Preventing Predatory Abuses in Litigation Between Business Competitors: Focusing on a Litigant's Reasons for Initiating the Litigation to Ensure a Balance Between the Constitutional Right to Petition and the Sherman Act's Guarantee of Fair Competition in Business

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PREVENTING PREDATORY ABUSES IN LITIGATION BETWEEN BUSINESS COMPETITORS: FOCUSING ON A LITIGANT'S REASONS FOR INITIATING THE LITIGATION TO ENSURE A BALANCE BETWEEN THE CONSTITUTIONAL RIGHT TO PETITION AND THE SHERMAN ACT'S GUARANTEE OF FAIR COMPETITION IN BUSINESS

As lawyers we know that it is not uncommon for parties to commercial litigation (even some who win) to be motivated to file their actions, not by the prospect of winning, but by the harassment value of the litigation.¹

Widgets International, Inc. (Widgets) has experienced a long period of success, commanding an overwhelmingly strong percentage of its product's market share. Every business day, Widgets solidifies its position in the market and protects itself against entry from other competitors. Eventually, however, a small company, Gizmo Technologies, Inc. (Gizmo) decides to attempt to enter the market and compete with Widgets. Gizmo's product is innovative, and genuine competition seems possible. How should Widgets counter such an entry?

Widgets may seek to use litigation and the courts as a predatory weapon.² By initiating litigation, Widgets can expect, regardless of the merits of the litigation, to cause Gizmo to incur great expense in defending the suit, to tie up Gizmo's entrepreneurial resources, and to scare away investors or customers who might otherwise find the new venture attractive.³ In fact, if

². The use of litigation as a predatory weapon is not limited to Widgets. Litigation also may serve as a viable strategy for Gizmo.
³. Joel R. Bennett & Maxwell M. Blecher, Litigation as an Integral Part of a
Widgets has a significant capital advantage over Gizmo, the merits of the litigation may become irrelevant; just defending the suit will make the new venture so expensive that Gizmo may abandon its efforts to enter the market. 4 Gizmo may fold before a court can even rule on the issues of the litigation. 5

Congress passed the Sherman Antitrust Act "in response to strong public fear of and hostility against monopolistic combinations and their anticompetitive business practices." 6 The Sherman Act prohibits "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations ..." 7 The Act also prohibits all "attempt[s] to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations ..." 8 At least under the terms of the Act, the predatory use of litigation would seem to violate the Sherman Act insofar as such litigation restrains trade protected by the Act.

Unlike other activity prohibited by the Sherman Act, 9 however, the right of access to the courts is protected by the First Amendment's right to petition. 10 Accordingly, courts must balance the interests of litigants in bringing their grievances before a court with Congress' interest in providing for free competition in interstate commerce. In establishing this balance, the Su-

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Scheme To Create or Maintain an Illegal Monopoly, 26 MERCER L. REV. 479, 480 (1975).

4. Id. at 480-81 (quoting Picard v. United Aircraft Corp., 128 F.2d 632, 641 (2d Cir.) (Frank, J., concurring), cert. denied, 317 U.S. 651 (1942)).

5. Other examples of the predatory use of litigation exist and are explored elsewhere in this Note. The Gizmo example has been selected only because it illustrates the potential harms that litigation poses to free and unfettered entry into the marketplace.


8. Id. § 2.

9. More traditional behaviors prohibited by the Sherman Act are price-fixing, refusals to deal, exclusive arrangements and vertical restraints, some mergers, and monopolizations and attempts to monopolize. See 2 EARL W. KINTNER, FEDERAL ANTITRUST LAW chs. 9-14 (1980).

10. See U.S. CONST. amend. I.
preme Court has created the Noerr-Pennington doctrine, which clearly favors the constitutional right to petition.\textsuperscript{11} The Noerr-Pennington doctrine generally immunizes a litigant from antitrust liability predicated on his decision to initiate litigation against a competitor.\textsuperscript{12} Nevertheless, this immunity is not absolute; the doctrine's sham exception may create liability when the decision to litigate merely masks the litigant's desire "to interfere directly with the business relationships of a competitor . . . ."\textsuperscript{13} Determining just when the sham exception should create antitrust liability, however, has proven very difficult for the courts. At the heart of this determination is the courts' struggle to define when litigation becomes predatory or "unfair."\textsuperscript{14}

The Supreme Court recently attempted to end this difficulty. In Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,\textsuperscript{15} the Court announced a clear, two-part test for determining when litigation should be labeled predatory, thereby creating antitrust liability.\textsuperscript{16} Under this new standard, in order to serve as the basis of liability under the sham exception, a court first must find as a matter of law that the lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."\textsuperscript{17} If the court so determines, then the court must "focus on whether the . . . lawsuit conceals 'an attempt to interfere directly with the business relationships of a competitor.'"\textsuperscript{18} Only after the antitrust plaintiff wins on these two issues is she allowed to proceed to prove the elements of the substantive antitrust claim.\textsuperscript{19}

\textsuperscript{11} The Noerr-Pennington doctrine was established by the Court's decisions in Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers v. Pennington, 381 U.S. 657 (1965).

\textsuperscript{12} See infra notes 81-116 and accompanying text.

\textsuperscript{13} Noerr, 365 U.S. at 144. Noerr is discussed extensively infra notes 81-97 and accompanying text.

\textsuperscript{14} See infra notes 37-41 and accompanying text.

\textsuperscript{15} 113 S. Ct. 1920 (1993).

\textsuperscript{16} Id. at 1928-29.

\textsuperscript{17} Id. at 1928.

\textsuperscript{18} Id. (quoting Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961)).

\textsuperscript{19} Id. at 1928.
Although potentially eliminating some confusion in determining whether litigation is predatory, the Court’s decision effectively rendered it impossible to prevent parties from using “meritorious litigation” for improper purposes. In limiting the judicial system’s ability to control parties who initiate litigation for reasons other than success on the merits, the Supreme Court in *Columbia Pictures* potentially curtailed the market protections created by the Sherman Act.

This Note argues that meritorious litigation brought for an improper purpose should be the basis for antitrust liability under the Sherman Act. In so arguing, this Note suggests that lower courts should apply *Columbia Pictures* only after finding that the litigation, if successful, would affect the competitive relationship between the litigants. When such a finding is not possible—that is, when the process of litigation, rather than its outcome, is used to affect the competitive relationship between the parties—courts should allow the injured party to proceed with proving a substantive violation of the Sherman Act.

This Note first discusses the Court’s decision in *Columbia Pictures*, explaining the Court’s current definition of the sham exception when applied to predatory litigation. This Note then outlines the potential harms of predatory litigation—exploring the balance between the substantive goals of the Sherman Act and the constitutional protection of the First Amendment’s right to petition—to conclude that the protection of the Sherman Act should be construed broadly and that the First Amendment’s right of petition should not be interpreted to provide absolute immunity for meritorious litigation brought for an improper purpose.

This Note proceeds with an interpretation of the development of the *Noerr-Pennington* doctrine to suggest that the Court’s case law indicates an analysis that this Note labels the “direct purpose/incidental effect” analysis. Under this analysis, the critical inquiry for courts in determining antitrust liability of meritorious litigation is whether the initiating party sought to harm its competitor through the outcome of the litigation or through the

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20. For the purposes of this Note, “meritorious litigation” means litigation that is not objectively baseless as defined in *Columbia Pictures*. See id.
process of litigation. Finally, this Note suggests that courts should adopt the direct purpose/incidental effect analysis. This discussion concedes several problems with the analysis—namely, the courts' hesitancy to litigate the merits and motivations associated with past litigation. Clearly, however, less draconian measures exist for preventing injustice and inefficiency than those the Court presented in its opinion in *Columbia Pictures*.

**PROFESSIONAL REAL ESTATE INVESTORS V. COLUMBIA PICTURES**\(^{21}\)

In *Columbia Pictures*, the Court announced a two-part test to determine when litigation activity will be immune from antitrust liability. Columbia Pictures Industries, Inc. and Professional Real Estate Investors, Inc. (PREI) competed against each other for the business of providing movie entertainment to hotel patrons through in-room service.\(^{22}\) *Columbia Pictures* began as a copyright complaint brought by Columbia Pictures against PREI, a suit that PREI ultimately won.\(^{23}\)

In response to Columbia Pictures' complaint, PREI filed a counterclaim, charging Columbia Pictures with violations of sec-

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\(^{22}\) PREI operated La Mancha Private Club and Villas in Palm Springs, California. *Id.* at 1923. PREI installed a videodisc player in each room and assembled a videodisc library of over 200 titles, available for rent to each visitor at the hotel. *Id.* PREI also attempted to create a market for selling videodisc players to other hotels. *Id.*

Columbia Pictures held the copyrights to the discs in PREI's library. *Id.* As well, Columbia Pictures licensed the transmission of its copyrighted movies to hotel rooms through Spectradyne, a wired cable system. *Id.* In the words of the Court, "PRE[II] . . . competed with Columbia not only for the viewing market at La Mancha but also for the broader market for in-room entertainment services in hotels." *Id.*

tions 1 and 2 of the Sherman Act. Specifically, PREI "alleged that Columbia[] [Pictures'] copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade."

Responding to PREI's counterclaim, the district court awarded summary judgment to Columbia Pictures and denied PREI's motion for further discovery on Columbia Pictures' motivations in filing suit against PREI. The court focused particularly on the legitimacy of Columbia Pictures' complaint, noting that "[i]t was clear from the manner in which the case was presented that [Columbia was] seeking and expecting a favorable judgment." In so doing, the court rejected PREI's theory that Columbia Pictures' subjective motivations could form the basis of antitrust liability.

On appeal, the Ninth Circuit Court of Appeals affirmed the district court's award of summary judgment. Judge Canby, in announcing the court's decision, wrote:

Because the sham exception to the Noerr-Pennington rule may have a chilling effect on those who seek redress in the courts, we have held that the exception should be applied with caution. We see no basis for holding that a suit brought with probable cause in fact and law may be a sham. Such a holding would erode the first amendment right to petition that is the basis for the Noerr-Pennington doctrine by imposing the risk of treble damages for initiating a suit based on a well-founded, but untested, legal theory.

25. Columbia Pictures, 113 S. Ct. at 1924.
27. Id. at *1. The judge also noted that "[a]lthough I decided against [Columbia], the case was far from easy to resolve, and it was evident from the opinion affirming my order that the Court of Appeals had trouble with it as well." Id.
29. Id. at 1531 (citations omitted). Quite interestingly, Judge Canby cites California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972), for the proposition that "a complaint alleging that the petitioner's competitors initiated administrative proceedings against the petitioner 'without probable cause, and regardless of the merits,' stated an antitrust cause of action." Columbia Pictures, 944 F.2d at 1529
The Supreme Court affirmed, holding that litigation was immune from antitrust liability unless the lawsuit is found to be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits [and it is also] . . . 'an attempt to interfere directly with the business relationships of a competitor.'\textsuperscript{30}

Writing for the Court, Justice Thomas compared antitrust liability to the tort of wrongful civil proceedings, which requires both a lack of probable cause and malice.\textsuperscript{31} In comparing the two, Justice Thomas stated that "[j]ust as evidence of anticompetitive intent cannot affect the objective prong of Noerr's sham exception, a showing of malice alone will neither entitle the wrongful civil proceedings plaintiff to prevail nor permit the factfinder to infer the absence of probable cause.\textsuperscript{32} Specifically, the Court stated that "[t]he existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation."\textsuperscript{33}

Although the Court's decision to affirm was unanimous, Justice Stevens filed a concurring opinion that criticized the Court's opinion for its "unnecessarily broad dicta."\textsuperscript{34} According to Justice Stevens, "[i]t might not be objectively reasonable to bring a lawsuit just because some form of success on the merits—no matter how insignificant—could be expected."\textsuperscript{35} Justice Stevens'}


\textsuperscript{31} \textit{Id.} at 1929. See infra notes 98-128 and accompanying text (arguing that \textit{California Motor Transp.} does not require that the litigation be brought without probable cause in order for the litigation to fall within the sham exception).

\textsuperscript{32} \textit{Columbia Pictures,} 113 S. Ct. at 1929-30 (citations omitted).

\textsuperscript{33} \textit{Id.} at 1929.

\textsuperscript{34} \textit{Id.} at 1932 (Stevens, J., concurring). Justice O'Connor joined in Justice Stevens' concurrence.

\textsuperscript{35} \textit{Id.} Justice Stevens' remarks actually stop short of the full truth, as the Court's "objectively baseless" test only requires that "an objective litigant . . . conclude that the suit is reasonably calculated to elicit a favorable outcome." \textit{Id.} at 1928 (emphasis added). As the Court notes in a footnote, although a winning lawsuit will always be immune from antitrust liability, "when the antitrust defendant has
concurrence suggested that the majority's bright-line rule might not apply when the defendant filed multiple suits or engaged in anticompetitive behavior external to the litigation.  

THE HARMS OF PREDATORY LITIGATION, THE CONSTITUTIONAL RIGHT TO PETITION, AND THE STATUTORY GUARANTEE OF FAIR COMPETITION IN BUSINESS

The Harms of Predatory Litigation

The first task in determining when litigation may be predatory is determining what types of behavior are predatory. Such a task is not easy. The difficulty of distinguishing predatory behavior from fair competition prompted one commentator to paraphrase Justice Stewart's oft-quoted definition of obscenity: "Businessmen and judges think they know it when they see it."  

Another commentator attempted to define predatory behavior with the following language:

Predation may be defined, provisionally, as a firm's deliberate aggression against one or more rivals through the employment of business practices that would not be considered profit maximizing except for the expectation either that (1) rivals will be driven from the market, leaving the predator with a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds inconvenient or threatening.

lost the underlying litigation, a court must 'resist the understandable temptation to engage in post hoc reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.' Id. at 1928 n.5 (citation omitted). Even lawsuits that are unsuccessful on the merits therefore may have immuni-
ty, regardless of the litigant's motivations for initiating them.

36. Id. at 1934-35. The facts in Columbia Pictures only presented the issue of whether antitrust liability was appropriate when the plaintiff instituted a single lawsuit with no interest in the outcome. For a discussion of a case in which the litigant also engaged in external anticompetitive behavior, see the discussion of United States v. Otter Tail Power Co., 417 U.S. 901 (1974), infra notes 117-28 and accompanying text; see also infra note 145 (arguing that Columbia Pictures should not apply when such external behavior exists).


39. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF
Litigation, and its associated costs, certainly can affect the competitive relationship between litigants. As Joel Bennett and Maxwell Blecher wrote:

A competitor seeking to utilize litigation as a weapon to stifle its competition hopes to achieve any number of the following goals:

1. Cause his competitor to incur enormous legal expenses in defending the suit, thus diverting needed funds from marketing, sales, promotion, and research and development efforts;

2. Tie up the managerial resources of the company and cause its executives to spend wasted time in preparing and defending the lawsuit, as well as diverting attention from the tasks of running the company;

3. Diverting customers away from the defendant, hopefully to the plaintiff, who are either afraid of being sued themselves, e.g., for contributory patent infringement, or are concerned that the company being sued will not be able to fulfill orders for products or will not survive as a viable entity long enough to warrant exerting efforts in developing a market for the sued company's products; and

4. Elimination of the sued entity from the marketplace completely, thus destroying its viability as a functioning competitor.40

Courts should view litigation initiated solely to drag one's opponents through the judicial process as predatory and subject to the liabilities imposed by the Sherman Act. Such a view is consistent with other areas of the law; both Rule 11 of the Federal Rules of Civil Procedure and the Model Rules of Professional Responsibility seek to curb even the use of litigation for reasons other than the resolution of meritorious disputes.41

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40. Bennett & Blecher, supra note 3, at 480; see Gary Myers, Litigation as a Predatory Practice, 80 KY. L.J. 565, 586-96 (1992) (arguing that predatory litigation serves to eliminate competition, discipline competitors, raise rival's costs, and create barriers to entry).

41. Rule 11 prohibits an attorney from filing pleadings, regardless of their merit, that are presented to harass another party, cause unnecessary delay, or cause needless increase in the cost of litigation. Fed. R. Civ. P. 11. As well, attorneys have an ethical obligation to refrain from asserting or chal-
reason exists that—when concerns about the process rather than the outcome of that process fuel the decision to litigate—antitrust liability should not arise from that decision.

The Constitutional Right To Petition

The First Amendment guarantees to every individual the right to petition the government: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." The right to petition is embedded in our nation's history and its violation was one of the primary grievances addressed in the Declaration of Independence. The right to petition is an effective mechanism for bringing the concerns and opinions of the people to the government. The right to petition also exposes governmental waste and misconduct. As well, by allowing free and unlimited petition for redress, public sentiment may be expressed peacefully and without resort to violence.

Although the right guarantees access to the government and is held in great esteem by the courts, the right is not abso-

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lenging an issue "unless there is a basis for doing so that is not frivolous." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1992). Under Rule 3.1, "[t]he action is frivolous . . . if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable . . . to make a good faith argument on the merits." Id. at cmt. (emphasis added). Based on this language, even if the lawyer can argue on the merits, ethical obligations apparently preclude the lawyer from continuing the action if the client's primary purpose is to injure the opposing party by the process of litigation.


43. Thomas Jefferson wrote:

In every stage of these oppressions, we have petitioned for redress, in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

44. Smith, supra note 42, at 1178.

45. Id.

46. Id. at 1179.

47. In his concurring opinion in McDonald v. Smith, 472 U.S. 479 (1985), Justice Brennan wrote of the interrelated nature of all First Amendment rights:
lute. In *McDonald v. Smith*, the Supreme Court held that the right to petition the government does not grant absolute immunity from liability for defamation. Writing for the Court, Chief Justice Burger commented that the historical roots of the right of petition originated prior to the Constitution and that "the values in the right of petition [are] an important aspect of self-government." Nevertheless, the Court looked to the history of the Framers to hold that no historical evidence existed to suggest that the Framers thought the right of petition to be an absolute right.

In fact, several barriers exist to limit the right to access a court. On an elementary level, jurisdictional rules and substantive legal principles serve to limit access. Even when the appropriate court is determined and a claimant has established

The Court previously has emphasized the essential unity of the First Amendment's guarantees:

It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peacefully to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, . . . and therefore are united in the First Article's assurances.

And although we have not previously addressed the precise issue before us today, we have recurrently treated the right to petition similarly to, and frequently as overlapping with, the First Amendment's other guarantees of free expression.


49. *Id.* at 485. The Court wrote that the right to petition only created a qualified privilege, and because North Carolina's definition of defamation was consistent with New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Petition Clause did not require anything more than that the plaintiff show that the defendant's statements were made with actual malice as that term was defined in *Sullivan*. McDonald, 472 U.S. at 485.

50. *McDonald, 472 U.S. at 483.*

51. *Id.*

52. For example, both subject matter jurisdiction and personal jurisdiction limit the ability of a party to access a court.

53. All legal actions must be based on a cognizable, substantive legal claim or else suffer dismissal for failure to state a claim upon which relief may be granted. *See* FED. R. CIV. P. 12(b)(6).
a sufficient legal claim, the parties' right to a hearing remains restricted. Rule 11 of the Federal Rules of Civil Procedure is one example of such a restriction. Rule 11 prohibits an attorney from submitting documents to the court that are presented for "any improper purpose" or that are not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

The United States Code also limits the right to petition the court, providing that

> [any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.]

Federal courts also have the inherent power to sanction both attorneys and parties, provided that the attorney or party has acted in bad faith.

The torts of malicious prosecution and abuse of process also limit a party's ability to prosecute a lawsuit. In order to be successful in an action for malicious prosecution, the plaintiff must show favorable termination of a former proceeding initiated by the defendant against the plaintiff. The plaintiff must also show that the defendant initiated the former proceeding

54. Id. rule 11(b)(1). Under Rule 11, examples of "improper purpose" include harassing another party, causing unnecessary delay, or causing needless increase in the cost of litigation. Id.
55. Id. rule 11(b)(2).
58. Id. § 4.03. Under the court's inherent power, "[t]he bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. "Bad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980) (quoting Hall v. Cole, 412 U.S. 1, 15 (1973)).
59. In the context of civil proceedings, the tort of malicious prosecution is sometimes referred to as the tort of wrongful civil proceedings. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 120, at 889 (5th ed. 1984). For the purposes of this Note, the term "malicious prosecution" will refer to all torts applicable to actions arising from wrongful civil proceedings.
60. Id. at 892.
with malice\(^\text{61}\) and without probable cause.\(^\text{62}\) The plaintiff also must show damages; “[c]ounsel fees incurred in defending against the wrongful civil suit are prominent among items of recovery.”\(^\text{63}\) Finally, a significant minority of jurisdictions require the plaintiff to show a “special grievance,” such as interference with his person or property by reason of the litigation.\(^\text{64}\)

The tort of abuse of process is similar to the tort of malicious prosecution, except that abuse of process does not require the plaintiff to prove that the former proceeding ended in her favor or that it was brought without probable cause.\(^\text{65}\) “Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish.”\(^\text{66}\) Accordingly, abuse of process seems most analogous to the concept of limitations on the right to bring an otherwise proper action for an improper purpose.\(^\text{67}\)

This discussion of the constitutional right to petition leads to

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61. Id. at 894-95. “Malice” is a term of art and may be found where the primary motive of the defendant was “ill will[,] or a lack of belief in any possible success of the action.” Id. at 895. Malice may also be found “where the proceeding was begun primarily for a purpose other than the adjudication of the claim in suit.” Id. This understanding of malice seems to incorporate the notion of “improper purpose.”

62. Id. at 893. In the context of a civil action, probable cause most likely means that the initiating party “reasonably believes that he has a good chance of establishing [the claim] to the satisfaction of the court or the jury.” Id. Where a party is uncertain as to the view a court will adopt, a party does not act without probable cause in submitting “a doubtful issue of law.” Id.

63. Id.

64. Id. at 889. Four reasons are advanced for this requirement. First is the fact that because the plaintiff was successful in the former proceeding, he should be seen to have been made whole in his victory. Id. This reason, however, ignores the potential expense the plaintiff incurred in defending against the former action. Second, the requirement does prevent a chilling effect against honest litigants who should not fear subsequent actions arising out of their legitimate litigation activities. Id. Third, the requirement places a definite end to the course of litigation. Id. Finally, some courts have expressed a belief that “not all ills can be relieved by more litigation.” Id. at 890; see Friedman v. Dozorc, 312 N.W.2d 585 (Mich. 1981); see also infra notes 146-72 and accompanying text (discussing some of these problems in the context of antitrust liability).

65. KEETON ET AL., supra note 59, § 121, at 897.

66. Id.

67. See supra notes 34-41 and accompanying text.
two conclusions. First, courts hold the right to petition in great esteem and often will grant it significant weight when balanced against other rights. Second, in spite of its standing as a fundamental right, the right to petition is not absolute and, in the context of courts, is limited by many rules that control the behavior of litigants.

The Statutory Guarantee of Fair Competition

Historically, both common law and statutory law have protected the guarantee of fair competition in business. American law promptly adopted the English common law rule against unreasonable restraints, viewing the rule as "an expression of individual liberty and free enterprise, the very epitome of the American ethic." However, the common law soon became inadequate to handle an industrializing, expanding country.

In 1890, Congress passed the Sherman Act "in response to strong public fear of and hostility against monopolistic combinations and their anticompetitive business practices." The Act's sponsor referred to the Act in congressional debate as a "bill of rights" and a "charter of liberty." Wrote Chief Justice Hughes: "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."

The prohibitions of the Sherman Act were expressed in very broad language, and part of Congress' intent in passing the

68. See VON KALINOWSKI, supra note 6, § 1.01[1].
69. Id. § 1.02[3].
70. Id. § 1.02[4]. Two reasons are suggested for this inadequacy. First, there was no uniformity in the country's antitrust laws as each state developed its own law. Id. Second, the majority of these laws were "defensive" in nature, voiding the restraining contract instead of punishing the guilty parties. Id.
71. Id. § 2.01. The Sherman Act prohibits "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1 (1988). The Act also prohibits all "attempt[s] to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." Id. § 2.
72. VON KALINOWSKI, supra note 6, § 2.01, at 2-3 n.8.
74. See supra note 71 (quoting statutory language of §§ 1 and 2 of the Sherman Act).
Act was to grant the federal courts a new jurisdiction to create a federal common law of antitrust. 75 However, the values that courts have read into the Act have been the subject of much debate. 76 The debate has focused on whether the Act is centered on the value of consumer welfare 77—protecting individuals from massive capital aggregation 78—or the value of promoting an economy of small, competitive units. 79 Depending on which value the interpreting court chooses, the balance between the constitutional right to petition and the statutory guarantee of fair competition may be affected. 80

75. See 21 CONG. REC. 3,152 (1890). As mentioned previously, "Congress' overriding objective was to attempt to restore, as far as possible, a free and open competitive environment absent anticompetitive business restraints . . . ." 1 KINTNER, supra note 9, § 4.1, at 126. Summarizing the Act's legislative history, Kintner concluded that Congress was "generally comfortable with the common law principles regarding restraints of trade and monopolies" and was concerned mostly with developing a national law of antitrust capable of regulating businesses free to avoid state law by setting up in a different state. See id. at 128.


77. Id. If a court interprets the Act to maximize consumer welfare, then the court must "distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output." Id. In such a value system, the Act's substantive result is a maximization of production, rather than any restructuring of the economy that Congress would have deemed worthy regardless of the effect on output. Id.

78. Id. at 8. In United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand wrote:

We have been speaking only of the economic reasons which forbid monopoly; but . . . there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.

Id. at 428. Such an approach is fundamentally different from an approach maximizing consumer welfare, see supra note 77, as Judge Hand's values place a desired economic organization above a maximization of consumer welfare.

79. Judge Hand reiterated his commitment to the values of economic organization stating that "[o]verall the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." Aluminum Co. of Am., 148 F.2d at 429 (emphasis added).

80. See infra notes 146-72 and accompanying text.
Needless to say, the broad language of the Sherman Act did not provide much guidance in balancing the competing interests of the First Amendment's right to petition and the Act's guarantee of fair competition. Thus, the courts were left to develop the appropriate balance between these two important interests.

**The Noerr-Pennington Doctrine and the Litigant's Reasons for Petitioning the Courts**

This Note argues that, in determining whether litigation is subject to antitrust immunity, courts should look to the litigant's motivation in initiating the litigation. In addition, courts should establish whether the anticompetitive harm is an incidental effect of a judgment or whether that harm is directly caused by the litigation process. For the purpose of this Note, this analysis is labeled the direct purpose/incidental effect analysis.

*The Beginning of Immunity for Petitioning: The Development of the Noerr-Pennington Doctrine*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[81] the Supreme Court held that the Sherman Act did not prohibit a group of businesses from petitioning the government using deceptive tactics, even though the petitioners' sole motivation was to harm and destroy their competitors.[82]

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82. *Id.* at 138-41. Noerr Motor Freight, along with 41 Pennsylvania truck operators and the Pennsylvania Motor Truck Association, filed suit against the Eastern Railroad Presidents Conference and several individual defendants after the defendants successfully petitioned the governor of Pennsylvania to veto the "Fair Motor Bill." *Id.* at 129-30. The Fair Motor Bill, which would have increased the maximum weight of a trucker's load on Pennsylvania roads, was directly against the interests of the railroads, who were in an economic struggle with the truckers for the long hauling of heavy freight. *See id.* at 128-30.

At trial, the trial judge found that "the defendants combined . . . with the intent and object of substantially lessening competition in the long-haul carriage of freight in unreasonable restraint of trade," Noerr Motor Freight v. Eastern R.R. Presidents Conference, 155 F. Supp. 768, 811 (E.D. Pa. 1957), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd*, 365 U.S. 127 (1961), and that the defendants' campaign revolved around a technique whose "sole means and . . . effectiveness is to take a dramatic fragment of truth and by emphasis and repetition distort it into falsehood." *Id.* at 814.
Writing for the Court, Justice Black began from the premise that "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws."\(^8\) The Court also recognized that the restraint at bar bore little similarity to traditional restraints of trade, noting that this dissimilarity "constitute[d] a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint."\(^9\)

Two factors punctuated the Court's holding that the Sherman Act did not prohibit mere petitioning of government. First, the Court stated that liability "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade."\(^{10}\) By creating such liability, individuals and associations would be chilled in their attempts "to make their wishes known to their representatives."\(^{11}\) This interaction, the Court believed, was the cornerstone of representative democracy.\(^{12}\) Second, the Court refused to construe the Sherman Act to create liability that arguably contradicted the constitutional protection of petitioning.\(^{13}\)

Thus, the Court was left to determine whether the defendants' anticompetitive purpose and use of deceptive publicity tactics created antitrust liability where no liability would exist for the mere act of petitioning the government. The Court easily disposed of the deceptive practices argument, noting that the lower courts had dismissed a similar counterclaim against the plaintiffs for using nearly identical tactics against the railroads.\(^{14}\) The Court also stated that, although the tactics may "fall[] far short of the ethical standards generally approved of in this country... [i]nsofar as [the] Act sets up a code of ethics at all, it is a

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83. *Noerr*, 365 U.S. at 135 (emphasis added).
84. *Id.* at 137.
85. *Id.*. The Court had already held that the Sherman Act did not prohibit a state regulatory program that restrained trade. See *Parker v. Brown*, 317 U.S. 341, 350-52 (1943).
86. *Noerr*, 365 U.S. at 137.
87. *Id.*
88. *Id.* at 137-38. Although the Court's constitutional discussion in *Noerr* was dicta, the constitutional underpinnings of the *Noerr-Pennington* doctrine grew stronger with time. See infra notes 98-102 and accompanying text.
89. *Noerr*, 365 U.S. at 141.
code that condemns trade restraints, not political activity. 90

The Court also was not troubled with its decision regarding anticompetitive purpose. Wrote Justice Black:

The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. . . . At least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had. 91

The Court went further, noting that, although the trial court found that the defendants' purpose "was to destroy the goodwill of the truckers among the public generally and among the truckers' customers particularly" and weaken the truckers' competitive position, no specific findings were made that the defendants directly attempted to persuade anyone to cease dealing with the truckers. 92

The focus of the Court's analysis was the direct purpose or intent of the defendants' petitioning activities. 93 However, the direct purpose should be distinguished from the indirect effect of the defendants' activities. The Court noted that "[i]t is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed." 94

The Court also noted that the defendants' awareness of this

90. Id. at 140.
91. Id. at 139-40. Five years later the Court reaffirmed its decision in Noerr, stating that "[n]othing could be clearer from the Court's opinion [in Noerr] than that anticompetitive purpose did not illegalize" political activity. United Mine Workers v. Pennington, 381 U.S. 657, 669 (1965). As in Noerr, the defendants in Pennington were legitimately attempting to influence the government. See id. at 660-61.
92. Noerr, 365 U.S. at 142. The Court noted that the record showed only attempts to influence the passage and enforcement of laws. Id.
93. In Noerr, the record showed that the defendants were legitimately attempting to influence the passage of the Fair Motor Bill. Id. at 142-43.
94. Id. at 143 (emphasis added).
effect was irrelevant.\textsuperscript{95}

Although the facts before the Court were insufficient to create antitrust liability, the Court stated in dicta that there may be situations where petitioning, "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."\textsuperscript{96} In such a case "the application of the Sherman Act would be justified."\textsuperscript{97} Such an analysis would require a court to look at the factors that motivate an individual or group to petition the government.

\textit{Extending the Immunity to Adjudicatory Tribunals: California Motor Transport Co. v. Trucking Unlimited}

In \textit{California Motor Transport Co. v. Trucking Unlimited},\textsuperscript{98} the Court extended the \textit{Noerr-Pennington} doctrine to protect petitioning in adjudicatory tribunals from antitrust liability.\textsuperscript{99} Besides extending the doctrine to adjudicatory tribunals,\textsuperscript{100} \textit{California Motor Transport} also provided the doctrine with a stronger constitutional basis and expanded the meaning of \textit{Noerr}’s sham exception.\textsuperscript{101} This Note argues that \textit{California

\textsuperscript{95} Id. at 143-44.

\textsuperscript{96} Id. at 144.

\textsuperscript{97} Id. \textit{Noerr}’s sham exception furthers the direct purpose analysis. Although \textit{Noerr} clearly held liability was not warranted where the anticompetitive effect was incidental to legitimate petitioning activity, the sham exception cautions courts to determine whether the activity is legitimately aimed at petitioning or interfering with a competitor’s business relationships.

\textsuperscript{98} 404 U.S. 508 (1972).

\textsuperscript{99} Trucking Unlimited’s complaint alleged that California Motor Transport and other defendants engaged in a conspiracy to institute adjudicatory proceedings to defeat applications made by Trucking Unlimited “to acquire operating rights or to transfer or register those rights.” \textit{Id.} at 509. Trucking Unlimited alleged that the conspiracy extended “to rehearings and to reviews or appeals from agency or court decisions on these matters.” \textit{Id.}


\textsuperscript{101} \textit{California Motor Transp.}, 404 U.S. at 510. Strengthening the constitutional basis of the \textit{Noerr-Pennington} doctrine, the Court stated that “[t]he right of access to the courts is indeed but one aspect of the right of petition.” \textit{Id.} The Court’s decision in \textit{Noerr} was based on the Court’s statutory interpretation of the Sherman Act. \textit{See}
Motor Transport continues the Noerr analysis of direct purpose and incidental effect.\(^\text{102}\) Although the Court held that the Noerr-Pennington doctrine extended to adjudicatory tribunals,\(^\text{103}\) the Court relied on Noerr's sham exception to hold that the lower court erred in dismissing Trucking Unlimited's complaint for failing to state a claim.\(^\text{104}\)

Again, the Court's decision focused on improper purpose and unethical conduct.\(^\text{105}\) The improper purpose in California Motor Transport, however, was not the anticompetitive purpose that motivated legitimate petitioning activity protected in Noerr;\(^\text{106}\) instead, the Court found that Trucking Unlimited's allegations were "not that the conspirators sought 'to influence public officials,' but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process."\(^\text{107}\)

\footnotesize{supra notes 78-88 and accompanying text. Wrote Justice Douglas for the Court:

[I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests \textit{vis-à-vis} their competitors. California Motor Transp., 404 U.S. at 510-11. By expressly basing the Noerr-Pennington doctrine on the constitutional protection of association and, more importantly, petition, the Court insulated the doctrine from congressional correction. See U.S. CONST. Art. VI cl. 2. As well, the constitutional basis allowed future courts to expand the Noerr-Pennington doctrine beyond the substantive area of antitrust law. See \textit{In re} American Continental Corp./Lincoln Sav. & Loan Sec. Litig., 845 F. Supp. 1377, 1384 (D. Ariz. 1993) (holding that Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc., 113 S. Ct. 1920 (1993), requires the probable cause element in a malicious prosecution action to be defined objectively); Hirschfeld v. Spanakos, No. Civ. 1588 (LAK), 1994 WL 709595, at *5 (S.D.N.Y. Dec. 20, 1994) ("The Court believes that the sham exception to the Noerr rule of antitrust immunity is applicable here by analogy, as the same First Amendment interests animate the treatment both of the actions of the Board of Elections in invoking the appellate process and of businesses accused of abusing governmental process for anticompetitive reasons."). For scholarly commentary suggesting that courts should be reluctant to continue such expansion, see Zauzmer, \textit{supra} note 47.}

\(^\text{102}\) See \textit{supra} notes 93-97 and accompanying text.

\(^\text{103}\) California Motor Transp., 404 U.S. at 510-11.

\(^\text{104}\) \textit{Id.} at 511.

\(^\text{105}\) See \textit{supra} notes 89-92 and accompanying text.

\(^\text{106}\) See \textit{supra} note 82.

\(^\text{107}\) California Motor Transp., 404 U.S. at 512. Trucking Unlimited alleged that "the power, strategy, and resources of the petitioners were used to harass and deter
Addressing the issue of unethical conduct, the Court distinguished unethical conduct in an adjudicatory tribunal from unethical conduct in other branches of government: "There are many ... forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." By distinguishing between the political and judicial arenas, the Court seemingly suggested that a separate sham exception applied when predatory litigation was at issue.\footnote{108}{109}

The Court, however, did not expressly address the issue of whether meritorious litigation could ever fall within the sham exception. In fact, the Court noted that "a pattern of baseless, repetitive claims" may result in antitrust liability,\footnote{110} which might suggest that only frivolous litigation would be subject to antitrust liability. However, Trucking Unlimited's pleadings clearly alleged that California Motor Transport "instituted the proceedings and actions ... with or without probable cause, and regardless of the merits of the cases,"\footnote{111} thereby suggesting that the merits of the litigation were not an issue in the Court's decision.\footnote{112}
Such a result at least comports with the Court's language in Noerr.\textsuperscript{113} Arguably, Noerr's sham exception focused solely on whether one intended to interfere directly with a competitor, having no legitimate interest in influencing governmental action.\textsuperscript{114} Although the Court recognized California Motor Transport's protected right to petition the courts, it noted that the right to petition did not absolutely immunize litigation from antitrust liability.\textsuperscript{115} The Court repeated that "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute."\textsuperscript{116}

Developing the Meaning of California Motor Transport: United States v. Otter Tail Power Company

One of the first opportunities for the lower courts to interpret the Court's decision in California Motor Transport was presented in United States v. Otter Tail Power Co.\textsuperscript{117} Prior to the Court's decision in California Motor Transport, a district court prevent the respondents from invoking those processes." \textit{Id.} at 518 (Stewart, J. concurring).

113. \textit{See supra} notes 96-97 and accompanying text.


116. \textit{Id.} at 514. The Court's language is especially interesting when viewed in light of Rule 11 of the Federal Rules of Civil Procedure. One of the certifications made by a lawyer signing a pleading under Rule 11 is that the suit "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." \textit{FED. R. CIV. P. 11}.

117. 360 F. Supp. 451 (D. Minn. 1973), \textit{aff'd}, 417 U.S. 901 (1974). Otter Tail was charged with violating § 2 of the Sherman Act by attempting to prevent municipalities from building municipal power systems instead of contracting with Otter Tail to carry electric power. Otter Tail Power Co. v. United States, 410 U.S. 366, 369 (1973). Specifically, the district court found that Otter Tail had attempted to monopolize the retail distribution of electric power by refusing to sell power at wholesale to proposed municipal distribution competitors, by refusing to "wheel" power to these competitors, by instituting and supporting litigation "designed to prevent or delay [the] establishment of those systems," and by invoking provisions in its transmission contracts with other suppliers so as to deny access to the municipal systems. \textit{Id.} at 368.
in Minnesota enjoined Otter Tail from "instituting, supporting, or engaging in litigation, directly or indirectly, against municipalities and their officials who have voted to establish municipal electric power systems for the purpose of delaying, preventing, or interfering with the establishment of a municipal electric power system," reasoning that "Noerr does not free from antitrust sanctions the institution of court litigation." \(^{119}\)

The Supreme Court vacated this portion of the lower court's order and remanded the case to be decided in light of California Motor Transport.\(^{120}\) Writing for the Court, Justice Douglas stated that the "use of ... judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims ... is within the 'mere sham' exception announced in Noerr."\(^{121}\)

On remand, the district court denied Otter Tail's motion to amend the findings to reflect that its litigation activities were immune from antitrust liability, noting that "the repetitive use of litigation by Otter Tail was timed and designed to prevent the establishment of municipal electric systems and thereby to preserve defendant's monopoly."\(^{122}\) As such, the court affirmed its holding that the litigation came within Noerr's sham exception.\(^{123}\)

Like the Court's decision in California Motor Transport, the Otter Tail decisions do not clearly address the issue of whether meritorious litigation is per se immune from antitrust liability. In its first decision, before the Supreme Court decided California Motor Transport, the district court found that Otter Tail initiated court litigation against municipalities "which had the effect of frustrating the sale of revenue bonds to finance the municipal

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118. Otter Tail, 410 U.S. at 369.
120. Otter Tail, 410 U.S. at 380. More than just predatory litigation was involved in Otter Tail. See supra note 117. The scope of this Note is limited to whether litigation, by itself, may warrant antitrust liability. This discussion should in no way suggest that acts independent of litigation are immune from antitrust liability in the same manner as is litigation.
121. Otter Tail, 410 U.S. at 380.
123. Id. at 452.
systems." Although the court found that all of Otter Tail's litigation was unsuccessful on the merits, no specific finding was made by the district court that any of the litigation was meritless.\(^{125}\)

On the other hand, Justice Douglas' opinion in *Otter Tail* stressed the lack of merit of the litigation, referring to "repetitive lawsuits carrying the hallmark of insubstantial claims."\(^{126}\) The district court's opinion on remand made no further mention of the merits of Otter Tail's litigation, stating only that "the repetitive use of litigation by Otter Tail was timed and designed principally to prevent the establishment of municipal electric systems and thereby to preserve defendant's monopoly."\(^{127}\) The Supreme Court summarily affirmed the district court's decision, at least tacitly approving the district court's analysis.\(^{128}\)

**The Direct Purpose/Incidental Effect Analysis and Vendo Company v. Lektro-Vend Corporation**

In Justice Blackmun's concurring opinion in *Vendo Company v. Lektro-Vend Corporation*,\(^ {129}\) the direct purpose/incidental ef-

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124. United States v. Otter Tail Power Co., 331 F. Supp. 54, 62 (D. Minn. 1971). The court noted that in order for the municipalities to successfully raise revenue, "[a] 'no litigation certificate,' reflecting the absence of litigation which might impair the salability of revenue bonds, [was] essential." *Id.* The causal relationship between Otter Tail Power Company's initiation of litigation and the harm to the municipalities was that the "pendency of litigation had the effect of preventing the marketing of the necessary bonds thus preventing the establishment of a municipal system." *Id.*

125. *Id.* This Note defines "meritorious litigation" as litigation that is not objectively baseless as defined in *Columbia Pictures*. See *supra* note 20. Even though Otter Tail Power Company's litigation was unsuccessful on the merits, such a finding does not necessarily mean that the litigation was objectively baseless. The notion of objectively baseless litigation is discussed extensively at *supra* notes 21-36 and accompanying text.

126. *Otter Tail*, 410 U.S. at 380 (emphasis added).

127. *Otter Tail*, 360 F. Supp. at 451. By stressing the purpose of the litigation, the district court apparently employed the direct purpose/incidental effect analysis. Arguably, the court was stating that Otter Tail was not interested in the outcome of the litigation but, instead, was only interested in the dilatory effects that such litigation would cause.


129. 433 U.S. 623, 643 (1977) (Blackmun, J., concurring). The Court in *Vendo* confronted the issue of when a federal court can enjoin an already-commenced state court proceeding that violates federal law. *Id.* at 623.
fect analysis easily could have decided the issue that Justice Blackmun found to control the outcome of the case.\textsuperscript{130} Justice Blackmun expressed the opinion that an anti-competition agreement and the initiation of litigation to enforce that agreement did not violate the Sherman Act.\textsuperscript{131} Specifically, Justice Blackmun wrote that "a pattern of baseless, repetitive claims or some equivalent showing of grave abuse of the state courts must exist before an injunction would be proper."\textsuperscript{132}

Justice Blackmun briefly discussed in dicta the role of the litigant's purpose in determining whether litigation creates antitrust liability. "In my view," wrote Justice Blackmun,

the District Court failed properly to apply the \textit{California Motor Transport} rule. The court believed that it was enough that Vendo's activities in the single state-court proceeding involved in this case were not genuine attempts to use the state adjudicative process legitimately. In reaching this conclusion, \textit{the court looked to Vendo's purpose in conducting the

Two lawsuits were at the center of the dispute in \textit{Vendo}. The first suit, filed in state court by Lektro-Vend Corporation, sought damages for the violation of a non-competition agreement in an employment contract between Harry Stoner, who manufactured vending machines for Vendo, and Lektro-Vend. \textit{Id.} at 627. Vendo subsequently filed an action in federal district court alleging that Lektro-Vend had violated §§ 1 and 2 of the Sherman Act, specifically alleging that the non-competition agreements were unreasonable restraints of trade and that Lektro-Vend's state claim was brought to "unlawfully harass" Vendo and to eliminate them as competitors. \textit{Id.}

After a $7 million judgment against Stoner was affirmed on appeal in state court, the federal district court preliminarily enjoined the state court from enforcing the judgement, holding that there was persuasive evidence that the agreement was overly broad and that the litigation activity was not a "genuine attempt to use the adjudicative process legitimately." \textit{Id.} at 629. As well, the district court found that collection efforts could possibly eliminate federal jurisdiction in this case. \textit{Id.} The district court's order was affirmed by the court of appeals. \textit{Id.}

130. Two issues were before the Court on appeal. The first issue was whether the district court's order was prohibited by the Anti-Injunction Act. \textit{See} 28 U.S.C. § 2283 (1988). Three Justices, led by then Justice Rehnquist, reversed the court of appeals, holding that the Anti-Injunction Act prohibited the district court's order. \textit{See Vendo}, 433 U.S. at 626-43.

The second issue, which Justice Blackmun and Chief Justice Burger discussed, was whether the anti-competition agreement and the initiation of litigation to enforce that agreement violated the Sherman Act. \textit{See id.} at 643-45 (Blackmun, J., concurring).

131. \textit{Id.} at 645 (Blackmun, J., concurring).

132. \textit{Id.} at 644 n.1.
state litigation and to several negative consequences that the litigation had for respondents. The court, however, did not find a "pattern of baseless, repetitive claims," nor could it have done so under the circumstances.\textsuperscript{133}

\textit{California Motor Transport} never stated, however, that a pattern of baseless, repetitive claims was a necessary finding before antitrust liability would result from the decision to litigate.\textsuperscript{134} Four justices dissented from the Court’s ruling, claiming in part that a state court’s finding that litigation was meritorious “does not disprove the existence of a serious federal antitrust violation.”\textsuperscript{135}

Although Justice Blackmun’s concurrence was based on his belief that a single lawsuit was not enough to create antitrust liability,\textsuperscript{136} he noted that the state court proceeding resulted in a judgment of over seven million dollars.\textsuperscript{137} Under the direct purpose/incidental effect analysis, the fact that a litigant obtained a seven million dollar judgment would be strong, if not incontrovertible, evidence that the litigant sought to use, rather than abuse, process.\textsuperscript{138}

\begin{footnotesize}
\textsuperscript{133} Id. at 645 (emphasis added).
\textsuperscript{134} See \textit{California Motor Transp. v. Trucking Unlimited}, 404 U.S. 509, 511-16 (1972); see also supra notes 98-116 and accompanying text.
\textsuperscript{135} \textit{Vendo}, 433 U.S. at 662 (Stevens, J., dissenting). The dissent’s position must be read for what it is, however. The issue before the Court was only whether a preliminary injunction was appropriate. As such, the Court’s opinions on the merits are somewhat speculative.
\textsuperscript{136} Id. at 643-45 (Blackmun, J., concurring). But see \textit{Myers}, supra note 40, at 619-24 (arguing that a single sham lawsuit should not be found per se incapable of creating antitrust liability); \textit{Clipper Express v. Rocky Mountain Motor Tariff Bureau}, 690 F.2d 1240, 1254-57 (9th Cir. 1982) (holding that, although multiple actions will make proving sham easier, a single lawsuit is sufficient to show lack of genuine petitioning activity), \textit{cert. denied}, 459 U.S. 1227 (1983); \textit{Skinder-Strauss Assocs. v. Massachusetts Continuing Legal Educ., Inc., No. Civ. A. 94-10868-PBS}, 1994 WL 683155 (D. Mass., Nov. 8, 1994) (relying on \textit{Columbia Pictures} to hold that a single lawsuit can give rise to liability under the sham exception).
\textsuperscript{137} \textit{Vendo}, 433 U.S. at 645 (Blackmun, J., concurring). Justice Blackmun also noted that the judgment had been affirmed by the Illinois Supreme Court. \textit{Id.}
\textsuperscript{138} For a more detailed discussion of a favorable verdict’s effect on this analysis, see supra note 35.
\end{footnotesize}
PROPOSING A FAIRER TEST TO DETERMINE WHEN THE DECISION TO LITIGATE SHOULD CREATE ANTITRUST LIABILITY

The Supreme Court's holding in Columbia Pictures completely immunizes meritorious litigation from antitrust liability, regardless of the plaintiff's purpose in initiating the litigation. In practice, Columbia Pictures has limited courts' inquiries as to whether litigation was "objectively baseless." However, at least one court refused to extend the Court's test further than the facts specific to Columbia Pictures. In USS-POSCO Industries v. Contra Costa County Building and Construction Trades Council, the Ninth Circuit held that Columbia Pictures "provides a strict two-step analysis to assess whether a single action constitutes sham petitioning." When the complaint alleges a series of lawsuits, however, the court held that "[t]he inquiry in such cases is prospective: Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?" Although there is no reason to predicate the direct purpose/incidental effect test on the number of filings made, the

139. See supra notes 21-36 and accompanying text.
140. See, e.g., Liberty Lake Investments, Inc. v. Magnuson, 12 F.3d 155, 158 (9th Cir. 1993) ("While not ultimately successful or of overwhelming strength, the suit was not so objectively baseless that no reasonable litigant could realistically expect success on the merits."); cert. filed, 62 U.S.L.W. 3863 (June 1, 1994); Harris Custom Builders, Inc. v. Hoffmeyer, 834 F. Supp. 256, 261-62 (N.D. Ill. 1993) ("An action that is well enough grounded, factually and legally, to survive a motion for summary judgment is sufficiently meritorious to lead a reasonable litigant to conclude that they had some chance of success on the merits.").
141. 31 F.3d 800 (9th Cir. 1994).
142. Id. at 810-11 (emphasis added). The court noted that "[t]his inquiry is essentially retrospective: If the suit turns out to have objective merit, the plaintiff can't proceed to inquire into subjective purposes." Id. at 811.
143. Id. Even though the court phrased the issue in terms of intentions or purposes, the court's analysis of the issue still focused on the merits of the actions, as the court held that the plaintiff could not show that the filings were undertaken to harass when over half of them were successful. Id.
144. See Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240, 1254-57 (9th Cir. 1982) (holding that, although multiple actions will make proving sham easier, a single lawsuit is sufficient to show lack of genuine petitioning activity), cert. denied, 459 U.S. 1227 (1983).
court's holding does recognize the central focus placed on a litigant's subjective intent.\footnote{145}

At least two concerns punctuate the Court's decision in Columbia Pictures. First, a subjective test that looks only to the litigant's subjective motivations in bringing the litigation may punish unjustly litigants who legitimately bring suits seeking a favorable outcome and may chill potential litigants from asserting untested legal claims.\footnote{146} Second, "[a] subjective test also could cause a tremendous increase in time and judicial resources spent to punish the rare litigant who lacks any concern for the judicial outcome of a meritorious lawsuit."\footnote{147}

Such a subjective test was proposed by the Fifth Circuit in In re Burlington Northern, Inc.,\footnote{148} where the court held that "success on the merits does not necessarily preclude an antitrust plaintiff from proving that the defendant's earlier litigation activities were sham."\footnote{149} The successful litigation at issue in Burlington Northern involved a water contract between the plaintiffs and the United States Department of the Interior, the water being needed for the operation of a pipeline.\footnote{150} The defendants successfully invalidated that contract.\footnote{151}

The scope of Burlington Northern, however, is limited. In say-
ing that success on the merits does not create an absolute bar on antitrust liability, the court only was allowing the plaintiff to engage in discovery to determine the defendants' intentions for initiating the litigation.\textsuperscript{152} No finding was made that the specific facts of the case would warrant antitrust liability.

Under the direct purpose/incidental effect test, courts should look to determine whether the litigant sought to harm his competitor through the outcome of the litigation or through the process of the litigation.\textsuperscript{153} Therefore, if the anticompetitive harm in \textit{Burlington Northern} was created not by the process of litigation but by the litigation's outcome, \textit{Noerr} immunity would exist regardless of the litigant's anticompetitive intent.\textsuperscript{154} On the other hand, if the litigant had no intention to influence the passage or enforcement of laws, then \textit{Noerr} immunity should not attach.\textsuperscript{155} In order to so determine, courts, as an initial matter, should look to the litigation under question to see if its outcome possibly could alter the competitive relationship.

At least one commentator has voiced concern over the \textit{Burlington Northern} test, arguing that factfinders would have a difficult time determining when litigants were motivated by "the necessary degree of subjective intent."\textsuperscript{156} However, if the jury's first determination is whether the outcome was capable of harming competition, then subjective intent would be relevant only in the few cases where the litigation could have no effect on the competitive relationship.\textsuperscript{157}

Accordingly, rather than focusing on whether litigation was

\textsuperscript{152} \textit{Id.} at 533-34.

\textsuperscript{153} Immunity under the \textit{Noerr-Pennington} doctrine exists only when the litigant is actually attempting to influence the passage or enforcement of laws. \textit{See supra} notes 96-97 and accompanying text.


\textsuperscript{155} \textit{Id.}

\textsuperscript{156} Johnson, \textit{supra} note 146, at 282.

\textsuperscript{157} This determination would replace the Court's "objectively baseless" determination in \textit{Columbia Pictures}. \textit{See} Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 113 S. Ct. 1920 (1993). Rather than presuming that all colorable litigation was brought to achieve the outcome, looking to whether the outcome could affect the competitive relationship would presume that litigation where the outcome would have affected the competitive relationship was brought to achieve that result.
"objectively baseless,"[158] courts should focus on whether the litigation's outcome could affect the competitive relationship between the litigants. If the outcome could affect the competitive relationship, then a litigant's anticompetitive intent would be irrelevant because anticompetitive intent does not create antitrust liability when a litigant is legitimately seeking to influence the government.[159] Only if the outcome would not affect the competitive relationship[160] should courts look to determine whether the litigation "conceals 'an attempt to interfere directly with the business relationships of a competitor.'"[161]

This test closely mirrors the Seventh Circuit's test in Grip-Pak, Inc. v. Illinois Tool Works, Inc.[162] In Grip-Pak, Judge Posner, writing for the court, stated that

we are not prepared to rule that the difficulty of distinguishing lawful from unlawful purpose in litigation between competitors is so acute that such litigation can never be considered an actionable restraint of trade, provided it has some, though perhaps only threadbare, basis in law. Many claims not wholly groundless would never be sued on for their own sake; the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation.[163]

As an example of an unlawful purpose, Judge Posner provided the following:

158. See supra notes 31-33 and accompanying text.
159. **Noerr**, 365 U.S. at 140.
160. By looking to the outcome of litigation, courts would include not only objectively baseless suits but also trivial, although colorable, suits that create economic harm.
161. **Columbia Pictures**, 113 S. Ct. at 1928 (citing **Noerr**, 365 U.S. at 144). Under this analysis, even trivial lawsuits incapable of harming the competitive relationship through their outcome would be immune from antitrust liability unless the antitrust plaintiff could show that the litigant sought to use the judicial process, rather than the outcome, as an anticompetitive weapon.
162. 694 F.2d 466 (7th Cir. 1982), cert. denied, 461 U.S. 958 (1983). Grip-Pak was attempting to produce plastic holders for beverage six-packs, a market in which Illinois Tool Works captured 90% of the market. **Id.** at 468. After a state court judge found that Illinois Tool Works' litigation was not brought maliciously, the district court dismissed Grip-Pak's antitrust complaint. **Id.** at 468-69.
163. **Id.** at 472.
Suppose a monopolist brought a tort action against its single, tiny competitor; the action had a colorable basis in law;[164] but in fact the monopolist would never have brought the suit—its chances of winning, or the damages it could hope to get if it did win, were too small compared to what it would have to spend on the litigation—except that it wanted to use pretrial discovery to discover its competitor’s trade secrets; or hoped that the competitor would be required to make public disclosure of its potential liability in the suit and that this disclosure would increase the interest rate that the competitor had to pay for bank financing; or just wanted to impose heavy legal costs on the competitor in the hope of deterring entry by other firms.165

In all these examples, “the plaintiff wants to hurt a competitor not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome.”166

As well, the direct purpose/incidental effect test addresses the concerns of the Sixth Circuit in Westmac, Inc. v. Smith.167 Because a plaintiff with a meritorious claim generally will bring that claim seeking success on the merits, the court held that a lawsuit raising “a legal issue of genuine substance” raises a rebuttable presumption that the plaintiff was interested in the outcome.168 By placing the burden on the defendant to show otherwise, the court adequately addressed First Amendment concerns.169 Similarly, by focusing the analysis first on whether successful adjudication on the merits can injure the competitor, the direct purpose/incidental effect analysis also protects First Amendment interests.

By focusing on whether the outcome of the litigation is capa-

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164. Under the test set out in Columbia Pictures, the antitrust defendant would be entitled to summary judgment because the litigation would be objectively reasonable. See Columbia Pictures, 113 S. Ct. at 1928.
165. Grip-Pak, 694 F.2d at 472.
166. Id.
167. 797 F.2d 313 (6th Cir. 1986), cert. denied, 479 U.S. 1035 (1987). In Westmac, the plaintiff alleged that the defendant used litigation to oppose plaintiff’s efforts to obtain bond financing to build grain elevators. Id. at 314-15.
168. Id. at 318.
169. Id.
ble of affecting the competitive relationship, courts will not waste judicial resources, as such a determination is equally amenable to summary judgment proceedings as is the "objectively baseless" prong of the current test.\footnote{170} Furthermore, such a test infrequently will chill potential litigants for two reasons. First, antitrust liability exists only where the litigation is between business competitors.\footnote{171} By requiring this relationship, litigants are put on notice to be alert for the special concerns voiced in the Sherman Act. Second, even when litigation is not immunized under the Noerr-Pennington doctrine, the antitrust plaintiff still must prove a substantive violation of the Sherman Act.\footnote{172}

\section*{Conclusion}

The Noerr-Pennington doctrine has long balanced the constitutional right to petition with the substantive protection of the Sherman Act. Under the Noerr-Pennington doctrine, legitimate petitioning efforts, whereby the petitioner genuinely seeks to influence the passage or enforcement of laws, are absolutely immune from antitrust liability.

In \textit{Professional Real Estate Investors v. Columbia Pictures},\footnote{173} the Supreme Court presumed that litigation that is objectively reasonable—that is, where an objective litigant concludes that "the suit is reasonably calculated to elicit a favorable outcome"\footnote{174}—is a legitimate petitioning effort as a matter of law.

\footnotesize
\begin{itemize}
\item \textit{170}. See \textit{Fed. R. Civ. P. 56} (providing for summary judgment).
\item \textit{171}. See \textit{2 Kintner, supra} note 9, § 10.2, at 62.
\item \textit{172}. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 113 S. Ct. 1920, 1928 (1993); \textit{id.} at 1936 (Stevens, J., concurring). In order to win treble damages under § 2 of the Sherman Act, a plaintiff must show that the defendant "had market power in the relevant market and that it acquired or maintained that power through improper means." Johnson, \textit{supra} note 146, at 275 (citing United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)). As well, the plaintiff must show that the litigation caused an antitrust injury. \textit{See} Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc., 944 F.2d 1525, 1529 (9th Cir. 1991), \textit{aff'd}, 113 S. Ct. 1920 (1993) (holding that "the costs of defending . . . suit would constitute antitrust injury"). A detailed discussion of the substantive elements of antitrust law is beyond the scope of this Note. For a more in-depth discussion of these elements, see \textit{2 Kintner, supra} note 9, §§ 9-10.
\item \textit{174}. \textit{Id.} at 1928.
\end{itemize}
Such an approach provides too little deference to the differences between the lawful and unlawful purposes set out in the *Noerr-Pennington* doctrine.

A more balanced test would require courts to look first to the desired outcome of the litigation. If that outcome could affect the competitive relationship between the litigants, then *Noerr* immunity should attach. However, if the outcome of the litigation would have only minimal affect on the competitive relationship, courts should determine whether the litigant is using the process of litigation to inflict antitrust injury.

Such a test reflects a compromise between the strong interests in both the right to petition and the substantive protection afforded by the Sherman Act. As well, the test will not unduly punish legitimate petitioners, chill potential petitioners, or waste valuable judicial resources.

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