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*Recent Developments in  
Competition and Antitrust Law*

# NOERR-PENNINGTON: SAFEGUARDING THE FIRST AMENDMENT RIGHT TO PETITION THE GOVERNMENT

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## I. Introduction

The right to petition the government is guaranteed in the First Amendment: “Congress shall make no law . . . abridging the freedom . . . to petition the Government for a redress of grievances.”<sup>2</sup> The *Noerr-Pennington* doctrine<sup>3</sup> exists to safeguard that right by conferring immunity on a wide variety of petitioning activities—including petitioning of the legislative, executive, and judicial branches—from subsequent legal liability.<sup>4</sup> While the *Noerr-Pennington* doctrine originated with immunity from claims under the Sherman Act, it extends much more broadly to confer immunity from many other legal claims premised on conduct involving protected petitioning activities.<sup>5</sup>

The scope of the *Noerr-Pennington* doctrine arises in a wide range of cases. For example, the issue has arisen recently with respect to cases involving: efforts to lobby local zoning

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2 U.S. CONST. amend. I.

3 The doctrine is named after two Supreme Court cases: *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (“*Noerr*”); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965) (“*Pennington*”).

4 See, e.g., *City of Colum. v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379 (1991) (“it is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right ‘to petition the Government for a redress of grievances,’ U.S. Const., Amtd. 1, to establish a category of lawful state action that citizens are not permitted to urge”); *Vibo Corp. v. Conway*, 669 F.3d 675, 683–84 (6th Cir. 2012) (explaining that *Noerr-Pennington* protects the constitutional right to petition the government embodied in the Petition Clause of the First Amendment); *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 846 (7th Cir. 2011) (“*Noerr-Pennington* was crafted to protect the freedom to petition guaranteed under the First Amendment.”).

5 See, e.g., *New West, L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) (“*Noerr-Pennington* has been extended beyond the antitrust laws, where it originated, and is today understood as an application of the first amendment’s speech and petitioning clauses.”); *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000) (“The immunity is no longer limited to the antitrust context; we have held that *Noerr-Pennington* immunity applies to claims under 42 U.S.C. § 1983 that are based on the petitioning of public authorities.”); *In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903, 911 (N.D. Ill. 2013) (“[T]he Seventh Circuit has applied the [*Noerr-Pennington*] doctrine broadly, including to RICO claims. . . . [B]ecause the doctrine derives from a constitutional source, other regional circuit courts have held that it must also extend to state law statutory and common law claims.”) (collecting cases); *Rondigo, LLC v. Twp. of Richmond*, 2012 WL 1021726, at \*5, 8 (E.D. Mich. Mar. 27, 2012) (applying *Noerr-Pennington* to Section 1983 and defamation claims).

boards;<sup>6</sup> litigation over patents and copyrights;<sup>7</sup> litigation in foreign jurisdictions;<sup>8</sup> “serial” litigation;<sup>9</sup> pre-suit demand letters;<sup>10</sup> citizen petitions submitted to the U.S. Food and Drug Administration (“FDA”);<sup>11</sup> proceedings before the U.S. Commodity Futures Trading Commission (“CFTC”);<sup>12</sup> and challenges to the Master Settlement Agreement ending advertising litigation against tobacco companies.<sup>13</sup> These recent cases present a number of recurring issues regarding the application of *Noerr-Pennington*.

One recurring issue is whether petitioning activity involves a “legislative” body or an “adjudicative” body. This is a critical question because the scope of *Noerr-Pennington* immunity differs for petitioning in the political arena compared to petitioning judicial bodies.<sup>14</sup> Another frequent issue is how courts should apply the “sham” petitioning exception, particularly the criteria relevant to determine whether prior petitioning was “objectively baseless.”<sup>15</sup> Relatedly, a question of practical importance is whether the determination on objective baselessness can (and should) in most circumstances be made on the pleadings or at another early stage in the litigation.<sup>16</sup>

In light of the purpose of the *Noerr-Pennington* doctrine, we provide the following suggestions:

(1) Because there is a significant difference in the scope of *Noerr-Pennington* immunity for legislative petitioning versus adjudicatory petitioning, greater clarity is necessary on how to identify what is legislative versus adjudicatory, particularly in light of the increasing role of administrative agencies that often perform both functions.

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6 See, e.g., *Mercatus*, 641 F.3d at 841-42.

7 See, e.g., *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 2013 WL 6682981, at \*7 (E.D. Va. Dec. 18, 2013); *Surface Supplied, Inc. v. Kirby Morgan Dive Sys. Inc.*, 2013 WL 5496961, at \*5 (N.D. Cal. Oct. 3, 2013); *Reg'l Multiple Listing Serv. of Minn., Inc. v. Am. Home Realty Network, Inc.*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 3367132, at \*12 (D. Minn. July 5, 2013); *In re AndroGel Antitrust Litig.*, 888 F. Supp. 2d 1336, 1343-44 (N.D. Ga. 2012); *Adobe Sys. Inc. v. Coffee Cup Partners, Inc.*, 2012 WL 3877783, at \*8-9 (N.D. Cal. Sept. 6, 2012).

8 See *Luxpro Corp. v. Apple Inc.*, 2011 WL 1086027, at \*4-5 (N.D. Cal. Mar. 24, 2011).

9 See *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 362-65 (4th Cir. 2013).

10 See, e.g., *Rock River Comm'ns, Inc. v. Universal Music Grp., Inc.*, \_\_\_ F.3d \_\_\_, 2014 WL 223689, at \*6-8 (9th Cir. Jan. 22, 2014); *OG Int'l, Ltd. v. Ubisoft Entm't*, 2012 WL 4809174, at \*2-3 (N.D. Cal. Oct. 9, 2012).

11 See, e.g., *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2013 WL 2181185, at \*20-22 (E.D. Tenn. May 20, 2013); *In re Prograf Antitrust Litig.*, 2012 WL 293850, at \*5 (D. Mass. Feb. 1, 2012); *In re Flonase Antitrust Litig.*, 795 F. Supp. 2d 300, 309-16 (E.D. Pa. 2011).

12 See *U.S. Futures Exch. LLC v. Bd. of Trade of City of Chi.*, 2012 WL 3155150, at \*3-4 (N.D. Ill. Aug. 3, 2012).

13 See *Vibo*, 669 F.3d at 683-86.

14 See *infra* § II.A.

15 See *infra* § III.A.

16 See *infra* § IV.

(2) The two-part inquiry (objective and subjective) set forth in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (“PREP”)<sup>17</sup> demarcates a narrow exception to *Noerr-Pennington* immunity based upon “sham” petitioning in the context of litigation. That exception should continue to be construed narrowly so as to avoid intrusion upon or chilling bona fide petitioning, including petitioning that may be unlikely to succeed but advances “‘good faith argument[s] for the extension, modification, or reversal of existing law.’”<sup>18</sup>

(3) Courts should continue to hold plaintiffs to the pleading standard of requiring specific facts that would show “objective baselessness” before allowing a claim based on alleged sham petitioning to proceed. When appropriate, courts should dismiss claims challenging petitioning activities subject to *Noerr-Pennington* immunity at the pleading stage, including in instances where the public or judicially noticeable record shows that the conduct at issue does not fall within the sham exception. If a more factual determination is necessary, courts should attempt to phase discovery such that the record necessary to evaluate summary judgment is created early in the litigation.

The remainder of this article explores these three issues in more detail.

## II. Adjudicatory Versus Legislative Petitioning

### A. The Scope of *Noerr-Pennington* Immunity for Adjudicatory Compared to Legislative Petitioning

The *Noerr-Pennington* doctrine arose in the context of providing immunity for legislative petitioning from antitrust liability. In *Noerr*, the Supreme Court held petitioning efforts by a group of railroads to influence legislation adverse to their competitors in the trucking industry were immune from liability under the Sherman Act. The Court explained that “the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.”<sup>19</sup> Thus, the Sherman Act does not punish “political activity” by which “the people . . . freely inform the government of their wishes.”<sup>20</sup> The Court reached that conclusion despite the fact that the railroads’ “sole purpose . . . was to destroy the truckers as competitors” and their efforts were conducted in an unethical and deceptive manner.<sup>21</sup>

Four years later in *Pennington*, the Court held a union’s efforts to petition the executive branch—specifically the Secretary of Labor—for a favorable minimum wage determination were immune from antitrust liability.<sup>22</sup> Notably, the Secretary of Labor granted the union’s minimum wage request. The Court therefore held that regardless of the union’s intent, the

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17 508 U.S. 49, 60–61 (1993).

18 *Id.* at 65 (quoting FED. R. CIV. P. 11).

19 *Noerr*, 365 U.S. at 137.

20 *Id.*

21 *Id.* at 138–45.

22 *Pennington*, 381 U.S. at 670.

plaintiff could not recover damages for injury it suffered by what was ultimately an act of the Secretary of Labor.<sup>23</sup>

**Adjudicatory petitioning.** The Supreme Court first applied *Noerr-Pennington* immunity to petitioning administrative agencies and courts in *California Motor Transport Co. v. Trucking Unlimited*.<sup>24</sup> The defendants instituted state and federal proceedings to defeat plaintiffs' applications to acquire certain operating rights. The Court held that the principles of *Noerr* and *Pennington* applied to petitioning of administrative agencies and courts: "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition."<sup>25</sup> But, the Court also held that immunity from the antitrust laws may not apply where "a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial process have been abused" by "effectively barring [an adversary] from access to the agencies and courts."<sup>26</sup>

Most recently, in *PREI* the Court articulated the contours of a specific two-part definition of "sham" petitioning *in the context of litigation*:

1. "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."<sup>27</sup> ("**Objective Component**")
2. "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals '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."<sup>28</sup> ("**Subjective Component**")

Significantly, the issue under the Subjective Component is *not* whether the defendant had an anticompetitive intent. A market participant is entitled to use the adjudicatory process to try to achieve an anticompetitive result or otherwise harm a competitor. Indeed, it is the nature of litigation that the plaintiff intends to gain an advantage over the defendant. Rather, the Subjective Component asks whether the party knew or reasonably should have known at the time that its litigation was objectively unreasonable.

The Court noted in *PREI* that it "need not decide . . . whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations."<sup>29</sup> While some courts put fraud and misrepresentations into a separate

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23 *Id.* at 671.

24 404 U.S. 508, 510 (1972).

25 *Id.*

26 *Id.* at 513.

27 *PREI*, 508 U.S. at 60.

28 *Id.* at 60-61 (quoting *Noerr*, 365 U.S. at 144; *Omni Outdoor*, 499 U.S. at 380) (emphasis in original).

29 *Id.* at 61 n.6.

analytic category under *Noerr-Pennington*,<sup>30</sup> it can be useful to think of fraud or misrepresentations as one way of satisfying the objectively baselessness requirement. As one district court stated, “it is apparent that any misrepresentation exception to the doctrine should be limited to

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30 See, e.g., *Mercatus*, 641 F.3d at 843-44 (describing a “fraud exception” that applies “if the misrepresentation (1) was intentionally made, with knowledge of its falsity; and (2) was material, in the sense that it actually altered the outcome of the proceeding”); *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 401-02 (4th Cir. 2001) (“If a fraud exception to *Noerr-Pennington* does exist, it extends only to the type of fraud that deprives litigation of its legitimacy.”).

misrepresentations respecting the substance of the claim that show that the party's litigation position had no objective basis, i.e., that it was not 'objectively genuine.'"<sup>31</sup>

**Legislative petitioning.** While the “sham” exception to *Noerr-Pennington* for adjudicatory petitioning is exceedingly narrow as defined by *PREI*, it is even more narrow, if it exists at all, in the legislative context.<sup>32</sup> In *City of Columbia v. Omni Outdoor Advertising*,<sup>33</sup> the Court stated that the “sham” exception would apply where a defendant’s “activities are ‘not genuinely aimed at procuring favorable government action’ *at all*.”<sup>34</sup> On the other hand, it is *not* a “sham” where a defendant “genuinely seeks to achieve his governmental result, but does so *through improper means*.”<sup>35</sup> This articulation significantly limits the scope of any possible “sham” exception for legislative petitioning because it “will indeed be a rare case to find a petitioner that has no genuine interest ‘at all’ in procuring governmental action, even though its principal purpose and expectation may be to injure its rivals directly through the petitioning process.”<sup>36</sup> Areeda states that “it is difficult” to identify what would qualify as “sham” in the legislative context: “least difficult for judicial processes, more difficult for administrative adjudication, much more difficult for executive or administrative action generally, and *most difficult for legislative processes where it is virtually impossible to identify the sham*.”<sup>37</sup>

In the context of legislative petitioning, courts have specifically rejected application of *PREI*'s “sham” exception for adjudicatory petitioning.<sup>38</sup> As the Ninth Circuit explained, “it would seem quite pointless to ask whether [a] lobbying effort was ‘objectively baseless.’ To decide objective baselessness, we would need objective standards, of which there are few, if any, in the political realm of legislation, against which to measure the defendant’s conduct.”<sup>39</sup> Thus, the Ninth Circuit held:

The sham exception is more easily applied to litigation, however, than it is to lobbying before executive or legislative bodies. . . . We decline to apply the [*PREI*] standard here. . . . Defendants petitioned county officials not to enter a lease,

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31 See *Thomas v. Hous. Auth. of Cnty. of L.A.*, 2006 WL 5670938, at \*9 n.49 (C.D. Cal. Feb. 28, 2006).

32 *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1061 (9th Cir. 1998) (“[T]he scope of the sham exception to the *Noerr-Pennington* doctrine depends on the branch of government involved. *If it is the legislature, the sham exception is extraordinarily narrow*. But if it is the judicial branch, this circuit recognizes three categories of anticompetitive behavior that can amount to a sham and, therefore, outside the protection of the *Noerr-Pennington* doctrine.”) (emphasis added).

33 499 U.S. 365 (1991).

34 *Id.* at 380 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4) (emphasis added).

35 See *id.* (quoting *Allied Tube*, 486 U.S. at 508 n.10) (emphasis in original).

36 ABA, Section of Antitrust Law, *THE NOERR-PENNINGTON DOCTRINE* 61 (1994); see also Shubha Ghosh & Darren Bush, *Predatory Conduct and Predatory Legislation: Exclusionary Tactics in Airline Markets*, 45 HOUS. L. REV. 343, 365–66 (2008) (“The sham exception is an impossible one to meet, and no reported case has found antitrust liability for engaging in what is essentially a political, rather than a market, process.”).

37 I Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 204, at 262 (2013) (emphasis added) (“Areeda”).

38 See, e.g., *Manistee*, 227 F.3d at 1094; *Kottle*, 146 F.3d at 1061 (“It is obvious that [the ways] in which litigation might be a sham do not necessarily extend beyond the litigation context.”).

39 *Kottle*, 146 F.3d at 1061.

and attempted to energize members of the public to do the same. There are no enforceable standards by which either of the two prongs of the [PREI] test can be applied. *The exception simply does not fit.*<sup>40</sup>

Indeed, the standards embodied in the PREI definition of “sham” that can be applied practicably to the institution of legal proceedings do not—and should not—apply to legislative petitioning.<sup>41</sup> The question therefore remains whether there is any sham exception to *Noerr-Pennington* immunity in the context of legislative petitioning. While the Ninth Circuit stated that “the sham exception is extraordinary narrow”<sup>42</sup> in the context of legislative petitioning, no circuit court appears to have expressly applied such an exception or explained what exactly it would be.

In the legislative context, the courts have also specifically rejected application of the exception to *Noerr-Pennington* immunity for fraud or misrepresentations that applies in the adjudicatory context: “[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.”<sup>43</sup> As the Seventh Circuit recently held, there simply is no fraud exception to *Noerr-Pennington* “outside of adjudicative proceedings.”<sup>44</sup>

## B. What is “Legislative” and What is “Adjudicatory”?

In light of the difference in the scope of *Noerr-Pennington* immunity in the context of legislative versus adjudicatory petitioning (if there is even any exception, however narrow, in the context of legislative petitioning), and to avoid chilling of the fundamental constitutional right that undergirds *Noerr-Pennington* immunity, it is essential that actors know, *ex ante*, how *Noerr-Pennington* applies to specific petitioning conduct.<sup>45</sup> Yet “the line between legislation and adjudication is not always easy to draw.”<sup>46</sup> One district court recently lamented: “*Noerr-Pennington* immunity has existed since the 1960s, but since that time there has been some disparate application of the rule due in part to confusion over

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40 *Manistee*, 227 F.3d at 1094 (emphasis added).

41 *See id.*; *Areeda*, ¶ 204, at 248 (“*First*, one lobbies for new legislation or rule making when existing law does *not* provide for the right being sought. *Second*, and more important, the range of legislative requests can be potentially infinite in variety. Legislative bodies have passed manifestly silly laws, and they are likely to do so again. Certainly one could not develop an ‘objective test’ whether the legislation or rule sought was manifestly unreasonable, for the First Amendment petitioning right is not limited to reasonable requests.”)

42 *Kottle*, 146 F.3d at 1061.

43 *See Cal. Motor*, 404 U.S. at 513; *see also Allied Tube*, 486 U.S. at 499–500 (“A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods.”).

44 *Mercatus*, 641 F.3d at 844; *id.* at 838–39 (“Even if we assume that the Hospital made material misrepresentations during and relating to the [board] proceedings concerning *Mercatus*’ physician center, such misrepresentations are legally irrelevant because those meetings were inherently political in nature.”).

45 *See id.* at 847 (stating that the risk of stifling “the legitimate exercise of” the core right to petition the government “grows when, as may often be the case, a layperson is uncertain whether the governmental action at issue is adjudicatory or legislative”).

46 *Id.* at 845 (quoting *Mercatus Grp. LLC v. Lake Forest Hosp.*, 695 F. Supp. 2d 811, 819 (N.D. Ill. 2010)).

where to draw the line between adjudicative and legislative activity.”<sup>47</sup>

The principal line-drawing difficulty arises most often in the context of proceedings before administrative agencies, which at different times act in different capacities, and sometimes simultaneously act in both legislative and adjudicative capacities.<sup>48</sup> The Seventh Circuit recently grappled with this problem and set forth a comprehensive set of factors to draw the line between legislative and adjudicatory.<sup>49</sup> Those factors include:

Whether the particular body has legislative power;

Whether the governmental actions at issue were matters of discretionary authority or instead were guided by more definite standards susceptible to judicial review;

The formality of the fact-finding processes (*e.g.*, whether evidence is subject to strict rules of relevance and admissibility, and whether there is a formal record of decision);

Whether testimony at the proceedings was under oath;<sup>50</sup>

Whether the fact-finding process is subject to political influences; and

Whether the proceedings involve or permit *ex parte* communications.

The courts sometimes single out the factor of whether the governmental action at issue was discretionary as having particularly great weight<sup>51</sup> because “[o]nly when administrative officials must follow rules is it meaningful to ask whether a petition before an agency was ‘objectively baseless.’”<sup>52</sup>

In *Mercatus*, the Seventh Circuit held that proceedings before a village board on plaintiff’s proposed physician center were “legislative.” The court noted the following in support of that determination: the board “generally acts in a policymaking capacity,” the board is “ill-equipped to conduct adjudicative proceedings,” the board “conducts the vast majority of its business through relatively informal public meetings,” both the plaintiff and defendant “engaged in *ex parte* lobbying of individual Board members,” “[n]one of the evidence the Board considered was subject to strict rules of admissibility or any recognizable evidentiary rules,” “one Board member . . . contacted independent think tanks for guidance,” “[m]embers of the general public were allowed to voice their opinions,” and “[n]one of the testimony before the Board was given under oath or on penalty of perjury.”<sup>53</sup> Furthermore, the Seventh Circuit emphasized that the Board’s decision on “developmental approval was

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47 *U.S. Futures*, 2012 WL 3155150, at \*3.

48 *See Mercatus*, 641 F.3d at 844.

49 *See id.* at 845–46; *see also Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 228 (7th Cir. 1975) (noting the city council had been delegated legislative powers of the state, it need not “compile an evidentiary record through formal proceedings,” “[i]t is free to base its actions on information and arguments that come to it from any source,” and “[i]ts members are subject to lobbying and other forms of *ex parte* influences”).

50 The Supreme Court “has treated as significant whether any testimony at the proceeding in question was given under oath or affirmation, under penalty of perjury.” *Mercatus*, 641 F.3d at 845 (citing *Allied Tube*, 486 U.S. at 504).

51 *See id.* at 846 (collecting cases).

52 *Kottle*, 146 F.3d at 1062.

53 *See Mercatus*, 641 F.3d at 847–48.

not guided by enforceable, definite standards subject to review.”<sup>54</sup>

Applying the factors discussed above, a district court recently found that proceedings of the CFTC regarding approval of an application to launch an exchange were legislative for purposes of *Noerr-Pennington*.<sup>55</sup> The court noted that the CFTC has both adjudicatory and legislative power, but held that the CFTC was acting in its legislative capacity because there was no complaint filed, the matter was not assigned to an administrative law judge, the fact-finding process was highly informal, evidence was not taken on the record and no rules of evidence applied, testimony was not given under oath, “the fact-finding process was subject to considerable lobbying and other *ex parte* influences,” and the CFTC’s decision was “more a matter of discretionary authority than a decision guided by definite standards susceptible to judicial review.”<sup>56</sup>

One particular circumstance in which the question of whether petitioning is legislative or adjudicative has often arisen relates to the filing of citizen petitions to the FDA. A few courts recently found the citizen petition process to be “adjudicatory” in nature,<sup>57</sup> but these courts have not grappled with the various factors that courts have typically relied on to distinguish legislative from adjudicatory proceedings. For example, these courts did not consider the nature of the fact-finding process for citizen petitions, whether the process is subject to *ex parte* communications, and the extent of discretion the FDA has in deciding on citizen petitions.

Perhaps most significant is that the courts do not appear to have sufficiently considered the discretionary nature of the FDA’s ruling on citizen petitions. In *U.S. Futures*, the district court found the petitioning to be legislative even though there were statutory guidelines, because those guidelines were broad and generalized so as to confer substantial discretion on the agency that was not readily susceptible to judicial review.<sup>58</sup> Whether the FDA’s discretion with respect to citizen petitions is similar deserves closer scrutiny. One court, for example, explained:

[T]he citizen petition process resembles lobbying to some extent. A petitioner can urge the FDA to exercise its administrative discretion by issuing, amending, or revoking a regulation or order; or by taking or refraining from an action. . . .  
[T]o the extent a citizen petition urges the FDA to exercise administrative

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54 *Id.*

55 *U.S. Futures Exch.*, 2012 WL 3155150, at \*3-4.

56 *See id.*

57 *See In re Skelaxin*, 2013 WL 2181185, at \*20-22 (to the extent it is relevant, the authors represent one of the defendants in *Skelaxin*); *In re Wellbutrin XL Antitrust Litig.*, 2012 WL 1657734, at \*4 n.4 (E.D. Pa. May 11, 2012) (noting the question of whether the citizen petition process is legislative or adjudicatory had not been raised); *In re Prograf*, 2012 WL 293850, at \*5 (holding “the FDA citizen petition process contains sufficient indicia of an adjudicatory proceeding to warrant application of the sham exception in this case”); *In re Flonase*, 795 F. Supp. 2d at 309-10 (assuming that the *PREI* two-part “sham” litigation test applied to “petitions to administrative agencies”).

58 *See U.S. Futures Exch.*, 2012 WL 3155150, at \*4 (“While 7 U.S.C. §§ 7(b) and 7(d) lay out eight application factors and eighteen core principles, respectively, for the CFTC to apply in considering DCM applications, these rules are extremely general in nature. The sheer numerosity of considerations points to a high level of discretion and flexibility, and insusceptibility to meaningful judicial review.”).

discretion, the process more closely resembles traditional legislative or executive lobbying. In this context, courts must exercise great caution, if not abstain from interfering with the process entirely.<sup>59</sup>

Along the same lines, a recent law review article states that the FDA's citizen petition process "is unlikely to receive judicial review because the FDA's refusal to grant the requested relief is within the discretion to choose which issues to pursue."<sup>60</sup>

Because *Noerr-Pennington* safeguards a constitutional right, the courts should be extremely cautious in expanding the exceptions to immunity by increasing the scope of activities within the "adjudicative" context.<sup>61</sup>

### III. Applying the Narrow "Sham" Exception for Adjudicatory Proceedings

#### A. Principles of the "Objectively Baseless" Determination

"The sham exception is narrow, and. . . the party attempting to invoke the exception bears a heavy burden of demonstrating that the lawsuit is objectively *meritless*."<sup>62</sup> This section sets forth three principles of the "objectively baseless" determination that courts should apply in assessing claims based on alleged "sham" petitioning: (1) litigation that is warranted by existing law or embodies a good faith attempt for the extension, modification, or reversal of existing law is not objectively baseless; (2) the objectively baseless determination should in most circumstances be resolved as a question of law; and (3) that determination typically should be made solely on the record in the litigation at issue.

*First*, "[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham."<sup>63</sup> But even where a party loses the underlying litigation, courts should be mindful to avoid "the understandable temptation to engage in *post hoc* reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation."<sup>64</sup>

The Court in *PREI* analogized the Objective Component to the concept of "probable cause, as understood and applied in the common law tort of wrongful civil proceedings" (frequently called malicious prosecution) and to Federal Rule of Civil Procedure 11, which "requires the plaintiff to prove that the defendant lacked probable cause to institute

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59 *Aventis Pharma S.A. v. Amphastar Pharm., Inc.*, 2009 WL 8727693, at \*11 (C.D. Cal. Feb. 17, 2009).

60 See M. Avery et al., *The Antitrust Implications of Filing "Sham" Citizen Petitions with the FDA*, 65 HASTINGS L.J. 113, 123 (2013); see also M. Sean Royall & Joshua Lipton, *The Complexities of Litigating Generic Drug Exclusion Claims in the Antitrust Class Action Context*, 24 ANTITRUST 22, 23 (2010) ("[B]ecause a citizen petition can be more akin to legislative or executive lobbying than to an adjudicatory process, such petitions are arguably entitled to even broader *Noerr-Pennington* doctrine immunity than applies to court proceedings.").

61 Cf. *Mercatus*, 641 F.3d at 846 ("the application of the sham exception might inadvertently stifle the legitimate exercise of this core right").

62 *CBS Interactive Inc. v. Nat'l Football League Players Ass'n, Inc.*, 259 F.R.D. 398, 413 (D. Minn. 2009) (internal quotation marks omitted).

63 *PREI*, 508 U.S. at 60 n.5.

64 *Id.* (internal quotation marks omitted).

an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose.”<sup>65</sup> “Probable cause to institute civil proceedings requires no more than a ‘reasonable belief that there is a chance that a claim may be held valid upon adjudication.’”<sup>66</sup> Probable cause to institute legal proceedings therefore exists where the legal position is “arguably ‘warranted by existing law’ or at the very least [is] based on an objectively ‘good faith’ argument for the extension, modification, or reversal of existing law.”<sup>67</sup>

In *PREI*, the Court held that the defendant “plainly had probable cause to sue” where the relevant law was unsettled.<sup>68</sup> More recently, the district court in *CBS Interactive* considered a claim based on alleged sham litigation where the defendant’s argument in the underlying litigation was arguably foreclosed by existing circuit precedent.<sup>69</sup> The court granted a motion to dismiss that claim because it found the defendant’s legal position was based at least on a “good faith argument for the extension, modification, or reversal of existing law,” it was also supported by “some legal commentators” who argued the existing circuit precedent “was wrongly decided,” and the defendant had argued that the relevant facts were “sufficiently distinguishable” from the circuit precedent “to warrant a different result.”<sup>70</sup> The court further buttressed its conclusion by explaining that a party “should not be exposed to antitrust liability for making [such an] argument, which would have a chilling effect on the right to petition.”<sup>71</sup>

In another recent decision, the court in *In re Androgel Antitrust Litigation*<sup>72</sup> granted summary judgment for the defendants with respect to claims that prior patent litigations were sham.<sup>73</sup> The court held that the defendants’ legal positions on issues such as the applicability of a patent certificate of correction and the “on-sale bar” doctrine were not objectively baseless based, in part, on subsequent case law supporting the defendants’ position.<sup>74</sup> In granting summary judgment, the court repeatedly emphasized that litigation is not objectively baseless when a legal argument is a “stretch [but does] not exceed the pale of an aggressive attempt to extend the existing law.”<sup>75</sup> The court also concluded that evidence that arguably undermines or discredits the position of the defendants’ experts in the underlying litigation does not establish that the litigation was objectively baseless

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65 *Id.* at 61–62, 65; *see also CBS Interactive*, 259 F.R.D. at 413 (“The analogy to the Rule 11 standard is supported by the Eighth Circuit’s explanation that the litigation must be ‘so clearly baseless as to amount to an abuse of process.’”) (quoting *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 487 (8th Cir. 1985)).

66 *PREI*, 508 U.S. at 62–63 (quoting *Hubbard v. Beatty & Hyde, Inc.*, 343 Mass. 258, 262 (1961)) (alterations omitted).

67 *Id.* at 65 (citing FED. R. CIV. P. 11).

68 *See id.*

69 *See* 259 F.R.D. at 414.

70 *See id.* at 413–14.

71 *Id.* at 414.

72 888 F. Supp. 2d 1336 (N.D. Ga. 2012).

73 *Id.* at 1357 (the authors’ firm represents one of the defendants in the *Androgel* litigation).

74 *See id.* at 1347, 1354.

75 *See id.* at 1347 (quoting *In re Terazosin Hydrochloride Antitrust Litig.*, 335 F. Supp. 2d 1336, 1360–61 (S.D. Fla. 2004)).

because “by pointing out mild inconsistency or confusion in [the expert’s] testimony[,] the Plaintiffs have not established that no reasonable litigant would believe there was a chance [the expert’s] testimony would be credited.”<sup>76</sup>

Some commentators have criticized courts for applying too strict a test for an antitrust plaintiff’s satisfying the Objective Component because a strict test means that few sham litigation claims will succeed.<sup>77</sup> But it is properly the rare situation in which the Objective Component is satisfied, because *Noerr Pennington* immunity is meant to protect an essential constitutional right and “only the exceptional lawsuit or other use of government machinery is objectively unreasonable in its inception or abusive in its pursuit.”<sup>78</sup> Moreover, there does not appear to be widespread damage from improper conduct going un-remedied. Indeed, the requirements of the sham exception “are most likely to be met only where the frivolous claim could not have done much harm anyway.”<sup>79</sup> And there remain other “doctrines of tort liability, statutory fees or judicial sanctions” to deal with improper litigation.<sup>80</sup>

**Second**, the determination of whether prior litigation was “objectively baseless” should in most circumstances initially be a question of law for the court to resolve. The Court explained in *PREI* that “[w]here . . . there is no dispute over the predicate facts of the underlying legal proceeding, a court may decide probable cause as a matter of law.”<sup>81</sup> Indeed, “[o]nly someone with legal training can rationally determine whether the pleading of a particular legal theory is justified by or a reasonable extension of existing law.”<sup>82</sup> A jury cannot practicably determine whether a reasonable litigant had probable cause to institute litigation; a jury cannot properly assess whether a good faith basis existed to assert novel legal claims; and a jury’s determination is likely, albeit improperly, to be influenced by evidence of anticompetitive intent—which, as noted, is immaterial to not just the Objective Component but also the Subjective Component of the “sham” petitioning exception to *Noerr-Pennington* immunity.

While there have been instances where the Objective Component has been submitted to a jury,<sup>83</sup> it is only the rare case—perhaps where the issue is whether the underlying claim was allegedly based on perjured testimony or other false evidence—in which a jury is in a better position than the court to assess whether prior litigation was “objectively baseless.” In those rare circumstances involving disputed, material facts on the question of objective baselessness, a court should consider submitting the disputed factual issues to a jury and then making the ultimate determination with respect to objective baselessness upon the

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76 *Id.* at 1351.

77 *See, e.g.,* Karen Roche, *Deference or Destruction? Reining in the Noerr-Pennington and State Action Doctrines*, 45 LOY. L.A. L. REV. 1295, 1321 (2012).

78 Areeda, ¶ 207, at 318.

79 *Id.*, ¶ 205, at 266.

80 *See Intellectual Ventures*, 2013 WL 6682981, at \*8.

81 *PREI*, 508 U.S. at 63. *See also Regional Multiple Listing Serv. of Minn. V. Am. Home Realty Network, Inc.*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 3367132, at \*12 (D. Minn. July 5, 2013) (“Whether a petitioning activity is objectively baseless for *Noerr-Pennington* purposes may be decided as a question of law.”).

82 Areeda, ¶ 207, at 325.

83 *See, e.g., La. Wholesale Drug*, 2009 WL 2708110, at \*1 (S.D.N.Y. Aug. 28, 2009) (stating that the jury concluded that the defendant’s citizen petition filed with the FDA “was not ‘objectively baseless’”).

facts that the jury finds. This is an approach used in some jurisdictions and endorsed by the Restatement of Torts with respect to claims for malicious prosecution.<sup>84</sup>

**Third**, in attempting to prove objective baselessness, the plaintiff should not be able to engage in wholesale re-litigation of the underlying case, or introduce new arguments or evidence that were not presented in the underlying litigation. Instead, the default rule should be that the objective baselessness determination be made based on “the record made in the [underlying] proceedings.”<sup>85</sup> This is particularly true where the record from the underlying litigation goes beyond the pleading stage to include discovery, summary judgment motions, or merits-based decisions by the court.

The most relevant evidence on the issue of objective baselessness will generally be the claims asserted in the underlying litigation, the legal arguments put forth in support of and in opposition to those claims, the evidence developed with respect to those claims, and any decisions by the court overseeing that litigation. Where that record provides no reason to conclude that the litigation was frivolous, the inquiry into whether litigation was “sham” should generally be brought to an end. And, needless to say, the fact that the underlying litigation failed, even decisively or at the pleading stage, should not be enough to plead or prove objective baselessness. The courts should look with skepticism on claims of objective baselessness that are principally supported by arguments never made and evidence never presented in the underlying litigation.

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84 See, e.g., *Forgie-Buccioni v. Hannaford Bros., Inc.*, 413 F.3d 175, 182 (1st Cir. 2005) (“Whether probable cause exists is a mixed question of law and fact [with respect to malicious prosecution under New Hampshire law]; that is, the court must submit conflicting evidence proffered on the issue of probable cause to the jury and then determine, based upon the facts the jury found, the ultimate issue of whether probable cause exists.”); *Heron v. Revere Copper & Brass, Inc.*, 494 F.2d 705, 707 (8th Cir. 1974) (“Unlike other tort actions the rule in malicious prosecution cases appears to be that the court determines the reasonableness of conduct. This rule is almost universally accepted in the cases.”); RESTATEMENT (SECOND) OF TORTS § 681B (1977) (stating that the court determines whether “the defendant had probable cause for his action” and the function of the jury is to determine “the circumstances under which the proceedings were initiated in so far as may be necessary to enable the court to determine whether the defendant had probable cause for initiating them”).

85 *Androgl*, 888 F. Supp. 2d at 1344 (quoting *iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1380 (Fed. Cir. 2011)).

## B. Serial Litigation

The Supreme Court's decision in *PREI* did not discuss how the two-part definition of the "sham" exception applies to the type of repetitive conduct at issue in *California Motor*. The right to petition is not deserving of less protection on the basis that a party frequently exercises that right. But some courts have interpreted *California Motor* and *PREI* as applying to different situations: according to these courts, *PREI* "provides a strict two-step analysis to assess whether a single action constitutes sham petitioning;" whereas *California Motor* "deals with the case where the defendant is accused of bringing a whole series of legal proceedings."<sup>86</sup> However, even if the test for sham litigation in the context of a series of legal proceedings should differ from the test in the context of a single underlying lawsuit, the test in the context of a series of legal proceedings should incorporate the essence of the Objective Component and the Subjective Component of *PREI* because the policies behind those components are equally applicable regardless of whether a series of legal proceedings has been instituted.

The Fourth Circuit recently addressed the issue of serial litigation in *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*.<sup>87</sup> Following *California Motor*, the Fourth Circuit stated that in the context of a series of legal proceedings instituted by the defendant, the court "should conduct a holistic evaluation of whether 'the administrative and judicial processes have been abused.' The pattern of the legal proceedings, not their individual merits, centers this analysis . . ."<sup>88</sup> "Of course, the subjective motive of the litigant and the objective merits of the suits are relevant, but other signs of bad-faith litigation . . . may also be probative of an abuse of the adjudicatory process."<sup>89</sup> The Fourth Circuit held that summary judgment for the defendants should have been denied because the evidence showed "the vast majority of the legal challenges failed demonstrably,"<sup>90</sup> plus there was additional indicia of bad-faith litigation, including a perverse attempt that would have enjoined the plaintiff's agreement to engage in environmental remediation and the fact that the defendant withdrew ten of the fourteen suits at issue "under suspicious circumstances."<sup>91</sup>

This sort of "holistic" approach is dangerously vague, and lacks the clear standards that are necessary to avoid chilling the constitutionally protected right to petition. Moreover, in some circumstances, such as where a patent holder is protecting its intellectual property rights from multiple different competitors, there will of necessity be multiple lawsuits filed, raising common issues, and no inference of baselessness or improper intent should be permitted

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86 *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Const. Trades Council*, 31 F.3d 800, 810-11 (9th Cir. 1994); see also *Primetime 24 Joint Venture v. Nat'l Broad. Co.*, 219 F.3d 92, 101 (2d Cir. 2000).

87 728 F.3d 354 (4th Cir. 2013).

88 *Id.* at 364 (quoting *Cal. Motor*, 404 U.S. at 513).

89 *Id.* at 364.

90 See *id.* The Fourth Circuit stated that "no particular win-loss percentage [applies] to secure the protection of the First Amendment" but "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.]" *Id.* at 365 (quoting *USS-POSCO*, 31 F.3d at 811) (emphasis added). In another recent case, a district court noted that "[i]f a defendant prevails in more than half of its lawsuits, it is unlikely that the lawsuits are meritless." See *Luxpro*, 2011 WL 1086027, at \*5.

91 *Waugh Chapel*, 728 F.3d at 365.

from either the number of lawsuits or the plaintiff's "batting average."<sup>92</sup> It is also true that where the series of lawsuits at issue is spread out among different defendants, the worry that a competitor is being improperly overwhelmed by litigation will be more attenuated. Even in the context of what is alleged to be serial litigation, the touchstone to any exception to *Noerr-Pennington* immunity must be that the litigation was objectively baseless when instituted and the defendant instituted the litigation knowing that it was baseless.

#### IV. Early Disposition of “Sham” Claims

“[T]here has been a strong impulse to identify and dispose of the invalid sham claim as early as possible in the antitrust suit.”<sup>93</sup> This impulse is evident in many decisions disposing of antitrust claims based on sham petitioning on motions to dismiss, as well as decisions recognizing that such claims, even if not subject to dismissal on the pleadings, are often appropriately disposed of through early summary judgment before (or after limited) discovery. Adjudication of claims based on sham petitioning as early as possible is justified not just by the general public interest in resolution of litigation in a speedy and efficient manner, but also by the specific importance of avoiding extensive discovery and protracted litigation that can unnecessarily deter the essential First Amendment right to petition the government.

##### A. Motions to Dismiss

In light of the purpose of the *Noerr-Pennington* doctrine, the courts should rigorously enforce the pleading standard requiring specific facts that would show “objective baselessness.” Many courts have emphasized the importance of holding plaintiffs to this pleading standard for claims based on alleged sham petitioning. The Ninth Circuit, for example, explained that “[w]hen ‘a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.’”<sup>94</sup> Similarly, in *GMA Cover*, the court held that “because an improper application of the sham exception could chill the exercise of [First Amendment] rights,” a plaintiff “must comply with Rule 9(b) by pleading with particularity ‘the ‘who, what, where, when and how’ of the misconduct,’ as well as plead ‘allegations regarding the specific activities which bring

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92 See *Kaiser Found. Health Plan, Inc. v. Abbott Labs.*, 552 F.3d 1033, 1047 (2009) (with respect to the fact that Abbott filed 17 patent infringement lawsuits, the court noted that the volume of Abbott's suits was dependent on the number of companies attempting to market products in competition with Abbott's product, “a matter over which Abbott had no control.”); *Twin City Bakery Workers & Welfare Fund v. Astra Aktiebolag*, 207 F. Supp. 2d 221, 224 n.2 (S.D.N.Y. 2002) (a brand name drug company's filing 12 patent infringement lawsuits against generic-drug applicants could not be considered “serial” litigation because “the lawsuits complained of . . . are simply individual actions against each of the ten . . . applicants. It would be unreasonable to expect defendants to initiate litigation against only some of the generic-drug applicants they claim are infringing their patents.”).

93 Areeda, ¶ 207, at 319.

94 See *Kottle*, 146 F.3d at 1063 (quoting *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1083 (9th Cir. 1976)); *Darba Enters., Inc. v. Amica Mut. Ins. Co.*, 2012 WL 3096709, at \*3 (D. Nev. July 30, 2012) (“Allegations of greater than ordinary particularity are required where, as here, there is a potential for a chilling effect of the fundamental First Amendment right to petition.”).

the defendant's conduct into one of the *Noerr-Pennington* exceptions.”<sup>95</sup> Numerous other courts likewise have carefully examined the factual allegations supporting the plaintiff's claim that the defendant engaged in sham petitioning.<sup>96</sup>

Many antitrust claims based on sham petitioning are dismissed on the pleadings for failure to make specific factual allegations explaining why the underlying litigation was allegedly a sham.<sup>97</sup> In *Intellectual Ventures I LLC v. Capital One Financial Corp.*,<sup>98</sup> for example, the court granted a motion to dismiss claims based on alleged sham litigation that failed to allege “any specific litigation history to support that claim” and failed to “identify any particular patents [the defendant had] attempted or threatened to enforce that have expired, been cancelled or adjudicated to be invalid.”<sup>99</sup> Of course, some such claims survive motions to dismiss, such as in *Regional Multiple Listing Service v. American Home Realty Network, Inc.*,<sup>100</sup> where the plaintiff provided detailed factual allegations in support of its claim of sham litigation (e.g., the defendant asserted a copyright infringement claim even though it “did not design and does not own” the relevant software; and that the defendant did not take or obtain the necessary written assignments for the photographs over which it was claiming copyrights).<sup>101</sup>

Before accepting that sham petitioning may have occurred, courts should take judicial notice of the decisions and the record from the underlying litigation. *Twin City Bakery Workers & Welfare Fund v. Astra Aktiebolag*,<sup>102</sup> illustrates why this is useful. The amended complaint in that case broadly alleged that twelve patent infringement suits were baseless based on the fact that the court in those suits had “declared invalid all asserted claims of two

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95 *GMA Cover Corp. v. Saab Barracuda LLC*, 2012 WL 642739, at \*11 (E.D. Mich. Feb. 8, 2012) (quoting *Meridian Project Sys. v. Hardin Constr. Co.*, 404 F. Supp. 2d 1214, 1221 (E.D. Cal. 2005)), report and recommendation adopted, 2012 WL 639528 (E.D. Mich. Feb. 28, 2012).

96 See, e.g., *Dish Network, LLC v. Fun Dish Inc.*, 2010 WL 5230861 (N.D. Ohio July 30, 2010) (“When pleading the sham exception to the *Noerr-Pennington* Doctrine, courts have required more specific allegations.”), report and recommendation adopted as modified, 2010 WL 5230860 (N.D. Ohio Dec. 16, 2010); *Letica Corp. v. Sweetheart Cup Co.*, 790 F. Supp. 702, 705 (E.D. Mich. 1992) (“When pleading the sham exception to the *Noerr-Pennington* doctrine, courts have required more specific allegations . . . . The courts have recognized such a need because the mere pendency of such actions may chill the exercise of first amendment rights. This is particularly true when the pending action involves antitrust violations because such actions involve long, drawn out discovery processes and great expense.”) (internal citations omitted).

97 See, e.g., *Surface Supplied, Inc. v. Kirby Morgan Dive Sys. Inc.*, 2013 WL 5496961, at \*5 (N.D. Cal. Oct. 3, 2013) (dismissing sham litigation claim for failure “to plead any facts showing th[e] lawsuits to be ‘objectively baseless’”); *OG Int'l*, 2012 WL 4809174, at \*2-3 (dismissing intentional interference, trade libel, and unfair competition claims against Ubisoft that were based on letters Ubisoft sent to OG's customers threatening litigation if the customers distributed OG's products for failure to sufficiently allege the letters were “objectively baseless”); *Adobe*, 2012 WL 3877783, at \*9 (dismissing sham litigation counter-claim because, among other reasons, Coffee Cup failed to allege the “requisite improper subjective intent,” i.e., that “Adobe had brought the lawsuit with the intent of [injuring Coffee Cup's business by requiring it to incur costs in defending the suit] or of interfering with its business in any other particular manner”).

98 2013 WL 6682981 (E.D. Va. Dec. 18, 2013).

99 *Id.* at \*7.

100 \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 3367132 (D. Minn. July 5, 2013).

101 *Id.* at \*12.

102 207 F. Supp. 2d 221 (S.D.N.Y. 2002).

of the six patents . . . as well as parts of a third patent.”<sup>103</sup> The court stated that “even on a motion to dismiss, [it] may take cognizance not only of those orders of [the judge overseeing the underlying litigations] expressly referenced in the Amended Complaint but also of her other orders and related public records in the case before her.”<sup>104</sup> And these materials showed that the amended complaint told only part of the story. The judicially-noticed materials revealed that the judge in the underlying case allowed “claims of infringement of four of the six asserted patents to proceed beyond summary judgment, and two of the four to proceed through trial . . . .”<sup>105</sup> The court in the antitrust case held that those facts “preclude[d] any contention that defendants’ litigation is so baseless as not to warrant *Noerr-Pennington* immunity,” and thus dismissed the claims with prejudice.<sup>106</sup>

## B. Summary Judgment

If claims are permitted to survive a motion to dismiss, courts should endeavor to phase discovery and summary judgment motions strategically such that potentially dispositive issues can be addressed early and efficiently.<sup>107</sup> Courts should address the question of objective baselessness through early summary judgment either before discovery or after only limited discovery.

It is often possible for the court in the antitrust case legitimately to conclude, as a matter of law based solely on the record in the underlying litigation, that the objective baselessness test cannot be satisfied.<sup>108</sup> As noted, courts should always consider whether such a conclusion can be reached before any inquiry into the Subjective Component of the *PREI* two-part test. Indeed, the Supreme Court held in *PREI* that it was proper to refuse the plaintiff’s “request for further discovery on the economic circumstances of the underlying copyright litigation,” *i.e.*, on issues relevant to the Subjective Component, because a plaintiff cannot “pierce . . . *Noerr* immunity without proof that [a defendant’s action] was objectively baseless or frivolous.”<sup>109</sup> Thus, the Court instructed that a plaintiff must “disprove the challenged lawsuit’s *legal* viability before the court will entertain evidence of the suit’s *economic* viability.”<sup>110</sup>

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103 *Id.* at 223.

104 *Id.* at 224.

105 *Id.*

106 *See id.* at 224–25.

107 *See* Federal Judicial Center, *MANUAL FOR COMPLEX LITIGATION* § 30.1, at 519–20 (2004) (“Effective management of antitrust litigation requires identifying, clarifying, and narrowing pivotal factual and legal issues as soon as practicable. . . . Defining the issues at an early stage may enable the court to structure the litigation so as to limit the scope and volume discovery, reduce cost and delay, facilitate the prospect of settlement, and improve the trial.”).

108 *Areeda*, ¶ 207, at 327 (“[N]o discovery is necessary to determine whether filed litigation is objectively reasonable under the existing law . . . . And since the criterion for determining legal unreasonableness is objective, nothing is gained by inquiring into the defendant’s state of mind.”).

109 *PREI*, 508 U.S. at 65; *see also* *Areeda*, ¶ 205, at 273 (“Because subjective intent became irrelevant once Columbia’s infringement suit was found non-baseless, the refusal below to allow discovery on that intent was correct.”).

110 *PREI*, 508 U.S. at 61 (emphasis in original).