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Seventh Circuit deepens the circuit split on the "sham exception" to Noerr-Pennington

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On 23 March 2020 the U.S. Court of Appeals for the Seventh Circuit issued a decision on Noerr-Pennington's sham exception, increasing a circuit split on the proper analysis of "serial petitioning" claims. *U.S. Futures Exchange, LLC v. Board of Trade of the City of Chicago, Inc.*, No. 18-3558 (7th Cir. 23 March 2020).[1] The Seventh Circuit held that each petition in the alleged "series" must be objectively baseless for the sham exception to apply – diverging from a number of circuits that have found that a showing of objective baselessness is required only in single-petition claims, not in serial petitioning sham claims.

This decision has important implications for clients that regularly petition the government:

- The Seventh and First Circuits now hold that a series of government petitions can only be considered a "sham" (and thus not immune from challenge under the antitrust laws) if each petition is 1) objectively baseless, and 2) brought with the subjective intent 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."
- Other circuits have held that the standard above applies only to single petitions and that serial petitioning may be considered a "sham" under less stringent standards. As a result of the circuit split, it is possible that the U.S. Supreme Court may weigh in on this issue, either in the *U.S. Futures Exchange* case (if the parties choose to seek certiorari) or a future case.
- The *U.S. Futures Exchange* decision is particularly relevant to pharmaceutical companies that submit multiple citizen petitions to the U.S. Food and Drug Administration (FDA). Under *U.S. Futures Exchange*, if those citizen petitions relate to a single overarching issue – e.g., whether the FDA should approve a specific generic – the reasoning of *U.S. Futures Exchange* may suggest that those filings amount to a single petition, not a series, and should have the same protection as an individual petition.

In *U.S. Futures Exchange*, plaintiff U.S. Futures Exchange (USFE) brought antitrust claims against the Chicago Board of Trade and the Chicago Mercantile Exchange. The plaintiff alleged, among other things, that the defendants filed with the Commodities Futures Trading Commission (CFTC) 54 objections to the plaintiff's application to be approved as a rival futures trading

[1] The opinion is available at http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D03-23/C:18-3558:J:Manion:aut:T:fnOp:N:2491263:S:0.

platform. USFE alleged that this pattern of filing serial petitions to the CFTC delayed its approval, which ultimately led to its failure as a competitor. USFE, opinion at 2-3.

The district court granted summary judgment on the ground, among others, that defendants' filing of objections to the CFTC was lawful government petitioning, and therefore protected from antitrust liability by the Noerr-Pennington doctrine.[2]

The Seventh Circuit affirmed. It rejected plaintiff's argument that defendants' petitioning fell into the "sham exception" to Noerr-Pennington, holding that under Supreme Court precedent, "sham" petitioning had to be both 1) objectively baseless, and 2) brought with the subjective intent 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." USFE, opinion at 12 (quoting *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) (emphasis in original)).[3]

The Seventh Circuit recognized that its ruling diverged from the views of the Second, Third, Fourth, and Ninth Circuits. USFE, opinion at 14. According to the court, each of those other circuits has "adopt[ed] some version of the view" that *Professional Real Estate Investors (PRE)*'s two-pronged approach applies only to single petition claims, such as a single sham lawsuit; by contrast, a less stringent test from *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) applies to serial petitioning. Specifically, those courts have held that under *California Motor Transport*, only the subjective prong applies: serial petitioning with the intent to interfere with a competitor's business through the use of the governmental process, rather than the outcome of that process, is sufficient to fall into the sham exception. The "objectively baseless" prong does not apply. Id.[4]

Siding with the First Circuit[5], the Seventh Circuit rejected the argument that *PRE* and *California Motor Transport* establish two different tests for single-petition and serial-petition claims. The court noted that *California Motor Transport* itself referred to patterns of "baseless," repetitive claims. USFE, opinion at 15. Thus, rather than overlooking the objectively baseless prong, *California Motor Transport* "contains the very origins of the sham exception's first step: an objective reasonableness assessment." Id. And that approach makes sense, according to the Seventh Circuit, because 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." Id. at 16.

Interestingly, the Seventh Circuit noted that even if *PRE* and *California Motor Transport* applied different standards to single-petition and serial-petition claims, USFE would still lose. According to the Seventh Circuit, even though defendants submitted 54 objections to the CFTC, those "multiple efforts to influence the Commission's decision [concerned] one overarching issue: whether to approve USFE's application." Id. at 17. Thus, the fact of multiple filings did not transform one proceeding on a single issue into a "pattern" or "series" of petitions. This part of the ruling, although likely dictum, may provide important guidance to courts in other cases. In a number of brand-generic pharmaceutical cases, for example, plaintiffs have alleged that a brand's submission of multiple citizen petitions to the FDA amount to a pattern of sham petitioning. If

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[2] The Noerr-Pennington doctrine protects companies and individuals from antitrust liability for lawful petitioning of the government, even when the petitioning seeks government action that would reduce competition. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

[3] The First Circuit agreed with the district court that defendants' petitioning was not objectively baseless, noting that the CFTC addressed each of defendants' objections, and required USFE to make certain changes in response to those objections. USFE, Opinion, at 17-18.

[4] The Federal Trade Commission has taken this position as well. See, e.g., Plaintiff Federal Trade Commission's Opposition to Shire ViroPharma Inc.'s Motion to Dismiss, at 21-22, *Federal Trade Commission v. Shire ViroPharma, Inc.*, 17-cv-00131-RGA (D. Del.), available at https://www.ftc.gov/system/files/documents/cases/022_ftc_opp_to_vp_mtd_5-25-17.pdf.

[5] USFE at 14 (citing *Puerto Rico Telephone Co. v. San Juan Cable LLC*, 874 F.3d 767 (1st Cir. 2017)).

those multiple citizen petitions relate to a single overarching issue – e.g., whether the FDA should approve a specific generic – the reasoning of *USFE* may suggest that those filings amount to a single petition subject to *PRE*, not a series.

The Seventh Circuit's decision indicates that the deepening circuit split on the sham exception to Noerr-Pennington may be ripe for Supreme Court review – *PRE*, after all, was decided in 1993. After 27 years, it is time for the Supreme Court to weigh in again.

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