LITIGATION AS A PREDATORY PRACTICE

HEARING

BEFORE THE

SUBCOMMITTEE ON
INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET

OF THE

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LITIGATION AS A PREDATORY PRACTICE

FRIDAY, FEBRUARY 17, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 9:36 a.m., in room 2141, Rayburn House Office Building, the Honorable Bob Goodlatte (Chairman of the Subcommittee) presiding.

Present: Representatives Goodlatte, Quayle, Chabot, Watt, and Jackson Lee.

Staff present: (Majority) Holt Lackey, Counsel; Olivia Lee, Clerk; and (Minority) Stephanie Moore, Subcommittee Chief Counsel.

Mr. GOODLATTE. Good morning and welcome to this hearing of the Subcommittee on Intellectual Property, Competition, and the Internet. Today's hearing is on litigation as a predatory practice.

The Judiciary Committee has heard ample evidence this Congress about the excesses and abuses of America's lawsuit system. We have heard how runaway litigation distorts our health care and patent systems. The Constitution Subcommittee has received testimony showing that our system of discovery in litigation is unduly costly and that even frivolous lawsuits too often go unsanctioned.

We have reported several bills to rein in litigation abuses, including the HEALTH Act, the Smith-Leahy America Invents Act, and the Lawsuit Abuse Reduction Act.

Today's hearing examines a different aspect of America's lawsuit problem, the strategic abuse of litigation system as an anti-competitive tactic. Precisely because our civil justice system is so expensive and tolerant of tenuous claims, litigation can be a deadly weapon in the hands of a cartel or an aspiring monopolist. Litigation can be used to drive up a competitor's costs, to gain access to a competitor's otherwise confidential information, and to divert a competitor's resources away from offering competitive goods and services.

Large companies can impose ruinous legal costs on their smaller competitors by forcing them to defend against a lawsuit. The median case in Federal court costs about $20,000 to defend, and, in many cases, the cost is much higher.

A predatory plaintiff controls the scope of the claims in the suit, and so has the ability to structure its claims and discovery requests in a way that maximizes costs for the defendant. And the costs of

litigation weigh much heavier on a small business than a large corporation.

If the claim is merely plausible, then a predatory plaintiff is entitled to discovery of any matter relevant to the claims or defenses in the case. A defendant may be forced to turn over e-mails, business plans, customer lists, and other sensitive information. The more documents the defendant is forced to turn over, the higher the costs of the lawsuit. And the lawsuit forces the defendant to spend time and money on litigation rather than competing in the marketplace.

For all of these reasons, litigation can be a particularly effective predatory strategy. Deployed strategically, litigation can put a competitor out of business, prevent a competitor from ever entering the market, or force a competitor to reduce its output.

If a big company succeeds in using litigation to limit competition, then there is a dangerous probability that it could profit by raising prices on consumers.

Indeed, strategic litigation can be a more effective means of eliminating a competitor than tactics like predatory pricing that have long been banned by the antitrust laws. Predatory pricing requires a dominant party to sell its products at below its costs, lowering its profits in the short term in the hope of realizing monopoly profits after the competitor is eliminated. With litigation, on the other hand, a party can seek a monopoly or to eliminate a competitor without having to lower its own prices.

While a litigation strategy imposes litigation costs on a predatory plaintiff, it imposes equivalent costs on a target defendant. The defendant, often a smaller business than the predatory plaintiff, may be less equipped to bear these costs.

As a predatory tactic, abusive litigation is relatively cost-effective for the predatory plaintiff and expensive for the defendant. This is why some commentators have dubbed abusive litigation a form of "cheap exclusion."

But the Supreme Court has created an exemption that protects abusive anti-competitive litigation from the antitrust laws. The Noerr-Pennington doctrine was originally formulated to create an antitrust immunity for citizens exercising their First Amendment right to petition the legislature. Because government actions are beyond the scope of antitrust laws, and because citizens have a right to petition the government to adopt policies they favor, the Court held that the political petitioning activities do not violate the antitrust laws.

The Court has since extended this holding to protect all forms of petitioning the Government, including the filing of a lawsuit. But the analogy between petitioning the legislature and petitioning a court is flawed.

Threatening to restrict a frivolous or abusive political argument could chill free speech and the flow of information, and raises serious First Amendment questions. But courts have long put reasonable limits on the types of arguments that a litigant can make and have long-sanctioned frivolous and abusive arguments made for improper purposes.

Abuse of process was a tort at common law. Rule 10 of the Federal Rules of Civil Procedure provides for dismissal of meritless

and implausible claims. Rule 11 provides sanctions for filings made with an improper purpose. The rules of evidence prohibit the introduction of evidence based on hearsay, conjecture, or unreliable methods of expert analysis.

Applying the antitrust laws to prohibit litigation filed with the anticompetitive intent to monopolize a market or to unreasonably restrain trade would not harm the public's right to access the courts for legitimate purposes. Unfortunately, the courts have liberally applied Noerr-Pennington antitrust immunity to litigation and have construed the sham litigation exception to that doctrine very narrowly.

As a result, abusive litigation persists as a predatory anticompetitive tactic. Today's hearing will explore this problem and how to address it.

I want to welcome and recognize the Ranking Member of the Subcommittee, the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. And I appreciate the Chairman convening this hearing.

The First Amendment holds a hallowed place in our Constitution, guaranteeing the right of people to petition the government. Antitrust laws are also of fundamental importance in our society. As Justice Thurgood Marshall observed years ago, "Antitrust laws are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

The question here seems to me to be, what happens when a fundamental personal right conflicts with a fundamental free enterprise right? Which right is more fundamental and should take precedence in that event?

Early tensions between these two principles brought into focus the need for doctrinal adjustments and led to the Noerr-Pennington immunity.

As we have heard, the Noerr-Pennington doctrine provides immunity from antitrust liability, the guardian of free enterprise rights, to individuals and corporations who exercise their personal rights to petition the Federal or State Government to take official actions that may impose a restraint on trade.

As Members of Congress, we often think about the right to petition the government as protecting lobbying, but Noerr applies to other areas of First Amendment expression as well.

In litigation, I think we can all imagine the dominant players in an industry reacting with hostility against a small player who dares to enter that market. Attempting to drive out rivals from the opportunity to compete is clearly an abuse of process and antitrust principles. But it is also too easy to respond to competitive lawsuits by claiming that the suit is merely a means to eliminate competition.

If dominant players, the rich and well-represented who can afford the best legal minds, walked into court on an equal footing with small players, the poor, the indigent, and the underrepresented, wouldn't our system of justice in general be eminently more fair? Or to state the converse, if the small players, the poor, indigent litigants, walked into court on an equal footing with domi-

nant players, the rich and well-represented, wouldn't justice be done a lot more often?

In an effort to constrain dominant players, the Supreme Court in a 1993 case, *Professional Real Estate Investors v. Columbia Pictures Industries*, the so-called *PRE* case, made an attempt to constrain the Noerr doctrine to prevent a perversion of the First Amendment by giving structure to the so-called sham exception to Noerr immunity.

In subsequent years, however, the *PRE* test for determining whether a petition in the litigation context is a sham has shown signs of ineffectiveness.

I believe it is important to consumers, the economy, and businesses—small and big—to know how to distinguish legitimate petition from an anti-competitive effort to undermine competition. In many ways, unfortunately, this Judiciary Committee has preoccupied itself with protecting dominant players from frivolous litigation. So in a sense, this hearing seems to me to represent a welcome role reversal for the Committee.

I am particularly interested in hearing from witnesses their views on the breadth of Noerr-Pennington in the litigation context, as well as the scope of the sham litigation exception. Are they currently working in a compatible fashion? Does one make the other meaningless? Further, should Noerr-Pennington immunity have parallel application across the methods available to petition the government? Or is litigation decisively different?

I appreciate that we have a businessman, a law professor, and a litigator on our panel, and I believe that we will be enriched by the diversity of perspectives reflected here today.

The Chairman spoke quite a bit in his opening statement about abusive litigation. I guess I come kind of from a different perspective. I have seen a lot of abusive defense of litigation: stonewalling, failing to give up documents, failing to allow the justice system. So perhaps our next hearing will be about that disparity between rich and poor, dominant and small, and we will get to really trying to level the playing field in the litigation context, which is really where the problem exists, in my opinion.

I yield back, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman for his comments. And I think he will find that this hearing will, indeed, touch on some of those issues that you describe.

And we welcome all of our witnesses and the contributions they will make.

But before I introduce them, I would like them, as is the custom of this Committee, to stand and be sworn.

[Witnesses sworn.]

Mr. GOODLATTE. Thank you very much, and please be seated.

Our first witness is Chris Saxman, a former member of the Virginia House of Delegates. Mr. Saxman's family founded and runs the Shenandoah Valley Water Company. Mr. Saxman has been involved in issues facing that industry as a former chairman and current board member of the International Bottled Water Association. I look forward to hearing his perspective on this issue as a policymaker and as a small-business man. And I am proud to call Mr. Saxman a constituent and friend.

Our second witness, Doug Richards, practices antitrust class action law and is the managing partner at the New York office of Cohen Milstein. Before entering private practice, Mr. Richards served as deputy general counsel of the Commodity Futures Trading Commission, where he received a special service award for exemplary accomplishment.

Our third and final witness is Professor Marina Lao of Seton Hall University School of Law. Professor Lao is a former attorney with the Department of Justice Antitrust Division, a member of the advisory board of American Antitrust Institute, and the former Chair of the section of antitrust and economic regulation of the Association of American Law Schools. Professor Lao's article "Reforming the Noerr-Pennington Antitrust Immunity Doctrine" examines the scope of Noerr-Pennington immunity and offers helpful suggestions for reform.

I would point out to each of the witnesses that there is a timer on the table in front of you. You have 5 minutes to make your statements. Your entire statement, written statement, will be made a part of the record. When the yellow light comes on, you will have 1 minute to complete your statement. When the red light comes on, we ask that you wrap up your remarks.

And we will start with Mr. Saxman.

Welcome. Glad to have you up from the Shenandoah Valley.

TESTIMONY OF THE HONORABLE CHRISTOPHER B. SAXMAN, FORMER DELEGATE, VIRGINIA HOUSE OF DELEGATES

Mr. SAXMAN. Thank you, Mr. Chairman, and Members of the Committee.

My name is Chris Saxman. I am a recently retired member of the Virginia General Assembly, having served the 20th House District from 2002 to 2010. I grew up in a small family business, the Shenandoah Valley Water Company, and we have 45 full-time employees for whom we provide health care for the entire family while paying above-average market wages. Additionally, I am a past chairman of the International Bottled Water Association, while currently serving on its board of directors and executive committee.

In short, Mr. Chairman, I have seen the business world as a frontline low-skill employee to a bottled water deliveryman to a manager to an executive. I have been a legislator who has worked on legislation dealing with just about every aspect of business, and I have also worked very closely with small mom-and-pop companies and large global corporations who employ people in the tens of thousands to improve products, services, relationships, and industry standards.

Over the course of my life in business and politics, I have come across a disturbing and pervasive business practice that, in my opinion, threatens the very foundations of the American free market capitalist system. In most political debates, I would be considered a free-market, supply-side adherent; however, I also believe that, as James Madison said, "If men were angels, no government would be necessary."

A sound economy is not just what one can do in a market but also what one should do. Government should protect people who are engaged in commerce just as it should protect the average cit-

izen. One cannot steal property from another just as one cannot physically harm or threaten another to gain property or pleasure.

The issue today before you is predatory litigation or, as I prefer to call it, legal extortion. I will give you two examples of which I have become aware in my various capacities.

Number one, a multinational non-American company in my industry willfully, intentionally, and knowingly breached a contract with which it had complied for 13 years in order to gain financially at the expense of an American company with whom they had had a successful, mutually beneficial 20-year business relationship. The American company, at the time of the breach, was .4 percent the size of the North American subsidiary of a large multinational which broke the contract, and one one-hundreth the size of its global parent.

The evidence through the trial clearly shows a pattern of behavior in which the larger company, and its employees, conspired to steal—my term—steal from the smaller firm that which it could not gain in the market or would not purchase at fair market value.

If our biggest competitors decide—I think I am missing part of my testimony. It is on the backside, Mr. Chairman.

Rather than simply pay the company fair market value for the business, the larger company figured that it would be cheaper to take the business via the American court system.

So by forcing the American company to defend its own property in Federal court and force the American company to spend millions of dollars in legal fees, the larger company determined it had nothing to lose.

What is even more disturbing is that the large multinational forced the smaller company to initiate the litigation. It is literally a win-win scenario. Even if, after 5 years of expensive and time-consuming litigation, which is still pending at the appellate level, they lose the case, the company will either expense it off their books or account it as an asset purchase ending up with the business they initially sought.

The large multinational went so far as to investigate the American company owner's personal and corporate debt load before it decided to take pre-emptive legal action. They waited until he was in a weakened condition and then made their move. The results for the consumer will be a less competitive market. The broader community will see wealth being transferred out of the country, lost jobs, lower wages and benefits, and overall economic decline.

The second case involves the extortion of taxpayer money by the use of threat of legal action by companies who have submitted bids to local governments under a legal Request for Proposal process. In this situation, a company will submit bids that do not entirely comply with an RFP but will have a bid price that is much higher than necessary. When that company is not awarded the RFP, the company will threaten legal action unless the bidding process is reconsidered. This causes inordinate delays and, obviously, higher bid awards, because most local governments cannot afford protracted legal expenses.

Companies know that they have a distinct advantage in this process—again, in a win-win scenario. They will either win the bid or get the local government to increase the overall price in the mar-

ket, which will naturally be seen in similar bids throughout the country, and all at taxpayer expense.

So a bid that forces up prices in X county in Virginia will transfer to Y city in North Carolina due to market realities. This is a very well-thought-out corporate strategy which, in conjunction with Federal mandates and accompanying Federal grants, strikes at the very heart of the problems that undermines our economy—lack of trust in our governing and institutional structures.

I can provide specifics upon request, but my interest here today is to leave you with the impression that there is something very wrong in our economy. The court system has been weaponized in the market and is being used against smaller, weaker companies who cannot withstand the attacks.

[The prepared statement of Mr. Saxman follows:]

Prepared Statement of the Honorable Christopher B. Saxman, former Delegate, Virginia House of Delegates

Mr. Chairman and members of the Committee,

My name is Chris Saxman. I am a recently retired member of the Virginia General Assembly having served the 20th House District from 2002–2010. I grew up in a small family business, Shenandoah Valley Water Company and we have 45 full time employees for whom we provide health care for the entire family while paying above average market wages. Additionally, I am a past Chairman of the International Bottled Water Association while currently serving on its Board of Directors and Executive Committee.

In short Mr. Chairman, I have seen the business world as a front line low skill employee to a bottled water deliveryman to a manager to an executive. I have been a legislator who has worked on legislation dealing with just about every aspect of business and I have also worked very closely with small mom and pop companies and large global corporations who employ people in the tens of thousands to improve products, services, relationships and industry standards.

Over the course of my life in business and politics, I have come across a disturbing and pervasive business practice that, in my opinion, threatens the very foundations of the American Free Market Capitalist system.

In most political debates I would be considered a free market supply side adherent; however, I also believe that as James Madison said "If men were angels, no government would be necessary."

A sound economy is not just about what one CAN do in a market but also what one SHOULD do.

Government should protect people who are engaged in commerce just as it should protect the average citizen. One cannot steal property from another just as one cannot physically harm or threaten another to gain property or pleasure.

The issue before you today is "predatory litigation" or as I prefer to call it "legal extortion."

I will give you two examples of which I have become aware in my various capacities.

1. A multinational non American company, in my industry, willfully, intentionally and knowingly breached a contract with which it had complied for 13 years in order to gain financially at the expense of the American company with whom they had had a successful mutually beneficial 20 year business relationship. The American company, at the time of the breach was .4% the size of the North American subsidiary of the large multinational which broke the contract and .01% the size of its global parent. The evidence throughout the trial clearly shows a pattern of behavior in which the larger company, and its employees, conspired to steal from the smaller firm that which it could not gain in the market or would not purchase at fair market value. Rather than simply pay the company fair market value for the business, the larger company figured that it would be cheaper to take the business via the American court system. So, by forcing the American company to defend its own property in federal court and force the American company to spend millions of dollars in legal fees, the larger company determined it had nothing to lose. What is even more disturbing is that the large multinational forced the smaller company to initiate the litigation.

It's literally a win win scenario. Even if, after 5 years of expensive and time consuming litigation (which is still pending at the appellate level) they lose the case,

the company will either expense it off their books or account it as an asset purchase ending up with the business they sought.

The large multinational went so far as to investigate the American company's owner's personal and corporate debt load before it decided to take pre-emptive legal action. They waited until he was in a weakened condition and then made their move.

The results for the consumer will be a less competitive market. The broader community will see wealth being transferred out of the country, lost jobs, lower wages and benefits, and overall economic decline.

2. Another case involves the extortion of taxpayer money by the use of threat of legal action by companies who have submitted bids to local governments under a legal Request For Proposal process. In this situation, a company will submit bids that do not comply entirely with an RFP but will have a bid price that is much higher than necessary. When that company is not awarded the RFP, the company will threaten legal action unless the bidding process is reconsidered. This causes inordinate delays and obviously higher bid awards because most local governments cannot afford protracted legal expenses. Companies know that they have a distinct advantage in this process again, in a win win scenario. They either win the bid or get the local government to increase the overall price in the market which will naturally be seen in similar bids throughout the country and all at taxpayer expense. So, a bid that forces prices up in X County in Virginia will transfer to Y City in Pennsylvania due to market realities. This is a very well thought corporate strategy which, in conjunction with federal mandates and accompanying federal grants, strikes to heart of the problem that undermines our economy—lack of trust in our governing and institutional structures.

I can provide specifics upon request but my interest here today is to leave you with the impression that there is something very wrong in our economy. The court system has been weaponized in the market and is being used against smaller, weaker companies who cannot withstand the attacks.

We are a small family business who is constantly competing with large multinational corporations for every customer. We live under the constant threat of predatory litigation. If our biggest competitors decide to train the full resources of their legal divisions on us, how can we compete? We just want to be in business to deliver good, safe and great tasting bottled water to our customers at the best price in the market. We employ 45 Virginians who share that goal and work hard every day to make it a reality. But we don't have a team of lawyers on retainer ready to engage in trench warfare. We want to win in the marketplace, not the courtroom. I think every small businessman in America feels the same way.

Imagine my surprise when I learned that the law creates a special exemption from antitrust, the Noerr-Pennington Doctrine, that protects these big companies' right to sue my family's business and fellow small businesses in an attempt to drive us from the market. I don't think it is right that one of the most effective strategies that our competitors can adopt to exclude us from the market is also one of the few exclusionary strategies that enjoys near blanket immunity from the antitrust law.

We're not afraid of predatory pricing by my rivals. We're not afraid of anything our competitors can do to us in the market. If the game is delivering water to our customers at the best price with the best service, I know we can beat them. We have the best and hardest working drivers, customer service reps, and sales team in the Shenandoah Valley. But if the game is a protracted lawsuit, well, we just can't compete with their lawyers.

The impacts are felt all across society in a subtle but serious way—people lose health care, jobs are lost and corporate profits are concentrated and in many cases sent overseas. Unless the law sanctions this behavior severely, big corporations will continue to engage in it. Unfortunately, experience teaches that they will not do what they should do, but what they can get away with. Right now they can abuse the legal system to weaken smaller competitors like us, and so they do. The antitrust law should be clarified so that abusive litigation is punished just as severely as other anticompetitive, predatory strategies—including by treble damages and, where appropriate, criminal sanctions.

Thank you Mr. Chairman.

Mr. GOODLATTE. Thank you, Mr. Saxman.

Mr. Richards, welcome. You might want to turn on your microphone there. Thank you.

TESTIMONY OF J. DOUGLAS RICHARDS, PARTNER, COHEN MILSTEIN

Mr. RICHARDS. Good morning, Chairman Goodlatte, Ranking Members Watt and Conyers, and Members of the Subcommittee. I am Doug Richards, and I am managing partner of the New York office of the law firm of Cohen Milstein Sellers & Toll. My legal practice focuses mainly on antitrust claims, largely including antitrust claims arising from unfounded patent litigation.

I have been asked to testify today to share my perspectives concerning the scope of immunity that one should have from antitrust liability stemming from use of litigation as a predatory practice. My perspectives on that question stem from my experience in having represented plaintiffs in several antitrust claims during the last 10 years that asserted claims of sham litigation, arising mainly from defective patents.

I am testifying on my own behalf, and the opinions expressed are my own.

Thank you for giving me the opportunity to testify about current legal standards governing antitrust liability stemming from sham litigation. It is important that the law governing Noerr-Pennington immunity strike a correct balance between the need to reward invention by allowing intellectual property owners to obtain and protect their intellectual property through litigation, on one hand, and the need to preserve competition in the face of unfounded intellectual property claims, on the other.

These antitrust issues often arise when a patent-holder sues a company alleging patent infringement, such as when a brand-name pharmaceutical company sues a generic drug company for infringing its patents and wins or settles the case. Purchasers of the drug at issue then sometimes bring an antitrust suit against the brand-name pharmaceutical company, claiming that the patent litigation was sham litigation, because the patent was invalid due to fraud on the part of the patent-holder in obtaining the patent.

I believe that the law is currently out of balance and effectively immunizes unfounded litigation to too great a degree from challenge under antitrust law. In several key respects, legal hurdles that an antitrust plaintiff must clear in order to pursue antitrust claims based on predatory litigation have been set too high by the courts. The result is that dominant corporations are often not held duly accountable when they bring unfounded intellectual property claims for the purpose of excluding competitors from the marketplace.

In resolving the tension between goals of antitrust and of intellectual property, the courts have stacked the deck in favor of intellectual property rights, even when they are legally unfounded, and to the detriment of the public's right to protect itself under antitrust law against unjustified monopoly prices.

Under the Professional Real Estate Investors case, the core requirement for antitrust liability arising from a claim of sham litigation is that the claim must be both objectively and subjectively baseless. Even from the outset of the analysis in actual cases, this dichotomy between objective baselessness and subjective baselessness is often unclear.

Suppose, for example, as is often true in these cases, that the antitrust plaintiff has uncovered evidence that a patent-holder actually conducted its own tests, prior to obtaining a patent, that showed in one way or another that the patent should not be granted. Does that evidence go to objective baselessness, subjective baselessness, or both?

If those tests weren't part of the published literature, defendants often argue they are irrelevant to objective baselessness, because all they show is what the defendant knew subjectively, and not what some sort of objective reasonable person would know. But shouldn't a test of baselessness address what the defendant actually knew?

There is no sensible reason to divorce the objective reasonableness inquiry from facts actually known at the time by the antitrust defendant, if the goal is to deter groundless claims.

In actual cases, to focus on what was actually known by a defendant often provides a richer and more reliable guide to what someone in the position of the antitrust defendant should have known, than to limit one's focus in the first instance only to what some purely hypothetical reasonable person would have known in some hypothetical context.

Even if objective baselessness is required, therefore, what the defendant actually knew should be one of the most reliable guides to whether a case was baseless in light of known facts.

Nevertheless, the court in the Professional Real Estate wrote that only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. One can reasonably argue that this statement relates only to evidence of the defendants' subjective motivation, and not to the defendant's subjective knowledge of facts.

But the Federal Circuit has not recognized that distinction, holding instead that facts that only the defendant itself was aware of prior to filing suit cannot properly be considered in making the objective reasonableness inquiry.

In cases where the antitrust defendant clearly knew facts that made the patent invalid, confusion about the fuzzy distinction between objective and subjective baselessness can cause courts to turn a blind eye to the clearest and most compelling evidence that a case had no reasonable basis at all.

I see my time is out, so I will just sum up by saying that I am in agreement with the fact that there is a need to curtail the scope of immunity from antitrust liability under the Noerr-Pennington doctrine.

And I thank you for the opportunity to testify today.

[The prepared statement of Mr. Richards follows:]

Testimony of

J. Douglas Richards
Partner, Cohen Milstein Sellers & Toll, PLLC

Before the

Subcommittee on Intellectual Property, Competition and the Internet

of the

House Committee on the Judiciary

Room 2141, Rayburn House Office Building

February 17, 2012

"Litigation as a Predatory Practice"

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Good morning, Chairman Goodlatte, Ranking Members Watt and Conyers, and members of the Subcommittee. I am Doug Richards, and I am managing partner of the New York office of the law firm of Cohen Milstein Sellers & Toll. My legal practice focuses mainly on antitrust claims, largely including antitrust claims arising from unfounded patent litigation. I have been asked to testify today to share my perspectives concerning the scope of immunity that one should have from antitrust liability stemming from use of litigation as a predatory practice. My perspectives on that question stem from my experience in having represented plaintiffs in several antitrust cases during the last ten years that asserted claims of sham litigation, arising mainly from defective patents. I am testifying on my own behalf, and the opinions expressed are my own.

Thank you for giving me the opportunity to testify about current legal standards governing antitrust liability stemming from sham litigation. It is important that the law governing Noerr-Pennington immunity strike a correct balance between the need to reward invention by allowing intellectual property owners to obtain and protect their intellectual property through litigation, on one hand, and the need to preserve competition in the face of unfounded intellectual property claims, on the other. These antitrust issues often arise when a patent-holder sues a company alleging patent

infringement, such as when a brand name pharmaceutical company sues a generic drug company for infringing its patents, and wins or settles the case. Purchasers of the drug at issue then sometimes bring an antitrust suit against the brand name pharmaceutical company claiming that the patent litigation was sham litigation because the patent was invalid due to fraud on the part of the patent-holder in obtaining the patent.

I believe that the law is currently out of balance, and effectively immunizes unfounded litigation to too great a degree from challenge under antitrust law. In several key respects, legal hurdles that an antitrust plaintiff must clear in order to pursue antitrust claims based on predatory litigation have been set too high by the courts. The result is that dominant corporations are often not held duly accountable when they bring unfounded intellectual property claims for the purpose of excluding competitors from the marketplace. In resolving the tension between goals of antitrust and of intellectual property, the courts have stacked the deck in favor of intellectual property rights, even when they are legally unfounded, and to the detriment of the public's right to protect itself under antitrust law against unjustified monopoly prices.

Under the *Professional Real Estate Investors* case,[1] the core requirement for antitrust liability arising from a claim of sham litigation is

that the claim must be both objectively and subjectively baseless. Even from the outset of the analysis in actual cases, this dichotomy between "objective" baselessness and "subjective" baselessness is often unclear. Suppose, for example -- as is often true in these cases -- that the antitrust plaintiff has uncovered evidence that a patent holder actually conducted its own tests, prior to obtaining a patent, that showed in one way or another that the patent should not be granted. Does that evidence go to objective baselessness, subjective baselessness, or both? If those tests were not part of the published literature, defendants often argue that they are irrelevant to "objective" baselessness because all they show is what the defendant knew subjectively, and not what some sort of objective "reasonable person" would know. But shouldn't a test of baselessness address what the defendant actually knew? There is no sensible reason to divorce the objective reasonableness inquiry from facts actually known at the time by the antitrust defendant, if the goal is to deter groundless claims. In actual cases, to focus on what was actually known by a defendant often provides a richer and more reliable guide to what someone in the position of the antitrust defendant should have known, than to limit one's focus in the first instance only to what some purely hypothetical, "reasonable" person would have known in some hypothetical context. Even if "objective" baselessness is required,

therefore, what the defendant actually knew should be one of the most reliable guides to whether a case was baseless in light of known facts.

Nevertheless, the Court in the *Professional Real Estate* case wrote that "[o]nly if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."[2] One can reasonably argue that this statement relates only to evidence of the defendants' subjective "motivation," and not to the defendant's subjective knowledge of facts. However, the Federal Circuit has not recognized that distinction, holding instead that facts that only the defendant itself was aware of prior to filing suit cannot properly be considered in making the objective reasonableness inquiry.[3] In cases where the antitrust defendant clearly knew facts that made the patent invalid, confusion about the fuzzy distinction between "objective" and "subjective" baselessness can cause courts to turn a blind eye to the clearest and most compelling evidence that a case had no reasonable basis at all.

That is not the only way in which current case law encourages courts to turn a blind eye to critical facts. The Federal Circuit stated a year ago that "[t]he existence of objective baselessness is to be determined based on the record ultimately made in the infringement proceedings."[4] Defendants since that time have argued that under that precedent, even if an antitrust plaintiff

has clear evidence that facts that were not available to the patent challenger in an underlying patent case show that the patent was invalid or unenforceable, the plaintiff is precluded from relying on those facts to establish "objective baselessness." It is difficult to see what legitimate purpose such a rule could serve, to the extent that the purpose of sham litigation legal standards is to distinguish between patent cases that are unfounded and cases that are not.

Not only have some courts turned a blind eye in both of these ways to telling evidence of baselessness, but they also have placed the high burden on antitrust plaintiffs of proving both objective and subjective baselessness by "clear and convincing evidence." The usual rule would be that absent any statutory provision for a heightened standard of proof, the applicable standard of proof is a preponderance of the evidence.[5] However, the Federal Circuit has clearly indicated that a requirement of "clear and convincing evidence" applies to both objective and subjective baselessness.[6] The combined effect of the Federal Circuit's potential exclusion of multiple categories of evidence from consideration in connection with "objective baselessness," and then its also having applied the heightened "clear and convincing" standard of proof to objective baselessness, is often to cause sham litigation cases either to fail altogether, or to settle on terms that reflect

only a fraction of the plaintiffs' actual losses, even when the plaintiff has clear evidence showing that a patent case was fundamentally unfounded, and was brought to maintain high prices rather than to vindicate any legitimate patent.

Not only have courts raised unfounded obstacles to sham litigation claims by excluding key evidence from consideration, and by adopting extraordinary standards of proof, but they also have denied standing to the most important categories of plaintiffs to sue based on enforcement of fraudulently procured patents. The traditional rule in antitrust law has long been that overcharged purchasers are the persons whose standing to assert antitrust claims is clearest, and that the standing of competitors to bring antitrust claims is more limited. Nevertheless, when the asserted basis for patent invalidity is that the antitrust defendant procured its patent through fraud on the patent office -- *i.e.*, when the antitrust liability in question rests on the Supreme Court's longstanding precedent in the *Walker Process* case[7] -- some courts have turned the conventional rule of antitrust standing on its head, holding that overcharged purchasers lack standing to pursue an antitrust claim.[8] Government antitrust authorities have uniformly argued against this rule, including the Department of Justice even in the recent Republican administration, as well as nearly all state Attorneys General.[9]

Academic commentary on point has similarly criticized this limitation on antitrust standing.[10] Nonetheless, whether overcharged purchasers have standing to bring an antitrust claim based on fraud on the patent office under *Walker Process* remains a highly controversial issue. In this way as well, case law in recent years has made it increasingly difficult for the purchasing public to hold defendants accountable, under United States antitrust law, for causing higher prices to the public by bringing groundless patent infringement litigation for the purpose of injuring competition and unfairly excluding competitors from the market. In the field of prescription drugs alone, this has enabled brand name drug manufacturers to extract hundreds of millions if not billions of dollars from seniors based on defective patents, for which the brand name drug manufacturers would otherwise have been held duly accountable in antitrust litigation.

Thank you for the opportunity to testify today. I look forward to answering any questions you may have.

END NOTES

[1] *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

[2] 508 U.S. at 60.

[3] *iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1378 (Fed. Cir. 2011).

[4] *iLOR*, 631 F.3d at 1378.

[5] *Grogan v. Garner*, 498 U.S. 279 (1991).

[6] *Wedgetail Ltd. v. Huddleston Deluxe, Inc.*, 576 F.3d 1302, 1304-06 (Fed. Cir. 2009). The Supreme Court would likely agree with this conclusion, in view of its recent holding that "clear and convincing evidence" is necessary to establish infringement. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S.Ct. 2238 (2011).

[7] *Walker Process Equ't, Inc. v. Ford Machinery & Chem. Corp.*, 382 U.S. 172 (1965).

[8] *In re Remeron Antitrust Litig.*, 335 F. Supp. 2d 522 (D.N.J. 2004); *The Kroger Co. v. Sanofi-Aventis*, 701 F. Supp. 2d 938 (S.D. Ohio 2010); *but cf. In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677 (2d Cir. 2009); *Molecular Diagnostics Labs. v. Hoffmann-LaRoche Inc.*, 402 F. Supp. 2d 276 (D.D.C. 2005).

[9] Brief for the United States and Federal Trade Commission as Amici, Curiae Supporting Plaintiffs-Appellants, *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 06-5525-cv (2d Cir.); Brief for the States of [40 States, the District of Columbia and Puerto Rico] Supporting Plaintiffs-Appellants and Reversal; *In re DDAVP Direct Purchasers Antitrust Litig.*, No. 06-5525-cv (2d Cir.).

[10] H. Hovenkamp, M. Lemley, M. Janis and C. Leslie, *IP and Antitrust* § 11.4b at 11-51-52 (2010 Supp.) (*Remeron* "mistakenly applies the antitrust rules for competitor standing to cases involving consumer standing").

Mr. GOODLATTE. Thank you, Mr. Richards.

Professor Lao, welcome. You might want to pull that microphone closer and turn it on.

TESTIMONY OF MARINA LAO, PROFESSOR OF LAW, SETON HALL UNIVERSITY SCHOOL OF LAW

Ms. LAO. Good morning, and I apologize for having been a little bit late. I got lost in this cavernous building, believe it or not.

Thank you so much for inviting me to participate in this hearing. I am a law professor at Seton Hall University School of Law.

My written statement and my testimony today is drawn in part from an article I had published, entitled "Reforming the Noerr-Pennington Antitrust Immunity Doctrine."

Let me first start out by giving a little bit of context. In a democracy, citizens have the right to petition the government. But efforts to influence the government sometimes have an impact on competition. When that happens, then there is a tension between the antitrust law and the First Amendment. The Noerr-Pennington immunity doctrine developed as a result of that, to try to reconcile and resolve that tension.

The Noerr-Pennington doctrine, as it stands, is sweeping. But in the early years, it was limited by a sweeping sham exception. The Noerr-Pennington immunity doctrine applies to both lobbying the legislature, the executive branch, and to the petitioning judiciary.

And I think therein lies some of the problem, because lobbying the legislature is quite different from so-called petitioning the judiciary, because when we talk about petitioning the judiciary, we are actually talking about litigation, filing a lawsuit.

So I am going to start out just by talking a little bit about litigation and the *PRE* case, which Mr. Watt had referred to quite a bit.

As I mentioned earlier, the sham exception at first was quite broad, and it kept check on the Noerr immunity doctrine. But in 1993, the Supreme Court decided the *PRE* case, which severely restricted the sham exception. Basically, it set forth a two-pronged test.

First, the plaintiff will have to show that the underlying case was objectively baseless, in the sense that no reasonable litigant could have realistically expected success on the merits. It must then show that the antitrust defendant brought the lawsuit for the purpose of harming the rival through the use of the government process, rather than through the outcome of that process.

Both parts of the test are quite troubling, as I stated perhaps in more detail in my written statement. And I don't really have time to go into it at length now.

But I would say that one of the reasons that the objective test is so troubling is that a case can in fact be objectively baseless if it is clearly irrational for the person to have brought the litigation but for the competitive harm that it could inflict on its rival. But if there is a colorable basis in law for the lawsuit, we would still say under *PRE* that this case fails to pass the objective baselessness test.

In fact, Justices Stevens and O'Connor, who had concurred in the judgment, disagreed sharply with this reasoning and with this articulation of the two-pronged test. They raised the point that you

can see how someone could bring a lawsuit, have it run for 10 years, take two trips to the Court of Appeals and recover a nominal sum from the defendant. Yet under this *PRE* test, this would be called a not objectively baseless lawsuit. And that is one of the problems.

The second prong is also slightly problematic, because you would have to show that the defendant brought the suit in order—for the purpose of harming the competitor through the use of the process and not for the outcome. But people often do have mixed motives, and often people do bring a lawsuit to get the outcome and as well to harm—and to harm the competitor as well.

So under this definition, it would seem as though the second test would also not be met. Without a meaningful doctrinal limit to the immunity doctrine, I think there are greater risks that dominant firms can bring actions against smaller companies that I think would not have been rationally brought, otherwise.

I think as a matter of policy, it would be desirable to limit Noerr and to perhaps expand the sham exception. The question is, does the First Amendment allow us to do that?

Various commentators have noted the distinction between petitioning the legislature and petitioning in the adjudicatory settings. And I totally agree with that.

I think when we are talking about petitioning the judiciary, we don't need that much protection. That is because the judiciary is very, very different. Already, the litigants are bound by very strict rules when they go into court to litigate. There are Rule 11 sanctions. There are all kinds of penalties for litigants, if they do not tell the truth.

So to the extent that all those sanctions and all those rules are considered constitutional, it is very hard for me to see why—if you say that you would not allow them to make misrepresentations, that somehow that might offend the First Amendment.

I see that I have run out of time. And I will just stop right here. If you have any questions, I would be happy to take them. Thank you.

[The prepared statement of Ms. Lao follows:]

Prepared Statement of Marina Lao, Professor of Law, Seton Hall University School of Law

Thank you for inviting me to participate in this hearing. I am a law professor at Seton Hall University School of Law specializing in antitrust law. I am also a member of the Advisory Board of the American Antitrust Institute (AAI), a former chair of the Section of Antitrust and Economic Regulation of the Association of American Law Schools (AALS), and a former attorney at the Department of Justice, Antitrust Division. My written Statement, and my testimony today, is drawn in part from an article that I have published entitled *"Reforming the Noerr-Pennington Antitrust Immunity Doctrine.*[1]

The essence of a representative democracy, protected by the First Amendment right to petition, is the citizen's right to communicate their desires, anticompetitively motivated or otherwise, to government officials. However, when efforts to persuade the government produce anticompetitive effects (harm to competition), they necessarily impinge upon federal antitrust law, creating tension between that law and the First Amendment and related values. The *Noerr-Pennington* antitrust immunity doctrine was developed in an effort to resolve that tension.

[1] Marina Lao, *Reforming the Noerr-Pennington Antitrust Immunity Doctrine,* 55 RUTGERS L. REV. 965 (2003).

As originally conceived, the *Noerr-Pennington* doctrine stood for the principle that genuine efforts to persuade the government to adopt a particular course of action are not subject to antitrust scrutiny, no matter how anticompetitive the petitioner's motive and the action sought. It originated from two U.S. Supreme Court cases that gave the doctrine its name: *Eastern Railroad President Conference v. Noerr Motor Freight,*[2] which immunized petitioning the legislature; and *United Mine Workers of America v. Pennington,*[3] which immunized petitioning the executive branch of the government. About a decade later, in *California Motor Transport Co. v. Trucking Unlimited,*[4] the doctrine was further extended to petitions to courts (and administrative agencies acting in an adjudicatory capacity). There is a "sham" exception to *Noerr:* if the petitioning is considered sham, *Noerr* immunity would have no application.

My Statement will focus on the current expansive scope of *Noerr,* and the correspondingly narrow sham exception, as it is applied to judicial petitions. Litigation can be a particularly effective method of predation.[5] Even if it is unsuccessful, it may inflict substantial costs on a competitor and otherwise cause significant competitive harm. I will also address whether such an expansive interpretation of the Noerr doctrine, as applied to judicial petitioning, is required under either the First Amendment right of petition or a statutory construction of the Sherman Act, and conclude that it is not.

T2Noerr doctrine as applied to judicial petitions, and the "sham" exception. In California Motor Transport, while the Supreme Court extended the Noerr antitrust immunity doctrine to judicial and quasi-judicial petitions, it applied a "sham" exception for the first time to deny immunity to the antitrust defendants. It held that the defendants, who had sought to forestall competition by routinely opposing their competitors' applications for operating rights in administrative and judicial proceedings, regardless of the merits of the cases, were not entitled to *Noerr* immunity because their petitioning was "sham." The sham exception, then unclearly defined and loosely applied to different kinds of improper conduct, served as a doctrinal limit to the expansive Noerr immunity principle for decades.

In 1993, however, the definition of sham was severely restricted by the Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Picture Industries, Inc.* (PRE).[6] Writing for the Court, Justice Thomas said that, for an underlying lawsuit to be considered sham, it must be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."[7] If this objective test is met, it must also be shown that 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."[8] In other words, the antitrust plaintiff must prove not only that the earlier lawsuit was objectively baseless but that the antitrust defendant had brought it merely to harm the competitor through the process and not for the litigation outcome.

Both parts of the test are somewhat troubling. As to the objective component, the Court also said that success in the earlier lawsuit precludes a finding of objective baselessness (while a lawsuit that is unsuccessful at every stage of the proceedings is not necessarily baseless).[9] This raises the question of how earlier lawsuits that succeed because of the antitrust defendant's misrepresentations or fraud upon the court should be treated. Would they be deemed to automatically fail the "objectively baseless" test because a successful lawsuit, by definition, is not baseless? Or should the misrepresentation take the judicial petitioning outside the scope of *Noerr*? Unfortunately, the Supreme Court in PRE reserved that question for another day.[10] As a result, lower court treatment of this issue has been confusing and inconsistent. Most seem to treat intentional misrepresentations as a subset of sham but require an additional showing that those misrepresentations "infected the core" of the claim

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[2] 365 U.S. 127 (1961).
[3] 381 U.S. 657 (1965).
[4] 404 U.S. 508 (1972).
[5] *See, e.g.,* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 347–78; Grip-Pak v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982), cert. denied, 461 U.S. 958 (1983).
[6] 508 U.S. 49 (1993).
[7] *Id.* at 60–61.
[8] *Id.* (quoting City of Columbia v. Omni Outdoor Adver. Inc., 499 U.S. 365, 380 (1991)).
[9] *Id.* at 60 n.5.
[10] *Id.* at 61 n.6 ("We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust immunity for a litigant's fraud or other misrepresentations.").

and the decision, or "deprived the litigation of its legitimacy" before the suit might be considered objectively baseless.[11]

Even in the absence of misrepresentations in an earlier suit, the Court's definition of an objectively baseless suit as one that no "reasonable litigant could realistically expect success on the merits" seems unnecessarily narrow. Under this definition, an earlier suit would not be defined as objectively baseless even if it is clearly irrational but for its ability to inflict competitive harm on a rival (the antitrust plaintiff), so long as the suit has a colorable basis in law such that a reasonable litigant *could* expect success on the merits. It should be noted that former Justices Stevens and O'Connor, who concurred only on the Court's judgment but not its reasoning, were very critical of this narrow definition of the objective baselessness test. They questioned whether a case involving ten years of litigation and two appeals to recover a dollar from a defendant, for example, would qualify as an objectively baseless suit under this test.[12]

PRE's second prong—the subjective standard—is also problematic. If the underlying lawsuit is already shown to be objectively baseless (a threshold prerequisite), it is unclear why the antitrust plaintiff must further demonstrate that the litigant brought the suit to harm the competitor through the *process* of litigation, and not for the *outcome.* Proof of objective baselessness, especially as the term is currently construed, should sufficiently show that the litigant had probably brought the suit for an improper purpose. It is difficult to imagine why the litigant would otherwise bring an objectively baseless suit. Therefore, at best, the subjective test seems superfluous. Moreover, under a literal reading of this test, if a litigant with an objectively baseless suit actually seeks to win the suit (most likely aided by misrepresentations) and not to simply use the process as an anticompetitve strategy, the subjective test may not be satisfied and the suit may not be considered sham even if the litigant loses the underlying suit. Thus, at worst, the subjective test eviscerates the sham exception.

In the absence of a meaningful doctrinal limit to the expansive *Noerr* immunity principle, there are greater risks that dominant firms could bring action against smaller competitors that they would not have rationally brought, in order to impose heavy costs on a small rival in the hope of excluding it from the market, diminishing its ability to compete on the merits, or deterring entry by other firms.[13] From a policy perspective, it would be desirable to limit *Noerr* to a narrower sphere of conduct so as to be more responsive to competition concerns. I believe that it can be done: the First Amendment right of petition does not call for the expansive interpretation currently given *Noerr* (and the corresponding narrow reading of its exceptions), particularly in the adjudicatory context. Nor is such a broad reading of the doctrine necessary under a statutory construction of the Sherman Act.

Limits of First Amendment protection for judicial petitioning. There is some uncertainty and confusion over whether *Noerr* is grounded on the First Amendment right of petition or on statutory construction. I will treat the doctrine as based partly on constitutional principles and partly on statutory interpretation and will analyze its appropriate scope under both, starting first with the constitutional right of petition.

Various commentators have noted the distinction between petitioning in legislative and adjudicatory settings and have argued that *Noerr* should be more liberally construed with respect to the former.[14] I agree with the distinction and would further suggest that, for petitioning in the adjudicatory context, the Constitution guarantees the right of *access* to courts (and other adjudicatory tribunals) but not much

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[11] *See, e.g.,* Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hospital, 185 F.3d 154 (3d Cir. 1999) (declining to carve out a misrepresentation exception); Cheminor Drugs Ltd. V. Ethyl Corp., 168 F.3d 118 (3d Cir. 1999) (declining to recognize a fraud or misrepresentation exception to Noerr, but treating misrepresentation as a variant of sham and applying a modified PRE test that requiring a showing that the misrepresentation "infected the core" of the case); Kottle v. N.W. Kidney Ctrs., 146 F.3d 1056 (9th Cir. 1998) (treating misrepresentation as a variant of the sham exception but adding the requirement that the fraud "deprives litigation of its legitimacy").

[12] 508 U.S. at 68.

[13] *See* Grip-Pak v. Illinois Tool Works, Inc.,, 694 F.2d 466, 472 (7th Cir. 1982), cert. denied, 461 U.S. 958 (1983) ("Suppose a monopolist brought a tort action against a single, tiny competitor; the action had a colorable basis in law; but in fact the monopolist would never have brought the suit . . . 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 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.")

[14] *See, e.g.,* Bork, supra note _____, at 356; Stephen Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of Noerr,* 57 Antitrust L.J. 327, 358 (1988).

more. The traditional constitutional argument for tolerance of some petitioning falsehoods and abuses is that penalizing misrepresentations may unduly "chill" the flow of information to the government as well as chill the people's exercise of their right to petition the government.[15] The concern is that some people may shy away from making efforts to influence government for fear that the statements they make or the information they provide may inch over the line of truth and result in antitrust exposure. But this argument is more persuasive for petitioning in legislative rather than adjudicatory spheres.

Legislative proceedings are more open and politically oriented than judicial proceedings and are generally expected to provide a forum for uninhibited debate. In the legislative process, there is also greater value placed on the free flow of information to the government. Legislative bodies are expected to solicit information and hear arguments from a variety of sources and sort through them before making decisions. It is also perhaps understood that political lobbying often involves some slanting of the truth and outright misrepresentations. Ideally, the greater input from divergent interests will correct, balance, or compensate for any such inaccuracies. For these reasons, more protection for petitioning in the legislative process may be justified.

Our judicial system, in contrast, operates very differently. It is not a free-for-all forum for unstructured policy debates or the airing of all grievances; disputes must be litigated in accordance with the rules and procedures that govern courts. Thus, the concern that less robust First Amendment protection might "chill" debate is arguably not a real issue in the right to petition in the adjudicatory sphere. More importantly, our court system is already subject to many restrictions. They include the imposition of Rule 11 sanctions for the filing of meritless complaints[16] and other penalties for various litigation abuses. For example, legal judgments obtained through fraud and misrepresentation can be set aside;[17] perjury is uniformly punished;[18] and penalties may be imposed for vexatious judicial filings.[19] There are also numerous court-imposed rules governing judicial proceedings. They range from rules prohibiting or limiting media coverage of certain trials,[20] limiting the right of attorneys to speak in some pending cases,[21] controlling the use of discovery documents,[22] and the like. Unless one is ready to argue that these existing rules and sanctions are all unconstitutional, which no one has suggested, it is difficult to see why stripping *Noerr* immunity off litigation misconduct would somehow be constitutionally impermissible. The right of petitioning the courts must, in fact, constitutionally permit substantial control of the adjudicatory processes.

In short, in terms of petitioning the courts, the First Amendment certainly protects citizens' right of *access* to courts and other adjudicatory processes. But it is questionable whether constitutional protections extend much beyond that. Those using our courts and other adjudicatory processes are already required to abide by myriad rules that govern those processes, and misrepresentations and various forms of improper litigation conduct are already subject to sanctions. An antitrust rule providing that material misrepresentations to courts, for example, would not be protected under *Noerr,* even if the litigant is genuinely seeking a favorable outcome in litigation, can be no more offensive to the Constitution than the existing rules that govern court processes. In other words, it is constitutionally permissible to recognize a misrepresentation exception to *Noerr* and to otherwise liberalize the sham exception in order to limit the scope of *Noerr,* at least in the litigation context.

Scope of *Noerr* protection under statutory construction. Of course, even if the breadth of the *Noerr* doctrine is not constitutionally mandated, whether the Sherman Act itself should be construed to give the doctrine such an expansive reading (and its exceptions a narrow reading) is a separate issue. Determining the appropriate parameters of Noerr as a matter of statutory interpretation is difficult because the Sherman Act provides no real guidance.

It is often said that federal antitrust law regulates *private,* not state, actions that are in restraint of trade.[23] Therefore, valid actions taken by the state are not subject

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[15] *See generally* Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity,* 80 CAL. L. REV. 1177 (1992).
[16] Fed. R. Civ. P. 11(b)(3).
[17] Fed. R. Civ. P. 60(b),
[18] *See, e.g.,* 18 U.S.C. § 1621
[19] *See* 28 U.S.C. § 1927
[20] *See, e.g.,* Bridges v. California, 314 U.S. 252, 271 (1941).
[21] *See, e.g.,* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048–51, 1058 (1991).
[22] *See, e.g.,* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (194)
[23] *See* Parker v. Brown, 317 U.S. 341, 350–51 ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature").

to antitrust scrutiny, no matter how anticompetitive their effect. It then logically follows that, in a representative democracy, if the government can lawfully take action that is anticompetitive, private citizens should be free to urge the government to take those actions.[24] Accordingly, the Sherman Act should not be interpreted in a way that would undermine the values of a democratic system of government, independent of First Amendment concerns.

Defining the statutory scope of *Noerr* (similar to an analysis under the First Amendment) requires distinguishing between legislative and judicial petitioning. The reasons for drawing the distinction are largely the same as those discussed for the First Amendment, and need not be reiterated here. The norms of acceptable conduct are decidedly different for lobbying in more open political settings than they are for litigating in the court system. As the Supreme Court suggested in *Noerr*, in a no-holds-barred fight among competitors in attempting to influence legislation, some misrepresentations may be inevitable.[25] That is not the case in judicial proceedings, where adjudicators must rely on the parties for the information on which a decision will be based and, therefore, expect the information presented to be accurate.[26] Presenting false information in judicial settings threatens the proper functioning of the system, and there is no reason to construe the Sherman Act to encourage these acts.

While the *Noerr* doctrine should encourage citizen participation in the political process, there is another value related to a democratic government that is worth protecting as well—the integrity of government. The need to protect the judicial system from corruption or abuse militates against too narrow an interpretation of sham and is a counterbalance against the reasons for a broad immunity concept.

Proposals for limiting the *Noerr* doctrine. The wide swath that has been cut for the petitioning immunity doctrine is unwarranted both constitutionally and as a matter of statutory construction. It also poses risks to competition and, ultimately, to consumers. Ideally, the PRE definition of sham should be liberalized. With respect to the objective baselessness test, the antitrust plaintiff must usually show, under current law, that the theory of the earlier suit was so contrary to existing law that no reasonable person could realistically expect to win on the merits. It may be better, instead, to require the antitrust plaintiff to merely show that the bringing of the earlier suit would not have been brought by a reasonable person were it not for the anticipated collateral damage that would be inflicted on the smaller rival sued. For example, if a dominant firm incurs large sums of money and spends years in litigation, including on appeal, to recover a nominal amount, it seems that the lawsuit should be considered objectively baseless despite the fact that the claim might have a colorable basis in law and the dominant firm ultimately won.

As to the subjective test, I propose eliminating it altogether for alleged sham in the litigation context. The subjective test is particularly unsuited for use in litigation settings for reasons that were addressed earlier.

I would also propose carving out a misrepresentation and fraud exception to *Noerr*.

Narrowing the *Noerr* doctrine (and liberalizing the sham exception) would promote the competition values that underlie the antitrust laws and yet not encroach on the constitutional First Amendment right of petition.

Mr. GOODLATTE. Thank you very much.

As time allows, we may do more than one round of questions, and that might afford you an opportunity to bring out some of the points in your remarks. And I hope that we can talk about some of the remedies that might be possible, given the constraints placed on all of us by the Supreme Court decision, which, obviously, you have to figure out how to deal with.

And, Mr. Saxman, I have read your testimony, and I know you didn't get through all of it, so let me ask you a question that might prompt you to get to some of the points that you had hoped to get to.

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[24] *See* City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 379 (1991)

[25] *Noerr Motor Freight,* 365 U.S. at 144.

[26] *See* Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240, 1261 (9th Cir. 1982).

Does a small business have a better chance of competing with a bigger business in the market or in the courtroom? And why?

Mr. SAXMAN. Oh, absolutely in the market, Mr. Chairman. And thank you for asking us some more questions on that line.

I can compete in the marketplace. When you get to a certain scale, you can compete against just about anyone in the world, depending upon your products, your market, and how well you are continually improving your operations.

But when you are up against a potential multi-year—some litigation will take 5 to 7 years, once you get through the entire process, with millions of dollars in legal fees. You are up against a cost parameter that you just never factor into your business operations. And with the margins that we deal with anyway, you are likely to make 10 percent on your money at the end of the day. So how can you calculate that in as expected expense, cost of goods, cost of doing business?

And then when you walk into your office every day and you see the people who are adversely impacted don't even know they are being adversely impacted, you know, the single mom with two kids who is trying to put them through school and who is relying on their health care. If their jobs are gone, their health care is gone. What are those kids going to be up against?

That is the human factor that really happens in the marketplace, because I would rather have my money invested in the market, developing our products and services, trying to make more money, provide more benefits for our employees. If we lose, if the companies in our industry lose, if small businesses lose, if people lose jobs, they lose wages, they lose benefits, they lose hope. It is staggering the amount of decline that can occur.

It is sort of the expression of, how does bankruptcy happen? Gradually, then suddenly. You don't know how long it is going to take to fight these lawsuits. And you are just trying to compete in an honest, open manner.

And these larger companies can conspire, literally conspire, because they have large legal teams—and that is perfectly within their rights to do so. But when they weaponize the legal system against us, to take what is rightfully ours, they can leverage us—if they brought a lawsuit or forced us to bring a lawsuit, most companies would throw their hands up and say, "I can't bear that cost. It is better for me to just get out, sell at a lower value, pennies on the dollar, then lose and lose everything."

It is quite unfair.

Mr. GOODLATTE. Let me ask you this: Do small companies who are dragged into litigation have to pass those costs onto consumers? And if they do have to pass those costs on, because they can be an expensive portion of their profit margin, how do they do that when they are competing in a competitive market where other people don't have those costs and, therefore, don't have to worry about raising their price?

Mr. SAXMAN. That is where you get into a cost structure, Mr. Chairman, that is untenable and impossible. There is a point at which you can't.

There is also a point at which the investment becomes—it is irrelevant to the effort. It is just not worth it. And when a person

gives up because not—you didn't lose in the marketplace because your products weren't good, or your services weren't good, or you didn't train your people, or you didn't do what you should have done, that goes on in the business—we do that every day. We wake up with that. We go to bed with that.

When someone can take it from you, with something you never even trained yourself to become, and can take it from you, I consider it a theft and crime. And I think it should be criminally prevented. They should be prosecuted, not just penalized financially.

Financially, they can absorb that into their operations, if they lose. We can't. The cost is too much. I think, personally, Mr. Chairman, people should go to jail. I think it is felonious.

Mr. GOODLATTE. Let me ask Professor Lao a question.

Isn't litigation fundamentally different from other forms of First Amendment petitioning? Should the same doctrine that exempts core speech, like citizens petitioning the legislature, really apply to litigation?

Ms. LAO. I personally don't think so. I think the First Amendment right of petition, with respect to litigation, really only allows access. It means that people will have access to the court system. You will be able to go and seek redress for your grievances.

But I don't think misrepresentations and abuse of process should be given that much tolerance. I can see the need to be a little bit more tolerant in the lobbying context because the norms are different. It is understood that in the rough-and-tumble world of lobbying that there might be, perhaps, the slanting of the truth or, perhaps, even misrepresentation.

But it doesn't really matter as much, because as a legislator, you have a lot of sources for information. You can reach out to different, diverse interests, and then you can then sort through the information and come to a conclusion.

But in the court system, we have an adversarial system, so the court does not, the judge does not go out and find the truth. It has to rely on the two parties to give it the truth. So I think in that instance, we have to be more careful about falsehoods and misrepresentations and so forth.

Mr. GOODLATTE. Thank you.

The gentleman from North Carolina is recognized.

Mr. WATT. Mr. Chairman, there are so many angles from which I could approach this. I am having a little trouble sorting through which one takes precedence.

Mr. GOODLATTE. If the turnout remains you and me, we will be able to ask a lot of questions, so fire away.

Mr. WATT. We will go back and forth, okay.

Mr. Saxman, I guess the problem I am having with your testimony kind of comes down to this question: Should a court in civil litigation take into account the relative power, financial position, or representation of the parties that are appearing before it? That is the logical extension of what you seem to be saying.

These people had more power than you. They had more money than you. They could stay in litigation a lot longer. And I don't know how a court is going to be able ever to do that.

I mean, I have been advocating that we level the playing field between powerful and non-powerful throughout my legal career,

but you seem to be taking the court into much, much deeper waters then I think we are capable of doing.

Maybe you can help me understand that.

Mr. SAXMAN. Yes, sir. Thank you for the question. And I certainly agree with you.

Do they have the right to bring lawsuits or action against us? Absolutely. If it is not legitimate, if it is meant to constrain us in the marketplace, if it is meant to tie us up, if they do it in a manner that is not—it is a great question, because how do you defend yourself in a marketplace when that is not the market? We are not a law firm. We don't do this.

So if you are out there just doing your own business, and they want to come in and take your business, for marginal P&L and quarterly basis, because a regional manager says we got to have this business, we will go in and breach contracts.

Mr. WATT. What if the circumstances were reversed?

Or maybe I should ask Mr. Richards and Professor Lao, is there anything in the law that protects litigants from abusive defense of litigation?

I will give you a couple examples. I mean, I could give you a bunch of them, because I practiced law for a lot of time. I mean, I have been in a lot of lawsuits where I was the only lawyer on the plaintiff's side, six or seven high-powered lawyers on the other side. They will paper you to death, mostly civil rights cases.

So I have seen a lot more abuse in actuality, I will give you another example, since I am talking about my own personal experience.

I represented Stevie Wonder when he was in his automobile accident in North Carolina. A simple case, clear liability. No question, after they scoured the car and made sure that no drugs or anything were involved. I understood that.

All we were looking for was the insurance company to pay some modest amount, because the guy who was driving the car, Stevie, was sitting there blind; he obviously wasn't driving the car. The guy who was driving the car drove the car right into the bed of a truck in front of them. Clear liability.

I end up in California taking depositions in the case, just because the lawyer wanted to meet Stevie Wonder.

Is that abusive?

I mean, this kind of stuff happens all the time in litigation. He knew his insurance company client was going to pay him for that trip out there. He wanted his kid to have Stevie Wonder's, my client's, autograph. And I am saying, why am I sitting in California for 3 days, waiting on a deposition in a case where there is clear liability?

This is disparity between the parties. Now how is the court ever going to take that into account? I go into court, and the court would laugh at me if I said, you know, this guy took me all the way to California to take a deposition. He knew he was going to pay the claim, at some point. But he was on the clock. He was abusing the process.

People abuse the legal process all the time. And we need some kind of constraints around it. But I guess my concern here is I

don't—this seems to me to be one of the least of the problems we ought to be trying to level the playing field on.

You know, I acknowledge that it is a problem, but what is the solution to it? How do we get past this—I am over my time, and then I am going to give you some more examples where there is abuse in the process. Disparities between the parties always give rise to abuse.

And that is why I was saying in my opening statement, we have preoccupied ourselves with the little people trying to find redress in litigation, saying that their class-action lawsuits, their individual lawsuits, are frivolous. This is a welcome reversal of our roles, as far as I am concerned. We ought to be looking out for little people. But I don't know how you do it, and I don't know what the standard ought to be.

That is the question that this Committee has got—and can we articulate a different standard that won't just result in more litigation, more appeals? And if this decision is based on a constitutional principle, how do we pass a statute that is going to have any impact on it anyway?

So, go ahead.

Mr. SAXMAN. Thank you, Congressman. And I certainly understand, from a non-legal perspective, having not been a lawyer, in the case that I was aware of that I brought to the Chairman's attention last year, you had a company in good faith that brought a contract to another—they were in business together. For 13 years, they——

Mr. WATT. You see, the problem is, Mr. Saxman, is you want to individualize this to your case. Our role here, we can't individualize this to your case. We have to come up with an articulable, global standard.

So, I mean, I am very sympathetic to your case. Don't get me wrong. I am not dismissing it. You were probably dealt with unfairly.

But come on, Mr. Richards, help me. You are in litigation.

Professor, you teach this stuff all the time, help us out.

Mr. RICHARDS. Well, if I may, Ranking Member Watt. All of the points you are making, I think, are very valid points. I mean, as a class-action plaintiff's lawyer, I am very sympathetic to them. I think I try and equalize, level the playing field, every day of my working career. I think those kinds of issues are very important.

To a large extent, they are dealt with through procedural issues, like class actions, Rule 23, efforts on the part of the Federal Rules Advisory Committee to keep costs down, that kind of thing. I think all that is good. All of that is better left in the purview of the Federal Rules Advisory Committee.

What we are talking about, I think, here is a little bit different. I think there is really an agreement, generally, in the case law and among all the witnesses, and I think there would be agreement between both parties, that there is nothing to be gained from baseless lawsuits.

Mr. WATT. I agree.

Mr. RICHARDS. The real challenge is to find out how you do find out——

Mr. WATT. Let me go on record saying I agree with that.

Mr. RICHARDS. And I agree with it, too.

How do you decide whether a lawsuit is baseless? And by what legal standard? That is really the hard part of what we have here.

And what happened in the Professional Real Estate case is that the Supreme Court articulated a standard for baselessness, which when applied in actual practice raises all kinds of questions and is extremely problematic.

It leaves so much room for debate about what it means that you wind up with courts going off and doing really uninformed things, because they are guided by standards that they try to take seriously, but they are so unclear that they don't know what——

Mr. WATT. Is it based on the Constitution or is it based on other——

Mr. RICHARDS. There is certainly a constitutional dimension to the right to petition your government, and there should be. But should the right to petition your government include the right to knowingly lie to your government? Shouldn't there be an exception for that?

Mr. WATT. If so, I hope you will tell some of the lobbyists that come see me. [Laughter.]

Mr. RICHARDS. I mean, I think there is more consensus, I think, about sort of what the exceptions to Noerr-Pennington should be than I think perhaps is coming across here.

There was an effort on the part of the Federal Trade Commission a few years ago, which wrote a very fine report relating to enforcements on the Noerr-Pennington doctrine, cataloging what the exceptions to the Noerr-Pennington doctrine are under established law. I think it is an excellent report. I think it does a good job of sorting through and laying out what the exceptions are.

One of the exceptions that it provides is an exception for fraud. And certainly in the patent cases, there is a Supreme Court case called Walker Process which recognized a long time ago that there can be an exception for Noerr-Pennington when you are dealing with fraud on the Patent Office in obtaining a patent.

So in the cases I am dealing with, there is really no—you know, courts almost never fail to see that there is a separate exception to Noerr-Pennington for sham litigation and a separate exception for fraud. They see that all the time.

The problem, really, or one of the big problems, is that the Professional Real Estate definition is very murky. And I think it gives rise to all kinds of problems about what it means. And when you have a murky standard like that, about something as fundamental——

Mr. WATT. Do you solve it legislatively?

Mr. RICHARDS. I think it could be solved legislatively.

Mr. GOODLATTE. Let me take back my time. We will come back to you, again, because I am doing a second round here.

Mr. WATT. Go ahead. I yield back.

Mr. GOODLATTE. I do want to follow up on your question, though, because it is right to the point. And that is, what can we do about this?

So I want to ask each of you, and I will start with Professor Lao, do any of you believe that there may be room for a compromise that holds anti-competitive abusers of litigation accountable while

remaining mindful of the concerns that led the Supreme Court to avoid full Sherman Act liability for litigation?

For example, could Congress provide for fee shifting if the court found that the suit was brought for anti-competitive purposes, not just sham purposes, but anti-competitive purposes? Or perhaps allow antitrust claims for predatory litigation to proceed only with Department of Justice or FTC approval?

Professor Lao?

Pull the microphone closer to you.

Ms. LAO. So that would be a bit of a compromise. You are stripping it of the Noerr immunity where there is sham, but then what you are saying is that you would require them, you would require the antitrust plaintiff, to get an okay from the government, from the FTC or the Department of Justice?

Mr. GOODLATTE. No, it would be a claim for predatory litigation.

Ms. LAO. Predatory litigation. So——

Mr. GOODLATTE. That would be your antitrust claim——

Ms. LAO. Oh, okay.

Mr. GOODLATTE [continuing]. Would be that the parties engaged in predatory litigation, but in order to get around the Supreme Court decision, could you put a caveat on it that it has to receive some stamp of approval?

Ms. LAO. That probably goes a little bit beyond what I am comfortable with. What I am suggesting is simply that, to the extent that they have gone beyond the bounds of what the First Amendment is protecting, then we should just take away the immunity. And when we say we take away the immunity, we are not imposing liability on them right away. We are just saying that it is not petitioning. Because it is not petitioning, then you are going to be subject to the antitrust laws. The antitrust plaintiff will still have to prove all of the elements of the antitrust violation.

So in a way, we are not really giving the antitrust plaintiff anything more than what was his due without the Noerr immunity doctrine.

But I guess I am quite conservative in that regard.

Mr. GOODLATTE. There have been some well-known prominent judges, like Judge Posner and Judge Bork, who have been critics of this Supreme Court test. And I am wondering if you think that—one test is the reasonable litigant test, which you advocated——

Ms. LAO. Right.

Mr. GOODLATTE [continuing]. And a version of which Judge Posner articulated in the Grip-Pak case. Could you describe that test?

Ms. LAO. Yes, I like that test very, very much.

The test is an objective test, and what it asks is, would a rational person have brought this lawsuit if you take away the anti-competitive harm that it would inflict on the competitor? So in other words, you are taking away that portion of it, and you are asking, would a rational person have brought such a lawsuit?

And if a rational person would not have brought the lawsuit, then it doesn't matter that the antitrust defendant actually won that lawsuit.

Judge Posner gave the example of a major firm, a dominant firm, bringing tort action against a tiny, tiny competitor, in order to ex-

tract certain things, hoping that they will have to make the disclosure. Once you have to make the disclosure to the SEC, or whatever, then you are going to see your finance charges go up when you go to get financing and so forth. So you are imposing costs, you are using litigation to impose costs on rivals.

So if you simply look at it and ask, if it weren't for all of these things, would you spend so much money to litigate, just to receive a nominal amount? And I believe that is what Judge Posner was describing as the possible test.

Mr. GOODLATTE. Mr. Richards, what do you think about that test?

Mr. RICHARDS. Well, the problem that I see with that test is that in lots of situations—take the intellectual property context that I am most familiar with. When someone brings a lawsuit on a patent, of course their objective is to take their competitor out of the market. That is why they are suing on the patent. Their contention is that that is what that patent entitles them to obtain.

If you adopt a test that somehow makes that wrongful, you are undermining the patent laws. You are undermining the whole purpose of the grant of the patent. So I am not sure that that standard would really work very well.

I need to think about it. I think you need to——

Mr. GOODLATTE. Well, let's ask Professor Lao what she thinks about your exception to that.

Can that be carved out as an exception, or is that a good rebuttal to this test?

Ms. LAO. We are talking about patents, right?

I think when we are talking about patents, patents are in a different category altogether, for that reason. Because when you do bring a lawsuit, you are trying to exclude the competitor.

But there is an additional problem with the subjective test in the *PRE* case. In the *PRE* case, the subjective test is that, if someone brings a lawsuit for the purpose of trying to win the lawsuit no matter how baseless it is, then it would automatically not be sham. So you could actually have a very invalid patent that you know is very, very shaky, and you would still bring the lawsuit, but it would not be considered sham. So I don't know how you would deal with something like that.

Mr. RICHARDS. Well, no, because of that, in actual patent litigation, it is objective baselessness that becomes the main focus and not the subjective baselessness, which is more or less a given. I mean, clearly, a subjective intent in a patent case is to take the competitor out of the markets. So subjective baselessness becomes not part of——

Mr. GOODLATTE. What about the patent case where the patent is expired but the company has come up with a specious argument why their rights should be preserved under the patent law? Or they re-patent with a minute change to the patent——

Mr. RICHARDS. That happens all the time.

Mr. GOODLATTE. And they bring litigation against the competitor to drive them out on that basis?

Mr. RICHARDS. And that happens all the time.

Mr. GOODLATTE. Right. So what do we do to stop that abuse?

Mr. RICHARDS. Something that is very disappointing, and you see over and over and over in these cases, is that people at the end of the patent life on the chemical compound will come up with a formulation patent, a patent on a coating that goes on the pill or something like that, and will get a patent from the Patent Office based on representations to the Patent Office about the uniqueness of this coating that are totally bogus. And then the consequence of that is that you have years of litigation where the brand-name drug manufacturer is able to give the generics off the market based on the bogus patent.

And you really need, desperately, in this country a legal standard to identify the situations in which brand-name drug manufacturers under those circumstances are held accountable because the patent claim is unfounded. That is very important.

In the *PRE* standard does not satisfy that need. It is too demanding. It is very, very difficult in practice. The distinction between objective and subjective is very unclear.

Mr. GOODLATTE. Thank you.

The Chair recognizes the gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I thank the Chairman and the Ranking Member.

This might be a hearing that we should either have an opportunity to continue or to expand it at another hearing going forward. I think it is a very vital question related to the balance of power. When you talk about a large company or a company that is making its mark on either the industry or the invention, and, of course, up against what is a company or a small company with smaller assets.

So let me just raise an across-the-board question, but start with Chris Saxman, as to the breadth and depth of the Noerr-Pennington case. From your perspective, how devastating is that for small businesses, startups, to thrive?

Mr. SAXMAN. Thank you, Congresswoman.

When I first brought this to the Chairman's attention—Congressman Goodlatte is my Congressman—I had no idea what Noerr-Pennington was. When counsel called me and said, well, this applies to the Noerr-Pennington doctrine, I said, "Who is Nora Pennington?" I have a daughter named Nora, so I went to "Nora."

And then I found out what it was, and that there was an exemption for companies to do this, I almost had to put my jaw back on head, because I couldn't understand how you could exempt—there could be an exemption for people to basically do what they shouldn't be doing.

And to Congressman Watt's original question, it happens all the time. People have differing opinions. They go to court. They settle it. Litigation occurs.

But when the market is adversely impacted, the larger company moves in and wants to compete, we can compete. If we have to go to court to justify our existence or our products or whatever we are doing, and they are exempt from antitrust protection, that is the problem. That is where the larger community is being harmed, and that is why antitrust exists in the first place.

When I was in the legislature, one of the words you always looked for in legislation that was drawn up were exemptions and

credits. Those are the bells and whistles that said, oh, here is what they are going for.

And exemptions are a problem. When you exempt people and corporations or anything from the law, that is the loophole that creates the problem. That is the bubble that is about to burst. And that is where——

Ms. JACKSON LEE. That is where you have the lopsided scales of justice, is what you are saying.

Mr. SAXMAN. And we can't——

Ms. JACKSON LEE. You are doing business and in the courtroom at the same time, fighting more or less not over an issue or a contractual issue, but fighting over your existence or whether someone is defining—whether you are violating some sort of protection that the company has.

Let me go to Professor Lao and just ask: How would you? And I know we have had this give-and-take. I assume other Members may have approached some of this.

But how would we reorder that scale of justice with the underlying premise that, in America, the courts are there governed by the law to resolve differences. But in this, as I perceive it, as I have read some of the materials, it looks as if I am at Wal-Mart and I'm shopping and seeing what the best deal would be for my company by way of a lawsuit.

Professor, and with the backdrop of Noerr-Pennington?

Ms. LAO. I must say, Congresswoman, that antitrust law does not take that so much into account. Over the last 20 years or so, antitrust has become very much of a price theory discipline. So rightly or wrongly, we look at the effect of conduct on price and output, rather than on whether it harms a smaller competitor or not. The Chicago School of thought has made that change and was started in the 1970's.

I do not count myself as being in that school of thought. But at the same time, I also do believe that perhaps antitrust should be guided more by economics, that perhaps we should leave it to some other discipline to care of the inequalities.

Ms. JACKSON LEE. Do you think Noerr-Pennington's reach is extensive?

Ms. LAO. I'm sorry?

Ms. JACKSON LEE. Do you think the Noerr-Pennington case is extensive in its reach?

Ms. LAO. I think the Noerr-Pennington case is all right when we are talking about petitioning the legislature or even the executive branch. But I think Noerr is too broad when we are applying it to petitioning the judiciary.

When you talk about petitioning the judiciary, we are really just talking about litigation. When we are talking about litigation, we are just talking about having the right to have access to the court system.

Ms. JACKSON LEE. Thank you.

Mr. Chairman, would you allow Mr. Richards to answer that question?

Mr. GOODLATTE. Sure.

Mr. Richards?

Ms. JACKSON LEE. Thank you.

Mr. RICHARDS. I think one of the ways that I see things somewhat differently from Professor Lao is that I think if the standard for an objective case were defined more fairly and more clearly, I would think that standard could apply to legislation and lobbying activity. I think the problem is in the standard.

I think some of what I think goes on is that it works so poorly in the litigation context that people want it fixed very desperately, and they think they are more likely to get a fix if they don't try to address the legislative context. And so they draw distinctions between them.

But I think if you come up with the right standard, it should apply to both.

I also would point out that there aren't just two contexts. There are lots of contexts were Noerr-Pennington applies. It applies to getting a patent from the Patent and Trademark Office. It applies to administrative contexts. So there is a whole range of situations where Noerr-Pennington immunity applies.

And I personally do not think that the right way to do it is to say, well, we are going to have one standard applicable in this context and a different one in this context and a different in this context and a different one in this context. The right thing to do would be to try to have a standard that is very clear, very fair, and that works in all of the contexts at the same time.

Mr. GOODLATTE. The time of the gentlewoman has expired.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. GOODLATTE. And I am going to just exercise my prerogative to follow-up on that question. I'm going turn to Mr. Chabot in just a second, but I want to follow up on that question while we are right on it.

Are you saying that somehow that Congress could come up with a protocol or a scheme or a measure that says that when you petition the United States Congress for redress of your grievances, that there is going to be some kind of parity, some kind of fairness in terms of what different organizations or different companies or different labor unions put into that petition? I mean, I don't understand how you would accomplish that in the legislative context to say you can only do but so much petitioning of your redress of grievance and beyond that it becomes an anti-competitive, unfair advantage for your arguing point of view.

Mr. RICHARDS. Well, the notion of that baselessness, I think, doesn't apply as well in the legislative context to begin with.

Mr. GOODLATTE. Right. Agreed.

Mr. RICHARDS. But suppose, for example, that someone obtained legislation based on absolutely false representations of fact, the consequence of which is that they developed a monopoly on a particular product, or something like that. Should nothing be able to be done about that?

That to me would be baseless lobbying activity, which had a terrible consequence of causing Congress to do something unknowingly, because they have been deceived, that has terrible anti-competitive consequences in the marketplace.

I think I should be actionable. I think if you come up with a good standard that applies the litigation context, it could apply in the context as well.

Ms. JACKSON LEE. Mr. Chairman, before you go, can I ask a question of you, please?

Mr. GOODLATTE. Sure.

Ms. JACKSON LEE. I have additional questions. May I submit them into the record?

Mr. GOODLATTE. Absolutely.

Ms. JACKSON LEE. And maybe the witnesses will—not maybe, but the witnesses will be able to respond in writing?

Mr. GOODLATTE. We will. In fact, we may have several other questions that need an answer. We will submit them all to the witnesses and ask that they respond in writing to anything that you provide to us, and we may have some ourselves.

Ms. JACKSON LEE. I ask unanimous consent, Mr. Chairman. Thank you.

Mr. GOODLATTE. I thank the gentlewoman. And it is so ordered.

And I am pleased to recognize the gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman. I will be relatively brief. I, actually, have an ambassador in the back waiting for a meeting, that they just brought down.

But my the question is this, from an international perspective, to the extent that other countries around the world, either in Europe or in Asia, either have laws which are applicable to this or have had situations like this come up, is there any sort of economic disadvantage that the current law here has to U.S. companies or not? Any of the folks here would be—Ms. Lao?

Ms. LAO. I am not aware of any.

Mr. RICHARDS. I think the general perception in most other countries is that they have been behind traditional American antitrust law and are trying to catch up. So they are certainly gradually adopting American-type antitrust standards.

And I would suspect that they will, over time, adopt something like the Noerr-Pennington doctrine. But because antitrust enforcement has been really not very vibrant, historically, in other countries, there is a lot there is no law about as to antitrust law in the other countries. So we are really way out in the forefront on this.

Ms. LAO. Except the E.C. is becoming extremely aggressive.

Mr. RICHARDS. They have, but I——

Ms. LAO. So then——

Mr. CHABOT. Which one was that?

Mr. RICHARDS. The European Community.

Ms. LAO. The European Community.

Mr. CHABOT. The European Community has.

Mr. RICHARDS. But have to say, I am not an international law scholar. I am not sure what the law currently is in the European Community on Noerr-Pennington. I just don't know.

Mr. CHABOT. Mr. Saxman?

Mr. SAXMAN. Again, I am not an attorney. I don't understand international law, let alone America law—American law, let alone international law.

The reality is, though, when international companies are behaving in a manner that they are not culturally aware of antitrust is, their behavior is outside of that realm of thinking. So what they

are doing in the marketplace is predicated on what their cultural philosophy is and economics. And antitrust is not part of that.

So that is part of the conditions that we feel in the marketplace every day, when you are up against international competition.

Mr. CHABOT. Okay, thank you very much.

Mr. Chairman, I will yield back.

Mr. GOODLATTE. I think the gentleman.

And the Chair recognizes the gentleman from North Carolina for further questions.

Mr. WATT. Mr. Richards, you have told us a couple times we need to get to the right standard that would apply across the board to petitioning in the legislative context, to petitioning. What is the right standard? I mean, have you articulated a right standard in your——

Mr. RICHARDS. I have not in my statement. I think it is a very complex question.

I think you go a long way toward that standard by looking at what the FTC wrote by way of exceptions to the Noerr-Pennington doctrine in its report, which I think was 2006. I think they did a really fine job in that.

I think the problem there, though, is that they really have to take as a given clear law, and some of the clear law that they are working with is the Professional Real Estate Investors case, so they do the best they can with that one, but it is really unclear.

There are a lot of other contexts though, where they identify, I think, very appropriately and clearly areas of law which should not be protected and that should be exceptions, like ministerial acts, which is also a subject addressed in Professor Lao's article, and like fraud, another subject addressed in Professor Lao's article, and in the patent context in the Walker Process case in the Supreme Court.

There are a lot of places where I think there probably is something like a consensus on what the rule should be here. I think one of the biggest problems is not really those areas. It is the Professional Real Estate Investor standard itself and this division, this artificial division of objective baselessness and subjective baselessness, and you having to address one before you can look at the other, so then you have to try and figure out which category evidence goes into. And it is just a mess.

Mr. WATT. So should whatever standard—suppose we got to a standard, should it apply to not only to the filing of legal claims? Should it also apply to counterclaims and cross-claims?

Mr. RICHARDS. I think if it applies to a claim, it should apply to any claim. Certainly, I think there are fewer—there is less likely to be an antitrust problem with a counterclaim, because antitrust predators——

Mr. WATT. Somebody in the audience disagrees with you, because they just sent me a question. Well, I will read the second part.

An antitrust claim is brought only by a defendant in reaction to being sued, generally, according to them. If the sham exception is made easier, the defense by the original plaintiff to the antitrust claim is made harder. Therefore, it is easier to use the antitrust counterclaim weapon against the original plaintiff who decided his grievance warranted seeking redress in court.

Do you disagree with that?

Mr. RICHARDS. You know, I would disagree with that because, often, who is the plaintiff and who is the defendant could be a consequence of things like a plaintiff seeking a declaratory judgment. If they know there is a controversy coming up, the plaintiff can just be trying to resolve the controversy so that it is not a defendant.

Mr. WATT. But you agree whatever standards are the appropriate standards ought to apply to claim, counterclaim, cross-claim, legislature, courts, administrative, the whole gamut?

Mr. RICHARDS. I think a baseless claim as a baseless claim——

Mr. WATT. Yes, okay.

Mr. RICHARDS. Whether it is a claim or counterclaim.

Mr. WATT. Professor Lao, the same question, right standard—the first question I asked to Mr. Richards—how would you articulate the right standard?

Ms. LAO. The right standard, I think that there are many parts of the standard that need to be changed. I don't know, if—do you want me to talk about several of them?

So, for instance, Mr. Richards talked about petitions. What does petition mean? It is something that we haven't actually talked about.

Well, for instance, I don't think the immunity should apply to someone who submits a petition where it is really nothing than just filing a form with the government. And the government simply does a ministerial task with——

Mr. WATT. Okay, I think I accept your proposition that this is much easier if it is applied only to the courts. So, I guess let me accept that.

Ms. LAO. Okay.

Mr. WATT. Let's except out that people who petition Congress can lie, cheat, steal, beg, borrow, anything. That is fair game, in our context.

Mr. GOODLATTE. Well, let's say they might face some other consequences, as some lobbyists have, if they engage in——

Mr. WATT. Right, if we did all of that. But in the legal context——

Ms. LAO. Okay, in the litigation context, okay.

Mr. WATT. In the litigation context.

Ms. LAO. Then I would like to see a couple of things.

First, I would like a fraud and misrepresentation exception to the Noerr doctrine carved out, so that if you obtained—if you succeed because of misrepresentation, that shouldn't mean that the lawsuit is not objectively baseless simply because you won, because, right now, that is what it is. If you win a lawsuit, then, by definition, your lawsuit was not objectively baseless. Now, I think that should be changed.

Mr. WATT. You are saying that I could win a lawsuit and lose a claim of whether it was—should have been filed?

Ms. LAO. So if I sue you in the underlying lawsuit, and I make misrepresentations to the court and so forth, and as a result——

Mr. WATT. I understand the misrepresentations.

Ms. LAO. Right.

Mr. WATT. But suppose I don't misrepresent. I win the lawsuit. Is there a circumstance under which I should still be subjected to——

Ms. LAO. I think so. I think so. This goes back to a——

Mr. WATT. What is that circumstance?

Ms. LAO. The Posner standard, Judge Poser's standard says that we simply look at whether it was a rational thing for the person to have done. Would a rational person have brought this lawsuit?

Mr. WATT. I have represented a lot of irrational clients. [Laughter.]

Ms. LAO. Excuse me?

Mr. WATT. No, I'm serious. I have represented a lot of irrational clients who would go to substantial expense to right wrongs without financial consequences. That is a pretty ambiguous standard, as far as I am concerned. But go ahead.

Ms. LAO. Well, that being Judge Posner. You know that he is an economics person, right? So what he does is——

Mr. WATT. Well, you can rationalize it on economic basis——

Ms. LAO. Right, right. He does it from——

Mr. WATT. But there are a lot of claims that can't be reduced to the economics of the claim.

Ms. LAO. True. But when we are talking about those claims, there probably isn't an antitrust angle to it, right? I think most people who bring lawsuits not for economic reasons but because they are angry about it or on principle, usually you are not talking about firms fighting over a patent and so forth, right?

Mr. WATT. But you are not limiting this exception to just an antitrust case. I know that is our jurisdiction here, but whatever standard you come up with, doesn't it have to apply outside the antitrust context?

Ms. LAO. No, I think I am really just addressing the antitrust context, because we are talking about the Noerr exception, right?

Mr. WATT. And aren't you implicitly accepting exactly what you didn't accept, which is the Chicago theory, that this is all about the economics of it?

Ms. LAO. Not really, because right now we are really talking about whether the antitrust plaintiff can bring an action against an antitrust defendant, alleging that he had violated Section 2 of the Sherman Act, for instance, right?

So all we are saying is we are opening the door for the plaintiff to do that. The plaintiff would still have to show the defendant has market power, that she committed exclusionary—that he committed exclusionary conduct, and that there was an anti-competitive effect, and that there was no business justification.

So we are not really imposing liability when we remove the shield. All we are saying is that, as a result of that, the antitrust plaintiff can go ahead as though there was nothing in its place.

So it is still a very high burden for the plaintiff to meet.

Mr. WATT. Mr. Chairman, I am well over my time.

Mr. GOODLATTE. If you would allow me, I would like to follow up on what you just said, and my counsel made this point. It is not about that irrational plaintiff, which you and I have both had, who are in pursuit of moral justice, if you will, and will go to whatever lengths to do it. It is about the rational pursuit, and I think this

would relate back to the case that Mr. Saxman is talking about, where another company in the business that he is in face with a large competitor, the rational pursuit of anti-competitive gain that is the key to the test here.

In other words, the suit would not be rational but for the anti-competitive motive.

Is that a fair sum-up of the test that you are trying to apply here? And would that give you some more comfort that we might have something here?

I like Mr. Richards' baseless test. I agree with you, and I agree with Professor Lao. I would not try to impose that in other environments than the judicial environment, and here's why. In the judicial environment, that small business is there whether they like it or not. They are fighting for their life, and it is them against a large entity that is attempting to use anti-competitive behavior to put them in a very, very difficult situation, whereas when you are talking about legislation, you have a multitude of different parties and players and the likelihood of success.

It does happen where somebody gets something slipped into a bill. I mean, reform of the rules of Congress so you have more transparency, less likelihood that an actor could get something put into legislation that would give them an anti-competitive advantage, is there. But I think addressing it differently than you address action in a courtroom, to me, makes sense.

And, therefore, I would like to keep this focused on what happens in the courts.

I would also like to encourage each of you—we will submit some questions in writing—to focus on remedies that we could undertake here in the Congress. It might be changes to the Federal Rules of Civil Procedure.

I am very interested in this issue, would like to pursue it further. This hearing has helped to, I think, point out the difficulties of any broadbrush solution to this. But I do think there are some narrow things that could make it less attractive to a business to engage in anticompetitive behavior in the nature and conduct of the legal proceedings that they undertake, especially if they are baseless and especially if they are for the clear purpose of gaining an anti-competitive advantage.

Anybody want to add anything to that?

Mr. SAXMAN. No, but I just wanted thank you, Mr. Chairman, for allowing us to come to you today and talk about what is going on in the marketplace. It is a very injurious to our economy, and hopefully we can find remedies to help save a lot of businesses out there.

Mr. GOODLATTE. I thank you.

Does the gentleman from North Carolina have anything he wants to add?

Mr. WATT. Just to explore a point that my staff is making with me, that Noerr-Pennington developed as an extension of the state action doctrine, which says that the state in its sovereignty can adopt anti-competitive practices if it wants. So the law should protect one's right to petition the government to do so.

And I guess just to explore that a little further, I was reading this article about the gentleman who set up across from the Super

Bowl, or an NFL game. I will just read the facts, then you will get the drift of where I am going.

Last year an anti-bullying advocate teamed with Best Buy on what seemed like a promising idea. He would park his bus in Best Buy's parking lot near the Cowboys Stadium before a game, and he would host a John Madden videogame tournament. He would charge participants of the tournament, would teach children about how to detect and stop bullying.

Arlington police and code enforcement officers asked Williams—asked the gentleman if he had a permit to be there. He did not, and he saw no reason why he should, since he was on private property of Best Buy with the store's express invitation.

Security officers insisted that he move the bus. It was a commercial operation located within a so-called clean zone ordinance, right? So that is the government.

So now a lawsuit has been filed. And the defense is Noerr-Pennington. This is state action. Of course, this is private action, too. It is the NFL that he sued that is trying to claim this defense under Noerr-Pennington.

But the point I think is, we shouldn't lose sight of the reason—I mean, I would probably be on the other side of the case with that guy, but Noerr-Pennington, as we understood it, was designed to allow governments to do certain anti-competitive things. So we need to be aware of that——

Mr. GOODLATTE. If you would yield?

Mr. WATT [continuing]. Maybe not private litigants, although the NFL is trying to hide behind the city's Noerr-Pennington defense here.

Mr. GOODLATTE. If you would yield, as has been pointed out with patent laws and so on, we do grant monopolies for a number of different purposes. In this case, however, I would see a difference between the city bringing the lawsuit or being sued and raising the Noerr-Pennington defense and the NFL, because the city has the right to enforce——

Mr. WATT. The NFL——

Mr. GOODLATTE. Well, the city has the right to raise the ordinance as a defense. And secondly, the individual who has been aggrieved here, the person promoting anti-bullying, and I agree with you. I would be very sympathetic to their efforts. But they have a whole separate course that they can pursue, and that is to petition the local government to change that law, so that it is accepting of the time of exception, the use exception, that they were attempting to make under those circumstances.

That is different than two private litigants being stuck in the courtroom together and one of them having brought the other in for anti-competitive reasons. So if you keep it narrow, I think maybe we can look for some solutions here.

Mr. WATT. As with most things, Mr. Chairman, what we have proven today is these issues are a lot more complex than they appear to be on their surface.

So with that, I will yield back.

Mr. GOODLATTE. And with that, I have to agree with that observation. And I think the gentleman.

And I think all of the witnesses today for your testimony.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made a part of the record.

And without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

And with that, I again think the witnesses and declare the hearing to be—now I have a gavel—the hearing adjourned.

[Whereupon, at 11 a.m., the Subcommittee was adjourned.]