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Strategic Litigation and Antitrust Petitioning Immunity

Nicholas E. Hakun*

The First Amendment allows a business to sue its competitors even if its goal is to destroy them. It should not, however, protect a lawsuit designed primarily to inflict harm collateral to the proceedings. Unfortunately, courts routinely fail to distinguish legitimate suits from predatory shams and have no solution for the litigant whose claims simultaneously achieve both goals.

Sophisticated businesses are weaponizing litigation to inflict harm on their competitors and being rewarded with antitrust petitioning immunity thanks to the Noerr-Pennington doctrine. After decades of divergence between the courts and economists, the doctrine's sham exception has been outsmarted. Economic analysis proves that the sham exception is woefully underinclusive and that more complex predatory suits are being inappropriately immunized. The Third Circuit's recent AbbVie decision highlights how the existing sham standard sometimes forces courts into anticompetitive outcomes. My proposal is an aggressive, economically robust solution to properly and fairly prosecute predatory litigation.

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INTRODUCTION

Antitrust laws exist to prevent abuse of the competitive process.¹ The problem is that anticompetitive abuse and procompetitive activity are often difficult to differentiate.² This problem drove the creation of antitrust petitioning immunity, commonly referred to as the *Noerr-Pennington* doctrine, to protect those whose actions straddle the line between appropriate and anticompetitively abusive.³

1. Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 564 (2012) (highlighting the aims of U.S. antitrust laws, among others “(1) private economic power, like all absolute power, is subject to abuse and injurious to public welfare; (2) such power must be decentralized to protect a free society from its abuse; (3) competitively structured markets diffuse private power and discipline economic decision making; and (4) antitrust policy is critical to preserving competitive markets” (citing Walter Adams & James W. Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257, 161–79 (1995))).

2. See Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 285–86, 305 (2010) (explaining how “irrational threats” and other seemingly non-profit maximizing strategies can be “both credible and profitable”).

3. See, e.g., James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 99 (1985) (“[A] firm that seeks to change the law (or to protect its interests while legislative or judicial efforts are in progress) may need to file petitions, suits, or

The *Noerr-Pennington* doctrine exists because the First Amendment protects the right to petition the government for redress.⁴ The tension created by our antitrust laws and the First Amendment has resulted in the principle that, if legitimate petitioning results in anticompetitive harm, courts should defer to protecting free speech over the competitive process.⁵ To enact this principle, courts grant the petitioner immunity from antitrust liability. This immunity applies wherever government petitioning occurs, including the courts.⁶

Courts apply the *Noerr-Pennington* doctrine in the litigation context to prevent competitors from turning the legal system into an anticompetitive weapon.⁷ Litigants who seek to abuse the judicial process do so through predatory litigation.⁸ The hallmark of predatory litigation is that the litigant's true motive is not the case's legal success but its anticompetitive impact.⁹ Identifying true motivation, however, has proven challenging for scholars and courts.¹⁰

Over the past fifty years, courts have struggled with identifying and prosecuting predatory litigation without infringing on the right to petition. The governing test for identifying predatory litigation is the “sham” exception, defined by the Supreme Court in its 1993 case *Professional Real Estate Investors*,

appeals against many potential respondents, particularly when there are many rivals in whose favor the challenged policy otherwise would work. Such conduct, however, might appear to be a meritless effort to barricade a market, if judged *ex ante* and from an ‘objective’ standpoint. Subjecting that firm to antitrust scrutiny might force the initiator of these actions to choose between facing chilling litigation or sacrificing potentially valid and valuable causes of action.”).

4. U.S. CONST. amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

5. See *Premier Elec. Constr. Co. v. Nat’l Elec. Contractors Ass’n*, 814 F.2d 358, 376 (7th Cir. 1987) (“The antitrust laws allow people to ask the government for a monopoly, and they allow them to keep what they get.”).

6. See Hurwitz, *supra* note 3, at 66 (“As a general rule, the *Noerr* doctrine gives primacy to first amendment considerations. In most circumstances, it provides immunity from antitrust challenge for efforts to influence legislative, executive, administrative, and adjudicatory conduct by government.”).

7. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991).

8. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 347 (1978) (“Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition.”).

9. See, e.g., Hurwitz, *supra* note 3, at 70 (“The conceptual theme underlying predatory use of governmental processes is that, for strategic purposes, governmental decisions are a manipulable factor in market performance. Just as a firm may seek to exacerbate raw material shortages or labor unrest that threaten to injure its competitors more than itself, so too may a firm seek to manipulate governmental decisions to the disadvantage of its rivals. In particular, firms may seek to raise their rivals’ costs disproportionately, restrict entry, or facilitate collusive behavior.”); see also CHRISTOPHER C. KLEIN, *THE ECONOMICS OF SHAM LITIGATION: THEORY, CASES, AND POLICY*, 24 (1989), https://www.ftc.gov/sites/default/files/documents/reports/economics-sham-litigation-theory-cases-and-policy/232158_0.pdf [<https://perma.cc/5Z5P-D5YC>].

10. See Lawrence A. Sullivan, *Developments in the Noerr Doctrine*, 56 ANTITRUST L.J. 361, 363 (1987) (“A sham purpose is also difficult to prove in respect of administrative or judicial litigation—but no longer impossible to prove.”).

Inc. v. Columbia Pictures (PRE).¹¹ A sham lawsuit must be objectively baseless, meaning filed without probable cause, and be subjectively motivated to harm competition.¹² Since *PRE*, the Supreme Court has been silent.

The *PRE* test has resulted in numerous anticompetitive outcomes, confusion in the lower courts, and strong criticism. Antitrust scholars have proposed alternative standards rooted in logic and economic theories.¹³ Commentators have decried *PRE*'s test as overly restrictive.¹⁴ Despite these pleas for reform, lower courts remain stuck with an unworkable “sham” standard.

One area where predatory litigation has been particularly rampant is the pharmaceutical industry. Scholars have long known that the existing intellectual property scheme surrounding pharmaceuticals has made the industry ripe for antitrust violations.¹⁵ The intense competition between generic and brand products can drive competitors to aggressive tactics.¹⁶ Thanks to government regulation, patent-holding monopolists have the power to impose delays on generic competitors.¹⁷

11. *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 51 (1993) [hereinafter *PRE*].

12. *See, e.g., In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class*, 868 F.3d 132, 148–49 (3d Cir. 2017) (“This two-tiered process requires the plaintiff to disprove the challenged lawsuit’s legal viability before the court will entertain evidence of the suit’s economic viability.” (quoting *PRE*, 508 U.S. at 60–61)).

13. *See, e.g., Christopher C. Klein, Strategic Sham Litigation: Economic Incentives in the Context of the Case Law*, 6 INT’L REV. L. & ECON. 241 (1986); Hurwitz, *supra* note 3, at 122–25.

14. Marina Lao, *Reforming the Noerr-Pennington Antitrust Immunity Doctrine*, 55 RUTGERS L. REV. 965, 1025 (2003) (“A case can have some minimal merit—sufficient to avoid the label ‘lack of probable cause’—and yet a reasonable litigant could not realistically expect success. To the extent that the majority opinion seems to adopt the probable cause standard for its objective baselessness test, it overly restricts the use of the sham exception.”).

15. *See id.* at 992–93 (“The pervasiveness of government regulation of drugs, and the fact that patents are often involved, makes this a particularly attractive area for firms to claim protection under the *Noerr* doctrine when they misuse government processes in order to impede competition.”); Matthew Avery, William Newsom & Brian Hahn, *The Antitrust Implications of Filing “Sham” Citizens Petitions with the FDA*, 65 HASTINGS L.J. 113, 132 (2013) (“*Professional Real Estate and Noerr-Pennington* thus seem to provide an avenue for delaying citizen petitions without fear of antitrust liability.”); Saami Zain, *Antitrust Liability for Maintaining Baseless Litigation*, 54 SANTA CLARA L. REV. 729, 745 (2014) (analyzing pharmaceutical patent litigations and arguing that “such litigation has the potential to be anticompetitive by delaying generic competition”).

16. *See Avery et al., supra* note 15, at 116 (“Once a pharmaceutical product loses patent protection, competitors almost always introduce generic versions of the drug as quickly as possible. Generic drugs can capture eighty to ninety percent of the market within months of entering the marketplace. In response to this intense generic competition, patent holders have used a variety of controversial means to effectively extend their patent-granted monopoly.”).

17. *See David Orozco, Strategic Legal Bullying*, 13 N.Y.U. J.L. & BUS. 137, 139 (2016) (“For example, companies exploit the law when they engage in sham litigation to deter market entry to start-up innovators”); *see also* Lao, *supra* note 14, at 995 (“Because generic versions cut deeply into the sales of brand name drugs, brand name drug manufacturers have aggressively used judicial and regulatory processes to block or delay their approval.” (citing Gardiner Harris & Chris Adams, *Delayed Reaction: Drug Manufacturers Step Up Legal Attacks that Slow Generics*, WALL ST. J., July 12, 2001, at A1 (discussing brand name drug manufacturers’ aggressive courtroom and regulatory tactics that are used to delay generic drugs’ entry into the market))).

In recent years, Congress even investigated the impact of predatory litigation.¹⁸ At the 2012 Judiciary Subcommittee hearing, entitled *Litigation as a Predatory Practice*, speakers explained that the doctrine is out of balance, “effectively immunizes unfounded litigation,” and that the hurdles the victimized party must overcome to pursue antitrust claims based on “predatory litigation have been set too high by the courts.”¹⁹ As a result, corporations are unaccountable.²⁰ Professor Lao, who testified, expounded on the “murky” *PRE* standard and focused on the situations where the doctrine has “gone beyond the bounds of what the First Amendment is protecting.”²¹ Even abusive patent litigation was discussed.²² However, no complete solutions were proposed.

The difficulty with prosecuting predatory litigation is that mixed motives are often at play.²³ On the one hand, the predator seeks to inflict an anticompetitive injury on its competitor for its own advantage.²⁴ On the other, it seeks to sue a competitor in court for, ostensibly, a legitimate grievance. This tension has baffled courts.²⁵ *Noerr-Pennington’s* uncertain foundation as a constitutional or statutory

18. See *Litigation as a Predatory Practice: Hearing Before the Subcomm. on Intell. Prop., Competition, & the Internet of the H. Comm. on the Judiciary*, 112th Cong. 3 (2012) (statement of Hon. Bob Goodlatte, Chairman, H. Subcomm. on Intell. Prop., Competition, & the Internet) (“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.”).

19. *Id.* at 9 (testimony of J. Douglas Richards, Partner, Cohen Milstein Sellers & Toll, PLLC).

20. *Id.*

21. *Id.* at 31 (testimony of Marina Lao, Professor of L., Seton Hall Univ. Sch. of L.).

22. *Id.* at 33 (testimony of J. Douglas Richards) (“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.”).

23. See Lao, *supra* note 14, at 1026 (“Very few lawsuits, even objectively baseless ones, would likely satisfy this test because most litigants have mixed motives, and it would be difficult to show that the litigant pursued the claim *purely* for the harassment of a competitor through the process and not in part for the outcome.”).

24. Gary Myers, *Litigation as a Predatory Practice*, 80 KY. L.J. 565, 586 (1992) (“Abusive litigation, like any predatory practice, might serve several anticompetitive purposes: eliminating competitors, disciplining competitors, raising rivals’ costs, or creating barriers to entry.”).

25. See Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CALIF. L. REV. 1177, 1219–20 (1992) (discussing the difficulty in deciding antitrust petitioning immunity when a court must determine whether the legitimate and anticompetitive motives’ “conflict is so severe that the competitive process (and the antitrust review that ensures it) should yield to the process for providing input to governmental decisions”).

doctrine also adds confusion.²⁶ Even though the Sherman Act is a statute, its role as the protector of the free market heightens its importance.²⁷

Prior literature has focused on critiquing *PRE*'s broad language as the foundation for reforming the sham standard. In particular, Justice Thomas's inconsistent baselessness standards have been a large focus of academic debate.²⁸ Others have written proposals using complex game-theory models designed to articulate predatory suits without considering court-usability.²⁹ At least one scholar has advocated for the wholesale elimination of the doctrine.³⁰ Even the Federal Trade Commission (FTC) is unclear about how best to resolve these ambiguities.³¹ As a result, existing scholarly debate has either missed the purpose of petitioning immunity or proposed a solution beyond the abilities of the courts to enact.³²

26. See, e.g., Stephen Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of Noerr*, 57 ANTITRUST L.J. 327, 330 (1988) ("Some commentators and courts have read this record and concluded that, whatever its origins, the *Noerr* doctrine is now a matter of constitutional law; yet others continue to insist that it is a creature of statutory interpretation."); Lao, *supra* note 14, at 969 ("The analysis depends, in part, on the doctrine's foundational basis. If it is rooted in the Constitution, then the First Amendment would provide the analytical framework, and immunity should be no broader than the constitutional mandate. If it is based on statutory construction, however, guidance would have to come from the Sherman Act itself.").

27. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, 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.").

28. See Lao, *supra* note 14, at 1025 ("With respect to the objective baselessness test, as Justice Souter pointed out in his concurrence, 'probable cause' and the 'reasonable litigant' formulation are not the same. A case can have some minimal merit—sufficient to avoid the label 'lack of probable cause'—and yet a reasonable litigant could not realistically expect success. To the extent that the majority opinion seems to adopt the probable cause standard for its objective baselessness test, it overly restricts the use of the sham exception. Litigation that is not without probable cause can, nonetheless, be used for improper purposes, as the existence of the common law abuse of process tort demonstrates. Therefore, instead of inquiring if an underlying suit had probable cause, I suggest asking if the suit is such that 'no reasonable litigant could realistically expect success on the merits,' and if the suit was used as an anticompetitive tactic."); see also Karen Roche, *Deference or Destruction? Reining in the Noerr-Pennington and State Action Doctrines*, 45 LOY. L.A. L. REV. 1295, 1342 (2012) ("Objectively baseless' should therefore mean that there is no reasonable expectation of success. This would help limit the number of petitions that *Noerr* immunizes.").

29. See, e.g., Ioannis Lianos & Pierre Regibeau, "*Sham*" Litigation: *When Can It Arise and How Can It Be Reduced?*, 64 ANTITRUST BULL. 643, 643–89 (2017); Lucia Helena Salgado & Rafal Pinho de Morais, *A New Test for Anticompetitive Litigation* (March 2013) (working paper) (on file with author); Christopher C. Klein, *Anticompetitive Litigation and Antitrust Liability* (August 2007) (working paper) (on file with the Middle Tennessee State University).

30. Tim Wu, *Antitrust & Corruption: Overruling Noerr* (Columbia L. Sch. Pub. L. Working Paper, Paper No. 14-663, 2020), https://scholarship.law.columbia.edu/faculty_scholarship/2666 [<https://perma.cc/2WCZ-S2QY>].

31. John D. Harkrider, *Antitrust in the Trump Administration: A Tough Enforcer That Believes in Limited Government*, ANTITRUST, Summer 2018, at 11, 13–14 ("In February 2017, the FTC filed a case against Shire ViroPharma seeking to narrow the immunity under *Noerr-Pennington*. Part of the FTC's reason for bringing this case is to further cement the *California Motor* 'pattern of petitioning' exception to the *Professional Real Estate Investors* decision's 'objectively baseless' test.").

32. See Leslie, *supra* note 2, at 286 ("[F]ederal judges may not be the best evaluators of business rationality for several related reasons, including the fact that most judges (1) have no relevant business

This Article argues that, within the existing framework of *Noerr-Pennington*, a more robust standard exists that will unify the conflicting ideas of courts and economists.³³ The core of predatory litigation is that whenever someone uses “the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon,” there should be consequences.³⁴ My proposal combines existing Supreme Court doctrine, the body of economic analysis on predatory litigation, and objective evidence to create “an enquiry meet for the case” of prosecuting predatory litigation.³⁵

Part I of this Article examines the history of the *Noerr-Pennington* doctrine and lays out the current legal framework for antitrust petitioning immunity in the litigation context up to the Third Circuit’s September 2020 *AbbVie* decision. Part II describes the underlying economic foundation of predatory litigation, its different forms, and its impact on competition. Part III discusses the discrepancies between the legal framework and economic realities of Strategic litigation and explore how courts have deviated from the proper analysis. Part IV presents my proposal for identifying and prosecuting predatory lawsuits through a holistic analysis that accounts for both the economic and constitutional interests at stake.

I. THE EVOLUTION OF LITIGANTS AND ANTITRUST IMMUNITY

The first formal application of antitrust petitioning immunity was in the political arena. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, a group of railroaders started a publicity campaign to harm their competitors, the rival truckers.³⁶ The railroaders’ campaign sought to influence government officials to enact laws that would make it harder for the truckers to compete against the railroad

experience; (2) are unfamiliar with pertinent economics and historical scholarship on anticompetitive conduct; (3) fail to recognize that businesses pursue goals beyond profit maximization; (4) are unable to appreciate how it may be rational for firms to intentionally display apparently irrational behavior; (5) do not consider constraints on business decisionmaking; and (6) are subject to cognitive biases, including hindsight bias and confirmation bias.”).

33. See Christopher C. Klein, *Predation in the Courts: Legal Versus Economic Analysis in Sham Litigation Cases*, 10 INT’L. REV. L. & ECON. 29, 29 (1990) (“The case law frequently defines sham litigation as anticompetitive litigation that is either ‘baseless’ or fraudulent, whereas economic analysis emphasizes the anticompetitive goals that motivate the use of government processes to attack rivals.”).

34. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991).

35. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 780–81 (1999); see also Steven C. Salop, *An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards* (Nov. 6, 2017) (working paper), <https://scholarship.law.georgetown.edu/facpub/2007/> [<https://perma.cc/DY42-N23P>].

36. *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 129–31 (1961).

industry as well as harm the truckers' relationship with their customers.³⁷ In short, the railroaders wanted to eliminate the truckers as competitors.³⁸

Despite the anticompetitive effects of their petitioning, the Supreme Court immunized the railroaders from antitrust liability. Justice Black concluded that the railroaders could not be sued because they were petitioning their government officials for a change in the laws.³⁹ The Court held that any harm to customer relations was merely incidental to this genuine effort and therefore could not justify the loss of petitioning immunity.⁴⁰ This conclusion highlighted the principle that even methods considered "unethical" could be protected from scrutiny under this doctrine.⁴¹

The Court, foreseeing potential abuses, ensured that immunization was not absolute. Justice Black explained that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."⁴² This case was the birth of the sham exception.

The sham exception was not applied to litigation until over a decade later.⁴³ In *California Motor Transport Co. v. Trucking Unlimited*, a group of truckers conspired to systematically institute legal proceedings against their competitors to prevent them from obtaining operating credentials.⁴⁴ The truckers vowed to file petitions "with or without probable cause, and regardless of the merits of the case" with their goal being to harass their rivals and impose delays and costs.⁴⁵ After forty

37. *Id.* at 130; *see also* *Noerr Motor Freight, Inc. v. E. R.R. Presidents Conf.*, 155 F. Supp. 768, 822 (E.D. Pa. 1957) ("A cursory reading of the facts as found would quickly indicate that the destruction of the defendants' good will was the primary goal of the defendants in their plan to monopolize the long-haul freight business."), *rev'd*, 365 U.S. 127 (1961).

38. *Noerr*, 365 U.S. at 129–30 ("The campaign so conducted was described in the complaint as 'vicious, corrupt, and fraudulent,' first, in that the sole motivation behind it was the desire on the part of the railroads to injure the truckers and eventually to destroy them as competitors in the long-distance freight business . . .").

39. *Id.* at 135 ("[N]o violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws.").

40. *Id.* at 138–39.

41. *Id.* at 139–40 ("We . . . hold that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had.").

42. *Id.* at 144.

43. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

44. *Id.* at 509 ("The conspiracy alleged is a concerted action by petitioners to institute state and federal proceedings to resist and defeat applications by respondents to acquire operating rights or to transfer or register those rights.").

45. *Id.* at 512 ("It is alleged that petitioners 'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.'" (alteration in original)).

separate cases, over half of them successful for the truckers, their competitors filed an antitrust suit claiming that these forty cases were anticompetitive shams.⁴⁶

Justice Douglas held the truckers' suits should not receive antitrust petitioning immunity despite their ostensible legitimacy. He wrote that "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils.'"⁴⁷ Since the truckers' suits induced competitive harm, Justice Douglas held that they could not rely on the First Amendment for protection.⁴⁸ As such, this series of petitions did not receive petitioning immunity.⁴⁹

While *California Motor* made clear that the right of access to the courts was essential, it failed to articulate a clear standard for "sham" suits.⁵⁰ This left the lower courts to decide the requirements for antitrust petitioning immunity on their own. As a result, a wide range of definitions of "sham" lawsuits developed.⁵¹

A. The Initial Sham Circuit Split (1972–1993)

In the years following *California Motor*, circuit courts ruled on antitrust petitioning immunity without clear guidance. This lack of guidance led to the development of competing sham litigation theories: some believed the suit's legal merit was the key to identifying a sham, while others believed that legal merit was only one factor.

The first, and larger, group of circuit courts relied on legal merit. Some courts required a sham to be legally unreasonable, while others reasoned that the test was whether the lawsuit was obviously meritorious or not.⁵² Under either theory, the conclusion was the same. Some courts phrased this as a decision between good and

46. *Trucking Unlimited v. Cal. Motor Transp. Co.*, No. 45073, 1967 U.S. Dist. LEXIS 11536, at *5–6 (N.D. Cal. Oct. 6, 1967), *rev'd on other grounds*, 432 F.2d 755 (9th Cir. 1970), *aff'd on other grounds*, 404 U.S. 508 (1972).

47. *Cal. Motor*, 404 U.S. at 515 (quoting *NAACP v. Button*, 371 U.S. 415, 444 (1963)).

48. *Id.* at 515 ("If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful.")

49. *Id.* at 516.

50. *Id.* at 513 ("Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.")

51. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507, n.10 (1988) (noting that the word "sham" might become "no more than a label courts could apply to activity they deem unworthy of antitrust immunity").

52. *See, e.g., Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 811–12 (2d Cir. 1983); *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 161 (3d Cir. 1984); *Eden Hannon & Co. v. Sumitomo Tr. & Banking Co.*, 914 F.2d 556, 564–65 (4th Cir. 1990); *South Dakota v. Kan. City S. Indus., Inc.*, 880 F.2d 40, 48–49 (8th Cir. 1989); *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1174–75 (10th Cir. 1982); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992); *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 663 F.2d 253, 264–65 (D.C. Cir. 1981).

bad faith.⁵³ Others asked whether the case had probable cause.⁵⁴ Still others merely asked whether the case was so weak as to be sanctionable under Federal Rule of Civil Procedure 11.⁵⁵

On the other end of the spectrum were those circuit courts that believed the legal merit of a case was not determinative of whether it was a sham. The most prominent proponent of this theory was Judge Posner.

In *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, Judge Posner explained how a business that filed a meritorious lawsuit against its competitor could still, nonetheless, be anticompetitive.⁵⁶ He opined on how litigants could abuse legal process in order to harm competitors through delay, cost, or other means.⁵⁷ Further, he rejected “the proposition that a nonmalicious lawsuit can never violate antitrust law” and held that probable cause should not be the standard because sophisticated litigants could easily circumvent that hurdle.⁵⁸ Judge Posner argued, instead, to evaluate the intentions underlying the decision to sue, despite the obvious challenges such an examination would pose.⁵⁹

Two other circuits adopted similar positions. The Sixth Circuit held that a case’s “genuine [legal] substance” raised only “a rebuttable presumption” of immunity.⁶⁰ Similarly, the Fifth Circuit in *In re Burlington Northern, Inc.* held that “success on the merits does not . . . preclude” proof of a sham if it could be established that the case was not “significantly motivated by a genuine desire for judicial relief.”⁶¹ The core principle expounded by this faction of courts was that an abuse of the judicial process could still exist alongside a legitimate case. The Fifth and Sixth Circuits concluded that analysis could not begin and end with the legal merits.

53. See, e.g., *Columbia Pictures*, 749 F.2d at 161 (citing *Cal. Motor*, 404 U.S. at 511) (“Only when resort to the courts is in bad faith and a ‘mere sham’ may antitrust liability be imposed.”).

54. See *Columbia Pictures Indus., Inc. v. Pro. Real Est. Invs., Inc.*, 944 F.2d 1525, 1530–31 (9th Cir. 1991), cert. granted 503 U.S. 958 (1992) (“Because a successful lawsuit involving no fraud upon the court is obviously based on probable cause, it cannot be a sham as a matter of law.”).

55. See *McGuire Oil*, 958 F.2d at 1561 n.12 (citing *Opdyke Inv. Co. v. City of Detroit*, 883 F.2d 1265, 1273 (6th Cir. 1989)) for the proposition that an “unsuccessful lawsuit [was] not a sham where the trial court did not treat the theory as frivolous and the antitrust plaintiffs did not contend that the theory of the underlying case was so farfetched as to warrant the imposition of sanctions against the attorneys who brought it.”

56. *Grip-Pak, Inc. v. Ill. Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982).

57. See *id.* at 472.

58. *Id.* (“The existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation; and if the improper purpose is to use litigation as a tool for suppressing competition in its antitrust sense, it becomes a matter of antitrust concern.”) (internal citations omitted).

59. *Id.* (“[W]e are not prepared to rule that the difficulty of distinguishing lawful from unlawful purpose in litigation between competitors is so acute that such litigation can never be considered an actionable restraint of trade, provided it has some, though perhaps only threadbare, basis in law.”).

60. *Westmac, Inc. v. Smith*, 797 F.2d 313, 318 (6th Cir. 1986).

61. *In re Burlington N., Inc.*, 822 F.2d 518, 528 (5th Cir. 1987); *Union Pac. R.R. Co. v. Energy Transp. Sys., Inc.*, 484 U.S. 1007 (1988).

This circuit split persisted until the Ninth Circuit, in 1992, held that a case filed with probable cause could never be a sham and that such cases always deserved antitrust petitioning immunity.⁶² After twenty years of denied petitions, the Supreme Court took the *PRE* case as the bellwether case to attempt to resolve the issue of antitrust petitioning immunity in the litigation context.⁶³

B. The Supreme Court's Sham Solution (1993)

The defendants in *PRE* (collectively, Columbia) filed copyright litigation against hotel operators (*PRE*) after the operators started renting Columbia's films to their guests.⁶⁴ *PRE* filed an antitrust action against Columbia because they believed the underlying claim was merely an attempt to restrain trade.⁶⁵ The district court disagreed that a sham existed, claiming its decision to grant summary judgment was a close call.⁶⁶ This close call, it claimed, gave Columbia probable cause—and immunity.

The Ninth Circuit agreed. It held that “[b]ecause a successful lawsuit involving no fraud upon the court is obviously based on probable cause, it cannot be a sham as a matter of law.”⁶⁷ The court proposed a two-part sham litigation test that asked first whether the suit was legally baseless and, second, whether it was brought as “part of an anticompetitive plan external to the underlying litigation.”⁶⁸ *PRE* appealed.

On petition to the Supreme Court, Justice Thomas, writing for the majority, affirmed the Ninth Circuit's decision and declared that his opinion would resolve the “inconsistent and contradictory ways” lower courts defined sham litigation.⁶⁹ The solution, he ordered, was to endorse the Ninth Circuit's suggested two-step plan based on probable cause.

The first step was deciding if the case was “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.”⁷⁰ If not objectively baseless, the case would receive antitrust petitioning immunity and the

62. See *Columbia Pictures Indus., Inc. v. Pro. Real Est. Invs., Inc.*, 944 F.2d 1525, 1530–31 (9th Cir. 1991), cert. granted 503 U.S. 958 (1992).

63. See *PRE*, 508 U.S. 49 (1993).

64. *Columbia Pictures Indus., Inc. v. Pro. Real Est. Invs., Inc.*, 866 F.2d 278, 279 (9th Cir. 1989) (“Mancha hotel guests may rent movie videodiscs from the lobby gift shop for a \$5 to \$7.50 daily fee per disc, which can be charged on the hotel bill After learning of these activities at La Mancha, Columbia Pictures, Inc. and six other motion picture studios (‘Columbia’) filed suit to prevent La Mancha from renting videodiscs to its guests, alleging copyright infringement.”) (footnote omitted).

65. *Columbia Pictures*, 944 F.2d at 1527.

66. *Id.* at 1528.

67. *Id.* at 1530–31 (citing *Omni Res. Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984)).

68. *Id.* at 1532.

69. *PRE*, 508 U.S. 49, 55 (1993).

70. *Id.* at 60.

inquiry would end.⁷¹ If, on the other hand, the case was objectively baseless, the second element would come into play. This element asked whether the litigant used “the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.”⁷² This element received little attention from Justice Thomas.

Justice Thomas focused on objective baselessness and equated it to probable cause like the Ninth Circuit. He declared *California Motor* as holding that there was an “indispensable objective component” to the sham exception and that, as such, “challenges to allegedly sham petitioning activity must be resolved according to objective criteria.”⁷³ That criteria, he decided, was probable cause, which “requires no more than ‘a reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication.’”⁷⁴

Justice Thomas’s focus on probable cause led him to draw comparisons between accusations of sham litigation and malicious prosecution. Because malicious prosecution was inappropriate whenever probable cause existed, Justice Thomas ruled that the existence of probable cause was an absolute defense to an allegation of sham litigation.⁷⁵ Interestingly, Justice Thomas also connected probable cause and objective baselessness with sanctions under Rule 11 by saying that since Columbia’s copyright action was, at least, an objectively “good faith argument for the extension, modification, or reversal of existing law,” the action was not baseless.⁷⁶ For all of these reasons, Justice Thomas held that Columbia’s infringement case had merit and that, therefore, it could not be an anticompetitive sham.⁷⁷ Columbia was given antitrust petitioning immunity for its claim.⁷⁸

Justice Stevens filed a concurring opinion because of his strong disagreement with Justice Thomas’s opinion, despite his agreement with the result that Columbia’s infringement suit was not a sham.⁷⁹ First and foremost, Justice Stevens

71. Justice Thomas went further and even cautioned courts against considering a losing claim as being objectively baseless. *Id.* at 60 n.5 (“A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must ‘resist the understandable temptation to engage in *post hoc* reasoning by concluding’ that an ultimately unsuccessful ‘action must have been unreasonable or without foundation.’”).

72. *Id.* at 61 (quoting *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1990)).

73. *Id.* at 58–59.

74. *Id.* at 62–63 (internal citations omitted).

75. *Id.* at 63 (“Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense.”).

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

77. *Id.*

78. *Id.*

79. *Id.* at 67 (Stevens J., concurring) (“While I agree with the Court’s disposition of this case and with its holding that ‘an objectively reasonable effort to litigate cannot be sham regardless of subjective intent,’ I write separately to disassociate myself from some of the unnecessarily broad dicta in the Court’s opinion.”) (internal citations omitted).

disagreed that probable cause should guarantee antitrust petitioning immunity.⁸⁰ He believed that “objectively reasonable lawsuits may still break the law.”⁸¹

Justice Stevens fundamentally disagreed with Justice Thomas’s formulation of how to identify whether litigation was anticompetitive. He explained that the term “sham” is “appropriately applied to a case, or series of cases, in which the plaintiff is indifferent to the outcome of the litigation itself, but has nevertheless sought to impose a collateral harm on the defendant.”⁸² The key distinction, he wrote, should be whether the chance of success on the merits was the motivation for the suit versus the collateral anticompetitive benefit.⁸³ He echoed Judge Posner’s proposition that some cases would not be filed without such a collateral benefit.⁸⁴

The final—and most fundamental—problem Justice Stevens articulated with Justice Thomas’s rigid two-step structure for antitrust petitioning immunity was that the facts were a poor bellwether of predatory litigation.⁸⁵ Justice Stevens pointed out that, regardless of which circuit this case had arisen from, every court would have granted petitioning immunity for *Columbia*.⁸⁶ Justice Stevens warned that courts would be faced with much “more complicated” cases and that Justice Thomas was wrong to draft such a strong rule from an “easy case.”⁸⁷ Nonetheless, Justice Stevens concluded that *Columbia*’s infringement claim against PRE was not a sham and that immunity was appropriate.

Since *PRE*, the Supreme Court has not heard another case on sham litigation. In the almost thirty-year silence since *PRE*, the circuit courts are again tasked with deciding when and how to grant antitrust petitioning immunity to litigants accused of abusing the judicial process. Now, the problem facing the lower courts is whether *PRE* overturned *California Motor* and, if not, how two cases that fundamentally contradict one another can coexist.

80. *Id.* at 67–68 (“Specifically, I disagree with the Court’s equation of ‘objectively baseless’ with the answer to the question whether any ‘reasonable litigant could realistically expect success on the merits.’ There might well be lawsuits that fit the latter definition but can be shown to be objectively unreasonable, and thus shams. It might not be objectively reasonable to bring a lawsuit just because some form of success on the merits—no matter how insignificant—could be expected.”) (footnote omitted).

81. *Id.* at 75 (“It is important to remember that the distinction between ‘sham’ litigation and genuine litigation is not always, or only, the difference between lawful and unlawful conduct; objectively reasonable lawsuits may still break the law.”).

82. *Id.* at 68.

83. *Id.* (“The distinction between abusing the judicial process to restrain competition and prosecuting a lawsuit that, if successful, will restrain competition must guide any court’s decision whether a particular filing, or series of filings, is a sham.”).

84. *Id.* at 73–75 (quoting *Grip-Pak, Inc. v. Ill. Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982)).

85. *Id.* at 69 (“There was no unethical or other improper use of the judicial system; instead, respondents invoked the federal court’s jurisdiction to determine whether they could lawfully restrain competition with petitioners.”).

86. *Id.*

87. *Id.* at 68, 76 (“I would not, however, use this easy case as a vehicle for announcing a rule that may govern the decision of difficult cases, some of which may involve abuse of the judicial process.”).

C. The Current State of Sham Litigation (1993–Present)

Since *PRE*, the Supreme Court has left the circuit courts to wrestle with the issue of deciding what standard governs antitrust petitioning immunity. Based on *PRE*'s holding that probable cause is an absolute defense to allegations of sham litigation, *California Motor*—which rejected immunity for cases filed “with or without probable cause”—should be doctrinally dead. Despite this contradiction, circuit courts have latched onto allowing both cases to coexist and have begun distinguishing them based on the factual differences underlying the cases.⁸⁸

For example, the Third Circuit adopted this approach in *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*, where a realty company faced a series of legal challenges it alleged were “designed to keep [its client] out of the market.”⁸⁹ The court held that whenever a party alleged a series of legal proceedings, the *California Motor* standard should govern, and when only one sham is alleged, it will use *PRE*'s “exacting two-step test [which] properly places a heavy thumb on the scale in favor of the defendant.”⁹⁰

These courts deemed the quantity of suits to be the “best way to make that determination” because, otherwise, “it is difficult to determine with any precision whether the petition was anticompetitive,” and they wanted to “prevent any undue chilling of First Amendment activity.”⁹¹ Because multiple petitions existed, the Third Circuit chose the *California Motor* approach and engaged in a “holistic” review of factors, like the win-loss percentage of the petitions.⁹² It also considered evidence of bad faith, such as the “magnitude and nature of the collateral harm imposed on plaintiffs by defendants’ petitioning activity.”⁹³

In *Hanover*, this led to a denial of antitrust petitioning immunity because it was sufficiently alleged that the defendants instituted the proceedings and actions without regard to the merits of the cases.⁹⁴ This standard, however, is not actually

88. See, e.g., *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 179 (3d Cir. 2015); *Waugh Chapel S., LLC v. United Food & Com. Workers Union Loc. 27*, 728 F.3d 354, 363 (4th Cir. 2013); *Primetime 24 Joint Venture v. Nat'l Broad. Co.*, 219 F.3d 92, 99–101 (2d Cir. 2000); *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800, 810–11 (9th Cir. 1994).

89. *Hanover*, 806 F.3d at 170.

90. *Id.* at 180 (When a single case is at issue and the *PRE* test is used “the analysis is retrospective: if the alleged sham petition is not objectively baseless, defendants are immune—end of story.”).

91. *Id.*

92. *Id.*

93. *Id.* at 181. The court then compared its win-loss percentage with other courts who had done a similar “analysis.” See, e.g., *Waugh*, 728 F.3d at 365 (finding sham where one of fourteen proceedings was successful); *USS-POSCO*, 31 F.3d at 811 (finding no sham where fifteen of twenty-nine lawsuits were successful); *Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc.*, 552 F.3d 1033, 1046 (9th Cir. 2009) (finding no sham where defendant “won seven of the seventeen suits” and each of the ten remaining cases “had a plausible argument on which it could have prevailed”).

94. *Hanover*, 806 F.3d at 183 (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 516 (1972)).

equipped to handle the “more complicated cases” Justice Stevens warned of.⁹⁵ The most egregious example of this is the recent Third Circuit decision of *FTC v. AbbVie*.⁹⁶

In *AbbVie*, the defendant pharmaceutical company initiated two patent infringement lawsuits against competitors Teva and Perrigo when the rival companies filed applications with the Food and Drug Administration (FDA) to produce nearly identical generic drugs⁹⁷ based on AbbVie’s patent before its expiration.⁹⁸ The benefit of these suits, under the Hatch-Waxman Act, was that they automatically imposed a thirty-month stay on Teva and Perrigo’s FDA approval, thereby allowing AbbVie’s monopoly to continue.⁹⁹

After both suits settled quickly with large settlements, the FTC filed an antitrust claim against AbbVie and claimed that the suits were shams.¹⁰⁰ AbbVie argued that under *PRE*, it had antitrust petitioning immunity. The district court disagreed and held that both suits were shams after an extensive summary judgment opinion and a sixteen-day bench trial.¹⁰¹ The district court concluded that, legally, AbbVie had no “reasonable belief” of success on the merits based on existing patent law and that, as such, its claims were “objectively baseless” under *PRE*.¹⁰² The court

95. *Id.* at 181.

96. *FTC v. AbbVie Inc.*, 329 F. Supp. 3d 98, 117–18 (E.D. Pa. 2018), *aff’d in part, rev’d in part and remanded*, 976 F.3d 327 (3d Cir. 2020).

97. To market a pharmaceutical product, the drug must obtain FDA approval. Approval can come in three ways: a Section 505(b)(1) “Full” New Drug Application, a Section 505(j) “Abbreviated” New Drug Application, or a Section 505(b)(2) “Hybrid” New Drug Application. *See* Federal Food, Drug, and Cosmetic Act § 505, 21 U.S.C. § 505 (b)(1)–(2), (j). The Abbreviated application is a “streamlined application” that is “appropriate for a company seeking to market a generic version of a brand-name drug.” *AbbVie Inc.*, 976 F.3d at 339. To file, the manufacturer must certify that “the manufacture, use, or sale of the generic will not infringe patents relating to the brand-name drug, or that those patents are invalid.” 21 U.S.C. § 355(j)(2)(A)(vii)(IV). This is a “paragraph IV certification.” *AbbVie Inc.*, 329 F. Supp. 3d at 108. The first applicant to receive Abbreviated Approval from the FDA enjoys “180 days of exclusivity” during which “no other generic can compete with the brand-name drug.” *FTC v. Actavis Inc.*, 570 U.S. 136, 143–44 (2013). This period can be worth “several hundred million dollars.” *Id.* at 144.

98. *See AbbVie*, 976 F.3d at 339–40 (“The Hatch-Waxman Act also has provisions that encourage the quick resolution of patent disputes. A paragraph IV notice ‘automatically counts as patent infringement.’ After receiving this notice, a patentee has 45 days to decide whether to sue.”) (internal citations omitted).

99. *See id.* at 340 (“The automatic, 30-month stay creates tension with the Hatch-Waxman Act’s procompetitive goals. Simply by suing, a patentee can delay the introduction of low-cost generic drugs to market and impede competition in the pharmaceutical industry.”).

100. *Id.* at 338 (“The FTC alleged that Defendants filed sham patent infringement suits against Teva Pharmaceuticals USA, Inc. and Perrigo Company, and that AbbVie, Abbott, and Unimed entered into an anticompetitive reverse-payment agreement with Teva. The FTC accused Defendants of trying to monopolize and restrain trade over AndroGel.”).

101. *FTC v. AbbVie Inc.*, No. CV 14-5151, 2017 WL 4098688 (E.D. Pa., Sept. 15, 2017) (Bartle, J.) and *FTC v. AbbVie Inc.*, 329 F. Supp. 3d at 106 (“Thereafter the court held an approximately three-week nonjury trial on the issues of subjective intent and monopoly power. The court now makes the following findings of fact and conclusions of law.”).

102. *AbbVie Inc.*, 2017 WL 4098688, at *11.

also held that AbbVie intended to interfere with competition and that the financial value of delaying entry motivated its decision to litigate.¹⁰³

The Third Circuit disagreed and held that AbbVie's suit against Teva was not a sham because it was not entirely legally baseless under *PRE*.¹⁰⁴ Judge Hardiman, writing for the court, explained the difficulty of his decision by opining how a plaintiff seeking to prove sham litigation faces an "uphill battle" in the pharmaceutical context because of the incentives presented by the Hatch-Waxman Act.¹⁰⁵ Nonetheless, he concluded, it was possible for a sham suit to exist, but warned that "the defendant's First Amendment right" to petition the government was at stake.¹⁰⁶

The decision to overturn the district court's determination that the Teva suit was objectively baseless was based on *PRE*'s explanation that the existence of probable cause to file a lawsuit, even when the law is decidedly against the underlying plaintiff's position, is an absolute defense. Judge Hardiman explained that, under *PRE*, "the more 'unsettled' the law is, the more reasonable is a belief that a claim will be held valid" under Rule 11.¹⁰⁷ Despite the district court's thorough analysis of the relevant patent law at issue, Judge Hardiman explained that the law was not *so* against AbbVie that its suits violated Federal Rule of Civil Procedure 11.¹⁰⁸ This low floor, he held, gave the case probable cause and precluded a finding of sham litigation.¹⁰⁹

The result of this was that AbbVie's subjective intent about its decision to sue Teva was ignored.¹¹⁰ In contrast, because of a slight factual wrinkle, the Perrigo suit

103. *AbbVie Inc.*, 329 F. Supp. 3d at 126. Judge Bartle concluded that "the only reason for the filing of these lawsuits was to impose expense and delay on Teva and Perrigo so as to block their entry into the TTRT market with lower price generics and to delay defendants' impending loss of hundreds of millions of dollars in AndroGel sales and profits." *Id.*

104. *AbbVie Inc.*, 976 F.3d at 361.

105. *Id.* The uphill battle exists because the submission of an ANDA is, by definition, an infringing act which "could only be objectively baseless if no reasonable person could disagree with the assertions of noninfringement or invalidity in the certification." *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class*, 868 F.3d 132, 149 (3d Cir. 2017).

106. *AbbVie Inc.*, 976 F.3d at 361 ("The automatic, 30-month stay is a collateral injury the defendant's mere use of legal process invariably inflicts. And though the stay ends if a court holds the defendant's patent is invalid or has not been infringed, it does not otherwise depend on a suit's outcome. Thus, a plaintiff may be able to show a defendant was indifferent to the outcome of its infringement suit, and the automatic, 30-month stay was an anticompetitive weapon the defendant tried to wield.").

107. *Id.* at 360 (quoting *PRE*, 508 U.S. 49, 64–65 (probable cause supports a claim if it is "arguably 'warranted by existing law'" (quoting FED. R. CIV. P. 11))).

108. *Id.* at 365. For example, Hardiman explained that one of the FTC's arguments was "*not so strong as to make the suits objectively unreasonable*" and that AbbVie "could reasonably have argued the rule did not apply or should be modified . . . Thus, a reasonable litigant in AbbVie['s] . . . position would *not necessarily see this rule as foreclosing its claim.*" (emphasis added) (first citing *PRE*, 508 U.S. at 65; and then quoting FED. R. CIV. P. 11). This, he decided, was enough to have probable cause and receive petitioning immunity.

109. *Id.*

110. *Id.* at 366 ("Thus, the District Court erred in concluding AbbVie and Besins's suit against Teva was objectively baseless. Accordingly, we will not consider the subjective motivation prong as to Teva.") (citing *PRE*, 508 U.S. at 60–61).

was affirmed under *PRE* as both objectively baseless and subjectively motivated to be anticompetitive.¹¹¹ Because of *PRE* and probable cause, the Teva suit was immunized while otherwise identical conduct, valued at \$448 million, was found to be a sham.¹¹² The Supreme Court has declined to intervene.

D. The Unresolved Doctrinal Disputes

The *AbbVie* decision exemplifies many of the concerns Justice Stevens explored in his *PRE* concurrence. First, Justice Stevens warned Justice Thomas that courts could disagree on what constituted objective baselessness.¹¹³ This disagreement is exactly what led to the Third Circuit's reversal of the district court in *AbbVie*. District Judge Bartle believed that no *reasonable* litigant would expect to have succeeded with *AbbVie*'s facts and the existing law and that, as such, the case was objectively baseless. However, on appeal, Judge Hardiman set the baseline to whether *AbbVie*'s claims *violated* Rule 11.

AbbVie also raises other questions about the *PRE* standard. Was the marginal difference between the legal basis of the Teva suit and the Perrigo suit enough to overcome the strong subjective evidence that *AbbVie* had the same clearly anticompetitive intent when it filed the Teva suit? Also, could the Third Circuit have chosen to consider *AbbVie*'s conduct as a series of petitions instead of two separate lawsuits and analyzed it under the *California Motor* standard? Would doing so have changed the outcome?

The bedrock principle of antitrust petitioning immunity is to protect those who petition the government for legitimate reasons and at the same time prosecute those who seek to use “the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.”¹¹⁴ Unfortunately, this is not the standard courts are using to evaluate allegations of sham litigation.

The *PRE* test immunizes anyone who can draft a lawsuit that beats Rule 11 sanctions and is deemed to have “probable cause.” This standard, thought to be objective by some, is seen by others as nothing more than allowing the subjective whims of a judge to decide what does or does not have “enough” legal merit.¹¹⁵

111. *Id.* at 368 (“Thus, the District Court did not err in concluding *AbbVie* and *Besins*'s suit against *Perrigo* was objectively baseless.”).

112. The District Court dismissed the FTC's claims to the extent they relied on a reverse-payment theory but found Defendants liable for monopolization on the sham-litigation theory. The court ordered Defendants to disgorge \$448 million in ill-gotten profits but denied the FTC's request for an injunction. The Third Circuit reversed the District Court's order for disgorgement of the \$448 million.

113. In his concurrence, Justice Stevens wrote that the facts of *PRE* were obviously not an anticompetitive sham suit and that “the original copyright infringement action was objectively reasonable—and the District Court, the Court of Appeals, and this Court all agree that it was.” *PRE*, 508 U.S. at 69 (Stevens, J., concurring).

114. *Id.* at 61 (emphasis in original) (quoting *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991)).

115. Elhauge, *supra* note 25, at 1232 (“One asks whether the chances of winning were ‘reasonable,’ which can be much the same as asking whether there was ‘probable cause’ to bring the

Courts willing to flex their creative muscles can find a way to articulate some theory under which the antitrust defendant's claim does not violate Rule 11 and is immunized under *PRE*. On the flip side, a court interested in holding the same defendant accountable could state that the law is so flimsy that "no reasonable litigant" should expect success, and therefore the case does not warrant petitioning immunity.¹¹⁶ The *PRE* standard is unclear and, on top of that, focuses on the wrong issue entirely.

This Article provides a solution to courts for how to approach allegations of sham litigation in both easy cases like *PRE* and hard cases like *AbbVie*. My solution keeps both *PRE* and *California Motor* intact, while ensuring that analysis focuses on exposing the underlying intent behind the suit. The proposal drives at the question of whether the litigation was instituted because of a *legitimate* desire for success on the merits or merely as a Trojan Horse to harm competition.

Before proposing my solution to the doctrine of antitrust petitioning immunity in the litigation context, it is essential to introduce the concept of anticompetitive litigation from a different angle. As such, Part II examines anticompetitive litigation from the perspective of economics.

II. THE ECONOMICS OF ANTICOMPETITIVE LITIGATION

Actions that are designed primarily to destroy, harm, or otherwise hinder competition instead of improving efficiency through competition in the marketplace are considered "predatory" or "exclusionary" under our antitrust laws.¹¹⁷ Historically, antitrust literature has focused on predatory pricing, whereby a firm sets its sales price below cost to drive out a weaker firm.¹¹⁸ The standard for determining whether to prosecute predatory pricing was the "profit sacrifice" test, which asked whether the decrease in price was rational or if the litigant was actually motivated by a desire to harm a competitor.¹¹⁹

While many scholars debate the viability of predatory pricing in the real world, non-price predation has taken hold as a popular and viable theory of anticompetitive

suit. This test entails examining the extent of legal and factual support for the party's position . . . [I]t is hard to see what plausible test based on the chances of winning could possibly explain excluding a litigant with a 52.5% success rate, as *California Motor* did. If, in response to these problems, one interprets the reasonable expectation test as referring to something other than the likelihood of success, then the test offers no guidance at all because which expectations are 'reasonable' becomes a completely conclusory judgment.").

116. *PRE*, 508 U.S. at 60.

117. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory.") (citing ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 348–49 (1978)); see also Myers, *supra* note 24, at 579.

118. Myers, *supra* note 24, at 584–86.

119. *Aspen Skiing Co.*, 472 U.S. at 602.

action.¹²⁰ Examples of non-price predation include excessive advertising, excess capacity, tying products, and predatory litigation tactics.

Such predatory litigation tactics should be deterred, but, as I explained in Part I, litigants employing them are too often *rewarded* with petitioning immunity. As such, this Part of the Article discusses the economic logic behind predatory litigation and then proposes a mathematical model for defining the different forms predatory litigation can take.

A. *The Theory of Predatory Litigation*

Litigation designed to impose burdens on an opponent's ability to compete can be considered predatory. Predatory litigation, like other forms of non-price predation, can serve many anticompetitive functions, such as excluding, disciplining, raising costs, and delaying or deterring entry.¹²¹ Any of these improper goals would show that the predator-litigant was not solely motivated by the merits of its suit. But an anticompetitive motive alone is not enough to state an actionable antitrust claim.

A predatory litigant must also meet the elements of the underlying antitrust violation in order to be prosecuted. The most common claim is a violation of section 2 of the Sherman Act¹²² and section 5 of the Federal Trade Commission Act.¹²³ To establish a violation of section 2, the predatory litigant must be shown to also (1) have monopoly power and (2) have willfully maintained that power.¹²⁴

Distinguishing predatory behavior from competition on the merits is not always easy. The fact that predatory litigation does not directly raise prices, for example, makes such suits harder to identify.¹²⁵ Ostensibly, filing a lawsuit against a competitor is permissible under the First Amendment and shows no outward signs of predatory intent.

120. See generally Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

121. Gary Myers, *Antitrust and First Amendment Implications of Professional Real Estate Investors*, 51 WASH. & LEE L. REV. 1199, 1201–02 (1994) (“Predatory litigation can serve several possible anticompetitive functions, including eliminating or disciplining competitors, raising rivals’ costs, and delaying or deterring entry into a market. From an economic standpoint, when a litigant brings suit for one of these reasons (rather than in an effort to prevail in the courtroom), the suit is predatory and threatens competition on the merits.”).

122. 15 U.S.C. § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .”).

123. 15 U.S.C. § 45(a)(1) (“Unfair methods of competition in or affecting commerce . . . are hereby declared unlawful.”).

124. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966) (“The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”).

125. Myers, *supra* note 24, at 596–97.

Those who engage in predatory litigation are always seeking an anticompetitive goal. These goals could include eliminating or disciplining a competitor, raising rivals' costs, or delaying or deterring a rival's entry into the marketplace. These goals are more easily achieved through predatory litigation than other forms of non-price predation. The predator-plaintiff has the benefit of deciding the claims to pursue, drafting the complaint, and choosing the forum in which to file. Furthermore, the defendant then cannot escape the predator-plaintiff's claim unless it can succeed by proving the claim is entirely improper as a matter of law or, only after costly discovery, that there is no genuine dispute of a material fact. These legal barriers make it easier for the predator-plaintiff to institute a predatory claim than for the defendant to escape one.

These inherent complications with our justice system make it more difficult to identify predatory lawsuits than other forms of predation. As such, it is helpful to identify foundational principles that exist in almost all, if not all, instances of predatory litigation.

Predatory litigation will be most successful and prevalent when three market factors are met.¹²⁶ The first market factor is that the party instituting suit be a dominant firm or conspiratorial group such that it has market power.¹²⁷ This factor dovetails nicely into the requirements of a monopolization claim, where the antitrust defendant must be found to have market power. The second factor is that the defendant is "a recent or potential entrant or a competitor."¹²⁸ This market factor drives directly to the types of anticompetitive motives driving the predator. The third factor is that the "effect of the plaintiff's action is to prevent or delay entry or expansion by the defendant, or to cause exit."¹²⁹ In instances where a firm is intent on keeping its market power, exclusionary conduct such as deterring entry would best be imposed on those competitors without strong footholds in the market.

Consider how these market factors exist in several prominent petitioning immunity cases seen in Part I. In *AbbVie*, the patent-holding pharmaceutical company obviously has market power by virtue of its intellectual property monopoly. *AbbVie*'s infringement suits were directed at two new entrants, Teva and Perrigo, and the direct effect of the institution of those suits was to impose a thirty-month delay on their entry. All three market factors are clearly met. Likewise, in *PRE*, Columbia was a patent-holding monopolist. The goal of Columbia's suit was to exclude *PRE* from the video rental market, although that result would only come about through a verdict, unlike the suits in *AbbVie*. This distinction will become more important later in the Article.

These three market factors serve to help identify situations where a lawsuit is more or less likely to be a predatory suit. These criteria alone do not determine

126. See Klein, *supra* note 9, at 14.

127. *Id.*

128. *Id.*

129. *Id.*

whether a claim is predatory. To actually be predatory, litigation must involve either fraud or some external anticompetitive goal that is motivating the predation. To illustrate this concept, I introduce a series of equations, inspired by the works of Gary Myers and Christopher Klein, to explain how an otherwise rational lawsuit can be corrupted by a predatory motive.

B. *A Model of Predatory Litigation*

Competitors are rational actors that always act to maximize profits.¹³⁰ Economists religiously¹³¹ analyze allegedly anticompetitive actions through the lens of rational-choice theory,¹³² such that it has become “a routine and almost unexamined part of every economist’s intellectual tool kit.”¹³³ This assumption and the mathematical tools that come with it have been applied to explain the economic motivations underlying a competitor’s decision to sue.¹³⁴

Law-and-economics scholars, armed with rational-choice theory, have derived the potential forms of predatory litigation.¹³⁵ Within this framework, litigation between competitors can be categorized into one of three categories: Legitimate, Fraudulent, or Strategic.¹³⁶

Presumptively, all litigation is Legitimate. Legitimate litigation is the typical, appropriate lawsuit that is “instituted on the basis of expected direct benefits from nonfraudulent success on the merits.”¹³⁷ It is a proper suit. Fraudulent litigation, in contrast, is “pursued because of benefits due to deception” and is universally rebuked by economists and jurists.¹³⁸ Finally, Strategic litigation is a suit motivated, at least in part, by a collateral goal that is not impacted by the results of the litigation. To best understand these forms of litigation, several equations are helpful.

The first inequality represents a Legitimate, and rational, lawsuit. This is used to represent the “honest nonstrategic plaintiff” who sues only when the expected value of winning in court (x is probability of success multiplied by J , the monetary

130. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 113 (5th ed. 2020) (“[B]usiness firms are (or must be assumed to be) profit maximizers.”).

131. See Leslie, *supra* note 2, at 265 (“As a result of the dominating influence of law and economics scholars, antitrust law now worships at the shrine of rationality. Rationality serves as the foundation for most model building and policy prescriptions within the law and economics school, as evidenced by such concepts as the rational actor theory and rational choice theory.”).

132. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 134 (2005) (“The entire antitrust enterprise is dedicated to the proposition that business firms behave rationally.”).

133. Thomas S. Ulen, *Rational Choice and the Economic Analysis of Law*, 19 L. & SOC. INQUIRY 487, 488 (1994) (reviewing RICHARD H. THALER, QUASI RATIONAL ECONOMICS (1991) and RICHARD H. THALER, THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE (1992)).

134. See Myers, *supra* note 24, at 602.

135. Klein, *supra* note 9, at 17–20.

136. *Id.*

137. *Id.* at 24.

138. See *id.*; Myers, *supra* note 24, at 602.

value of judgment), exceeds the cost of litigation (C) including “attorneys’ fees, court costs, expert witness fees, time spent by employees on the litigation, travel, and other miscellaneous expenses.”¹³⁹

(1) $xJ > C$ Legitimate Suit

For example, a plaintiff who believes she has a 30% chance of winning \$1 million in litigation would only engage in that litigation if the cost was *less* than the expected value of that judgment, or \$300,000. The foundational principle of rationality tells us that not all lawsuits with any chance of success will be litigated.

If the chance of success is too remote, or the cost of litigating too high, the suit is not cost-justified and will not be pursued. This is the scenario Judge Posner had predicted in *Grip-Pak*.¹⁴⁰ In instances like this, where the expected value of success on the merits is outweighed by the costs of litigation, no rational litigant would institute the action. These suits are irrational, despite their merit. This is reflected in the second equation below.

(2) $xJ < C$ Irrational Suit

This inequality represents an instance where an otherwise meritorious lawsuit is not cost-justified, as the expected value of judgment is less than the cost. According to Judge Posner and economic theory, this lawsuit would never be litigated.¹⁴¹ Recall our earlier example, where the expected judgment was \$300,000. Now imagine the costs of litigating were increased to half a million dollars. Filing this lawsuit would no longer be economically rational.

By breaking down the expected value into its two components, it is clear that the suit *could* be cost-justified because the value of winning on the merits is \$1 million, which is clearly above the costs of litigating. It is not worth that value, however, because it is discounted by the odds of success, 30%. Consider alternative sets of variables that could result in a different expected value, holding the litigation costs steady at half a million. For instance, a suit with a 75% chance of success, but only a judgment worth \$550,000 would not be rational. Similarly, a suit with a 1% chance of success would only be rational if the judgment was over \$50 million.

139. Myers, *supra* note 24, at 602.

140. *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982) (“Many claims not wholly groundless would never be sued on for their own sake; the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation. Suppose a monopolist brought a tort action against its single, tiny competitor; the action had a colorable basis in law; but in fact the monopolist would never have brought the suit—its chances of winning, or the damages it could hope to get if it did win, were too small compared to what it would have to spend on the litigation . . .”).

141. *See generally id.*

What about a case with no chance of success on the merits? This is Justice Thomas's *PRE* sham concept. If a suit has no chance of success, x would equal zero and, according to rational-choice theory, it could never be rational.¹⁴² This concept will be discussed further in Part III.

Rational firms will not pursue a lawsuit if it is not cost-justified, no matter how meritorious. So, when a seemingly irrational lawsuit is filed, courts should be wary that it is potentially predatory.

In order to determine whether a Legitimate suit is predatory, courts should examine whether it is Fraudulent or Strategic. This brings us to the third inequality which shows the first, and most obvious, type of predatory litigation.

$$(3) \quad (x+f)J > C \qquad \text{Fraudulent Suit}$$

Here, the introduction of a modifying variable " f " changes the probability of success on the merits. This inequality is otherwise identical to equation (1). This " f " represents any fraudulent attempt by the plaintiff to improperly increase its odds of success in court, whether by deception, deceit, or other means.

Building off of the example discussed above, if a \$1 million lawsuit only had a 30% chance of success and the costs were \$500,000, the suit would not be rational. But, if the plaintiff was willing to defraud the court and manufacture evidence sufficient to raise its chances of winning to 75%, it could make the expected value of the suit \$750,000. Now, the suit is rational—though wholly illegal. Note that this equation also assumes that but for the fraudulent increase in probability, the suit would not be cost-justified.

No one disputes that Fraudulent cases are undeserving of petitioning immunity. Not only that, but sanctions and other penalties should be enforced against such cases. As such, this Article does not focus on Fraudulent suits.

The other type of predatory litigation is the Strategic suit. Judge Posner theorized that, while some suits would seem irrational because they are "too small compared to what it would have to spend on the litigation," they could, in fact, become cost-justified if the monopolist also sought a predatory goal.¹⁴³ Judge Posner wrote that, in this situation, the "plaintiff wants to hurt a competitor not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome."¹⁴⁴ This extrinsic competitive harm is the hallmark of Strategic litigation. I refer to that harm as the collateral anticompetitive benefit.

142. Klein, *supra* note 9, at 20 ("In the notation here, 'baseless' cases are cases with $B = 0$, while the economic definition includes all cases for which $B < L$."); *id.* at 42 ("They involve claims that are 'baseless,' 'frivolous' or otherwise not colorable" and chance of success equals zero.).

143. *Grip-Pak*, 694 F.2d at 472.

144. *Id.*

The collateral anticompetitive benefit can be seen in the fourth equation. This is a modification of inequality (1) and represents Strategic litigation by introducing the collateral anticompetitive benefit as “ A .” Like Judge Posner, this equation assumes that the suit on its own is not cost-justified. By adding a collateral anticompetitive benefit, an irrational suit can become rational.

$$(4) \quad xJ + A > C \qquad \text{Strategic Suit}$$

The most important feature of this equation is that “ A ” is not affected by the probability of success, “ x ,” unlike the fraudulent “ f ” variable in equation (3). Here, “ A ” is an independent—and therefore guaranteed—value conferred to the plaintiff merely for initiating the suit. Judge Posner explains this as “hurt[ing] a competitor not by getting a judgment against him . . . but just by the maintenance of the suit.”¹⁴⁵

In our example of the irrational \$1 million suit with a 30% chance of success and costs of \$500,000, the introduction of a collateral anticompetitive benefit of at least \$200,000 would make this suit rational. If, for example, instituting a lawsuit deterred the defendant-competitor’s entry, the plaintiff-monopolist would extract monopoly profits for a longer period of time, regardless of whether the suit is ultimately meritorious or not.

Interestingly, a Strategic suit could be predatory whether or not it was a “sham” as defined by Justice Thomas in *PRE*, even if x was set to zero. Whether x is zero, one, or any other value, it is possible that the suit was nonetheless Strategic, if the value of A was greater than C .

If a lawsuit’s expected value is less than its cost ($xJ < C$) but the collateral anticompetitive benefit (A) is large enough to make the suit economically viable, the suit should be considered predatory. As I noted in Part I, however, courts routinely immunize Strategic lawsuits, even when their predatory nature is obvious, because of the *PRE* test. As long as “ x ” is greater than zero, the suit *could* be considered to have “probable cause” which is enough for antitrust petitioning immunity.

C. Economics Is Not Enough

In conclusion, Strategic, mixed-motive litigation exists and is predatory under both economic theory and traditional antitrust doctrine. While it is easy to create an economic model to describe anticompetitive litigation, it is not enough to prosecute it. This model and theory cannot answer the questions of whether every instance of Strategic litigation is actionable or how to draw the line between permissible and impermissible cases.

This problem stems from Strategic litigation’s inherent mixed motives to sue a competitor and to obtain a collateral anticompetitive benefit. Suing a competitor is a constitutionally protected action. Imposing a competitive harm on one’s

145. *Id.*

competitor, however, is illegal and goes directly against society's deeply rooted beliefs in a fair and free market. When does one goal supersede the other, and how should courts decide?

In Part III of this Article, I return to the jurisprudence of antitrust petitioning immunity and bridge the gap between the current legal process of identifying anticompetitive suits and the economic theory presented above. Specifically, this Article's focus is on mixed-motive Strategic suits, such as *AbbVie*, that have been hamstrung by the *PRE* probable-cause prerequisite. I analyze how the probable-cause barrier is preventing courts from analyzing Strategic litigation like economists, and I deconstruct these barriers so that, in Part IV, a revised solution can be constructed.

III. BRIDGING THE DOCTRINAL/ECONOMIC GAP

Economists know that Strategic suits are not the same as shams.¹⁴⁶ Strategic litigation, from an economic perspective, exists when a litigant sues a competitor with mixed motives. These motives are (1) to seek success on the merits and (2) to collect a collateral anticompetitive benefit. Of course, the most important question is how to decide which motive is the stronger motivating force when both motives are present. For now, the most important fact is just that both motives simultaneously exist.

Compare a sham suit as defined by *PRE* with a Strategic suit. In a true sham, there should be no motive for success on the merits because the case, by definition, is objectively baseless and lacks probable cause. Without a motive to win on the merits of the lawsuit, the only motives left are anticompetitive.

The issue with *PRE* is that some suits with probable cause can still be Strategic, and therefore predatory. If the lawsuit's expected value is less than its cost ($xJ < C$) but has a collateral anticompetitive benefit (A) large enough to make the suit economically viable, the suit will pass the *PRE* test despite being objectively anticompetitive.

Most courts cannot appreciate this distinction because *PRE*'s probable-cause prerequisite prevents them from wrestling with these issues. This prerequisite not only is irrelevant according to the economic framework of Part II but actually hinders the ability to analyze the nuanced issues of mixed motives. Thankfully, it is not necessary and is, in fact, severable from the doctrine of antitrust petitioning immunity. The next Section of this Article explains why.

A. Deconstructing the Probable-Cause "Requirement"

The *PRE* decision to grant antitrust petitioning immunity on any case with probable cause is the largest imposition courts currently face when deciding whether

146. See Klein, *supra* note 33, at 29 ("The case law frequently defines sham litigation as anticompetitive litigation that is either 'baseless' or fraudulent, whereas economic analysis emphasizes the anticompetitive goals that motivate the use of government processes to attack rivals.").

a lawsuit should be prosecuted under the antitrust laws. Justice Stevens rightly criticized this part of Justice Thomas's decision, saying that "objectively reasonable lawsuits may still break the law."¹⁴⁷ This proposition is correct. As such, now I will show why Justice Thomas's imposition of probable cause is not economically logical, constitutionally mandated, or doctrinally necessary.

1. *Not Economically Logical*

The decision by Justice Thomas to use probable cause as a basis for antitrust petitioning immunity is not economically necessary for analyzing predatory litigation. To the contrary, such a requirement actually detracts from the relevant factors and limits courts' abilities to prosecute anticompetitive cases.

Justice Thomas declared that "[t]he existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation."¹⁴⁸ He used the traditional definition of probable cause: "no more than a 'reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication.'"¹⁴⁹ Justice Thomas chose to equate his conceptualization of probable cause and objective baselessness with Federal Rule of Civil Procedure 11.¹⁵⁰

From an economic perspective, defining a case as objectively baseless or without probable cause is a method of explaining a case's chance of success on the merits. An objectively baseless case has *no* chance of success, whereas a case with some merit—probable cause—has *some* chance of success on the merits.¹⁵¹ Whereas it is legally impossible for an objectively baseless case to succeed, a case filed with probable cause has a chance.

Recalling the equations from Part II, economists represent the probable cause requirement, and therefore objectively baseless suits as defined by *PRE*, by setting "x" equal to zero. This is reflected in equation (5) below.

$$(5) \quad J(0) < C \qquad \qquad \qquad PRE \text{ "Sham" Suit}$$

In this equation, the lack of probable cause creates a situation where no meritorious suit is economically rational. Regardless of the amount of the judgment (*J*), the suit is not cost-justified because there is no chance of success on the merits. The case represented in equation (5) is how the *PRE* test views an objectively

147. *PRE*, 508 U.S. 49, 75 (1993).

148. *Id.* at 62.

149. *Id.* at 62–63 (citing RESTATEMENT (SECOND) OF TORTS § 675 cmt. e (AM. L. INST. 1977)).

150. *Id.* at 65 (citing FED. R. CIV. P. 11) ("Columbia's copyright action was arguably 'warranted by existing law' or at the very least was based on an objectively 'good faith argument for the extension, modification, or reversal of existing law.'").

151. Klein, *supra* note 9, at 42 (discussing how "claims that are 'baseless,' 'frivolous,' or otherwise not colorable" are mathematically represented with a benefit from litigation of zero).

baseless “sham.” Economists consider this standard to be “an unduly restrictive standard that would allow much anticompetitive litigation.”¹⁵²

Recall our example from Part II, where litigation was not cost-justified because the odds of success were too slim to make the expected value greater than the costs.¹⁵³ This suit is not a sham under *PRE*, but once the collateral anticompetitive benefit was introduced, the case became predatory. The only way such a case would be prosecuted under existing law is if the suit has *no chance* of winning (probability equals zero). For courts, the probability of success is determinative, whereas economists focus instead on the entire equation. This is the divergence between courts and economists.¹⁵⁴

It is enough to say, here, that if a case has probable cause, such that $x > 0$, courts following *PRE* will refuse to analyze whether any collateral anticompetitive benefit exists. This is to say, in the language of our equations, that if $x > 0$, the “*A*” variable is disregarded. But as this Section highlights, the probable-cause requirement is logically unnecessary.¹⁵⁵ Why, then, does it exist? The typical response is that the probable-cause test exists out of deference to the First Amendment and the history of the *Noerr-Pennington* doctrine.

2. Not Constitutionally Mandated

Opinions about antitrust petitioning immunity are riddled with invocations of the First Amendment. In *AbbVie*, for example, the court began its analysis of the sham doctrine with the proclamation that “[t]he defendant’s First Amendment right ‘to petition the Government for a redress of grievances’ is at stake.”¹⁵⁶ Since as early as *Noerr*, the Supreme Court has viewed the doctrine of antitrust petitioning immunity as closely related to constitutional issues.¹⁵⁷

It is unclear whether *Noerr* is actually a First Amendment doctrine case or whether it is an interpretation of the Sherman Act that acutely accounts for the First

152. *Id.* at 39.

153. *Supra* notes 140–142 and accompanying text (In our example of the irrational \$1 million suit with a 30% chance of success and costs of \$500,000, the introduction of a collateral anticompetitive benefit of at least \$200,000 would make this suit rational. If, for example, instituting a lawsuit deterred the defendant-competitor’s entry, the plaintiff-monopolist would extract monopoly profits for a longer period of time, regardless of whether the suit is ultimately meritorious or not.)

154. Klein, *supra* note 9, at 42 (explaining how “the major disagreement arises over cases in which the plaintiffs have some chance of winning, but . . . [the] collateral benefits from bringing the suit (regardless of outcome)” are either insignificant alone to motivate the litigation or where “the collateral gains alone could prompt the suit, while the benefits on the merits are positive but less than litigation costs”).

155. Lao, *supra* note 14.

156. *FTC v. AbbVie Inc.*, 976 F.3d 327, 361 (3d Cir. 2020) (quoting U.S. CONST. amend. I).

157. *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136–38 (1961) (warning that imposing an overly aggressive interpretation of the Sherman Act “would raise important constitutional questions”).

Amendment.¹⁵⁸ Courts also wrestle with this question.¹⁵⁹ Whether it is directly derivative of the First Amendment or not, I argue that, as long as *Noerr* immunity does not extend beyond existing First Amendment principles, there can be no argument that the doctrine conflicts with the right to petition such that it could be deemed unconstitutional.

The First Amendment does not protect every lawsuit filed with probable cause. Many have relied on the First Amendment, and a fear of “chilling” the right to petition, as a defense to expanding the scope of antitrust petitioning immunity for litigation.¹⁶⁰ However, in reality, antitrust litigants are offered a uniquely high level of First Amendment protection under Justice Thomas’s *PRE* test.

The existence and prosecution of abuse-of-process claims show that the requirement for probable cause cannot be the constitutional line protecting the right to petition. The Court in *California Motor*, which relied heavily on the First Amendment, did not fear imposing antitrust liability on cases filed with probable cause. In fact, “*California Motor* identified the First Amendment as the principal source of the *Noerr-Pennington* doctrine, . . . extended it still further to the conduct of litigation,” and expressly used it to impose liability on cases filed with probable cause.¹⁶¹

The suits filed in *California Motor* were not objectively baseless or irrational. In fact, the defendants had won over half of their forty cases, leading one scholar to joke that “not only did their litigations have a genuine chance of

158. See, e.g., Myers, *supra* note 121, at 1200 (“Significantly, *California Motor Transport* also expressly held that *Noerr-Pennington* is based both on an interpretation of the Sherman Act and on the Petition Clause of the First Amendment.”); David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL’Y 293, 300 (1994) (“The Court is clear that it does not want to encroach on the First Amendment rights identified in *Noerr* But the Court has not used First Amendment principles in defining the scope of the doctrine.”); Roche, *supra* note 28; Calkins, *supra* note 26, at 346 n.96 (“As some have expressed it, *Noerr* is a statutory doctrine with a constitutional ‘core.’”); David L. Meyer, *A Standard for Tailoring Noerr-Pennington Immunity More Closely to the First Amendment Mandate*, 95 YALE L.J. 832, 832 (1986) (“The Supreme Court has repeatedly held this basic policy to be of *near-constitutional importance*.” (emphasis added) (first citing *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); and then citing *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359–60 (1933))).

159. See, e.g., *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 n.5 (9th Cir. 2006) (“*Noerr-Pennington* is a specific application of the rule of statutory construction known as the canon of constitutional avoidance, which requires a statute to be construed so as to avoid serious doubts as to the constitutionality of an alternate construction.”).

160. *FTC v. AbbVie Inc.*, 976 F.3d 327, 361 (3d Cir. 2020) (quoting U.S. CONST. amend. I), *cert. denied*.

161. *Premier Elec. Constr. Co. v. Nat’l Elec. Contractors Ass’n, Inc.*, 814 F.2d 358, 371 (7th Cir. 1987) (first citing Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 94–104 (1977); and then citing James D. Hurwitz & Debra Simmons Neveu, *The Noerr Doctrine: Its Significance and Current Interpretation*, in *THE POLITICAL ECONOMY OF REGULATION: PRIVATE INTERESTS IN THE REGULATORY PROCESS* 33, 47–50 (F.T.C. 1984)).

success . . . they were batting over .500!”¹⁶² Legal merit did not cloak these litigants in constitutional immunity.

In *California Motor*, the Supreme Court based its decision to not immunize the anticompetitive suits on the principle that First Amendment rights cannot be immunized from scrutiny when they are used as the means to violate a statute.¹⁶³ It said that while litigants “have the right of access to the . . . courts to be heard . . . that does not necessarily give them immunity from the antitrust laws.”¹⁶⁴ The Court went on to say that “it is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.”¹⁶⁵ The Court concluded that “[i]f the end result is unlawful, it matters not that the means used in violation may be lawful.”¹⁶⁶

Years later, Judge Posner interpreted *California Motor*’s analysis to support the theory that probable cause was not a constitutionally mandated baseline for immunizing litigation from scrutiny.¹⁶⁷ In *Grip-Pak*, Judge Posner preemptively resolved the issue of whether probable cause was a constitutional requirement and stated that

If all nonmalicious litigation were immunized from government regulation by the First Amendment, the tort of abuse of process would be unconstitutional—something that, so far as we know, no one believes. *The difference between abuse of process and malicious prosecution is that the former does not require proving that the lawsuit was brought without probable cause* If abuse of process is not constitutionally protected, no more should litigation that has an improper anticompetitive purpose be protected, even though the plaintiff has a colorable claim.¹⁶⁸

This position has been echoed by scholars as well.¹⁶⁹ In short, there is no constitutional demand for blanketly immunizing all suits with probable cause. As

162. Elhauge, *supra* note 25, at 1190.

163. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972).

164. *Id.* at 513–14.

165. *Id.* at 514 (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)) (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.”).

166. *Id.* at 515.

167. *Grip-Pak, Inc. v. Ill. Tool Works, Inc.*, 694 F.2d 466, 471 (7th Cir. 1982) (“It takes a rather free-wheeling imagination to extrapolate from the *California Motor Transport* opinion a principle that if applied across the board would, as we have suggested, make the tort of abuse of process invalid under the First Amendment; and we decline to do so—noting, also, that the Court used the language of abuse of process to describe the kind of litigation activity that the First Amendment does not protect.”(comparing *Cal. Motor*, 404 U.S. at 513, with *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 228 (7th Cir. 1975))).

168. *Id.* (emphasis added).

169. See Lao, *supra* note 14, at 1012 (“[T]he First Amendment right of petition does *not* require the constitutional protection of all lawsuits except those lacking probable cause If abuse of process is actionable even for underlying suits that had probable cause, and no one has ever suggested that the

such, any decision to use probable cause as a gatekeeper to protect anticompetitive litigation from scrutiny must be part of “a separate question whether, as a matter of antitrust principle, the Sherman Act should be interpreted to forbid using litigation to suppress competition.”¹⁷⁰ As the next Subsection explains, this is not correct either.

3. Not Doctrinally Necessary

Justice Thomas made the intentional choice in *PRE* to declare probable cause a requirement for antitrust petitioning immunity. He correctly surmised that, from the beginning of the doctrine, antitrust petitioning immunity demanded an “unprotected activity lack objective reasonableness.”¹⁷¹ His misstep, however, was holding that the objective inquiry was into the *legal* reasonableness of the case.

In *California Motor*, the conduct that did not deserve antitrust immunity was described as a series of “proceedings and actions . . . *with or without probable cause, and regardless of the merits of the cases.*”¹⁷² Probable cause was not the deciding factor, but Justice Thomas ignored this distinction. In fact, both Justice Thomas and the Ninth Circuit cited this exact phrase from *California Motor* but withheld critical information.

In Justice Thomas’s recitation of the Ninth Circuit’s summary judgment decision, he quoted the lower court’s explanation of sham litigation as either an abuse of the judicial process, a misrepresentation in the adjudicatory process, or the pursuit of a pattern of baseless, repetitive claims instituted “*without probable cause, and regardless of the merits.*”¹⁷³ The Ninth Circuit’s omission of the words “with or” is material.

The Court in *California Motor* expressly held that cases brought *with* probable cause could be shams, but the Ninth Circuit’s interpretation ignored that distinction. The Ninth Circuit went so far as to state that “the existence of probable cause ‘preclude[d] the application of the sham exception as a matter of law’ because ‘a suit brought with probable cause does not fall within the sham exception to the *Noerr-Pennington* doctrine.’”¹⁷⁴ The Ninth Circuit concluded that it saw “no basis for holding that a suit brought with probable cause in fact and law may be a sham” and said that such a holding would “erode the first amendment right to petition that is the basis for the *Noerr-Pennington* doctrine.”¹⁷⁵ Justice Thomas then repeated this logic.

tort is unconstitutional, it necessarily follows that the right of petition does *not* constitutionally mandate protection of all litigation except those without probable cause.”).

170. *Grip-Pak*, 694 F.2d at 471–72.

171. *PRE*, 508 U.S. 49, 57 (1993).

172. *Cal. Motor*, 404 U.S. at 512 (emphasis added).

173. *PRE*, 508 U.S. at 54 (emphasis added) (quoting *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 944 F.2d 1525, 1530 (9th Cir. 1991) (quoting *Cal. Motor*, 404 U.S. at 513)).

174. *Id.* (quoting *PRE*, 944 F.2d at 1531–32).

175. *PRE*, 944 F.2d at 1531.

Justice Thomas interpreted *California Motor* as signifying that “the institution of legal proceedings ‘without probable cause’ will give rise to a sham if such activity effectively ‘bar[s] . . . competitors from meaningful access to adjudicatory tribunals and so . . . usurp[s] th[e] decision-making process.’”¹⁷⁶ This interpretation, coupled with his conclusion that *California Motor* required an “indispensable objective component,” resulted in the probable-cause requirement.¹⁷⁷ Justice Thomas believed that the *legal* objectivity of a case was the objective component, whereas a reading of the plain language of *California Motor* clearly shows that its holding was not based on legal merit.

The Court in *California Motor* looked for a set of facts that would lead “the factfinder to conclude that the administrative and judicial processes have been abused.”¹⁷⁸ The Court admitted that it would “be a difficult line to discern and draw” but that once it was drawn—and it could be shown “that abuse of those processes produced an illegal result”—a sham would be identified.¹⁷⁹ This was its objective inquiry—not legal merit.

The question still remains: how and why did Justice Thomas agree with the Ninth Circuit to adopt its standard instead of using this opportunity to advance the doctrine? At least two answers exist. First, as mentioned in Part I, the facts of *PRE* were not conducive to creating a robust predatory-litigation test. Justice Stevens pointed out in his concurrence that the case was “easy” and under *any* version of the existing sham tests, *PRE* would never be considered a sham.¹⁸⁰ There were no allegations of fraud or a collateral anticompetitive benefit. It is debatable whether, under the economic framework, the case is predatory at all. As such, Justice Thomas would have had to use hypothetical anticompetitive injuries, instead of *PRE*’s facts, to construct a robust predatory-litigation test.

The second possible reason that Justice Thomas was so easily swayed by the Ninth Circuit was that *PRE* committed a tactical error during the litigation. In its brief to the Supreme Court, *PRE* argued for a sham standard whereby the court had to subjectively determine whether the allegedly predatory plaintiff was indifferent to the outcome of the litigation.¹⁸¹ No justice was interested in relying on subjective evidence of the motivations of the case.¹⁸² So, at oral argument, *PRE* chose a new theory. During questioning, petitioner’s counsel was asked about its theory of genuine motivation and compared it to an ulterior motive.¹⁸³ He responded that, upon reflection after filing the brief, “a more workable standard for the Court

176. *PRE*, 508 U.S. at 58 (quoting *Cal. Motor*, 404 U.S. at 512) (emphasis added).

177. *Id.*

178. *Cal. Motor*, 404 U.S. at 513.

179. *Id.*

180. *See PRE*, 508 U.S. at 76 (Stevens, J., concurring).

181. *Id.* at 56 (majority opinion).

182. *See id.* at 76 (Stevens, J., concurring).

183. Transcript of Oral Argument at 10, *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) (No. 91-1043), 1992 WL 687879, at *10.

[would be] to examine [shams] on a but-for basis.”¹⁸⁴ This standard, almost identical to that of *Grip-Pak*, was dismissed by Justice Thomas off-hand in the opinion but cited extensively by Justice Stevens.¹⁸⁵ Had the issue been briefed properly, or had the facts been conducive to such a theory, would the outcome have been different?

In conclusion, the probable-cause standard is not economically necessary to identifying predatory litigation and actually inhibits a court’s ability to identify Strategic lawsuits. It is not constitutionally mandated, as the continued existence of the tort of abuse of process shows. And it was not doctrinally predetermined. *PRE* was a poor test case for determining the legal contours of predatory litigation.

While the probable-cause requirement is economically, constitutionally, and doctrinally unnecessary, it serves as a serviceable test for “baseless” lawsuits that *seek* to harm competition. It creates a test for one form of a predatory lawsuit, but not for all of them. So, as courts have done ever since *PRE* was decided, they can distinguish their cases based on the facts. Under my proposal, *PRE* is limited to the analysis of the types of cases identified in equation (5), *supra*. For other types of predatory suits, however, probable cause cannot be a restriction.

* * * * *

Having deconstructed the probable-cause requirement and shown why a revision of the predatory-litigation law can survive without it, we may now analyze the second distinction between the law and economics of antitrust petitioning immunity. This issue is intent.

PRE “reject[ed] a purely subjective definition of ‘sham.’”¹⁸⁶ In fact, both Justices Thomas and Stevens support the proposition that evidence of predatory litigation should be objective, not subjective.¹⁸⁷ As a result, Justice Thomas relegated any analysis of subjective intent to the second step of the *PRE* sham standard.¹⁸⁸ Courts still use subjective evidence of predatory intent to decide whether a case fits the *PRE* definition of sham.¹⁸⁹ As I describe next, use of subjective evidence is not

184. *Id.* (Petitioner: “On reflecting further on it, what may be a more workable standard for the Court is to examine it on a but-for basis; namely, if the case would not have been brought but for the predatory motive separating out the legitimate petitioning motive from the predatory motive, if it were not brought but for the predatory motive, that case would never have been brought at all legitimately.”).

185. *PRE*, 508 U.S. at 56.

186. *Id.* at 60.

187. *Compare id.* at 57 (“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 litigant. We now answer this question in the negative and hold that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.”), *with id.* at 75–76 (Stevens, J., concurring) (“In sum, in this case I agree with the Court’s explanation of why respondents’ copyright infringement action was not ‘objectively baseless,’ and why allegations of improper subjective motivation do not make such a lawsuit a ‘sham.’”).

188. *Id.* at 60 (“Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation.”).

189. *See, e.g.*, *FTC v. AbbVie Inc.*, 976 F.3d 327, 370 (3d Cir. 2020), (citations omitted) (“[C]onsider the following syllogism: (1) A lawsuit is objectively baseless if ‘no reasonable litigant could realistically expect success on the merits[;]’ (2) and a litigant who files an objectively baseless lawsuit must have had some subjective motivation for suing; (3) but because the lawsuit was objectively

the economically sound way to identify predatory litigation, as some courts have already suggested.¹⁹⁰ Instead, courts should use objective evidence under the theory of specific intent.

B. Addressing Anticompetitive Intent

Obtaining evidence of anticompetitive intent is one of the hardest issues facing courts surrounding antitrust petitioning immunity.¹⁹¹ The difficulty lies in the “evidentiary problems of disentangling real from professed motives.”¹⁹² This fear is what has driven the doctrine towards proxies like probable cause or the number of suits filed.¹⁹³ Such proxies avoid the two important questions: first, what kind of evidence should be used to support a claim of anticompetitive intent, and second, what intent is actually the predatory one?

1. Specific Versus Subjective Intent

It is possible to use objective evidence to establish predatory intent. Judge Posner did not believe that “the difficulty of distinguishing lawful from unlawful purpose in litigation between competitors is so acute that such litigation can never be considered an actionable restraint of trade, provided it has some, though perhaps only threadbare, basis in law.”¹⁹⁴ Most importantly, he declared that “[t]he difficulty of determining the true purpose [of a lawsuit] is great but no more so than in many other areas of antitrust law.”¹⁹⁵ Existing antitrust doctrine provides the solution.

baseless, the litigant’s subjective motivation could not have been success on the merits, unless the litigant was unreasonable; (4) thus, a reasonable litigant’s subjective motivation for filing an objectively baseless lawsuit must be something besides success on the merits.”), *cert. denied*.

190. *See id.* at 361 (“[T]he number of lawsuits a brand-name drug manufacturer files will sometimes reveal little about its subjective motivation for suing, because the Hatch-Waxman Act ‘incentivizes [brands] to promptly file patent infringement suits by rewarding them with a stay of up to 30 months if they do so.’” (quoting *In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class*, 868 F.3d 132, 132 (3d Cir. 2016))).

191. *See, e.g.,* Hurwitz, *supra* note 3, at 98 (“Courts and commentators generally agree that proof of improper intent, as described in *MCI*, is required to overcome the presumption of good faith petitioning and demonstrate a sham. Nonetheless, there is no consensus on how antitrust plaintiffs may, or must, demonstrate that intent.”).

192. *See* *Grip-Pak, Inc. v. Ill. Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982).

193. *Id.* (citing Fischel, *supra* note 161, at 109–10) (“Concern with the evidentiary problems may explain why some courts hold that a single lawsuit cannot provide a basis for an antitrust claim . . .”).

194. *Id.* Judge Posner’s logic was that the difficulty inherent in determining a litigant’s true intent for filing a lawsuit was not worth diluting the doctrine. He was “not prepared to rule that the difficulty of distinguishing lawful from unlawful purpose in litigation between competitors is so acute that such litigation can never be considered an actionable restraint of trade, provided it has some, though perhaps only threadbare, basis in law.” *Id.* He explained the problem as being “harder than distinguishing lawful from unlawful purpose in abuse of process cases, though even there subtle distinctions abound—for example, the distinction between suing to get damages and suing to induce the defendant to discontinue the activity challenged in the suit by putting him to the expense of litigation.” *Id.*

195. *Id.*

Instead of combing through records to find evidence of the individual actors' actual anticompetitive intent, antitrust cases often rely on evidence of "specific intent to monopolize, in the sense that the overwhelming—perhaps the sole—purpose of the defendant's conduct is to reduce competition."¹⁹⁶ To be found with a specific anticompetitive intent, the defendant would need to have "intended to harm competition."¹⁹⁷

Specific intent is not synonymous with subjective intent.¹⁹⁸ Subjective intent requires a production of "evidence that directly reveals the *particular* defendant's state of mind."¹⁹⁹ In contrast, specific-intent analysis is "conducted on the basis of objective evidence, respecting the necessary consequences of actions. Rather than asking for direct evidence of what the defendant had in mind, the objective approach asks what can be inferred as a state of mind reasonably attributable to defendant in light of his conduct."²⁰⁰ Antitrust jurists believe that this is true because of the foundational principle of rationality.²⁰¹ Intent can, therefore, be inferred from a monopolist's actions.

Specific intent is especially favored in Sherman Act section 2 predation cases.²⁰² This approach allows courts to infer intent "on the basis of the evidence indicating the absence of credible [procompetitive] . . . justifications for the monopolist's conduct."²⁰³ The Supreme Court chose to adhere to specific intent in *Aspen Skiing*, for example, because Justice Stevens, writing for the majority, believed that "no monopolist monopolizes unconscious of what he is doing"²⁰⁴ and that anticompetitive exclusion is "always deliberately intended."²⁰⁵

Consider how, using a specific-intent standard, a predator-plaintiff's intent could be expressed objectively as the expected value of the suit and the guaranteed value of the collateral anticompetitive benefit. This would provide evidence of whether the suit was motivated by a predatory purpose without relying on subjective

196. Ronald A. Cass & Keith N. Hylton, *Antitrust Intent* 3 (Bos. Univ. Sch. of Law Working Paper Series, Law & Legal Theory, Working Paper No. 00-02, 2000), <https://ssrn.com/abstract=239324> [<https://perma.cc/XK95-R32P>] (citing *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945)).

197. *Id.* at 7.

198. See Hurwitz, *supra* note 3, at 99 ("Subjective intent standards also raise concerns. As Professor Areeda has observed, the problems of proof are substantial. These difficulties are compounded where a party acts from several motives or where a corporate decision to litigate reflects the views of committee members who have differing perspectives, opinions, and goals. In addition, litigation is not often amenable to ex post strategic or cost-benefit analyses to disclose the suit's generating influences.").

199. Cass & Hylton, *supra* note 196, at 4.

200. *Id.*

201. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1984) (quoting *Aluminum Co.*, 148 F.2d at 432).

202. *Id.*

203. Cass & Hylton, *supra* note 196, at 22.

204. *Aspen Skiing Co.*, 472 U.S. at 602 (quoting *Aluminum Co.*, 148 F.2d at 432).

205. *Id.* (quoting ROBERT BORK, *THE ANTITRUST PARADOX* 160 (1st ed. 1978)).

evidence of intent, which is “too easy to hide—and allege.”²⁰⁶ For this reason, and others, the use of specific-intent evidence is preferred to subjective-intent evidence.²⁰⁷

Having identified an objective source of evidence to build a case of predatory intent, it is time to identify and distinguish the multiple anticompetitive intents at issue in claims of predatory litigation. Two anticompetitive intents are at issue, but only one is predatory.

2. *Distinguishing Acceptably Anticompetitive and Predatory Intents*

In predatory litigation, multiple intents are at play.²⁰⁸ First, there is the obvious: when a plaintiff-competitor files a lawsuit against a competitor, it (should) hope to win the suit in court.²⁰⁹ I will refer to this as the “outcome” intent.

All outcome intents are immunized under *Noerr-Pennington*. That is why the doctrine exists. No matter what the plaintiff hopes to accomplish through its verdict from the courts, *Noerr-Pennington* protects the result. A litigant suing a competitor to win and maintain a monopoly, or obtain one through defeating a foe in court, has an inherent anticompetitive motivation. This is an anticompetitive “outcome” intent, and no matter how strong, vicious, or malicious the intent, it is immunized. This point is echoed by Judge Posner in *Grip-Pak*: “[L]itigation is [not] actionable under the antitrust laws merely because the plaintiff is trying to get a monopoly. He is entitled to pursue such a goal through lawful means, including litigation against competitors.”²¹⁰ This is not the only intent to monopolize that is present, however.

There is a second anticompetitive intent that the *Noerr-Pennington* doctrine should *not* immunize: the intent to harm the competitor through invoking the litigation process. While pursuing a monopoly is permissible, “[t]he line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself—regardless of outcome—of litigating.”²¹¹ This anticompetitive externality is the “abuse of process” intent.

206. Elhaage, *supra* note 25, at 1232; *see also* Cass & Hylton, *supra* note 196, at 21 (“Where there is a real intent to do something illegal, well-advised firms are unlikely to provide much in the way of helpful evidence If antitrust plaintiffs were required to prove subjective intent through reference to statements that provided clear intent of it, it would be the extraordinary case where any firm would retain ‘smoking gun’ memoranda in their files.”).

207. *See* Daniel J. Gifford, *The Role of the Ninth Circuit in the Development of the Law of Attempt to Monopolize*, 61 NOTRE DAME L. REV. 1021, 1021–23 (1986) (specific-intent evidence resolves ambiguities surrounding defendant’s conduct); *see also* Cass & Hylton, *supra* note 196, at 22 (noting that the Supreme Court “seems to have read [section 2 of the Sherman Act] as imposing a specific-intent requirement”).

208. *See* Elhaage, *supra* note 25, at 1231 (“The most strategic of litigants genuinely hope they win, even if the odds may not look good, and the most nonstrategic of litigants usually dislike their opponents enough to take some pleasure in inflicting litigation costs on them.”).

209. This motive, presumably, exists whether or not there is probable cause—because even a case that some would say lacks probable cause could win, and winning never hurts. Setting aside this particular idiosyncrasy, the motivation to win is ever present.

210. *Grip-Pak, Inc. v. Ill. Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982).

211. *Id.*

Abuse-of-process intents should not be immunized because they are not based on the disinterested, neutral decision of a third party like the court.²¹² When the intent to injure arises from the “*process*—as opposed to the *outcome*,” *Noerr-Pennington* should not provide protection.²¹³

In addition to understanding the difference between an anticompetitive intent based on the competitive harms from the *outcome* of a suit versus an intent to use the *process* to harm competition, it is helpful to distinguish the potential injuries these intents seek to inflict. Courts, however, routinely ignore this distinction. Whereas injuries from the court’s decision on the merits are immunized, injuries arising from the institution of the suit that are not outcome dependent are not immunized.²¹⁴

Justice Stevens wrote that the “distinction between abusing the judicial *process* to restrain competition and prosecuting a lawsuit that, *if successful*, will restrain competition must guide any court’s decision whether a particular filing, or series of filings, is a sham.”²¹⁵ An injury that arises from the resolution of the lawsuit is protected under *Noerr-Pennington*, even if the suit was motivated by anticompetitive intent. On the other hand, a collateral injury that arises from the mere imposition or maintenance of the suit may result in an antitrust case.

In *Premier Electric*, Judge Easterbrook explained that to properly honor *Noerr*’s sham exception “it is important to identify the source of the injury to competition.”²¹⁶ He eloquently summarized the distinction between outcome and abuse of process intents as follows:

If the [competitive] injury is caused by persuading the government, then the antitrust laws do not apply to the . . . [resulting] persuasion If the injury flows directly from the “petitioning”—if the injury occurs no matter how the government responds to the request for aid—then we have an antitrust case.²¹⁷

When a competitor files a lawsuit, and that action triggers a simultaneous injury to a competitor, the court must be able to articulate and separate the injuries. Use of the judicial process to harass or deter competitors is when immunity should not apply. This concept, coupled with the differences between process and outcome intent, provides the necessary framework to understand the necessary goals for curtailing for predatory litigation.

The guiding definition of a sham is “the use of ‘the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.”²¹⁸ While many courts have quoted this phrase in their opinions, it is almost never used as it

212. See generally Elhauge, *supra* note 25.

213. *Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991).

214. Elhauge, *supra* note 25, at 1228 (“The answer is that the injury results no matter what the government official *decides*.”).

215. *PRE*, 508 U.S. 49, 68 (1993) (Stevens, J., concurring) (emphasis added).

216. *Premier Elec. Const. Co. v. Nat’l Elec. Contractors Ass’n, Inc.*, 814 F.2d 358, 376 (7th Cir. 1987).

217. *Id.*

218. *PRE*, 508 U.S. at 68 (Stevens, J., concurring) (quoting *Omni*, 499 U.S. at 380).

should be: to guide the analysis. As such, in Part IV, I use this principle along with the theory of specific intent to derive a practical and appropriate standard for prosecuting predatory litigation.

IV. PROPOSAL: PROSECUTING PREDATORY, MIXED-MOTIVE SUITS

This Article was inspired by a desire to correct the mistakes Justice Stevens identified in *PRE*. He saw *PRE* as an “easy case” that was being used “as a vehicle for announcing a rule that may govern the decision of difficult cases, some of which may involve abuse of the judicial process.”²¹⁹ Now, having explored some difficult cases improperly immunized by *PRE*’s probable-cause prerequisite, exposed the underlying logical missteps of its analysis, and spent considerable time properly laying the economic foundations and appropriate evidentiary analysis of predatory litigation, we may now move forward. I have established that an abuse-of-process theory of prosecuting predatory suits is constitutionally permissible, economically logical, and not doctrinally foreclosed, but this does not settle the practical question of how courts should evaluate such mixed-motive cases.

The First Amendment protects litigants seeking redress from the judiciary, and *Noerr-Pennington* bestows petitioning immunity to them even if the results they seek are anticompetitively motivated. This second, distinct, and improper anticompetitive goal can simultaneously exist within that same conduct. When a plaintiff’s engagement of the legal process strategically imposes collateral anticompetitive harm on a competitor that benefits the plaintiff regardless of the outcome of the suit, how should courts address that externality?

Below, Table 1 outlines the differences between the *PRE* test (top-left half of boxes) with the economics of predatory litigation (lower-right half). See how these differing tests only lead to one situation where the outcome is different.

219. *Id.* at 76.

		Legal Basis: Probable Cause	
		<i>No</i>	<i>Yes</i>
Collateral Anticompetitive Benefit	<i>No</i>	<p><u>PRE immunity</u></p> <p><i>Not Predatory</i></p>	<p><u>PRE immunity</u></p> <p><i>Not Predatory</i></p>
	<i>Yes</i>	<p><u>PRE “sham”</u></p> <p><i>Definitely Predatory</i></p>	<p><u>PRE immunity</u></p> <p><i>Possibly Predatory</i></p>

Table 1: Identifying Predatory Litigation

In the fourth quadrant (lower-right box) lies the world of mixed motives. These cases, defined as one where “the process of petitioning is used both in hopes of obtaining governmental action and in order to impose expense and delay on competitors,” are where the courts and economists diverge.²²⁰ Under *PRE*, mixed motives do not impact sham analysis. If the suit has any legal merit (i.e., probable cause) the collateral anticompetitive benefits are ignored out of deference to the First Amendment. As this Article has shown, this approach is unnecessary, imprecise, and ignores the fundamental issue.

The solution is not as easy as flipping the script. One cannot expect the mere existence of a collateral anticompetitive benefit to automatically destroy any chance of antitrust petitioning immunity, either. As Professor Elhauge explains:

If a genuine hope of winning sufficed to receive immunity, then abuses of process would effectively go undeterred, and predatory litigation would flourish. If, on the other hand, a purpose of harassing opponents sufficed to lose immunity, then firms would fear to bring even meritorious litigation against their competitors. The mere existence of either motive should thus not suffice to establish immunity or non-immunity. *Some weighing of the motives must be made.*²²¹

220. Elhauge, *supra* note 25, at 1192.

221. *Id.* at 1231 (emphasis added).

I agree. But before reaching this critical balancing test, I will address several screening techniques that courts should utilize to decrease the chances of improperly stripping a litigant of its petitioning immunity when the time to balance motives arises.

This Article proposes a robust inquiry into whether litigation is used as an anticompetitive weapon that is mindful of protections for those who petition the government. The primary tension that my proposal resolves is the minimization of false positives (genuine lawsuits that are mistakenly prosecuted as predatory) while not categorically protecting false negatives (predatory suits that receive petitioning immunity) like the *PRE* test.

To achieve this goal, I propose a three-step process. First, the case would need to be evaluated through an “antitrust screen” that would eliminate allegations of predatory litigation that are not, in fact, antitrust claims. Second, if the case successfully passed the “antitrust screen,” the case would then have to pass through the second screen that seeks to eliminate *close* instances of false positives. Third, if the case survives the two screens, then the case loses *Noerr* petitioning immunity and is analyzed under the typical predation test from antitrust law. Now, I break down each component of this test.

A. The Antitrust Screen

In Part II, I discussed several market factors that would allow courts to discern whether a predatory suit was possible from an antitrust standpoint.²²² These factors are (1) market power, (2) existence of a competitive or potentially competitive relationship between plaintiff and defendant, and (3) some collateral anticompetitive benefit stemming from the litigation. The existence of these three factors establish that the case is properly filed as an antitrust claim. Most interestingly, *PRE* would fail this test because there was no evidence of any collateral anticompetitive benefit.

B. The Specific-Intent Screen

After determining these market factors exist, it is time to begin critically analyzing the intents and injuries stemming from the allegedly anticompetitive litigation. Recall the analysis of the multiple anticompetitive motives and injuries from Part III of this Article. There, I laid out that a predatory lawsuit could have two different motives and sources of anticompetitive injury. The difference was whether the intent to harm competition or the resulting injury arose from the outcome or the process. First, I will discuss the injury.

If an allegedly predatory lawsuit does not have a collateral anticompetitive injury, it can never be the subject of a section 2 violation. If the only anticompetitive injury arising from an allegedly predatory case is from the *relief* sought by the

222. See generally *supra* Part II.

underlying plaintiff, then this is not an instance of mixed motives and there is no attempt to inflict injury through the litigation *process*. Such a case must be immunized under *Noerr-Pennington*.

In contrast, if the antitrust plaintiff can articulate a cognizable antitrust injury stemming from the litigation *process*, as opposed to the *outcome*, then a predatory case can exist. To establish whether a litigant possessed an anticompetitive intent to inflict that process injury, I recommend using specific-intent analysis, instead of subjective intent.

Then, the question arises, how much evidence is necessary? Past proposals have included examinations of whether one motive or the other was “significant”²²³ and a proposal that the collateral anticompetitive benefit be both a “necessary and sufficient objective motivation for the allegedly strategic litigation.”²²⁴

Of these proposals, the combination of necessary and sufficient conditions appears not only to be the most robust but also the one that most closely resembles the underlying antitrust principles in play and the abuse-of-process foundation of the legal test at issue. This test, proposed by Professor Elhauge, requires “the antitrust plaintiff alleging strategic litigation” to show “(1) that the antitrust defendant would not have brought the original suit but for the direct injury imposed on his competitor, and (2) that the defendant would have brought suit even without any prospect of winning in order to inflict the direct costs or delays on his competitor.”²²⁵ From an economic equation standpoint, Elhauge’s test would look like equation 6 below.

$$(6) \quad Jx < C < A \qquad \text{Prosecutable Predatory Litigation}$$

The expected judgment of the litigation itself, as opposed to the costs of litigation, makes the suit irrational. At the same time, the collateral anticompetitive benefit, itself, is more valuable than the cost of litigating. The predator needed the collateral anticompetitive benefit to make the suit rational and the value of that benefit alone was worth initiating the suit.

The sufficient condition, that the collateral anticompetitive benefit to the predatory litigant exceed the cost of litigating, is out of deference to the abuse of process “primary” motive doctrine.²²⁶ The necessary condition, that the expected value of the suit be less than the cost of litigating, follows the profit sacrifice model used in antitrust for predatory action in section 2 cases and Judge Posner’s *Grip-Pak* opinion. Under this test, “the monopolist’s conduct must be irrational but

223. See Elhauge, *supra* note 25, at 1232 (citing *Coastal States Mktg. Inc., v. Hunt*, 694 F.2d 1358, 1372 (5th Cir. 1983)).

224. *Id.* at 1234.

225. *Id.*

226. See generally, RESTATEMENT (SECOND) OF TORTS § 682 (AM. L. INST. 1965).

for its anticompetitive effect.”²²⁷ This is precisely what Judge Posner articulated in *Grip-Pak*, Justice Stevens suggested in *PRE*, and economists have concluded is the proper test for predatory behavior in the antitrust realm, as described in Part III.

But, unlike Professor Elhauge’s proposal, I do not recommend requiring that both the necessary and sufficient conditions be met to lose *Noerr-Pennington* petitioning immunity. This is because, unlike *PRE* “sham” litigation, Strategic litigation under this test should not be treated as per se anticompetitive. Strategic litigation should only become predatory under the antitrust laws after a thorough analysis of whether the profit sacrifice test was met. Instead, I argue that the sufficient condition, whether the case would have been filed even with no chance of success, should be the threshold question that determines whether immunity should exist. If that can be established, then the necessary condition, the profit sacrifice test, should be analyzed traditionally.

C. Predatory Behavior, Profit Sacrifice Analysis

To review, to plead a proper case of predatory litigation, the plaintiff must first pass the “antitrust screen.” This requires establishing “(1) ‘evidence of market structure’ (i.e., market power and relevant markets . . .) and (2) ‘exclusionary effect’ (i.e., foreclosure of a competitor from a market . . .)—both of which can ordinarily be obtained without access to the defendant’s own records—[and] indicate that an antitrust violation is plausible.”²²⁸ These factors, plus evidence that the plaintiff and defendant are competitors, are the first-level antitrust screens.

Then, to overcome the presumption of antitrust petitioning immunity, the antitrust plaintiff would have to plausibly allege that “the defendant would have brought suit even without any prospect of winning in order to inflict the direct [anticompetitive harm] on his competitor.”²²⁹ This is the sufficient condition proposed by Professor Elhauge.

At this point, the antitrust plaintiff has shown that the monopolist defendant had market power, that the defendant was a competitor of the plaintiff, that the litigation process caused the plaintiff anticompetitive harm, and that the benefit to the monopolist of that harm was large enough to be worth filing this lawsuit, even if there was no chance of winning. Accordingly, the potentially predatory suit should not be immunized under *Noerr-Pennington* and should be evaluated in a manner similar to other forms of allegedly predatory conduct under section 2.

The goal would be to determine whether the *primary* motive was to harm competition through the litigation process, not the outcome. This would be governed by specific evidence of anticompetitive intent. The prosecuting entity

227. *Novell, Inc., v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597 (1984)).

228. *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 462 (7th Cir. 2020) (quoting Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 90 (2018)).

229. Elhauge, *supra* note 25, at 1234.

would present objective evidence that the conduct was irrational but for the collateral anticompetitive benefit, as well as any subjective evidence of improper anticompetitive intent that could be useful to assist the finder of fact. Against this, the accused predator would argue that the anticompetitive impact from the process was not the driving force of the suit.

Finally, the finder of fact would be tasked with deciding the primary motive for the suit. Whether this is done via a calculation of expected benefit versus the collateral anticompetitive benefit or is done qualitatively is not necessary to define now. The importance of this test is to provide adequate screens to prevent false positives, while still ensuring that predatory litigation can be identified and prosecuted.

As with any test, it is imperfect. If a predatory motive existed but was not sufficiently large enough on its own to justify the suit, an irrational lawsuit would still be immunized under this test. At the same time, a borderline-Legitimate suit that was filed alongside a coincidental anticompetitive harm could, theoretically, be improperly prosecuted. However, the fact that I am using market screens to ensure that only dominant players pursuing monopolies whose actions have imposed exclusionary effects on competitors ensures that even if this test is incorrect, it harms someone who can afford the mistake.

CONCLUSION

When litigation is used as an anticompetitive weapon, it should be prosecuted under the antitrust laws as predatory. Under our current framework, this is only sometimes the case. Hopefully, this Article's proposal provides a solution to this problem that is accurate, practical, and fair. While no standard is perfect, this Article may help future courts grapple with the failings of the *Noerr-Pennington* doctrine when mixed motives are at play. The mixed motives of strategic, predatory litigation impose great challenges on our courts, but as I have laid out here, this problem is not only solvable, but very much worth solving.