The Noerr-Pennington Doctrine  
A Constitutional Defense Available to Attorneys  

Presented by: Peter C. Contino, Esq.  
Rivkin Radler LLP  
New York, New York  

For the American Bar Association  
Spring 2013 Conference on Lawyers Professional Liability  

Introduction  

In recent years we have seen decisions in many cases which have permitted non-clients to bring claims against attorneys, notwithstanding the absence of privity, or even a near privity relationship, between the attorney and the claimant. In the classic statement of the rule of privity, “...absent privity, a plaintiff must set forth a claim of ‘fraud, collusion, malicious acts or other special circumstances’ in order to maintain a cause of action.”¹ The Noerr-Pennington doctrine provides attorneys with a potential defense to this “other tortious conduct,” exception to the privity rule, where the “other tortious conduct,” complained of arises out of the lawyer’s assisting their clients in petitioning the government on the client’s behalf.  

The potential application of the Noerr-Pennington doctrine as a defense should not be underestimated, considering the scope and nature of the assistance provided by lawyers to clients: as lobbyists petitioning federal, state and local legislative bodies; before administrative bodies and tribunals; and in litigation in the courts generally.  

Genesis of the Noerr-Pennington Doctrine  

The Noerr-Pennington doctrine has its genesis in two United States Supreme Court decisions² decided in 1961 and 1965, respectively, dealing with antitrust litigation, in which the Supreme Court recognized a defense to a suit under the antitrust laws, rooted in the U.S. Constitution’s First Amendment right to petition the government:  

Congress shall make no law... prohibiting the... right of the people... to petition the Government for a redress of grievances.³  

As the body of case law interpreting the Noerr-Pennington doctrine has evolved, in this writer’s view, it has the potential to be an effective response on behalf of attorney-defendants to retaliatory lawsuits resulting from assistance provided by attorneys to clients in their clients’ petitioning activities before the various legislative, administrative and judicial bodies of government (i.e. in civil litigation). In that regard, the details of application of Noerr-Pennington, as a defense, largely revolve around its principal exception.  

Noerr, however, withheld immunity from ‘sham’ activities because ‘application of the Sherman Act would be justified’ when petitioning activity, ‘ostensibly
directed toward influencing governmental action, is a mere sham to cover... an attempt to interfere directly with the business relationships of a competitor.’ Id., at 144. In Noerr itself, we found that a publicity campaign by railroads seeking legislation harmful to truckers was no sham in that ‘effort to influence legislation’ was ‘not only genuine but also highly successful.’ Ibid.

In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972), we elaborated on Noerr in two relevant respects. First, we extended Noerr to ‘the approach of citizens... to administrative agencies... and the courts.’ 440 U. S. at 510. Second, we held that the complaint showed a sham not entitled to immunity when it contained allegations that one group of highway carriers ‘sought to bar competitors from meaningful access to adjudicatory tribunals and so to usurp the decision-making process’ by ‘institut[ing]... proceedings and actions... with or without probable cause, and regardless of the merit of the cases.’ Id., at 512 (internal quotation marks omitted). We left unresolved the question presented by this case – -- whether litigation may be sham merely because a subjective expectation of success does not motivate the lawsuit. We now answer this question in negative and hold that an objectively reasonable effort to litigate cannot be a sham regardless of subjective intent.4

Thus, where a complaint alleges a cause of action arising out of some effort by the defendant (and his counsel) to petition the government, be it in the form of an attempt to influence the legislative process, administrative process, or through obtaining relief by way of civil litigation in the courts, a First Amendment right of the defendant is implicated, and the burden then shifts to the party bringing the claim to plead, and ultimately prove, that such effort to “petition the government,” when viewed objectively, was a “sham.” As discussed below, given the restrictive definition of the “sham” exception to application of the Noerr-Pennington doctrine, overcoming same can be a heavy burden for a plaintiff, making the doctrine/defense an effective shield for a defendant-attorney.

Since California Motor Transport, we have consistently assumed that the sham exception contains an indispensable objective component. We have described a sham as ‘evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims.’ Otter Tail Power Co. v. United States, 410 U.S. 366, 380, 35 L. Ed. 2d 359, 93S. Ct. 1022 (1973) (emphasis added). We regard as sham ‘private action that is not genuinely aimed at procuring favorable government action,’ as opposed to ‘a valid effort to influence government action.’ Allied Tube & Conduit Corp. v. Lektro-Vend Corp., 433 U.S. 623, 645, 53 L. Ed. 2d 1009, 97 S. Ct. 2881 (1977)... Indeed, by analogy to Noerr’s sham exception, we held that even an ‘improperly motivated’ lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is ‘baseless.’ Bill Johnson’s Restaurant Inc. v. NLRB, 461 U. S. 731, 743 – 744, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983).

We now outline a two-part definition of ‘sham’ litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the lawsuit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr,
and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals ‘an attempt to interfere directly with the business relationships of a competitor.’ Noerr, supra, at 144 (emphasis added), through the ‘use of governmental process – – as opposed to outcome of that process – – as an anticompetitive weapon,’ Omni, 499 U. S. at 380 (emphasis in original). This two-tiered process requires the plaintiff to disapprove the challenged lawsuit’s legal viability before the court will entertain evidence of the suit’s economic viability.5

The Noerr-Pennington doctrine has been applied to bar a multiplicity of civil lawsuits. Moreover, while the successful prosecution of an underlying action is prima facie evidence that it was not a ‘sham,’6 a settled or even an unsuccessful action can provide the basis for a Noerr-Pennington defense to a subsequent retaliatory lawsuit.7

The Doctrine’s Application to Attorneys

There are relatively few decisions reported which expressly apply the Noerr-Pennington doctrine as a defense for an attorney, where the lawyer has been sued as a result of his representation of a client. The most prominent decision in this area is the Ninth Circuit case of Freeman v. Lasky, Haas & Cohler,8 decided in 2005, affirming a District Court decision that a viable defense under the Noerr-Pennington doctrine was available to lawyers who represented a client defending an antitrust action, on an agency theory, on the basis that a lawyer acts as the agent for his client and therefore, has available to him all defenses which were available to the client.

The First Amendment petition right belongs to the defendants in the original case, though their employees, law firms and lawyers, as their agents in that litigation, get the benefit of it as well.9

A few state appellate court decisions have adopted the Friedman reasoning by implication.10 An unreported trial court decision in a matter handled by this writer reached the same result.11 Thus, although the constitutional right belongs to the client, where the lawyer’s actions arise out of his activities as a lawyer, acting as an agent for the client, the lawyer shares the same constitutional protection for petitioning activities under the First Amendment to the U.S. Constitution as does the client.

Scope of Application of the Doctrine

Courts have expanded application of the Noerr-Pennington doctrine as a defense to retaliatory lawsuits arising out of an underlying civil litigation in contexts far beyond the doctrine’s origin in the field of antitrust law.

The Noerr-Pennington doctrine has been applied to a host of federal claims and state law tort and statutory causes of action based on activities of the defendants arising out of or in connection with petitioning activities involving both state and federal governments, including the
filing of lawsuits in state and federal courts. Further, while some courts have limited the scope of the Noerr-Pennington defense to activity directly related to a petition to the government or a court (e.g. pleadings and motions), other courts take a broader view and apply the doctrine as a defense to acts that are, “reasonably and normally attendant upon protected litigation,” such as sending letters threatening court action…

In a 1983 decision the Supreme Court recognized application of the Noerr-Pennington doctrine outside of the antitrust field to hold that the Petition Clause of the First Amendment protects access to judicial process in the labor relations context.

In 2006, the Ninth Circuit Court of Appeals held that the Noerr-Pennington doctrine immunized a defendant from RICO claims based upon a lawsuit arising from demand letters sent by a satellite television provider to numerous purchasers of specialized electronic equipment capable of accessing its transmission signal, without first attempting to determine the purpose for which such equipment was utilized. In so ruling, the Ninth Circuit stated as follows:

[W]e conclude that the Noerr-Pennington doctrine stands for a generic Rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause (Citation omitted)…Under the Noerr-Pennington rule of statutory construction, we must construe Federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise. We will not lightly impute[d] to Congress an intent to invade freedoms” protected by the Petition Clause.

Accordingly, we hold that RICO and the predicate statute at issue here do not permit the maintenance of a lawsuit for the sending of a pre-litigation demand to settle legal claims that do not amount to a sham. Because the demand letters at issue here sought settlement of claims against Sosa under the Federal Communications Act, and no sham is claimed, they cannot form the basis of liability under RICO.

A 2010 decision by District Judge Kenneth Karas, of the Southern District of New York, in Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills, is particularly instructive. Mosdos was a civil rights action involving claims under 42 U.S.C. Sections 1982, 1983, 1985 and 2000, alleging religious discrimination, as well as other claims, against several defendant municipalities and public officials who made pre-answer motions to dismiss. In a far-reaching decision, Judge Karas first notes that the Second Circuit, “…has yet to decide whether ‘the Noerr-Pennington doctrine… must be applied mechanically in cases outside the antitrust area’,” and to claims of civil rights violations in particular. However, after surveying supportive decisions of the Third, Fifth, Sixth, Seventh Eighth and Ninth Circuit Courts of Appeals on the issue, Judge Karas concludes that, “in developing the Noerr-Pennington doctrine, the Supreme Court sought to protect conduct that falls within the ambit of the First Amendment right to petition, ‘regardless of intent or purpose’ behind that conduct, so long as that conduct does not constitute sham activity.” Judge Karas went on to conclude that, “government actors are afforded some measure of protection under the Noerr-Pennington doctrine and the First Amendment to petition
when they lawfully do so (i.e. when they are in compliance with other applicable constitutional provisions) in a representative capacity,” and that to obviate Noerr-Pennington immunity, a plaintiff must demonstrate both the objective and subjective components of a sham.  

There are also numerous state and federal court decisions applying the Noerr-Pennington doctrine to dismiss various state law tort claims and statutory claims, including: claims for tortious interference with contract, malicious prosecution, tortious interference with prospective economic advantage; prima facie tort, Unfair Business Practices Act claims, etc. Each of these decisions carry with them an implicit defense to a retaliatory claim against the attorney who prosecuted the underlying action.

Limitations on the Doctrine’s Scope

The clearest limitation on the application scope of the Noerr Pennington doctrine occurs where a court determines that the activity complained of does not arise out of the “petitioning” of some governmental entity (i.e. legislative, administrative, executive or the courts) by or on behalf of the defendant. An example of this would be where the defendant was engaged in private commercial activity. That was the case in Litton Systems Inc., v. AT&T, where defendant claimed that it was entitled to Noerr-Pennington immunity from suit by Litton because the claims arose out of tariff filings by AT&T with the Federal Communications Commission. In that case, the Second Circuit Court of Appeals rejected AT&T’s argument reasoning that:

AT&T erroneously assumes that a mere incident of regulation -- -- the tariff filing requirement -- -- is tantamount to a request for governmental action akin to the conduct held protected under Noerr and Pennington,… AT&T was ‘engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws.’ The decision to impose and maintain the interface tariff was made in AT&T’s board room, not the FCC; AT&T’s power to exclude Litton and other competitors from the telephone terminal equipment market resulted not from the FCC’s regulatory authority but from AT&T’s exclusive control of the telephone network.

Just as the First Amendment does not protect all speech, an exception to the Noerr Pennington doctrine is carved out for claims of defamation.

Similarly, where plaintiff’s complaint pleads sufficient facts, or the evidence submitted to the court is sufficient to satisfy plaintiff’s obligation to establish deliberately false or fraudulent representations by the defendants, which were material to the defendants obtaining governmental action, a plaintiff’s cause of action may overcome the assertion of a Noerr-Pennington defense under the sham exception.

Conclusion

Where an attorney is sued by a non-client in a matter arising out of the attorney’s representation of the client in connection with the client’s petitioning activity, whether involving legislative, administrative, executive or litigated matters, the attorney may enjoy the client’s
constitutional immunity from suit under the First Amendment by reason of application of the Noerr-Pennington doctrine.

This potential avenue of defense is worthy of consideration in all such cases.

End Notes

3 U.S. Constitution, 1st Amendment.
6 Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180, 1185 (9th Cir. 2005).
7 Movers & Warehouseman's Association of Greater New York, Inc. v. Long Island Moving & Storage Association, Inc., 1999 U.S. Dist. LEXIS 20667, at 21-22 (relying upon the Supreme Court decision in Professional Real Estate Investors, the District Court agreed with the defense's argument that… “Plaintiffs sham litigation’ cause of action must be dismissed because plaintiff has not advanced any facts showing that defendant’s litigation was objectively baseless.); See also, Matsushita Electronics Corp. v. Loral Corp., 974 F. Supp. 345 (S.D.N.Y. 1997) (award of summary judgment to plaintiff in underlying action was not determinative of claim that prior litigation was a "sham").
8 Freeman, Supra.
9 Id., at 1184.
12 Freeman, Supra., at 1184 (“Because the Noerr-Pennington doctrine grows out of the Petition Clause, its reach extends only so far as necessary to steer the Sherman Act clear of violating the First Amendment. Immunity thus applies only to what may fairly be described as petitions, not to litigation conduct generally.”)
13 Matsushita Electronics Corp. v. Loral Corp., Supra, at 359 (citing Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358, 1367 (5th Cir.1983); See also Primetime 24 Joint Venture v. National Broadcasting Company, Inc., 219 F.3d 92, 100 ( 2d Cir. 2000).
15 Sosa v. DirectTV, Inc., 437 F3d 923, (9th Cir. 2006).
16 Id., at 931.
17 Id., at 942.
19 Mosdos, Supra, at 594-95.
20 Id., at 596.
21 Id., at 601-2.

23 700 F.2d 785 (2d Cir. 1983); See also Posner v. Lewis, 80 A.D.3d 308, 912 N.Y.S.2d 53 (N.Y. App. Div.) (where defendants had no standing to petition the school board, regarding the tenure status of a particular teacher because they did not live in or have, children in the district, and were motivated purely by animus toward plaintiff).

24 Litton, 700 F.2d at 807. See also Whelen v. Abell, 48 F.3d 1247 (D.C. Cir. 1995).
