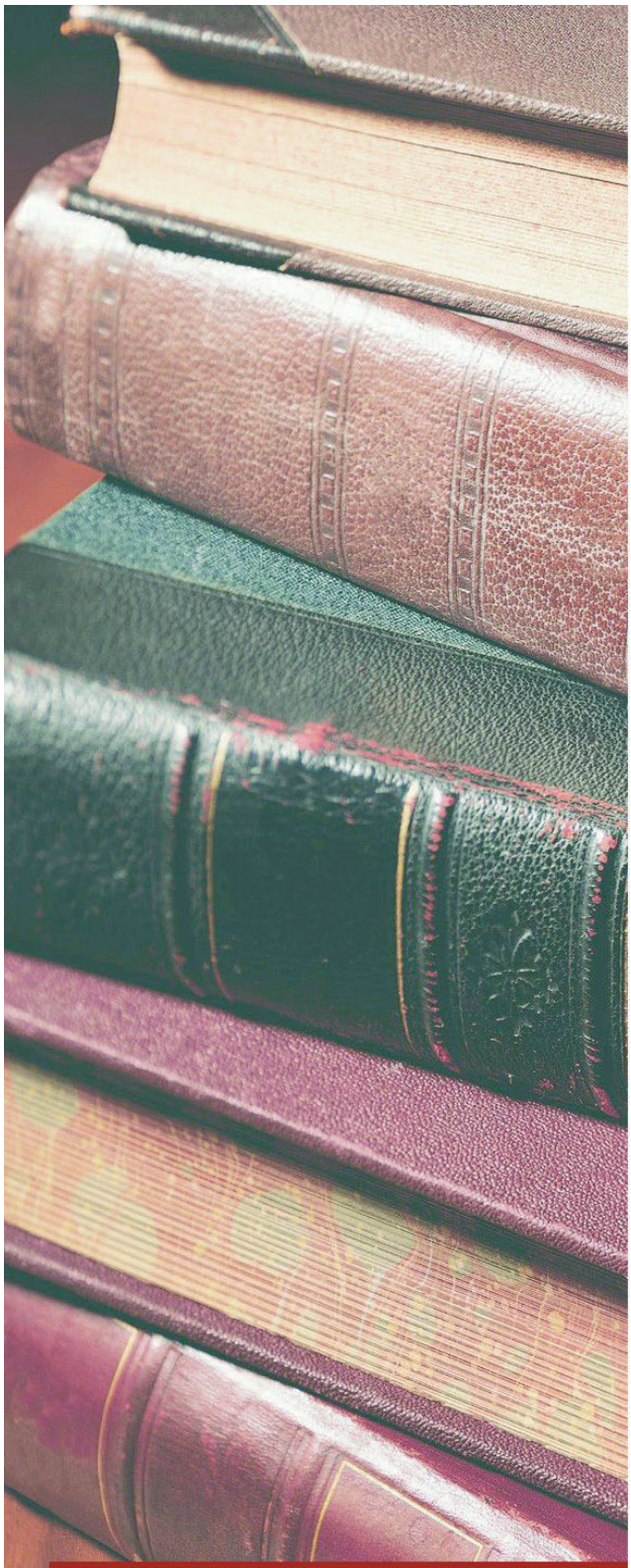

Spring 2009

E&I UPDATE

A publication of the Exemptions & Immunities Commitee of the Section of Antitrust Law, American Bar Association

IN THIS ISSUE

MESSAGE FROM THE EDITOR

The Exemptions and Immunities Committee of the ABA Section of Antitrust Law is charged with educating, updating and generally supporting the Antitrust Section on issues relating to exceptions to the antitrust laws.

This mission is both narrow and broad. Some exemptions, such as the Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521-22, are both narrow and industry-specific. Others, such as the State Action doctrine, cut across all industries and are in place to protect important interests of federalism that go beyond the antitrust laws.

This Spring 2009 edition of the E&I Update contains two articles that consider important nuances of the latter, broadly applicable exemptions. E&I Editorial Board Member Peter Barile has contributed yet another interesting piece. Peter considers the cases that have declined to find Noerr-Pennington immunity in the context of non-sham litigation, where the antitrust defendant has brought a pattern of cases without regard to the merits. This is an important doctrinal issue, and one that has gotten a good deal of attention from the antitrust agencies.

Caroline Brown contributes an interesting summary of the Committee's recent brown bag on the application of implied immunities in the lower courts since the Supreme Court's decision in *Credit Suisse v. Billing*, 554 U.S. 264 (2007).

Please send all submissions for future issues to:

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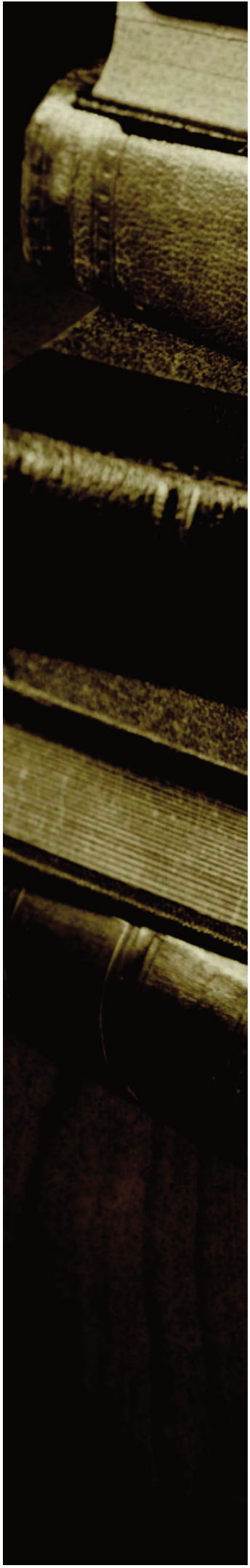

Finally, contributing editors Greg Garrett and Richard Fueyo have provided summaries of the key exemptions and immunities cases from the second half of 2008 and first quarter of 2009.

Beyond this newsletter, the E&I Committee is involved in a number of exciting projects.

First, at this month's ABA Spring Meeting, the Exemptions and Immunities Committee is sponsoring a program on the Foreign Trade Antitrust Improvement Act, entitled "U.S. Antitrust Law and Global Claims: Navigating the Foreign Trade Antitrust Improvement Act." The FTAIA is widely described as one of the most confusing and poorly written antitrust statutes, but has become increasingly important as global cartels are exposed and international coordination expands. The program is scheduled for Wednesday, March 25 at 2:00 pm, and features four experienced practitioners and litigators as panelists. Edward B. Schwartz of DLA Piper, Ian Simmons of O'Melveny & Myers LLP and Jodi Trulove of Dickstein Shapiro have all grappled with these issues in Court. R. Hewitt Pate of Hunton & Williams LLP, also an experienced litigator, brings the additional perspective of a former government attorney who must balance comity and broad policy questions with the need for strict enforcement of the antitrust laws. Michael G. Egge of Latham & Watkins LLP will moderate the panel. Exemptions and Immunities Vice Chair John Roberti will serve as Session Chair, warming up the audience with a few jokes and then introducing the panel. If any of the jokes manage to cause a single audience member to crack a smile (other than awkward laughter that comes with a joke that bombs), the editors of this newsletter pledge that they will be printed in this space.

The Committee is also working on two forthcoming publications. First, a book on the *Noerr-Pennington* doctrine is advancing and we hope it will be available this summer. Second, the second edition of the *State Action Practice Manual* is being edited as we speak. We remain enthusiastic about both projects.

We urge you to become a member of our Committee, if you are not already one. We also welcome any and all contributions from those interested in this area of the law; we have projects for all levels of commitment. Whether it is drafting summaries of key developments in the case law for publication on our list-serv or drafting an article for publication in a future edition of the E&I Update, you can help us continue to provide useful information to the Section. If you are interested in finding out more about these efforts, please contact our Committee Chair, Howard Morse, or any of the Vice-Chairs listed below.

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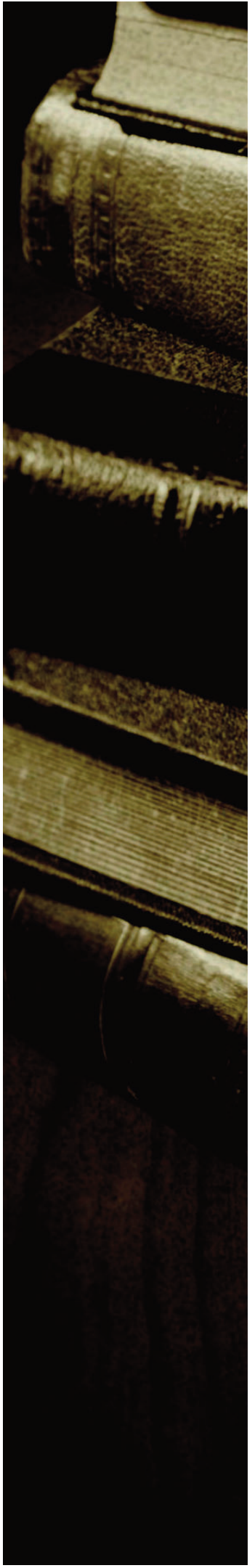


There Must Be A Pattern Here Somewhere: A Review of the Pattern Exception to *Noerr-Pennington* Sham Litigation Rule

Peter Barile

"How many licks does it take to get to the Tootsie Roll center of a Tootsie Pop? . . . One, Two, Three . . . The world may never know."[1] The evolving case law on the "pattern" variant of the sham litigation exception to the *Noerr-Pennington* doctrine evokes memories of that TV commercial from the 1970s with the cartoon owl and the kid and the Tootsie Pop—exactly how many cases does it really take to constitute a "pattern" or "series" sufficient to invoke the sham exception? Although there is some guidance, the case law often has impelled courts to resort to arithmetic or take an "I know it when I see it"[2] approach to determine whether a series of litigations constitutes a sham. Recent cases suggest a more substantive approach, focusing not merely on numbers, but on the content and context of lawsuits to determine when a series of litigations may be a sham sufficient to overcome the presumption of antitrust immunity under *Noerr*.

Noerr in a Nutshell. The *Noerr-Pennington* doctrine holds that "[t]hose who petition government for redress are generally immune from antitrust liability."[3] *Noerr* thus shields an antitrust defendant from liability for competitive injuries resulting from concerted or individual conduct that is reasonably calculated or genuinely intended to petition government decision-makers for redress. Defined both by the boundaries of the First Amendment Right to Petition and the scope of the Sherman Act, *Noerr* immunity extends to legitimate petitioning conduct directed to any of the three branches of government—legislative, executive, or judicial.[4] In the courts, *Noerr* immunity may apply not only to the prosecution of litigation, but also the defense of litigation.[5] It has been held that *Noerr* also protects pre-litigation threat letters.[6] Even third-party funding of a legitimate lawsuit has been held *Noerr*-protected,[7] as have settlements with governmental entities.[8] The Supreme Court has qualified such immunity, however, explaining that "activity ostensibly directed toward influencing governmental action does not qualify for Noerr immunity if the litigation is a 'sham.'"[9]

Three Different Flavors of Sham Litigation. A recent decision by the Ninth Circuit provides a good vehicle by which to consider the various types of sham litigation. In *Kaiser Foundation Health Plan, Inc. v. Abbott Laboratories, Inc.*,[10] the Ninth Circuit earlier this year succinctly described "three situations" where the sham exception has been held to apply. The court described sham litigation as occurring where:

- A "lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful;"
- A "party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy;" and
- A "series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose."[11]

Flavor 1: Objectively Baseless Sham Litigation. In *Professional Real Estate Investors v. Columbia Pictures Industries*,[12] the Supreme Court "outline[d] a two-part definition of 'sham' litigation." For a litigation to be judged a sham, it must be both objectively baseless and subjectively anticompetitive.[13] The Court made plain that "[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham."[14] The objective baselessness test is notoriously difficult to meet; thus the emergence of other sham varieties.

Flavor 2: Fraud Sham Litigation. One possible way around the objective baselessness test is to assert that the litigation at issue was somehow fraudulent. In *California Motor Transport Co. v. Trucking Unlimited*,[15] the Supreme Court explained that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."[16] Likewise, in *Allied Tube and Conduit Corporation v. Indian Head*,[17] the

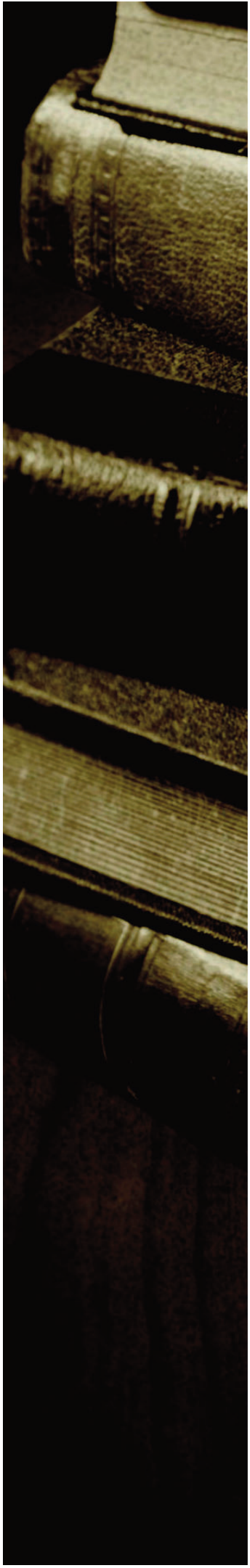
Court observed that "unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations."[18] In the wake of these cases, some courts and the Federal Trade Commission have recognized a fraud exception to *Noerr*.[19] Thus, it has been held that *Noerr* does not provide immunity to a litigant where an alleged misrepresentation "affects the core" of the case, such that the fraud "deprives the litigation of its legitimacy."[20] Misrepresentations may rob the judicial process of its legitimacy, and, therefore, courts have held that they should not enjoy the same protection that the *PRE* test prescribes.[21]

Flavor 3: Pattern Sham Litigation. While the stringent objective baselessness test "applies to an allegation of a single instance of sham litigation,"[22] a few courts have held that "a different *Noerr-Pennington* test applies to an antitrust claim premised on the institution of a series of legal proceedings."[23] *California Motor Transport* observed that a "pattern of baseless, repetitive claims . . . which leads a factfinder to conclude that the administrative and judicial processes have been abused . . . cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'"[i] Justice Stevens, in his concurring opinion in *PRE*, was one of the first to raise this issue. Justice Stevens suggested that the "sham" exception should extend not only to cases that lacked probable cause (the test for "objectively baseless" used by the majority), but also to "a case, or a 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 the governmental agencies."[ii]

A line of cases drawing upon *California Motor Transport* and Justice Stevens' concurrence in *PRE* has created the additional category[iii] of sham litigation that has been termed "pattern" or "series" sham litigation.[27] The Second Circuit, for instance, has held that proof of the "objective baselessness," as articulated in *PRE*, is not required where "the defendant is accused of bringing a whole series of legal proceedings."[28] In such a situation, "the fact that a small number in the series of lawsuits turn out not to be frivolous will not be fatal to a claim . . . even a broken clock is right twice a day."[29] Other courts have applied this test in various contexts (although without necessarily finding liability),[30] but it bears noting that a number of district courts have held that *PRE* governs regardless of the number of filings involved.[31]

A Numbers Game. While much of the case law understandably focuses on the number of lawsuits brought, it is unsettled how many claims constitute a pattern of sham filings. In *USS-POSCO Indus. v. Contra Costa County Bldg. & Trades Council, AFL-CIO*,[32] in which fifteen of twenty-nine suits were successful, the Ninth Circuit held the conduct not to be a pattern of baseless claims.[33] By contrast, in *Primetime 24 Joint Venture v. NBC*,[34] where hundreds of challenging "petitions" were made without regard to the merits, the conduct was held to constitute a pattern falling within the sham exception.[35] On a number of reported occasions, plaintiffs have tried to characterize just two litigations as a pattern in order to escape the objective baselessness test; none has succeeded.[36] And in one case, plaintiffs claimed that eight is enough, but the court disagreed.[37] In another, however, nine was the magic number, and that pattern was held a sham.[38]

Getting Away From the Numbers. Recent cases suggest a retreat from a numbers approach taken in many of the cases to a more substantive approach in which the context and content of the claims alleged to constitute the alleged illegal patterns are evaluated. In the recent *Kaiser* case, the Ninth Circuit affirmed the district court's ruling in the *Terazosin Hydrochloride Antitrust Litigation*,[39] holding that the exception was not satisfied where 17 lawsuits were at issue.[40] According to the Court, "Abbott won seven of the seventeen suits. It lost the other ten, but in each of the ten cases it had a plausible argument on which it could have prevailed."[41] The court further explained, "It is true that Abbott was litigious, but to some degree its litigiousness was a product of Hatch-Waxman. Abbott filed suit quickly in order to preserve its rights under Hatch-Waxman, but it did not persist in litigating when it became obvious that the suits were baseless."[42] A very recent district court case has read *Kaiser* to mean that (at least in the Hatch-Waxman con-



text), the number of lawsuits "matters little, if at all."[43] Thus, evaluating whether or not multiple lawsuits constitute a sham, the court observed, should involve "determining whether a substantial number of the suits lacked objective merit,"[44] which would serve to tether more securely the pattern theory to the objective baselessness test of *PRE*.

* * *

It bears watching whether this merits-based (as opposed to numbers-based) approach to discerning a "pattern" of sham litigation takes hold, whether inside or outside of the Hatch-Waxman context, and whether the approach adds more coherence to this still developing doctrine.

1 *See Tootsie Gallery: View Tootsie Videos, (English) Tootsie Pop Vintage*, at http://www.tootsie.com/gal_commercial.php.

2 *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

3 *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993) (PRE).

4 *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (litigation); *United Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965) (administrative advocacy); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-37 (1961) (lobbying).

5 *See, e.g., Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005).

6 *See, e.g., McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992).

7 *See, e.g., Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 401 (4th Cir. 2001).

8 *See, e.g., A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 250-54 (3d Cir. 2001).

9 *PRE*, 508 U.S. at 51 (citation omitted).

10 552 F.3d 1033 (9th Cir. 2009), *pet. for reh'g and reh'g en banc filed* (Jan. 28 2009), *resp. to pet. ordered* (Feb. 2, 2009), *resp. filed* (Feb. 23, 2009). The petition for rehearing *en banc* focused on the issue of whether or not the Ninth Circuit had exceeded its jurisdiction by deciding a related *Walker Process* claim; that issue is beyond the scope of this article.

11 *Id*. at 1045 (quoting *Sosa v. DIRECTV, Inc.*, 437 F.3d 932, 938 (9th Cir. 2006).

12 508 U.S. 49 (1993)

13 *Id*. at 51.

14 *Id*. at 60 n.5.

15 404 U.S. 508 (1972).

16 *Id*. at 510-11.

17 486 U.S. 492 (1988).

18 *Id*. at 499-500.

19 *See, e.g., Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1060 (9th Cir. 1998); *In the Matter of Union Oil Co. of Cal.*, 138 F.T.C. 1, 25 (2004).

20 *Baltimore Scrap*, 237 F.3d at 401-02.

21 *See, e.g., Clipper Express v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1261 (9th Cir. 1982) ("In the adjudicatory sphere, . . . information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these [entities] and does not deserve immunity from the antitrust laws."). *See generally* I PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 203e (3d ed. 2007); Federal Trade Commission, *Enforcement Perspectives on the* Noerr-Pennington *Doctrine: an FTC Staff Report, at 23-24 (2006).*

22 *In re Fresh Del Monte Pineapple Antitrust Litig.*, No. 04-md-1628, 2007 U.S. Dist. LEXIS 1372, at *54, n.19 (S.D.N.Y. Jan. 4, 2007).

23 *De Beers LV Trademark Ltd. v. Debeers Diamond Syndicate, Inc.*, No. 04-civ-4009, 2005 U.S. Dist. LEXIS 9307, at *29 (S.D.N.Y. May 18, 2005).

24 *Cal. Motor Transp.*, 404 U.S. at 513.

25 *PRE*, 508 U.S. at 68 (Stevens, J., concurring).

26 There is also precedent related to the third "pattern" exception sometimes called "scheme liability," holding that antitrust plaintiffs may recover damages stemming from the defense of meritorious litigation that is connected to a larger anticompetitive "scheme." *See, e.g., Hynix Semiconductor Inc. v. Rambus, Inc.*, No. C-06-00204, 527 F. Supp. 2d 1084, 1097-98 (N.D. Cal. 2007). *See generally* Peter A. Barile III, *Scheme Liability Revisited: Recovering Antitrust Damages Resulting from Meritorious Patent Litigation*, E & I UPDATE, Winter 2008, at 4.

27 See, e.g., USS-POSCO Indus. v. Contra Costa County Bldg. & Trades Council, AFL-CIO, 31 F.3d 800, 811 (9th Cir. 1994) ("reconcil[ing] [PRE and Cal. Motor Transp.] as applying to different situations"). See generally Russell Wofford, Considering the "Pattern Litigation" Exception to the Noerr-Pennington Antitrust Defense, 49 Wayne L. Rev. 95 (2003).

28 Primetime 24 Joint Venture v. NBC, 219 F.3d 92, 101 (2d Cir. 2000) (quoting USS-POSCO, 31 F.3d at 811).

29 USS-POSCO, 31 F.3d at 811.

30 *See, e.g., ERBE Elektromedizin GmbH v. Canady Tech.*, 529 F. Supp. 2d 577, 589-90 (W.D. Pa. 2007) (the commencement of four separate patent infringement litigations did not constitute a pattern sufficient to trigger the sham exception).

31 *See, e.g., Travelers Express Co. v. Am. Express Integrated Payment Sys.*, 80 F. Supp. 2d 1033, 1042 (D. Minn. 1999) (applying *PRE*'s standard of objective baselessness to each suit in a series of patent infringement litigation).

32 31 F.3d 800 (9th Cir. 1994)

33 *Id.* at 811.

34 219 F.3d 92 (2d Cir. 2000).

35 *Id.* at 101.

36 *Amarel v. Connell*, 102 F.3d 1494, 1519 (9th Cir. 1996) (two insufficient); *Kottle*, 146 F.3d at 1063 (two insufficient); *Erbe Electromedizin*, 529 F. Supp. 2d at 589-90; *Fresh Del Monte Pineapple*, 2007 U.S. Dist. LEXIS 1372, at *54, n.19 (two insufficient); *Applera Corp. v. MJ Research, Inc.*, 303 F. Supp. 2d 130, 133-34 (D. Conn. 2004) (two insufficient); *Marchon Eyewear, Inc. v. Tura LP*, No. 98-cv-1932, 2002 U.S. Dist. LEXIS 19628, at *24 (E.D.N.Y. 2002) (two insufficient).

37 *Marchon Eyewear, Inc. v. Clariti Eyewear*, Inc., No. 04-cv-2103, 2005 U.S. Dist. LEXIS 43901, at *14 (E.D.N.Y. Apr. 6, 2005) (eight is not enough).

38 *Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp.*, 192 F. Supp. 2d 519, 539 (M.D. La. 2001) (nine is enough).

39 335 F. Supp. 2d 1336 (2004) (MDL No. 1317).

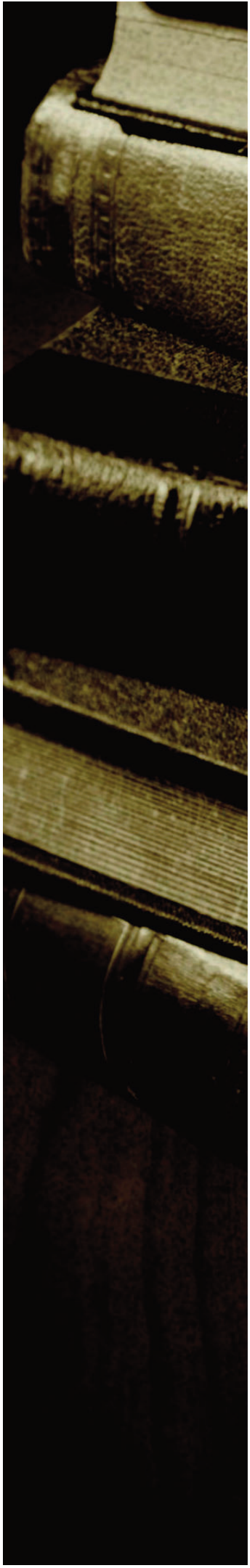
40 552 F.3d 1033.

41 *Kaiser*, 552 F.3d at 1047.

42 *Id.*

43 *Aventis Pharma S.A. v. Amphastar Pharmaceuticals, Inc.*, No. 5:03-cv-00887-MRP-PLA , Dkt. 1072, at 19 (C.D. Cal. Feb. 17, 2009).

44 *Id.* at 15-16.



Brown Bag Review: "Implied Repeals Under the Antitrust Laws: How Far Are the Courts Willing To Go?"

Caroline Brown

The question of the scope of implied immunity has been gathering increased attention since the issuance of the Supreme Court's opinion in Credit Suisse v. Billing, 554 U.S. 264 (2007). It has spawned significant recent lower court decisions like those in the Short Sale Antitrust Litigation, Borey, and Dahl, and major new decisions loom on the horizon with the Second Circuit appeal in Short Sale and the pending motions to dismiss in the multidistrict Municipal Derivatives Antitrust Litigation. In a brown-bag discussion entitled "Implied Repeals Under the Antitrust Laws: How Far Are the Courts Willing To Go?" presented by the Exemptions & Immunities Committee and the Financial Services Committee of the ABA Section of Antitrust Law, a panel debated the likely impact of the case going forward. Panelists included Darren Bush, University of Houston Law School; Andrew Entwistle, Entwistle & Cappucci; and Ali Stoeppelwerth, Wilmer Hale, LLP. The panel was moderated by Ken Carroll of Carrington Coleman and the E & I Committee, and Scott Scheele of DOJ and the Financial Services Committee.

Prior to *Credit Suisse*, the courts observed a fairly clear presumption against finding implied immunity, particularly in light of the trend at that time towards deregulation. *Credit Suisse*, which ruled that the breadth of federal securities regulation impliedly preempted the antitrust claims at issue, altered that stance. "We must interpret the securities laws as implicitly precluding the application of the antitrust laws to the conduct alleged in this case," wrote Justice Breyer in the 7-1 ruling, which reversed the Second Circuit.

In *Credit Suisse*, plaintiff investors had challenged practices related to the initial public offerings of stock, alleging that 16 major investment banks and institutional investors had engaged in "an epic Wall Street conspiracy," as a lower court described the allegation, to inflate aftermarket stock prices for dot-com companies. Taken together, *Gordon* v. *New York Stock Exchange, Inc*., 422 U. S. 659 (1975); *United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U. S. 694 (1975); and *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), make clear that a court deciding this preclusion issue is deciding whether, given context and likely consequences, there is a "clear repugnancy" between the securities law and the antitrust claims, *i.e.,* whether the two are "clearly incompatible."

The divided brown-bag panel disagreed about whether *Credit Suisse* largely just consolidated past precedent, as Entwistle and Stoeppelwerth contended, or marked a sea change in the approach to implied immunity, as Bush argued. But two things were agreed upon: (i) the four-part test articulated by the Supreme Court in *Credit Suisse* at the very least better and more clearly defined the analytical approach courts must take to questions of implied immunity, and (ii) the antitrust laws seem to yield under this test where there is other pervasive regulation in place.

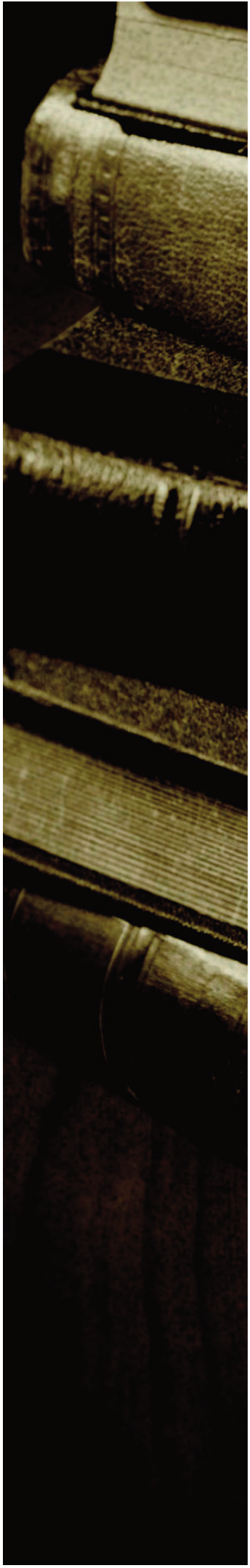
The panel agreed that the degree to which a court focuses upon the particular conduct at issue likely will become the most critical issue. How specifically the court looks at both the conduct and regulation at issue will define both whether there has been a specific grant of regulatory authority and whether it has been exercised. Stoeppelwerth argued that prohibition of conduct is not necessary to demonstrate either a grant of regulatory authority or the exercise of that authority. A decision not to prohibit conduct or to regulate conduct by, for example, requiring disclosure, this may well satisfy the regulation prongs of the *Credit Suisse* test. The panelists agreed that proving regulation in such circumstances, i.e., in the absence of active prohibition or regulation, likely will require, at a minimum, some evidence that shows there was some direct consideration by an agency and there was a policy decision made *not* to exercise regulatory authority. Absent particularized evidence of this sort with respect to the specific conduct in question, warned Bush and Entwistle, a determination of implied immunity would approach "field

preemption"—which seems inconsistent with the particularized test outlined by the Court in *Credit Suisse* but, Professor Bush suggested, perhaps not far from the concepts foreshadowed earlier in *Trinko*. Exactly what sort of evidence will be required to demonstrate this consideration will vary case by case. For example, in one lower court decision, there was evidence going back many years demonstrating that the SEC had studied price stabilization practices and considered its pro- and anti-competitive effects and ultimately allowed the practices to continue.

Because these determinations are made at the motion-to-dismiss stage, pleading will be very important, the panel opined. Complaints that merely piggyback SEC investigations with a focus on wrongdoing and misconduct will come under greater scrutiny under *Credit Suisse*, because defendants are going to have a much easier time defining the specific conduct at issue. This may then allow defendants to argue past the two threshold issues of (1) whether there exists regulatory authority under the securities law to supervise the activities in question and (2) whether there is evidence that the responsible regulatory entities exercise that authority. Where no active regulation of the specific alleged conduct is shown, Defendants might then be able to assert that there is no risk that simultaneous application of securities and antitrust laws would produce conflicting guidance, requirements, duties, privileges or standards of conduct—the ultimate criterion under *Credit Suisse*.

It is this prong—whether there is a "clear repugnancy" between the securities law and antitrust claims such that the two are incompatible—on which the panel thought courts likely would focus as the law develops, just as the Court in *Credit Suisse* had spent most of its time on this factor. Courts will examine carefully whether there exists a conflict or danger of upsetting the regulatory scheme, explicit or implicit, if the case proceeds on antitrust grounds.

Whether *Credit Suisse* will reach beyond the ambit of securities laws remains to be seen, although the panelists agreed that its reasoning appears clearly applicable to any area of the law and society marked by comprehensive regulation. Moreover, if the broad-reaching application of *Twombly* is any indication, we can expect it to reach into any regulated area.



E&I CASE LAW UPDATE

In re Rail Freight Fuel Surcharge Antitrust Litigation, *2008 U.S. Dist. LEXIS 105107 (D.D.C. Dec. 31, 2008)*

In *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 2008 U.S. Dist. LEXIS 105107 (D.D.C. Dec. 31, 2008), the court held that the plaintiffs' state law causes of action (including state antitrust counts) against the defendant railroads were preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. §§ 10101, *et seq.*, and granted the defendants' motion to dismiss those claims.

The plaintiffs, indirect purchasers of rail freight transportation services, alleged that the defendants, the four principal U.S. railroads, had conspired to fix prices in violation of, inter alia, state antitrust laws. The defendants allegedly agreed to charge a uniform fuel surcharge, to be calculated as a percentage of the total cost of freight transportation. Because the asserted conspiracy arose after the deregulation of the railroad industry, the defendants were not required to seek regulatory approval of the surcharges.

The defendants moved to dismiss the state law claims, asserting that the ICCTA preempted state antitrust law, and relied on the ICCTA's express preemption provision: "The jurisdiction of the [federal Surface Transportation] Board ["STB"] over (1) transportation by rail carriers and the remedies provided [in the ICCTA] with respect to rates . . . is exclusive. . . . the remedies provided under [the ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." The court noted that the preemption provision is to be interpreted broadly, in part because of the longstanding federal regulation of the rail industry. Therefore, whether state law is preempted turns on whether enforcement of that law "would have the effect of preventing or unreasonably interfering with railroad transportation." Although the states retain police power over health and safety, if the exercise of that power is "unreasonably burdensome" on railroad operations, the state law will be preempted by the ICCTA. The court determined that the plaintiffs' state law claims were preempted because their application would create "just the patchwork of railroad regulation that ICCTA sought to preempt."

The plaintiffs argued that the ICCTA preemption section established both the jurisdiction of the STB and the preemptive effect of the STB's decisions, and therefore the STB's jurisdiction was coextensive with the scope of federal preemption. The plaintiffs contended that, because the STB lacked jurisdiction over private railroad freight contracts—the subject of the plaintiffs' claims—the ICCTA did not preempt the state law counts. The court found that argument unpersuasive, as it "confuses the STB's jurisdiction with the scope of federal preemption and assumes that Congress would not have allowed ICCTA to leave a regulatory void." As the court explained, the statute's legislative history made clear that the ICCTA was not intended to permit the states to regulate railroads concerning any subject that traditionally had been left to federal law, and in some cases, Congress intentionally left potential plaintiffs without a remedy.

The plaintiffs also relied on 49 U.S.C. § 10709(c)(1) in support of their contention that their claims were not preempted. That statute provides in part that the railroad freight contracts about which plaintiffs complained are not subject to the STB's jurisdiction and "shall not be subject to this part." The court rejected this argument, finding that Section 10709(c)(1) was intended only to make clear that the STB lacked jurisdiction over certain types of contracts; it was not intended to permit state regulation. The type of contracts about which plaintiffs complained constituted eighty percent of all rail traffic, and to credit the plaintiffs' argument would "gut the purposes of ICCTA."

The plaintiffs also argued that the ICCTA's "evidentiary savings clause" demonstrated that their state law claims were not preempted. That statute, 49 U.S.C. § 10706(a)(3)(B)(ii), states in part: "in any proceeding in which it is alleged that a carrier was a party to an agreement . . . in violation of [the Sherman Act, the Clayton Act, and other federal laws]. . . or of any similar State law, proof of an agreement, conspiracy, or combination may not be inferred from" certain kinds of evidence. The court held that this statute provided the railroads with evidentiary protections, but it could not be read as a grant of authority for the states' antitrust laws to be applied to the railroads' alleged conduct. Had Congress intended to permit state antitrust laws to apply to railroads, the court held, "it would not have created the exception so tangentially." And the preemption clause, coupled with the ICCTA's legislative history, overwhelmingly supported the defendants' position. Therefore, the court dismissed the plaintiffs' state law claims.

[Thanks to Greg Garrett]

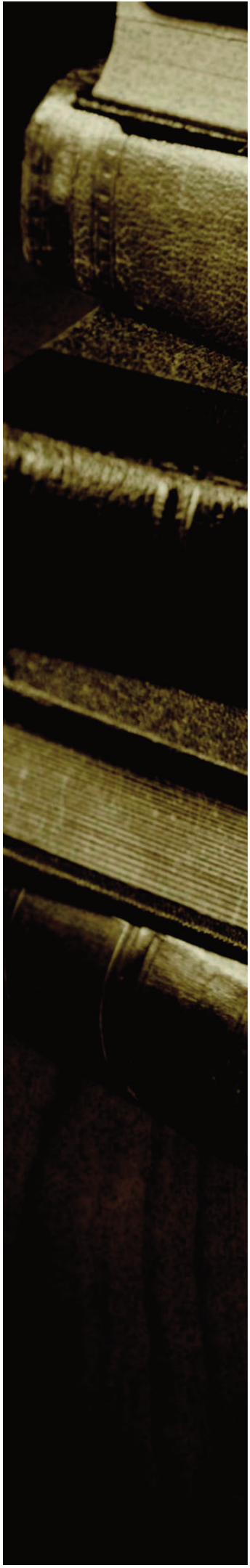
Aventis Pharma S.A. v. Amphastar Pharmaceuticals, Inc., *2009 WL __, Case Nos. 5:03-0087-MRP, 5:04-00333-MRP (C.D. Cal. Feb. 17, 2009)*

In *Aventis Pharma S.A. v. Amphastar Pharmaceuticals, Inc.*, 2009 WL __, Case Nos. 5:03-0087-MRP, 5:04-00333-MRP (C.D. Cal. Feb. 17, 2009), the court dismissed the defendant's counterclaim, which alleged federal antitrust violations, finding that most of the challenged conduct was protected by *Noerr*, and the remaining allegations were insufficient to state an antitrust claim.

The FDA granted Aventis, a brand-name pharmaceutical manufacturer, approval to market its drug, Lovenox. Aventis subsequently filed a citizen petition with the FDA, asserting that the chemical composition of the active ingredient in Lovenox, enoxaparin, was not fully known, and for that reason, any applicant wishing to market a generic version should be required to demonstrate that its manufacturing process was fully equivalent to Aventis's method. Amphastar, a generic pharmaceutical manufacturer, then filed an application to market a generic version of enoxaparin, and asserted in the application that Aventis's patent was invalid, unenforceable, or would not be infringed. Aventis then brought suit against Amphastar for patent infringement, and pursuant to the Hatch-Waxman Act, Amphastar's application to market a generic was automatically stayed. The day after Aventis filed suit, the FDA stated that it had been unable to reach a decision on Aventis's citizen petition because it raised "complex issues requiring extensive review." Amphastar subsequently filed a response to Aventis's petition with the FDA, asserting that Aventis had changed the enoxaparin manufacturing process seventeen times in eight years, undercutting the factual premise for Aventis's requested relief. To date, the FDA has not issued a decision on Aventis's citizen petition.

A trial was then held on Amphastar's claim that the patent was unenforceable due to Aventis's inequitable conduct. The court found for Amphastar on that defense, holding that when Aventis applied for its patent, Aventis intended to deceive the patent office; that finding was upheld on appeal, 525 F.3d 1334 (Fed. Cir. 2008). In its counterclaim, Amphastar alleged that Aventis had violated Section Two of the Sherman Act, because the patent infringement lawsuit was sham litigation, and its citizen petition was frivolous and materially false.

The court first ruled that, because *Noerr* potentially immunized two courses of challenged conduct (Aventis's lawsuit against Amphastar and Aventis's citizen petition with the FDA), and because a different standard of review was applicable to each, each course of conduct had to be analyzed sepa-



rately. Relying on *Kaiser Foundation Health Plan, Inc. v. Abbott Labs., Inc.*, 552 F.3d 1033 (9th Cir. 2009), the court found that if the counterclaim alleged facts sufficient to overcome *Noerr* immunity for either tranche of conduct, then the non-immunized conduct could be considered with the other allegations of the complaint in determining whether an antitrust violation had been sufficiently plead.

As to Amphastar's claim that Aventis's patent enforcement lawsuit was sham litigation, the court applied the three-pronged test for defining sham litigation, as set forth by the Ninth Circuit in *Kaiser*: (1) the lawsuit was objectively baseless and the defendant had an unlawful motive in bringing it; or (2) the defendant committed knowing fraud, consisting of intentional misrepresentations severe enough to deprive the proceedings of their legitimacy; or (3) the defendant had brought a series of lawsuits pursuant to a policy of starting proceedings without regard to the merits and for an unlawful purpose. The court assumed without deciding that the Federal Circuit, whose holdings are authoritative in patent cases, would agree that when the elements of (3) are met, the challenged conduct loses *Noerr* immunity.

First examining Aventis's initiation of the patent lawsuit, the court held that Amphastar could not satisfy the first prong because Aventis had filed a petition for certiorari in the underlying litigation; therefore, Aventis's position on inequitable conduct could yet be vindicated. In the alternative, the court held that Aventis's lawsuit was not objectively baseless, because Aventis had made credible legal arguments to change the law concerning inequitable conduct in patent prosecutions, and Aventis had pressed for a reasonable legal interpretation of the facts concerning inequitable conduct.

The court found that Amphastar's counterclaim was sufficient to defeat *Noerr* immunity through the second method of proving sham litigation, described by the Court as the *Walker Process* theory. The court stated that, under *Walker Process*, Amphastar was required to allege facts sufficient to show that Aventis had fraudulently procured the patent and had fraudulently sought to enforce the patent. Aventis had alleged with sufficient plausibility and specificity that Aventis had misrepresented material facts to the Patent & Trademark Office (PTO), that the PTO had relied on those misrepresentations in granting the patent, that Aventis was aware of the Lovenox patent's fraudulent procurement when Aventis filed the lawsuit against Amphastar, and that the lawsuit had caused Amphastar injury. The court did not, however, state what facts had Aventis misrepresented.

Examining the third method of defining sham litigation, the court found that the counterclaim failed to allege facts sufficient to show Aventis had a subjective policy of instituting lawsuits as an anticompetitive weapon, or that a substantial number of those lawsuits lacked objective merit. The court relied on its prior ruling that Aventis's legal theories were not objectively baseless, and accordingly, could be entitled to *Noerr* immunity.

The court then turned to Amphastar's claim that Aventis had violated Section Two by filing a materially false citizen petition with the FDA. The court stated that the citizen petition process bore some resemblance to legislative lobbying, and if analyzed as such, "few or no exceptions [to *Noerr* immunity] apply." The citizen petition process also had some characteristics of an adjudicatory proceeding, and if analyzed under that rubric, *Noerr* immunity would be considered under the three-pronged test of *Kaiser*. Because Aventis's petition was based on the statutory requirement that a proposed generic drug have the "same" active ingredient as the brand-name drug, and did not ask the FDA to exercise discretion, the court analyzed the petition as though it initiated a judicial proceeding.

Because the FDA had not ruled on Aventis's citizen petition, the court could not determine whether Aventis's petition was objectively baseless; therefore, the court ruled that, under the first and third prongs of the *Kaiser* test, Amphastar had not demonstrated that the conduct was beyond the protec-

tion of *Noerr*. And, because there was only one petition at issue, Amphastar could not demonstrate that Aventis had engaged in a series of anticompetitive acts.

In analyzing the second aspect of the *Kaiser* test for sham litigation, the court declined to use the *Walker Process* test because the FDA petition was "outside the patent context." Instead, to demonstrate that the conduct was beyond the bounds of *Noerr* immunity, Amphastar had to demonstrate that Aventis had "so misrepresented the truth . . . that the entire proceeding was deprived of its legitimacy," and the elements of fraud had to be plead with sufficient particularity pursuant to Rule 9(b). Although the court found it plausible that Aventis had made a misrepresentation to the FDA regarding whether Aventis had changed its manufacturing process for Lovenox, Amphastar had failed to demonstrate that the misrepresentation deprived the citizen petition proceeding of their legitimacy, because Amphastar had already told the FDA of the misrepresentation. Amphastar also failed to plead facts sufficient to find that the misrepresentation was material. And Amphastar failed to demonstrate that, but for the fraud, Amphastar was prepared to enter the market with reasonable speed upon FDA approval, because Amphastar acknowledged that it had difficulty obtaining a supply of ingredients necessary to manufacture enoxaparin. Therefore, Aventis's filing of the citizen petition was entitled to *Noerr* immunity.

The court concluded that Amphastar had sufficiently alleged that the patent lawsuit brought by Aventis could be beyond the protection of *Noerr*. Nonetheless, the court found that Amphastar had failed to allege antitrust injury, and therefore dismissed the counterclaim. On March 3, 2009, the court granted Amphastar leave to amend its counterclaim.

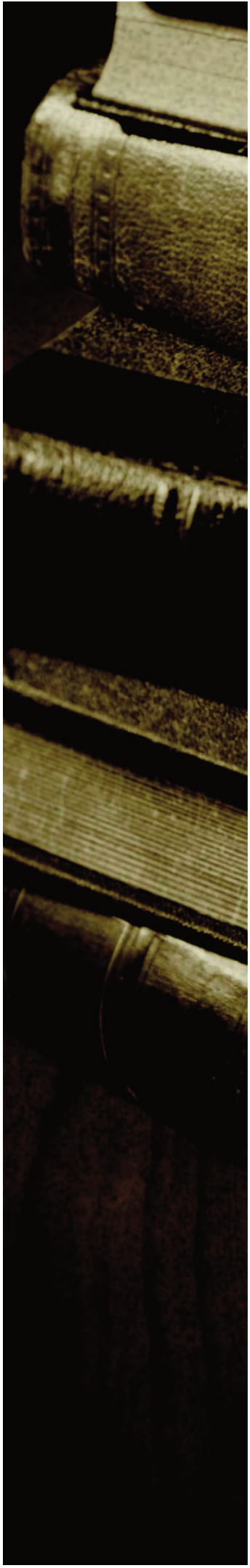
[Thanks to Greg Garrett]

Maverick Recording Co. v. Chowdhury, *2008 U.S. Dist. LEXIS 63783 (E.D.N.Y. Aug. 19, 2008)*

In *Maverick Recording Co. v. Chowdhury*, 2008 U.S. Dist. LEXIS 63783 (E.D.N.Y. Aug. 19, 2008), the United States District Court for the Eastern District of New York granted plaintiffs' motion to dismiss defendants' antitrust counterclaims, finding that the challenged conduct was protected from antitrust liability by *Noerr*.

Plaintiffs, groups of record companies, filed suit against defendants for copyright infringement, arising from the defendants' alleged misuse of plaintiffs' copyrighted music over the internet. The defendants filed counterclaims, alleging that the plaintiffs collusively refused to settle individual lawsuits, and tied settlement with any one defendant to a settlement with every other defendant. Defendants also alleged that plaintiffs had conferred settlement authority on "their cartel, the Recording Industry Association of America, Inc." The defendants did not identify the provision(s) of the antitrust laws that the plaintiffs allegedly violated.

The plaintiffs moved to dismiss the counterclaim, and the court held that the plaintiffs were entitled to dismissal based on *Noerr*. Relying on *Joblove v. Barr Laboratories, Inc.*, 466 F.3d 187 (2d Cir. 2006), the court stated that "plaintiffs have the right to join together to prosecute their claims of copyright infringement, even if such conduct could be considered anticompetitive, as long as the litigation is not a 'sham.'" Because the court had already held that the plaintiffs' allegations established plausible claims of copyright infringement, *Elektra Entertainment Group, Inc. v. Schwartz*, 2008 U.S. Dist. LEXIS 26183 (E.D.N.Y. April 1, 2008), the litigation could not be considered a sham, and the counterclaims were dismissed.



The court also held that the defendants had failed to satisfy the pleading standard set forth in *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007), because their allegations were insufficient to establish a "plausible antitrust claim."

[Thanks to Greg Garrett]

Native American Distributing v. Seneca Cayuga Tobacco Co., *546 F.3d 1288 (10th Cir. 2008).*

The Tenth Circuit addressed a claim for conspiracy to violate the Sherman Act and the Robinson-Patman Act in *Native American Distributing v. Seneca Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008). The antitrust issues were subsidiary to the primary issue in the dispute—whether the Defendant Seneca-Cayuga Tribe of Oklahoma, a domestic dependent nation (the "Tribe"), enjoyed sovereign immunity from the contractual and conspiracy claims asserted by the Plaintiffs. The Court found that sovereign immunity had not been waived by the Tribe and barred all claims against it. To reach that conclusion, the Court had to decide that the contracting party was the Tribe itself rather than a separate Tribal corporation, which by the terms of its corporate charter had waived sovereign immunity. Also, the Court ruled but there could be no estoppel of the right to assert sovereign immunity based upon alleged representations by the tribe to the plaintiffs that no explicit waiver of sovereign immunity was necessary due to the waiver provision of the corporate charter.

With respect to the individual defendants, the Court briefly considered whether the Tribe was the real party in interest, which would provide an umbrella of sovereign immunity over the individual defendants as well. That was the basis of the trial court's decision dismissing the individual defendants. However, the Court elected to avoid this issue and affirm on alternative grounds by deciding that no valid claims had been asserted against the individual defendants for conspiracy to violate the antitrust laws.

The dispute arose after the Tribe engaged Native American Distributors ("NAD"), to advance the Tribe's tobacco enterprise. The relationship eventually soured and NAD and one of its officers brought suit against the Tribe and various affiliated individuals. The Plaintiffs alleged a breach of contact claim against the Tribe and civil conspiracy claims against all the defendants. The civil conspiracy claim did not specifically reference what civil wrongs the defendants allegedly conspired to commit, but in briefing the Plaintiffs argued that the complaint should be read to allege violations of Section One of the Sherman Act and/or either of two sections of the Robinson-Patman Act—15 U.S.C. 13, which prohibits rebate discrimination, and subsection (a) of the same statute, the familiar prohibition against price discrimination.

As noted, the Tenth Circuit elected to affirm the dismissal of the individual Defendants on alternative grounds. More specifically, the Court dismissed the vague and conclusory allegations of conspiracy to violate the Sherman Act as implausible under *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007), and found that the allegations of a conspiracy between the Tribe and its employees were barred under the intra-enterprise conspiracy doctrine announced in *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752 (1984). The individual tribal officials named as defendants were held not to be independent economic actors or to be so pursuing self-interested goals.

With respect to the alleged conspiracy to violate the Robinson-Patman Act, the Court found the alleged rebate discrimination conspiracy failed to state a cause of action, as that section of the Robinson-Patman Act does not permit private causes of action. The more pedestrian claim of a price discrimination conspiracy was dismissed for lack of antitrust standing, as the plaintiffs failed to allege damage to competition. In point of fact, the plaintiffs' claims were wholly bereft of allegations

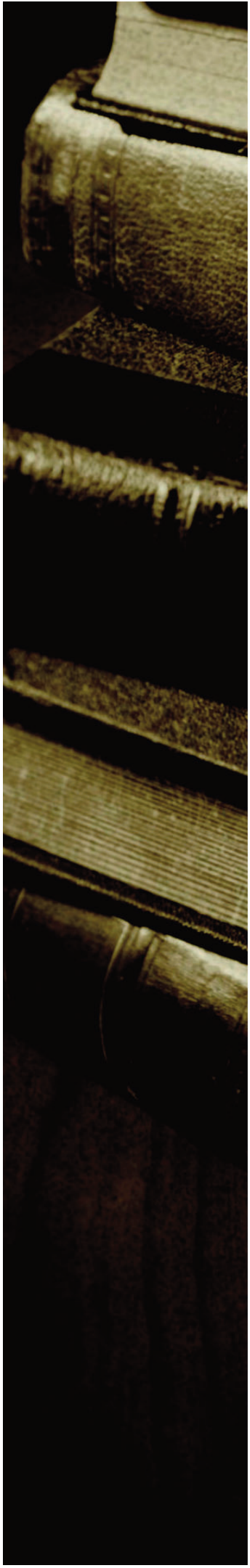
regarding the relevant market that NAD was part of, or how competition was affected in that market, suggesting that the invocation of the Sherman Act and the Robinson-Patman Act in briefing was more an afterthought. Plainly, the plaintiffs did not anticipate that the Tribe would be immune from its contractual claims

[Thanks to Richard K. Fueyo]

Asif A. Sial v. Unifund CCR Partners, *No. 08 CV 0905, 2008 WL 4079281 (S.D. Cal. Aug. 28, 2008)*

In *Asif A. Sial v. Unifund CCR Partners*, No. 08 CV 0905, 2008 WL 4079281 (S.D. Cal. Aug. 28, 2008), the Southern District of California issued another in a line of opinions recognizing the applicability of the *Noerr-Pennington* doctrine outside the antitrust context, explaining that the "doctrine sets forth a rule of statutory construction 'applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause.'" 2008 WL 4079281 at *2 (quoting *Sosa v. DirecTV*, 437 F.3d 923, 931 (9th Cir. 2006)). At issue was a Fair Debt Collection Practices Act ("FDCPA") claim; in particular, allegations that defendants obtained a default judgment and garnished plaintiff's wages despite knowing they had not served a copy of the summons and complaint, as is required by law, and as was represented to the court in seeking the default judgment. *Id*. at *2-4. The court held that, assuming the allegations to be true, this deceptive conduct was indeed petitioning, but was a sham and would provide grounds for setting aside the default judgment. *Id*. at *4. The Court, therefore, denied defendants' Rule 12(c) motion for judgment on the pleadings. *Id*. at *5. While the case does recognize the applicability of *Noerr* outside the antitrust context, it also underscores that *Noerr* will not protect deceptive petitioning directed toward the judicial branch.

[Thanks to Peter Barile]



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U.S. Antitrust Law and Global Claims: Navigating the Foreign Trade Antitrust Improvement Act

Wednesday, March 25, 2009
2:00 -3:30 pm

Presented by the Civil Practice and Exemptions and Immunities Committees

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Speakers

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Edward B. Schwartz, *DLA Piper, Washington, DC*
Ian Simmons**,** *O'Melveny & Myers LLP, Washington, DC*
Jodi Trulove, *Dickstein Shapiro LLP, Washington, DC*

Moderator

Michael G. Egge, *Latham & Watkins LLP, Washington, DC*

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John Roberti, *Mayer Brown LLP, Washington, DC*