentations made under oath at a legislative committee hearing in the hopes of spurring legislative action~~.

~~Id.~~ at 504, 108 S.Ct. at 1939 (emphasis added). The purpose of the ~~Noerr-Pennington~~ doctrine is to protect against "litigation [which] threatens to chill a petitioner's right to free speech." ~~Barnes Foundation v. Township of Lower Merion~~, 927 F.Supp. 874, 877 (E.D.Pa. 1966). However, there is no First Amendment right to lie while testifying under oath before Congress or any legislative or administrative agency. Accordingly, defendants may not claim that these misrepresentations and concealments are protected.

## IV. ~~Illegal Conduct -- Including Making False Representations or Material Omissions Before Congress Even Though Not Under Oath -- Was Not Intended to Be Protected By the Noerr-Pennington Doctrine~~

---

[2] Defendants cite to ~~Senart v. Mobay Chemical Company~~, 597 F.Supp. 502 (D. Minn. 1984), which is inapposite. ~~Senart~~ involved a personal injury action arising from alleged exposure to toluene diisocyanate. Plaintiff's complaint included an allegation that manufacturers of toluene diisocyanate conspired to persuade OSHA to reject a proposal for more stringent safety standards. Plaintiff did not allege breach of a voluntary undertaking. Furthermore, although the court held that ~~Noerr-Pennington~~ barred plaintiff's claim of conspiracy, the court reasoned that even though defendants acted in concert to persuade OSHA, they sought permissible ends "~~and acted only through permissible means~~." ~~Id.~~, at 506.

The ~~Noerr-Pennington~~ doctrine was never intended to protect those who employ certain illegal means to influence government. This distinction has been noted by a number of courts.

For example, in ~~Instructional Systems Dev. Corp. v. Aetna Cas. and Sur. Co.~~, 817 F.2d 639 (10th Cir. 1987), the court reversed a motion for summary judgment because the plaintiff "presented evidence that [the defendant] bribed purchasing officials." ~~Id.~~ at 649. The court held that "~~bribery, or misuse or corruption of government processes are outside the protection of the Noerr-Pennington doctrine~~." ~~Id.~~ at 650 (emphasis added).

~~Central Telecommunications v. TCI Cablevision~~, 610 F.Supp. 891, 897 (1985), ~~cert. denied~~, 480 U.S. 910, 107 S.Ct. 1358 (1987) involved a suit arising from a bidding competition for a municipal monopoly on cable television services. The plaintiff alleged that during the time that bids were being considered by the City, defendant illegally contacted and threatened the consultant retained by the City and threatened to terminate television service to the City. ~~Id.~~ at 895. Accordingly, the court denied defendant's motion for summary judgement noting that "when accompanied by illegal or fraudulent actions, efforts to influence public officials are not exempt under the ~~Noerr-Pennington~~ doctrine." ~~Id.~~ at 897.

Likewise, in ~~Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Etc. Loc. 150~~, 440 F.2d 1096 (9th Cir. 1971), ~~cert. denied~~, 404 U.S. 826, 92 S.Ct. 57 (1971), plaintiffs alleged "that due to threats, duress and other coercive measures exercised upon the California State Fair officials, the officials issued a directive forbidding the sale of any Coca-Cola upon the fairgrounds during the 1966 State Fair." ~~Id.~~ at 1096. The Court held that "the doctrine of ~~Noerr-Pennington was not intended to protect those who employ illegal means to influence their representatives in government~~." ~~Id.~~ at 1099 (emphasis added).

In ~~Westborough Mall v. City of Cape Girardeau, Mo.~~, 693 F.2d 733 (8th Cir. 1982), ~~cert. denied~~, ~~Drury v. Westborough Mall~~, 461 U.S. 945, 103 S.Ct. 2122 (1983), the Eighth Circuit reversed a summary judgment which had been entered on ~~Noerr-Pennington~~ grounds holding that "[b]ecause the plaintiffs have presented facts that support an ~~inference of unlawful conduct~~ -

city officials may have been induced by the . . . defendants by means other than legitimate lobbying to illegally revert plaintiff's . . . zoning -- ~~the Noerr doctrine may not be relied upon~~." ~~Id.~~ at 746 (emphasis added).

In ~~Cipollone v. Liggett Group, Inc.~~, 668 F.Supp. 408 (D.N.J. 1987), a cigarette personal injury case cited by defendants, the court drew a distinction between different types of illegal conduct in deciding a motion in limine filed by tobacco companies. Although the ~~Cipollone~~ court was not asked to consider specific evidence, plaintiffs indicated an intent to introduce evidence of 1) financial rewards to members of Congress and 2) instances of providing false and misleading information to improperly influence legislation. ~~Id.~~ at 409. The court noted, "the purpose behind the ~~Noerr-Pennington~~ rule -- that the exercise of First Amendment freedoms should not be chilled by the threat of potential liability -- does not extend to lobbying methods that '~~subvert the integrity of the governmental process~~.'" ~~Id.~~ at 410, ~~quoting~~ ~~Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n~~, 663 F.2d 253, 262 (D.C.Cir. 1981) (emphasis added). Thus, the court held that any evidence of "financial rewards to legislators" would not be excluded from trial. ~~Id.~~

With respect to statements to Congress, the court in ~~Cipollone~~ did state, as quoted by defendants, that "The claim of furnishing false and misleading information to Congress, if true, although unethical and reprehensible, is entitled to protection as political speech." 668 F.Supp. at 410; ~~see~~ Defs.' Mem., p. 26. However, defendants fail to note the very next sentence of ~~Cipollone~~:

> However, the Supreme Court has made plain that such evidence is admissible under certain circumstances.

~~Id.~~ Thus, as noted below in Section VI, the court deferred considering the admissibility of defendants' statements to Congress until trial.

Plaintiffs recognize that there are cases which imply that misrepresentations to Congress and/or members of a state legislature may be entitled to some ~~Noerr-Pennington~~ protection. Plaintiffs submit that these rulings are inconsistent with other cases denying such protection for

illegal conduct.[4] As discussed more extensively in plaintiffs' Memorandum in Opposition to the Tobacco Institute's Motion for Summary Judgement (On First Amendment Grounds), the First Amendment does not immunize commercial speech which is false, misleading or deceptive. Accordingly, logic dictates that ~~Noerr-Pennington~~ immunity not be extended to immunize defendants' illegal conduct. Moreover, as noted above, even in ~~Cipollone~~, the court found that while furnishing false information to Congress "is entitled to protection as political speech," the court also noted that "the Supreme Court has made plain that such evidence is admissible under certain circumstances." 665 F. Supp. at 410.

**V. ~~Re-broadcasting and Re-publication Constitutes Commercial Speech and Is Not Protected by the First Amendment or Noerr-Pennington Immunity~~**

Petitioning activity does not include statements and representations made to the public for purposes other than seeking to influence or encourage legislative or executive activity. In this case, defendants have intentionally re-published and publicly disseminated, for promotional purposes, numerous statements and representations made during petitioning activity. For example:

- A February 19, 1976 press release created by The Tobacco Institute: "Horace R. Kornegay, president of The Tobacco Institute . . . testified that . . . as the free market system works out, more than 80 percent of U.S. cigarettes today yield medium or low 'tar' levels, . . . He quoted several scientists who . . . remain unconvinced that smoking causes disease . . ." Ex. 2.

- A September 7, 1978 press release prepared by The Tobacco Institute stated: "The following statement was made by Horace R. Kornegay, president of The Tobacco Institute, in connection with hearings held today by the Tobacco Subcommittee of the House Agriculture Committee: 'Congress has finally heard what so many of us have been convinced of for a long time, that tobacco smoke has not been shown to cause disease . . .' 'This evidence should . . . put an end to efforts to make smokers social outcasts.'" Ex. 3.

- A March 25, 1994 press release from The Tobacco Institute stated: "The House Subcommittee on Health and the Environment today was told clearly and unequivocally that...[c]igarette manufacturers do not 'manipulate' the level of nicotine in various brands." Ex. 4.

Statements such as these, in furtherance of defendants' public relations campaign, constitute commercial speech. False, deceptive, and misleading commercial speech is not entitled to First Amendment protection and is, therefore, constitutionally actionable. ~~Ibanez v.~~

~~Florida Department of Business and Professional Regulation, Board of Accountancy~~, 512 U.S. 136, 114 S.Ct. 2084, 2088 (1994).

## VI. ~~Defendants' Conduct and Misrepresentations Before Government Authorities May Be Introduced As Evidence In This Case~~

Even assuming, for the sake of argument only, that defendants' statements and misrepresentations before governmental agencies cannot themselves furnish a basis for civil liability under the Amended Complaint, they have evidentiary value and are admissible. The U.S. Supreme Court specifically noted the potential admissibility of such evidence in ~~United Mine Workers of America v. Pennington~~, 381 U.S. 657, 85 S.Ct. 1585 (1965):

> It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under 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 tends reasonably to show the purpose and character of the particular transactions under scrutiny.'

~~Id.~~ at 670 n.3, 85 S.Ct. at 1593-1594 n.3. ~~See also~~, ~~Cipollone v. Liggett Group, Inc.~~, ~~supra~~; ~~U.S. Football League v. National Football League~~, 634 F.Supp. 1155, 1180-1181 (S.D.N.Y. 1986); ~~Feminist Women's Health Center, Inc. v. Mohammed~~, 586 F.2d 530, 543 n.7 (5th Cir. 1978).

Thus, the court in ~~Cipollone~~, quoting the above language from ~~United Mine Workers~~, deferred ruling on the admissibility of particular evidence until trial. The court stated that "the court, at this time, cannot evaluate whether the specific evidence to be offered is probative . . . and whether any probative value is outweighed by undue prejudice." 668 F.Supp. at 411. Accordingly, the court denied the motion in limine. Similarly, in this case the evidence must be considered at trial.

## ~~CONCLUSION~~

For all of the foregoing reasons, plaintiffs respectfully request that this Court deny defendants' motion.

Dated this 4th day of November, 2000.

RESPECTFULLY SUBMITTED,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By ~~/s/ Roberta B. Walburn~~
Michael V. Ciresi (#16949)
Roberta B. Walburn (#152195)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

Janette L. Skeels

444 Market Street, Suite 2700
San Francisco, California 94111-5332
(415) 399-1800

SPECIAL ATTORNEYS FOR THE STATE OF MINNESOTA
AND
ATTORNEYS FOR BLUE CROSS AND BLUE SHIELD OF MINNESOTA

· At one hearing, plaintiffs stated: "[D]efendants have come up with a new theory, that is the causal chain in this c
's through the legislature. That is not nor has it ever been the plaintiffs' theory of this case." (Unless specifically reference
Combined Recital, all exhibits to this memorandum are to the Affidavit of Vincent J. Moccio in Support of Plaint
morandum in Opposition to Defendants' Motion for Summary Judgment Based on Inability to Prove Causat
fendants' Right to Petition the Government.")

· Although the ~~Noerr-Pennington~~ doctrine arose in the context of the Sherman Act and claims of anti-competi
vity occurring through the petitioning process, some courts have subsequently extended the doctrine beyond antit
ms. In ~~Kellar v. Von Holton~~, 568 N.W.2d 186 (Minn.App. 1997), the Minnesota Court of Appeals noted that whether or
~~rr-Pennington~~ bars tort claims was an issue of first impression. The court determined that the issue before it did not req
announce adoption of the ~~Noerr-Pennington~~ doctrine, but in dicta the court rejected appellant's argument that
~~rr-Pennington~~ doctrine applies only in antitrust actions. ~~Id.~~ at 193.

· On remand, the Minnesota Supreme Court sustained the verdict on a promissory estoppel theory. ~~Cohen v. Cov~~
~~dia Co.~~, 479 N.W.2d 387 (Minn. 1992).

· These cases are also inconsistent with the U.S. Supreme Court's holding in ~~McDonald v. Smith~~, 472 U.S. 479, 105 S.Ct. 2
85) that the right to petition the government for redress is not an absolute privilege.