

Circuits Reinforce Split over When *Noerr-Pennington* Shields Serial Litigants

Dylan Carson and Scott Russell

Filing lawsuits to injure rivals—especially nascent competitors—is as old as the hills and as American as apple pie.¹ As competition law developed in the 20th century, so did the risk of antitrust liability for dominant firms that attempted to protect their market position by burdening rivals with litigation.² For example, in 1938, a group of radio speaker manufacturers were subjected to Section 1 scrutiny for filing at least 54 patent infringement lawsuits, along with additional letters threatening infringement suits. As the Ninth Circuit stated, “We may assume that each of those acts would be lawful, and still a conspiracy might be shown. If the agreement has an unlawful purpose, it is a conspiracy, notwithstanding that the means used to carry it out were lawful.”³ Litigation, it has been said, “can be an integral part of a scheme prohibited by the Sherman Act.”⁴

In the 1960s, however, the Supreme Court conferred antitrust immunity on lawsuits filed against rivals with the creation of the *Noerr-Pennington* doctrine. That doctrine immunizes formal requests—such as litigation and regulatory protests—to secure government action intended to harm competitors, except when that petitioning is a “sham.”⁵ A sham, as the term implies, is not a legitimate effort to exercise the constitutionally protected right to petition the government to redress a grievance; rather, it is a cover for the “true” purpose of employing the courts or regulatory machinery of government in bad faith to inflict economic pain upon a competitor. That pain can take many forms, including raising rival’s costs, erecting costly entry barriers, delaying or deterring entry, or using a combination of obstacles to drive a rival out of business.⁶

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¹ See, e.g., *United States v. Krasnov*, 143 F. Supp. 184, 195 (E.D. Pa. 1956), *aff’d*, 355 U.S. 5 (1957) (“The financial strength of Dyer-Gruen-Jackson, Inc., was carefully checked and when it was found that it was weak and, in fact, almost out of business, it was decided to institute suit against that company.”); *Picard v. United Aircraft Corp.*, 128 F.2d 632, 641 (2d Cir. 1942) (Frank, J., concurring) (“[T]he expense of defending a patent suit is often staggering to the small businessman. And there is reason to believe that, unable, for that reason, to defend a threatened patent suit, many persons capitulate to a well financed patentee without litigating . . .”).

² See, e.g., *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 424–25 (10th Cir. 1952) (noting that, “although Kobe believed some of its patents were infringed, the real purpose of the infringement action and the incidental activities of Kobe’s representatives was to further the existing monopoly and to eliminate Dempsey as a competitor” and commenting that “we must not permit the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition.”).

³ *Lynch v. Magnavox Co.*, 94 F.2d 883, 889 (9th Cir. 1938).

⁴ *Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755, 760 (9th Cir. 1970), *aff’d*, 404 U.S. 508 (1972); see also *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 62 (D. Minn. 1971), *aff’d in part, vacated and remanded in part*, 410 U.S. 366 (1973) (“One who enjoys a monopoly may not resort to litigation for the purpose of illegally maintaining the monopoly.”).

⁵ See generally Maxwell M. Blecher & Joel R. Bennett, *Litigation as an Integral Part of a Scheme To Create or Maintain an Illegal Monopoly*, 26 MERCER L. REV. 479 (1975).

⁶ See Gary Myers, *Litigation as a Predatory Practice*, 80 KY. L.J. 565, 586–96 (1992) (cataloging cases where abusive litigation was used as tool to compete).

Although the Supreme Court expressly carved out a sham exception to *Noerr-Pennington* immunity, lower courts disagree over the applicable standard when multiple lawsuits are challenged as sham petitioning. In 2020, two cases solidified a 5-2 circuit split on this issue, but no cert petition was filed in either case. The majority of circuits—the Second, Third, Fourth, Ninth, and Tenth—have held that a different analysis applies when the legality of a pattern of lawsuits or petitions is challenged than when just a single petition is at issue. When multiple lawsuits are implicated, these courts have held antitrust immunity may be lost under the sham exception if the series of petitions demonstrates a pattern of filings made solely to inflict harm through burdensome process, without consideration of the merits or interest in the requested relief. As a result, the majority of circuits have held that the overall pattern of filings can qualify as a sham—therefore subject to antitrust scrutiny and damages—even if a small percentage of the petitions were objectively reasonable or ultimately proved successful.

In contrast, two circuits—the First and Seventh—have held that a separate standard for immunity does not apply when scrutinizing a pattern of sham petitioning. In those circuits, every petition is subject to the same two-step test: (1) whether it was objectively baseless (i.e., had no reasonable chance of success) and if so, (2) whether the subjective intent of the petitioning was to harm a rival. Under this standard, only objectively baseless petitions can give rise to potential antitrust liability, and *Noerr-Pennington* shields a pattern of petitions which had merit, were successful, or at least were objectively reasonable. As a result, an antitrust defendant who succeeds in barring entry of a competitor or raising its rival's costs through a long series of unsuccessful lawsuits or administrative petitions may be immunized from liability so long as each unsuccessful petition had a reasonable chance of success (even if achieving that success was not the purpose of the petitioning).

The right to petition provides antitrust immunity to petitioners even when they weaponize that petitioning in an effort to harm rivals, unless the petitioning is a “sham.”

With the split now covering more than half of the federal circuits, the issue of when the *Noerr-Pennington* doctrine shields litigants who file a series of lawsuits or regulatory petitions is ripe for Supreme Court resolution. In 2018, the Supreme Court declined to grant certiorari to review the First Circuit's decision on the issue, and in 2020, the unsuccessful plaintiff declined to appeal the Seventh Circuit's decision on the issue. Until Supreme Court review occurs, antitrust practitioners tussling with potential sham litigation claims—which frequently arise in pharmaceuticals, health care, telecommunications, and other patent-intensive sectors—lack the certainty needed to advise historically litigious clients of the antitrust risk associated with filing additional lawsuits against rivals. From the perspective of antitrust practitioners (and their clients) with a vested interest in the predictability of outcomes, this is unfortunate since “federal [antitrust] law, in its area of competence, is assumed to be nationally uniform, whether or not it is in fact.”⁷

Establishing the Sham Exception to *Noerr-Pennington* Immunity

The Petitioning Clause of the First Amendment guarantees the right “to petition the Government for a redress of grievances.”⁸ The right to petition provides antitrust immunity to petitioners even when they weaponize that petitioning in an effort to harm rivals, unless the petitioning is a “sham.” In 1961, the Supreme Court established the sham exception to antitrust immunity in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*⁹

⁷ *In re Pittsburgh & Lake Erie R.R. Co. Sec. & Antitrust Litig.*, 543 F.2d 1058, 1065 n.19 (3d Cir. 1976).

⁸ The right to petition is one of “the most precious of the liberties safeguarded by the Bill of Rights.” *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967).

⁹ *Eastern R.R. Presidents' Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961).

In *Noerr*, truck operators sued railroad companies for running a public relations campaign encouraging laws which would harm the trucking business, a competitor in the long-distance freight hauling business. The railroads admitted their publicity campaign was designed to influence state lawmaking and enforcement regarding overweight trucks and taxing heavy vehicles for claimed damages to the roads from those trucks.¹⁰ After the U.S. District Court for the Eastern District of Pennsylvania held the railroads liable for their publicity campaign under the Sherman Act (but found that the truckers were not liable for a similar publicity campaign targeted at the railroads), the case made its way to the Supreme Court, which held that “no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws.”¹¹ The First Amendment’s Right to Petition protects such conduct.

The Court stated that “the Sherman Act does 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.”¹² The Court held that the railroads’ campaign was immune from antitrust scrutiny even though “the railroads’ sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business” because it is “neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.”¹³

Importantly, however, the Court carved out an exception to immunity for “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 in those situations, “the application of the Sherman Act would be justified.”¹⁴ As a result, the Court held that the Sherman “Act was not violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement.”¹⁵ The Court, however, did not elaborate how lower courts should distinguish valid petitioning from a “mere sham.”

Nor did the Court elaborate on the sham exception to antitrust immunity in *United Mineworkers of America v. Pennington*.¹⁶ In that 1965 case, a coal miner union and large mining companies had asked the U.S. Secretary of Labor to establish a high minimum wage for companies selling to the Tennessee Valley Authority (TVA) and had also petitioned the TVA to limit certain coal purchases, all with the goal of driving smaller, nonunion mine operators out of business.¹⁷ On appeal, the Supreme Court reversed an antitrust verdict against the union, holding that “*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.”¹⁸ The Court reiterated that an “anticompetitive purpose did not illegalize the conduct” of a group of

¹⁰ *Id.* at 131.

¹¹ *Id.* at 135.

¹² *Id.* at 136.

¹³ *Id.* at 138–39.

¹⁴ *Id.* at 144.

¹⁵ *Id.* at 145.

¹⁶ 381 U.S. 657 (1965).

¹⁷ *Id.* at 660.

¹⁸ *Id.* at 670.

firms seeking to influence public officials in an attempt “to destroy” another group of competitors: “Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”¹⁹

In 1972, the Court elaborated on sham petitioning in *California Motor Transport Co. v. Trucking Unlimited*.²⁰ There, in a suit similar to *Noerr*, a group of rival trucking companies allegedly conspired to monopolize “the highway common carriage business in California and elsewhere” by “institut[ing] state and federal proceedings to resist and defeat applications by [the plaintiff truckers] to acquire operating rights or to transfer or register those rights.”²¹ The defendant truckers’ conduct “extend[ed] to rehearings and to reviews or appeals from agency or court decisions” regarding the trucking rights.²²

Plaintiffs alleged that the defendant truckers “instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases” to “bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process.”²³ Based on allegations that serial litigants were not seeking government action but instead were deploying their “power, strategy, and resources” to block rivals from securing needed government licenses through repetitive petitions, the Supreme Court held that “a pattern of baseless, repetitive claims” can constitute sham petitioning when it “leads the factfinder to conclude that the administrative and judicial processes have been abused.”²⁴

Since *California Motor*, the Supreme Court has not addressed the standard for determining when repetitive petitions constitute a sham, nor has the Supreme Court opined on the minimum number required to demonstrate a pattern of sham petitioning. In 1973, the *Otter Tail* Court confirmed that *California Motor* defined sham litigation as “evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims.”²⁵ In 1988, the *Allied Tube* Court noted that, “in whatever forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action.”²⁶ And in 1991, the *Omni* Court stated that a “classic example” of sham petitioning “in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon” would be “the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay.”²⁷

In 1993, in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, the Court provided its most robust treatment to date of the sham exception.²⁸ In *PRE*, the Court considered a hotel operator’s antitrust challenge to a single copyright infringement lawsuit, brought by a group of movie studios, to bar the hotel from renting their movies to guests. While considering whether

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¹⁹ *Id.* at 669, 670.

²⁰ *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

²¹ *Id.* at 509, 511.

²² *Id.* at 509.

²³ *Id.* at 512.

²⁴ *Id.* at 511, 513.

²⁵ *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973).

²⁶ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988).

²⁷ *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991).

²⁸ 508 U.S. 49 (1993).

the copyright case was bereft of *Noerr-Pennington* immunity, the Court introduced a two-step test: *first*, “the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits”; and only if this first step is met, then *second*, the lawsuit’s subjective motivation must show “an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.”²⁹ Under *PRE*, “[t]his 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.”³⁰ Because “litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless,” the Court held that “an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.”³¹

The Court commented that it had “repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.”³² The Court equated the objective reasonableness test to the concept of probable cause, noting that “[t]he existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation” and that “[p]robable cause to institute civil proceedings requires no more than a reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication.”³³ The *PRE* Court instructed that, “[w]hen a court has found that an antitrust defendant claiming *Noerr* immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant’s position could realistically expect success on the merits of the challenged lawsuit” and, therefore, is entitled to antitrust immunity.³⁴ With this new two-pronged standard, the Court held that the hotel failed to move past the first step—that is, it did not demonstrate that the movie studios’ copyright action was “objectively meritless”—because “[a] court could reasonably conclude that [the studios’] infringement action was an objectively plausible effort to enforce rights.”³⁵

In a concurrence in *PRE*, Justice Stevens criticized some of the “unnecessarily broad dicta” in the Court’s opinion, explaining that some lawsuits may be shams even if objectively reasonable because there may be “a case, or series of cases, in which the plaintiff is indifferent to the outcome of the litigation itself, but has nevertheless sought to impose a collateral harm on the defendant by, for example, impairing his credit, abusing the discovery process, or interfering with his access to governmental agencies.”³⁶ Justice Stevens also warned against an overly restrictive sham standard that immunizes a “plaintiff who had some reason to expect success on the merits but because of its tremendous cost would not bother to achieve that result without the benefit of collateral injuries imposed on its competitor by the legal process alone.”³⁷

²⁹ *Id.* at 60–61 (citations, quotations, brackets, and emphasis omitted).

³⁰ *Id.* at 61.

³¹ *Id.* at 51, 57.

³² *Id.* at 59.

³³ *Id.* at 62–63 (quotations omitted).

³⁴ *Id.* at 63.

³⁵ *Id.* at 65.

³⁶ *Id.* at 67–68 (Stevens, J., concurring).

³⁷ *Id.* at 68–69 (Stevens, J., concurring).

Lower Court Treatment of Patterns of Petitioning

The Supreme Court has not revisited the boundaries of the sham exception to *Noerr-Pennington* immunity since *PRE*. Critically, the Court has not addressed the tension between *California Motor*, which established that a pattern of petitioning with or without probable cause may be a sham, and *PRE*, which held that a lawsuit brought with probable cause is not a sham. In the interim, lower courts have tried to resolve this tension. A circuit split, summarized in the following table and chronicled below, has developed over the circumstances when a pattern of petitions qualifies as a sham unworthy of First Amendment protection.

Circuit Split Overview Which Standard Determines Whether a Pattern of Petitions Is a Sham and Not Shielded by the <i>Noerr-Pennington</i> Doctrine?	
Jurisdictions Applying <i>California Motor</i> to a Pattern of Petitions	Jurisdictions Applying <i>PRE</i> to a Pattern of Petitions
Ninth Circuit: <i>USS-POSCO</i> (1994)	First Circuit: <i>PRTC</i> (2017)
Second Circuit: <i>PrimeTime 24</i> (2000)	Seventh Circuit: <i>U.S. Futures Exchange</i> (2020)
Fourth Circuit: <i>Waugh Chapel</i> (2013)	
Third Circuit: <i>Hanover Realty</i> (2015)	
Tenth Circuit: <i>CSMN Investments</i> (2020)	

USS-POSCO: Ninth Circuit Articulates the Pattern Test for Establishing the Sham Exception to *Noerr-Pennington* Immunity

Immediately following the *PRE* decision, the Ninth Circuit encountered a factually similar case to *California Motor*, which addressed a core question: Did the “objectively baseless” test from *PRE* implicitly overturn or modify the *California Motor* “sham” test (i.e., multiple petitions with probable cause may still be a sham)? In *USS-POSCO Industries v. Contra Costa County Building & Construction Trades Council, AFL-CIO*, the Ninth Circuit confronted allegations that labor unions filed 29 lawsuits attempting to coerce a steel company to use unionized labor to refurbish a steel plant.³⁸ The U.S. District Court for the Northern District of California found the unions’ conduct immunized, and on appeal the unions argued that under *PRE* a plaintiff “must show that each individual suit the unions brought was objectively baseless.”³⁹

Judge Kozinski, writing for the Ninth Circuit, disagreed, holding that *PRE* had not overruled *California Motor* and that repetitive litigation that is not objectively baseless can still amount to sham petitioning. The court ruled that *PRE* provides a two-step test for assessing “whether a single action constitutes sham petitioning,” whereas *California Motor* governs whether “a whole series of legal proceedings” is a sham, such that the cases apply to “different situations.”⁴⁰ Under *PRE*, the analysis of a single case is “retrospective: If the suit turns out to have objective merit, the plaintiff can’t proceed to inquire into subjective purposes, and the action is perforce not a sham,” while under *California Motor*, the inquiry is “prospective: Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?”⁴¹

³⁸ 31 F.3d 800, 804 (9th Cir. 1994).

³⁹ *Id.* at 810.

⁴⁰ *Id.* at 810–11.

⁴¹ *Id.* at 811.

Alleging and proving that a pattern of successive petitions was brought regardless of their merits in order to harass a rival “would be sufficient to overcome the [petitioner’s] Noerr-Pennington defense.”

Notably, the Ninth Circuit recognized a compelling policy justification for the Supreme Court’s decision to apply different standards based, in part, on the number of challenged petitions. Because lawsuits are “invariably costly, distracting and time-consuming” and “having to defend a whole series of such proceedings can inflict a crushing burden on a business,” the court ruled that *California Motor* “recognized that the filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action.”⁴² As a result, the key question regarding a pattern of petitions “is not whether any one of them has merit—some may turn out to, just as a matter of chance—but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.”⁴³

By the Ninth Circuit’s reasoning, “the fact that a small number in the series of lawsuits turn out not to be frivolous will not be fatal to a claim [because] . . . even a broken clock is right twice a day.”⁴⁴ Thus, the court in *USS-POSCO* held that, when a pattern of petitioning is alleged, it is not necessary to inquire into whether each action is objectively baseless. Alleging and proving that a pattern of successive petitions was brought regardless of their merits in order to harass a rival “would be sufficient to overcome the [petitioner’s] *Noerr-Pennington* defense.”⁴⁵ Ultimately, however, the Ninth Circuit affirmed the application of *Noerr-Pennington* immunity because 15 of the 29 lawsuits were successful, rendering a “batting average” above .500, which could not be “reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success.”⁴⁶

PrimeTime 24: Second Circuit Continues This Trend

In 2000, in *PrimeTime 24 Joint Venture v. NBC, Inc.*, the Second Circuit reached the same conclusion as the Ninth Circuit.⁴⁷ There, a satellite television provider filed a Section 1 claim against the major television broadcast networks and their trade association and affiliates. Under the federal statutory framework of the Satellite Home Viewership Act (SVHA), the networks were required to license their programming to satellite providers like PrimeTime if the “over-the-air” signal strength to any given customer was deficient. After PrimeTime designated which viewers it claimed the right to serve, broadcasters had the right to challenge those signal strength estimates, requiring PrimeTime to conduct a signal-strength test for every challenged household if it wanted to continue serving those customers. PrimeTime alleged that the networks over-challenged PrimeTime’s list of eligible subscribers and “intentionally abused the SHVA’s signal-strength challenge provision by filing baseless challenges for the purpose of raising PrimeTime’s cost structure and thereby reducing competition from it.”⁴⁸

After the district court held that the *Noerr-Pennington* doctrine covered the broadcast networks’ SVHA challenges as protected petitioning, the Second Circuit disagreed. Citing *California Motor*,

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *PrimeTime 24 Joint Venture v. NBC, Inc.*, 219 F.3d 92 (2d Cir. 2000).

⁴⁸ *Id.* at 95–96.

Like the Ninth Circuit, the Second Circuit held that the two-step PRE process for determining when a single petition constitutes a sham is distinguished from cases where defendants bring a series of legal proceedings.

the court concluded that “concerted assertion of baseless claims with the intent of imposing costs on a competing firm to prevent or impair competition from that firm . . . is predatory, without any redeeming efficiency benefitting consumers.”⁴⁹ Because “the *Noerr–Pennington* doctrine does not extend to ‘every concerted effort that is genuinely intended to influence governmental action,’” the court noted that defendants “may well have engaged in a ‘pattern of baseless, repetitive’ signal-strength challenges to harm PrimeTime, even though PrimeTime itself was engaged in a pattern or practice of copyright violations.”⁵⁰

Like the Ninth Circuit, the Second Circuit held that the two-step *PRE* process for determining when a single petition constitutes a sham is distinguished from cases where defendants bring a series of legal proceedings. In the latter case, the Second Circuit agreed with the Ninth Circuit that the relevant question was whether the “legal filings [were] made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment.”⁵¹ If so, the “relevant issue is whether the legal challenges ‘are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.’”⁵² The court agreed that “it is immaterial that some of the claims might, ‘as a matter of chance,’ have merit.”⁵³ Judged against this standard, the court held that PrimeTime alleged “conduct virtually identical to that deemed by the Ninth Circuit in *USS–POSCO* to be ‘automatic petitioning . . . without regard to and regardless of the merits of said petitions,’ that ‘if proven, would be sufficient to overcome the [defendants’] *Noerr–Pennington* defense.”⁵⁴

Waugh Chapel: Fourth Circuit Adopts Same Approach

In 2013, the Fourth Circuit joined the Second and Ninth Circuits in ruling that a pattern of anticompetitive petitioning can lose *Noerr–Pennington* immunity even if individual petitions are not objectively baseless. In *Waugh Chapel South, LLC v. United Food & Commercial Workers Union 27*, two labor unions filed 14 legal challenges, one of which was successful, against real estate developers in an effort to prevent a shopping center from hosting a non-unionized supermarket.⁵⁵ When the developers sued the unions for unfair labor practices, the district court held that *Noerr–Pennington* shielded the legal challenges because none were objectively baseless.⁵⁶

The Fourth Circuit reversed, “agree[ing] with the distinction adopted by our sister circuits” that, “when purported sham litigation encompasses a series of legal proceedings rather than a singular legal action . . . the sham litigation standard of *California Motor* should govern.”⁵⁷ The court noted that, although it “is unclear whether *PRE*[] distinguished or displaced the sham litigation test first propounded in *California Motor*,” in “the absence of any express statement that the sham litigation

⁴⁹ *Id.* at 99.

⁵⁰ *Id.* at 100, 102 (citations omitted, quoting *Allied Tube* and *California Motor*).

⁵¹ *Id.* at 101 (quoting *USS–POSCO*).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* (citation omitted).

⁵⁵ *Waugh Chapel South, LLC v. United Food & Commercial Workers Union 27*, 728 F.3d 354, 357–58 (4th Cir. 2013).

⁵⁶ *Id.* at 358.

⁵⁷ *Id.* at 363–64.

standard in *PRE[]* supplanted *California Motor*,” the court was “obligated to follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.”⁵⁸

The Fourth Circuit distinguished *PRE* “because it is ill-fitted to test whether a series of legal proceedings is sham litigation,” reasoning that, when “a party contends that it is defending a sham lawsuit, it is relatively simple for a judge to decide whether the singular claim it is presiding over is objectively baseless,” but “it is an entirely different undertaking to collaterally review—as here—fourteen state and administrative lawsuits for baselessness.”⁵⁹ In that context, “a district court should conduct a holistic evaluation of whether the administrative and judicial processes have been abused” by the pattern of petitions.⁶⁰ In focusing on the “pattern of the legal proceedings, not their individual merits,” a court may find relevant “the subjective motive of the litigant and the objective merits” while “other signs of bad-faith litigation ... may also be probative of an abuse of the adjudicatory process.”⁶¹

Applying that standard and reversing dismissal, the court noted that, “[w]hile there is no particular win-loss percentage that a litigant must achieve to secure the protection of the First Amendment, a one-out-of-fourteen batting average at least suggests a policy of starting legal proceedings without regard to the merits and for the purpose of” violating the law.⁶² The Fourth Circuit also agreed with the Ninth Circuit’s logic that a limited number of successful petitions does not rescue a pattern of sham petitions: “the fact that there may be moments of merit within a series of lawsuits is not inconsistent with a campaign of sham litigation, for even a broken clock is right twice a day.”⁶³

***Hanover Realty*: Third Circuit Establishes a Pattern**

In 2015, the Third Circuit joined the prior three circuits, adopting the pattern exception to sham petitioning in *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*⁶⁴ There, in a split 2-1 decision, the court “agree[d] with the approach to *California Motor* and *Professional Real Estate* that has been adopted by the Second, Fourth, and Ninth Circuits,” namely that the standards “apply to different situations: *California Motor* to a series of sham petitions and *Professional Real Estate* to a single sham petition.”⁶⁵ The Third Circuit held that a local supermarket was not protected by *Noerr-Pennington* after it filed four separate actions against a developer seeking administrative approval to build a competing supermarket in town.⁶⁶

⁵⁸ *Id.* at 363 (brackets and quotations omitted).

⁵⁹ *Id.* at 364.

⁶⁰ *Id.* at 364 (quotations omitted).

⁶¹ *Id.* at 364.

⁶² *Id.* at 365 (quotations omitted).

⁶³ *Id.* (quotations omitted).

⁶⁴ *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*, 806 F.3d 162, 179–80 (3d Cir. 2015).

⁶⁵ *Id.* at 179–80.

⁶⁶ The court explicitly rejected the notion that four separate proceedings was “too few” to comprise a “pattern or series,” and did “not set a minimum number requirement for the applicability of *California Motor* or find that four sham petitions will always support the use of *California Motor*.” *Id.* at 181. How many petitions are made, and their success rate, can be key evidentiary issues in pattern cases. *See, e.g., Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc.*, 552 F.3d 1033, 1046 (9th Cir. 2009) (finding no pattern of sham petitioning when 7 of 17 (41%) of lawsuits were successful and had “a plausible argument on which it could have prevailed” for the other ten).

The court stated that the “best way” to determine whether petitioning is a sham “depends on whether there is a single filing or series of filings.”⁶⁷ With only one petition, the two-step test of *PRE* “places a heavy thumb on the scale in favor of the defendant” accused of sham petitioning, whereas *California Motor* advises that a “more flexible standard is appropriate when dealing with a pattern of petitioning.”⁶⁸ The Third Circuit noted that, “[n]ot only do pattern cases often involve more complex fact sets and a greater risk of antitrust harm, but the reviewing court sits in a much better position to assess whether a defendant has misused the governmental process to curtail competition.”⁶⁹ The *California Motor* inquiry “asks whether a series of petitions were filed with or without regard to merit and for the purpose of using the governmental process (as opposed to the outcome of that process) to harm a market rival and restrain trade.”⁷⁰

Following the Ninth Circuit’s broken clock analogy, the Third Circuit held that, “even if a small number of the petitions turn out to have some objective merit, that should not automatically immunize defendants from liability.”⁷¹ As a result, when “deciding whether there was such a policy of filing petitions with or without regard to merit, a court should perform a holistic review that may include looking at the defendant’s filing success—i.e., win-loss percentage—as circumstantial evidence of the defendant’s subjective motivations.”⁷² According to the court, “If more than an insignificant number of filings have objective merit, a defendant likely did not have a policy of filing ‘willy-nilly without regard to success,’” while a “high percentage of meritless or objectively baseless proceedings, on the other hand, will tend to support a finding that the filings were not brought to redress any actual grievances.”⁷³ The Third Circuit also instructed that lower courts reviewing pattern cases “should also consider other evidence of bad-faith as well as the magnitude and nature of the collateral harm imposed on plaintiffs by defendants’ petitioning activity (e.g., abuses of the discovery process and interference with access to governmental agencies).”⁷⁴

In dissent, Judge Greenberg on the Third Circuit panel disagreed that *California Motor* required a different standard for assessing a pattern of petitions compared to *PRE*’s two-prong test for a single petition, noting that *California Motor* itself stated that “a pattern of baseless, repetitive claims” may be a sham. As a result, Judge Greenberg opined that *PRE* requires plaintiffs to demonstrate that each petition in a series is objectively baseless before *Noerr-Pennington* immunity is lost.⁷⁵ In 2016, the Supreme Court denied defendant’s petition for certiorari.⁷⁶ At that time, however, there was no split in the circuits on the treatment of a pattern of petitions.

In the first break with the prior four circuits, the First Circuit in 2017 expressed doubt as to whether California Motor established a separate standard for immunity than PRE.

PRTC: First Circuit Bucks the Trend

In the first break with the prior four circuits, the First Circuit in 2017 expressed doubt as to whether *California Motor* established a separate standard for immunity than *PRE*. In *Puerto Rico Telephone*

⁶⁷ *Hanover 3201 Realty, LLC*, 806 F.3d at 180.

⁶⁸ *Id.* at 180.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 181.

⁷⁴ *Id.*

⁷⁵ *Id.* at 199–201 (Greenburg, J., dissenting).

⁷⁶ 136 S. Ct. 2451 (2016).

Company v. San Juan Cable LLC, a telephone company (PRTC) filed a monopolization case against a cable company (OneLink) for filing 24 petitions to a regulatory board and other tribunals in an effort “to deny, slow down or otherwise impede PRTC’s efforts” to secure a license to offer a competing TV service.⁷⁷ The U.S. District Court for the District of Puerto Rico granted summary judgment on the basis that *Noerr-Pennington* immunized the defendant because all of its petitions were objectively reasonable, even though “none resulted in a meaningful victory.”⁷⁸

On appeal, the First Circuit rejected the argument that *California Motor* applied to defendants’ 24 petitions. The court acknowledged that “opinions of the four circuits to have addressed similar arguments directly—all in one way or another adopt some variant of this view” that *California Motor* applies when “the defendant’s decision to file the series of petitions paid no heed to whether they had merit.”⁷⁹ The court was “quite skeptical of the notion that a defendant’s willingness to file frivolous cases may render it liable for filing a series of only objectively reasonable cases” and “less skeptical[] than [its sister circuits] . . . that *PRE[]* does not apply fully to the filing of a series of suits.”⁸⁰

The First Circuit explained that, “where a party files a large number of petitions—here twenty-four according to PRTC—and every single one is objectively reasonable, we struggle to see how a jury could reasonably conclude that the party was filing petitions ‘regardless of the merits of the cases.’”⁸¹ The court reasoned that “[o]ne large lawsuit or intervention in an agency proceeding can impose much more of a burden on a competitor than might a series of smaller claims.”⁸² The court also noted that, “while [it] can see the logic inherent in reasoning that a nonfrivolous suit might be viewed differently when flown in a flock of frivolous suits, [it] see[s] little logic in concluding that an exercise of the right to file an objectively reasonable petition loses its protection merely because it is accompanied by other exercises of that right.”⁸³ As a result, the First Circuit affirmed the grant of summary judgment, “accept[ing] that *Noerr-Pennington* immunity applied to each petition because of its objective reasonableness, not because of its causal role.”⁸⁴

In a concurrence, two judges noted that the majority opinion “leaves open the possibility that, *PRE[]* notwithstanding, a monopolist might be liable under the antitrust laws for engaging in a pattern of petitioning, even though no single filing in that pattern is objectively baseless.”⁸⁵ They did not explain, however, in what circumstances a pattern of objectively reasonable petitions could lose *Noerr-Pennington* immunity, and joined the majority opinion that *PRE*’s objectively baseless test determines whether repetitive petitioning is a sham. In 2018, PRTC’s certiorari petition was denied.⁸⁶

⁷⁷ Puerto Rico Tel. Co. v. San Juan Cable LLC, 874 F.3d 767, 768 (1st Cir. 2017). Author Dylan Carson was counsel for Puerto Rico Telephone Co. before the U.S. District Court in *PRTC v. San Juan Cable Co.*

⁷⁸ *Id.* at 769.

⁷⁹ *Id.* at 771.

⁸⁰ *Id.*

⁸¹ *Id.* at 772 (quoting *California Motor*).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 772 n.4.

⁸⁵ *Id.* at 773 (Barron, J. and Torruella, J., concurring).

⁸⁶ Puerto Rico Tel. Co. v. San Juan Cable LLC, 138 S. Ct. 1597 (2018).

U.S. Futures Exchange: Seventh Circuit Joins First Circuit in Rejecting Separate Sham Test Under California Motor for Pattern of Petitioning

In March 2020, the Seventh Circuit entered the fray in a case involving commodities and futures trading, *U.S. Futures Exchange, LLC v. Board of Trade of the City of Chicago, Inc.*⁸⁷ When a nascent electronic trading exchange, U.S. Futures Exchange (USFE), applied for regulatory approval from the U.S. Commodity Futures Trading Commission, two incumbent exchanges filed 54 objections to the USFE's application and requested postponement of the CFTC's hearing on the application. After the new trading exchange failed, it sued the two incumbent exchanges for causing its delayed entry and subsequent failure. The U.S. District Court for the Northern District of Illinois held the incumbents' petitioning immune under *Noerr-Pennington*, relying on *PRE*.⁸⁸

The Seventh Circuit affirmed, “stand[ing] with the First Circuit” and rejecting the argument that “*California Motor* provides a separate rubric to use whenever a ‘pattern’ of sham filings is alleged.”⁸⁹ Like the First Circuit, the Seventh Circuit decided to split from the four circuits that had “adopt[ed] some version of the view that *PRE* applies only to single-lawsuit cases while *California Motor* applies to all others.”⁹⁰ The Seventh Circuit held there was no need to “reconcile” *PRE* and *California Motor* because the objective reasonableness portion of the sham exception is “indispensable” and, echoing *PRTC*, that there is “‘little logic’ in concluding a petitioner loses the right to file an objectively reasonable petition merely because it chooses to exercise that right more than once in the course of pursuing its desired outcome.”⁹¹ Finally, the court held, in the alternative, that, “[e]ven if *PRE* and *California Motor* provided two different standards for non-pattern and pattern cases,” the plaintiff’s case did not involve a pattern of petitioning because defendants’ 54 filings in one CFTC approval proceeding did not “transform [that] one . . . proceeding into many.”⁹² Applying *PRE*, the court concluded that defendants’ petitioning was objectively reasonable, justifying the grant of immunity. USFE did not appeal the decision to the Supreme Court.

CSMN Investments: Tenth Circuit Acknowledges “California Motor Sham Test”

A month later, in April 2020, the Tenth Circuit adopted the Third Circuit’s interpretation of *California Motor* in a non-antitrust context, and held that the “*California Motor* Sham Test” applied to its consideration of a real estate developer’s civil rights action in a property zoning dispute. In *CSMN Investments*, the U.S. District Court for the District of Colorado had dismissed the plaintiff’s case against a local homeowners association and government entity that sought to block approval of an addiction treatment center in its community.⁹³ On appeal, the Tenth Circuit affirmed that the plaintiff had not met the two-step *PRE* test for sham petitioning because the defendants’ conduct before a county commission, a state trial court, and appeals court was objectively reasonable, even if mostly unsuccessful.⁹⁴

⁸⁷ *U.S. Futures Exch., LLC v. Bd. of Trade of the City of Chicago*, 953 F.3d 955 (7th Cir. 2020).

⁸⁸ *Id.* at 964.

⁸⁹ *Id.* at 964–65.

⁹⁰ *Id.* at 964.

⁹¹ *Id.* at 965.

⁹² *Id.* at 965–66.

⁹³ *CSMN Inv., LLC v. Cordillera Metropolitan Dist.*, 956 F.3d 1276 (10th Cir. 2020).

⁹⁴ *Id.* at 1280–84.

Lower courts, however, have split over whether the Supreme Court's decision in California Motor means that there are separate standards: one for sham petitioning when multiple petitions are at issue (California Motor) and one for sham petitioning when there is only a single claim (PRE).

The Tenth Circuit also held that the defendants' "conduct [did] not qualify for the *California Motor* sham exception."⁹⁵ Quoting *Waugh Chapel*, the court noted that under *California Motor* "sham litigation occurs where a pattern of baseless, repetitive claims ... emerge[s] which leads the factfinder to conclude that the administrative and judicial processes have been abused."⁹⁶ The court found, however, that the defendants' conduct before three tribunals was part of the same case and did not constitute multiple petitioning, so the defendants had not "engaged in a series of lawsuits that were intended to abuse judicial processes" and, therefore, were afforded the immunity of the Petition Clause.⁹⁷

Supreme Court Will Have to Resolve Split over When a Pattern of Petitions Constitutes a Sham

Every year, *Noerr-Pennington* immunity arises in a wide array of contexts.⁹⁸ *California Motor* established that a pattern of petitions brought "with or without probable cause, and regardless of the merits of the cases" could deprive a petitioner of *Noerr-Pennington* immunity. *PRE* held that a petition brought with probable cause is, by definition, objectively reasonable and not a sham, and therefore excepted from antitrust scrutiny. Lower courts, however, have split over whether the Supreme Court's decision in *California Motor* means that there are separate standards: one for sham petitioning when multiple petitions are at issue (*California Motor*) and one for sham petitioning when there is only a single claim (*PRE*).

On one side of the split, five circuits have embraced *California Motor's* "flexible" test for a pattern of petitioning by looking holistically at the subjective purpose and effect of the overall pattern, without an inspection of the objective merit of each individual petition, to determine whether serial litigation "without regard to the merits" has been improperly used as an economic weapon and is a sham subject to antitrust scrutiny. These circuits hew more closely to the concurrence by Justice Stevens in *PRE* that "[r]epetitive filings, some of which are successful and some unsuccessful, may support an inference that the process is being misused," and, therefore, that a different rule should "govern the decision of difficult cases, some of which may involve abuse of the judicial process," since "objectively reasonable lawsuits may still break the law."⁹⁹

On the other side of the split, two circuits, following *PRE*, appear to require that at least one petition in a pattern must be considered objectively baseless for serial petitioning to lose antitrust immunity. According to *PRTC*, a litigant can lose every petition and still be shielded from antitrust scrutiny so long as each of those petitions is not objectively baseless.

Of note, both federal antitrust enforcement agencies have referred to *PRE* and *California Motor* as providing separate and distinct standards for invoking the *Noerr-Pennington* doctrine, based on whether a single or a series of petitions are challenged. The DOJ, in a December 2020 amicus

⁹⁵ *Id.* at 1288.

⁹⁶ *Id.* (quotations omitted).

⁹⁷ *Id.*

⁹⁸ See, e.g., *Construction Cost Data, LLC v. Gordian Grp., Inc.*, 814 Fed App'x 860, 861–67 (5th Cir. 2020) (affirming trial judgment for defendant on antitrust and business tort claims in dispute over copyright and trademark protected construction industry books after jury rendered unanimous verdict that *Noerr-Pennington* affirmative defense applied to pre-litigation cease-and-desist letters); *Veritext Corp. v. Bonin*, 417 F. Supp. 3d 778, 786–88 (E.D. La. 2019) (*Noerr-Pennington* immunized lobbying by court reporter association to regulatory body to enforce state statute prohibiting certain reporter contracts).

⁹⁹ *PRE*, 508 U.S. at 73–76 (Stevens, J., concurring).

brief in a recent Seventh Circuit appeal, noted that “drawing on *California Motor*, some courts have applied a separate standard when the alleged anticompetitive conduct consists of a series of petitions, instead of a single petition.”¹⁰⁰ The DOJ’s brief quoted three of the circuits which have invoked the *California Motor* test for serial petitioning, but did not opine on the propriety of those courts’ application of that test instead of *PRE*. In 2006, the FTC staff issued a report supporting the *California Motor* standard, and stated that “a pattern of repetitive petitions filed without regard to merit and for the sole purpose of using the government process, rather than the outcome of the process, to harm directly marketplace rivals and suppress competition should be subject to anti-trust liability without the requirement that each underlying filing meet *PRE*’s standard for objective baselessness.”¹⁰¹

The Supreme Court missed the opportunity to resolve the circuit split when certiorari was denied in the *PRTC* case and not sought by the losing side in *U.S. Futures Exchange*. Predictions about how the circuit split will be resolved, should cert be granted, are beyond the purview of this article. Until the Supreme Court explains whether a pattern of petitions can be considered sham litigation even where none of the petitions are objectively baseless, a competitor that determines that the benefits from filing repetitive but reasonable petitions outweighs the litigation costs will have an incentive to engage in serial petitioning. Meanwhile, antitrust plaintiffs who anticipate that serial petitioners will raise a *Noerr-Pennington* defense will likely center their claims in the five federal circuits which have accepted that the *California Motor* sham test applies to a series of petitions because in those jurisdictions, as the Third Circuit has noted, a plaintiff can “more easily overcome *Noerr-Pennington* immunity when the defendant ha[s] engaged in multiple legal actions against the plaintiff,” given the “more flexible standard” and “holistic review” of the *California Motor* test compared with *PRE*’s “exacting two-step test.”¹⁰² ●

¹⁰⁰ See Brief for the United States of America as Amicus Curiae in Support of Appellees, *UFCW Local 1500 Welfare Fund v. AbbVie Inc.*, Case No. 20-2402, at 19 (7th Cir. Dec. 28, 2020), <https://www.justice.gov/atr/case-document/file/1349641/download>.

¹⁰¹ See Fed. Trade Comm’n Staff Report, *Enforcement Perspectives on the Noerr-Pennington Doctrine* 35 (2006), <https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf>.

¹⁰² *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class*, 868 F.3d 132, 157 (3d Cir. 2017).