Widener University

School of Law
Environmental & Natural Resources Law Clinic

Widener School of Law Environmental & Natural Resources Law Clinic's Citizens Guide to Strategic Lawsuits against Public Participation (SLAPP) in Pennsylvania

SUMMARY

Citizens concerned about environmental problems have certain legal protections under Pennsylvania law when they communicate with government officials. Declaring that "it is contrary to the public interest to allow lawsuits, known as Strategic Lawsuits Against Public Participation (SLAPP), to be brought primarily to chill the valid exercise by citizens of their constitutional right to freedom of speech and to petition the government for the redress of grievances," 27 Pa. C.S.A. § 8301, the Participation in Environmental Law or Regulation Act provides immunity to any person who files a lawsuit/appeal or makes an oral or written communication to a government entity relating to the enforcement or implementation of an environmental law or regulation. Thus, to claim immunity under the Act, the citizen's lawsuit/appeal or communications must be:

- directed at government officials
- related to the enforcement or implementation of an environmental law or regulation
- aimed at procuring favorable government action

The Act does not apply (and therefore does not protect the citizen) if the citizen's lawsuit/appeal, actions, or communications are one of the following:

- knowingly false, deliberately misleading, or made with malicious and reckless disregard for the truth or falsity (for example, claiming the property was contaminated when knowing it was not)
- made in "bad faith" for the sole purpose of interfering with existing or proposed business relationships
- is a wrongful use or abuse of process (like filing an appeal after the time for appeal has expired)

In addition, the right to petition the government for redress of grievances in the First Amendment may provide additional protection.

This document contains only general information. It is not an attorney-client communication, is not intended to provide legal advice or assistance or to solicit or create an attorney-client relationship, and does not create an attorney-client relationship between the Widener Environmental and Natural Resources Law Clinic and the reader. You should consult a lawyer about your specific circumstances.

MORE-DETAILED GENERAL DESCRIPTION OF THE LAW

As concerned citizens, you have the constitutional right to participate in your local government. To assure citizens of this right, the Pennsylvania General Assembly passed the Participation in Environmental Law or Regulation Act. The policy and purpose of the Act, found at 27 Pa.C.S.A. §8301-8305, was described as follows:

> "The General Assembly finds and declares as follows: (1) It is contrary to the public interest to allow lawsuits, known as Strategic Lawsuits Against Public Participation (SLAPP), to be brought primarily to chill the valid exercise by citizens of their constitutional right to freedom of speech and to petition the government for the redress of grievances. (2) It is in the public interest to empower citizens to bring a swift end to retaliatory lawsuits seeking to undermine their participation in the establishment of State and local environmental policy and in the implementation and enforcement of environmental law and regulations."

EXTENT OF IMMUNITY

The Act provides immunity for any person who (1) either files a lawsuit/appeal or (2) makes an oral or written communication to a government entity relating to the enforcement or implementation of an environmental law or regulation. This immunity extends to civil liability for legal proceedings seeking damages, as long as their actions were "aimed at procuring favorable governmental action." Therefore, for a citizen to be immune from liability, their actions or communications must be (1) directed at government officials, (2) related to the enforcement or implementation of an environmental law or regulation, (3) aimed at procuring favorable governmental action.

Although the Act allows a certain level of immunity, three exceptions are contained in §8302. ***First***, if the allegation in the action or communication is knowingly false, deliberately misleading or made with malicious and reckless disregard for its truth or falsity, the citizen's actions are not immune. For example, in Penllyn Greene Associates, L.P. v. Clouser, citizens made comments to the media stating that the proposed development site was contaminated with various pollutants; in reality, the state Department of Environmental Protection had already declared the property as clean, therefore rendering the statements either false or made with reckless disregard for falsity. The court therefore did not extend immunity to citizen's actions under this exception.

Second, if the allegation in the action or communication is made in bad faith – for example, made for the sole purpose of interfering with existing or proposed business relationships, the citizen's actions are not immune. How far this exception extends is not clear. In Pennsbury Village Associates, LLC v. McIntyre, for example, the citizen was a party to a settlement agreement allowing several easements to the developer for placement of an access road (the placement of which would be determined by the township), and the developer therefore argued that the citizen's actions were only aimed at interfering with the provisions of this stipulation. The Commonwealth Court sided with the citizen in this case, claiming that the motives behind his actions were irrelevant as long as his communications were related to an environmental law or regulation and were aimed at procuring favorable governmental action. However, on appeal, the Pennsylvania Supreme Court

held that while the communications were related to an environmental law or regulation and were aimed at procuring favorable governmental action, the Commonwealth Court failed to acknowledge that the citizen waived his right to the statutory immunity through the settlement agreement it entered into. The court stated that "[the] settlement agreement provides an overriding legal basis rendering statutory immunity unavailable to [a citizen] as it constitute[s] a pre-existing legal agreement directly speaking to the [issue at hand]."

Third, if the oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation is later determined to be a wrongful use or an abuse of process, the citizen's actions are not immune. This exception effectively denied immunity to the citizen in Pennllyn, primarily due to untimely zoning appeals nearly nineteen months after initial approval (an appeal usually must be filed within 30 days of the decision). Moreover, although the appeal was untimely, appellants were granted a hearing date and continuances, but withdrew only three hours before the scheduled hearing. This was ultimately seen as "an instance of using the legal process solely as a weapon to harass."

Finally, in order for a court to apply any one of these exceptions to immunity for a citizen, it must ALSO find that the action or communication is not relevant to the enforcement or implementation of an environmental law or regulation. This prerequisite has left courts open to determination and application of the immunity clause from case to case, as discussed below.

ENVIRONMENTAL LAW OR REGULATION

In order for communications to be immune under the Act, they must relate to the enforcement or implementation of an "environmental law or regulation." There is some uncertainty as to how far PA courts will extend the Act's immunity when the underlying regulations relate to land use and zoning.

Pennllyn Greene Associates, L.P. v. Clouser, decided in 2005, is a narrow interpretation of "environmental law." The citizens in this case filed both land use and zoning appeals and charged that the approvals were arbitrary and in opposition to the township and municipal planning code. Here the court determined that citizen's appeals, although having a somewhat attenuated link to an environmental issue, were not protected under the Act as related to enforcement or implementation of environmental law.

Pennsbury Village Associates, LLC v. McIntyre, decided in 2008, broadened the definition of "environmental law or regulation." In that case, the citizen made comments to public officials urging them to forgo approval of land development in Chester County. As in Pennllyn, the comments were made in opposition to a land use approval and had an attenuated link to an environmental regulation (specifically, open space requirements under the township ordinance), but here the court extended immunity to the citizens under the Act. In allowing immunity, the court defined environmental as "of, relating to, or associated with the environment, OR relating to or being concerned with the ecological impact of altering the environment." Although this case was overruled in 2011, that ruling did not affect the definition of environmental law or regulation, as the court reversed on other grounds (those grounds being that the citizen had entered into a legally

binding settlement agreement speaking directly to the issue at hand, thus rendering any statutory immunity unavailable).

PROTECTION UNDER THE NOERR PENNINGTON DOCTRINE OF THE FIRST AMENDMENT

A second source of protection for citizens can be found in the right to petition for redress of grievances recognized in the first amendment of the United States Constitution. The explanation and application of this right is found in what is called the *Noerr Pennington* doctrine, which derives its name from two famous United States Supreme Court cases.

The doctrine has its origins in the 1961 decision *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.* In that case, a group of trucking companies sued a group of railroads, claiming that the railroads had conspired to restrain trade and monopolize the long-distance freight business. The Supreme Court found that it was "clear" that the Sherman Act did not prohibit "two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."[1] While laying out this exemption, the Court also noted that, however, "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor ..." and thus the exemption does not apply.[2]

The basic immunity in *Noerr* was reaffirmed by the Supreme Court in *United Mine Workers v. Pennington*.[3] In *Pennington*, several large coal companies attempted to eliminate the competition of smaller coal companies by persuading the Secretary of Labor to set a higher minimum wage. The United States Supreme Court found that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself even though intended to eliminate competition."[4]

While the *Noerr Pennington* doctrine initially arose in the anti-trust field, the doctrine has been expanded to protect the First Amendment petitioning of the government from claims brought under the federal and state law, including environmental actions.[5] For example, in *Protect Our Mountain*

---

[1] *Noerr*, 365 U.S. at 136.

[2] *Id.*, at 139.

[3] 381 U.S. 657 (1965).

[4] *Id.*

[5] *See e.g.*, *Santana Products, Inc. v. Bobrick Washroom Equipment, Inc.*, 249 F. Supp.2d 463 (M.D.Pa. 2003), *aff'd in part, vacated in part, remanded on other grounds*, 401 F.3d 123 (3d Cir. 2005) (applying *Noerr Pennington* doctrine to Lanham Act and tortious interference claims); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999) (*Noerr* immunity applies to tortious interence and unfair competition claims); VIM, Inc. v. Somerset Hotel Ass'n, 19 F. Supp. 2d 123 (W.D. Pa. 1998), aff'd, 187 F.3d 627 (3rd. Cir, 1999) (noting that it is

Environment, Inc. v. District Court In and For Jefferson Country,[6] a developer who had obtained rezoning decisions from a board of county commissioners filed a complaint for damages based on the tort of abuse of process and civil conspiracy against an environmental group and two individuals. The environmental group and two individuals challenged the ruling denying their motion to dismiss based on the environmental group's First Amendment right to petition the court for redress of grievance. Upon finding that that the group's suit challenging a rezoning determination was filed pursuant to the rule which provided an exclusive judicial remedy for challenging rezoning determination, there was no showing at the dismissal hearing that the group's legal activities were undertaken primarily to harass the developer who obtained a rezoning decision or to accomplish some other improper objective for purpose of the sham exception to the *Noerr Pennington* immunity doctrine, and it could not be determined on the basis of the pleading alone that the complaint challenging the rezoning was without a reasonable basis, the court determined that summary denial of the motion to dismiss was not warranted, where the motion was based on the group's right to petition the court.

Similarly, in *Charter Tp. Of Union v. United Investments, Inc.*,[7] the court found that the appellee's activity of speaking publicly and petitioning the town government for enforcement of existing zoning laws against the appellant was protected by the First Amendment and the *Noerr Pennington* doctrine. The Court noted that this would be so even were the appellees to have had an ulterior motive of interfering in the appellant in the appellants business relationships. The Court noted that unless the activity in question is a sham, the knowing infliction of injury from petitioning does not render the campaign illegal because to hold otherwise would be tantamount to outlawing all such campaigns. Thus, the *Noerr Pennington* doctrine is a principle of constitutional law barring litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted. Moreover, the Court added, that the United States Supreme Court had found that the sham exception to the *Noerr Pennington* involves a plaintiff whose activities are not genuinely aimed at procuring government action at all, whereas in the instant case, the appellees had not only sought legitimate government action, but had obtained it in the form of a legitimate suit by the town for enforcement of the zoning law, which has been recently settled by consent judgment.

---

clear that Noerr Pennington doctrine applies to civil conspiracy, tortious interference, and malicious use of process claims); *Zeller v. Consolini*, 758 A.2d 376 (Conn. 2000) (noting that although the *Noerr Pennington* doctrine of immunity is most often asserted against anti-trust claims, the court acknowledged that the doctrine is equally applicable to many types of claims that seek to assign liability on the basis of a defendant's exercise of its First Amendment rights); *Keller v. VontHoltrum*, 568 N.W. 2d 186 (Minn. Ct. App. 1997) (noting that the *Noerr Pennington* immunity doctrine is not limited to the antitrust context); *Arim v. General Motors Corp.*, 520 N.W.2d 695 (Mich. Ct. App. 1994) (noting that the *Noerr Pennington* doctrine is not limited to federal anti-trust actions, but may be invoked in other actions under state or federal law to protect the First Amendment right to petition the government).

[6] 677 P.2d 1361 (Colo. 1984).

[7] 2001 WL 936765 (Mich. Ct. App. 2001).

In comparison, in *Village of Lake Barrington v. Hogan*,[8] objecting citizen voters and property owners brought a counterclaim against a village alleging that their rights were violated by the village's suit, which sought a declaration that village ordinances adopting a special area were valid and alleging that the citizens' threats to litigate the special service area constituted tortious interference with contract and tortious interference with economic advantage. The court found that the village was not entitled to file the sham litigation even if the declaratory judgment count had merit, and the village's tort claim were clearly barred by the citizens' conditional privilege arising out of their own right to seek redress of grievance under the First Amendment.

The United States Supreme Court seems to have broadened the scope of protected activities and narrowed its view of the "sham" exception since issuing the *California Motor Transport Co. v. Trucking Unlimited*.[9] In *California Motor Transport Co.*, a group of truckers allegedly had conspired together to deter competitors from obtaining new or expanded operating rights from the California Public Utilities Commission and the Interstate Commerce Commission by opposing every such application, regardless of the merits. Rather than defining the parameter of the sham exception, the Court listed several examples of the sham exception, such as "perjury of witnesses," "use of a patent obtained by fraud to exclude a competitor from the market," "conspiracy with a licensing authority to eliminate a competitor," and "bribery of a public purchasing agent".

Later in *City of Columbia v. Omni Outdoor Advertising*,[10] the Supreme Court noted that the sham exception to the *Noerr Pennington* doctrine encompassed situations in which persons used the governmental process - as opposed to the outcome of that process - as an anti-competitive weapon. A classic example, the Court stated, was filing a frivolous objection to the license application of a competitor, with no expectation of achieving denial of the license, but simply in order to impose expenses and delay. In other words, the sham exception involves a defendant whose activities were not genuinely aimed at procuring favorable government action at all. The Court in *Omni* concluded that the sham exception does not apply as the action was aimed at procuring favorable government action. However, it is worth noting that although courts in recent years have demonstrated reluctance to find a sham exception to the *Noerr Pennington* doctrine with respect to actions seeking a zoning change, or attempting to block such a change,[11] this should not be seen as immunizing all such actions.

---

[8] 272 Ill. App. 3d 225.

[9] 404 U.S. 508 (1972).

[10] 499 U.S. 365 (1991).

[11] See. e.g., *Oberndorf v. City & County of Denver*, 900 F.2d 1434 (10th Cir. 1990); *Westborough Mall, Inc. v. City of Cape Cirardeau, Mo.*, 693 F.2d 733, 746 (8th Cir. 1982); *Liberty Lake Invs., Inc v. Magnuson*, 12 F.3d 155 (9th Cir. 1982).

CONCLUSION

The right to participate in government is a fundamental right of citizens. The *Noerr Pennington* doctrine and the Participation in Environmental Law or Regulation Act seeks to ensure citizen immunity for communications made to the government in good faith and seeking favorable action on matters of environmental law or regulations. However, it is important for the citizen to realize that not all actions will be considered immune under the *Noerr Pennington* doctrine or the Act. Further, both interpretations of the meaning of "Environmental law" are still valid in Pennsylvania. To determine if particular actions or communications fall within the *Noerr Pennington* doctrine or the Act's protections, you should contact an attorney and seek legal advice.

This document contains only general information. It is not an attorney-client communication, is not intended to provide legal advice or assistance or to solicit or create an attorney-client relationship, and does not create an attorney-client relationship between the Widener Environmental and Natural Resources Law Clinic and the reader. You should consult a lawyer about your specific circumstances.