1992

# Litigation as a Predatory Practice

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# ARTICLES

# Litigation as a Predatory Practice

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## INTRODUCTION

In this period of burgeoning litigation, courts and legislatures have recognized that the filing and conduct of a lawsuit can itself be an independent tort or wrong. Various causes of action and remedies are now available to deter abusive litigation, including state tort actions for abuse of process and malicious prosecution. In federal court, Rule 11 of the Federal Rules of Civil Procedure and other rules and statutes offer means of deterring frivolous litigation and compensating injured parties.

When abusive litigation accomplishes or attempts to accomplish an anticompetitive result, the federal antitrust laws offer yet another avenue for relief. Despite the observation that antitrust claims are generally on the decline,[1] the volume of antitrust cases based on "sham" litigation has increased substantially in the last few decades.[2] This trend is understandable in light of society's increasing awareness of abusive litigation and the generous remedies available under the antitrust laws.[3]

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I would like to thank George Cochran and Tom Mason for their comments on an earlier draft of this Article and Pamela Guren Bach and Angel Lawyer Morgan for their research assistance.

[1] *See* Steven C. Salop & Lawrence L. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1002-04 (1986) (showing decline in antitrust litigation during the 1980s). Stephen Calkins has demonstrated that courts are using summary judgment and other methods of pretrial disposition of antitrust cases more frequently than in the past. *See* Steven Calkins, *Summary Judgment, Motions to Dismiss and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1104-61 (1986).

[2] *See infra* notes 179-82 and accompanying text.

[3] The remedies available under the antitrust laws include treble damages, costs and attorneys' fees, *see* 15 U.S.C. § 15 (1988), and injunctions, *see* 15 U.S.C. § 25 (1988). In addition, the antitrust laws of course offer access to the federal courts, which many lawyers and litigants view as a desirable forum in which to bring complex claims.

Although the volume of antitrust claims alleging "sham" litigation has been high, the law in the area has been unsettled and often confusing. Some of this confusion is the result of ambiguous language in the major Supreme Court decisions that established the antitrust standards for sham litigation cases. These cases inevitably present issues concerning *Noerr-Pennington* immunity. The Supreme Court established this immunity in two landmark cases, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[4] and *United Mine Workers v. Pennington.*[5] The gist of the *Noerr-Pennington* doctrine is that genuine efforts to influence governmental entities are immune from liability under the antitrust laws, even if the lobbying efforts lead to plainly anticompetitive governmental actions.[6] In its 1972 decision *California Motor Transport Co. v. Trucking Unlimited,*[7] the Supreme Court held that antitrust immunity extends not only to efforts to influence legislatures and other political bodies but also to the initiation and conduct of lawsuits.[8] The Court noted, however, that *Noerr-Pennington* immunity is not absolute. Quoting *Noerr,* Justice Douglas noted: "[T]here may be instances where the alleged conspiracy '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.'"[9]

Since these landmark decisions, courts and commentators have grappled with the *Noerr-Pennington* doctrine, attempting to distinguish "genuine efforts" to seek legal redress from lawsuits that are "mere sham." As former Judge Robert H. Bork observed in *The Antitrust Paradox: A Policy at War with Itself,* "Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition. Antitrust law is beginning to catch up with it, but the criteria to govern this field are not yet fully formulated."[10] Citing

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[4] 365 U.S. 127 (1961).

[5] 381 U.S. 657 (1965).

[6] *See* United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139-40 (1961).

[7] 404 U.S. 508 (1972).

[8] *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511-12 (1972).

[9] *Id.* at 511 (quoting *Noerr,* 365 U.S. at 144).

[10] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 347 (1978).

various commentators, Professor Gary Minda has noted that antitrust law in this area continues to be "'uncertain,' 'inconsistent,' 'disintegrating,' and . . . an antitrust 'quagmire.' The Supreme Court's case-by-case approach to this important area of antitrust law has been unfruitful because adjudication has failed to raise, let alone resolve, serious analytical difficulties at the core of the *Noerr-Pennington* doctrine."[11]

Although the antitrust laws clearly should deter anticompetitive litigation, the appropriate standards for doing so are uncertain. This Article reviews and evaluates the sham litigation case law, finding that many courts have allowed immunity too readily or on inappropriate grounds. It attempts to develop comprehensive standards for antitrust claims based on sham litigation. In Part I, this Article surveys the Supreme Court precedent in the *Noerr-Pennington* area. Part II examines the economic literature on predation and provides an economic framework for evaluating sham litigation as a form of predatory behavior. The economic analysis in that Part indicates that predatory litigation can serve a number of anticompetitive purposes, that it may be more effective than other forms of predation, and that it can be assessed using a cost-benefit test.

Part III assesses the principal issues that have troubled the courts in evaluating exclusionary litigation cases. The issues include: (1) whether predatory litigation must be frivolous or meet some other standard of baselessness; (2) whether abusive litigation must give rise to "access barring" in order to overcome *Noerr-Pennington* immunity; (3) what the role of anticompetitive or other improper motives is under *Noerr-Pennington*; (4) whether a pattern of baseless litigation is required or whether one lawsuit suffices to establish an antitrust violation; and, (5) what the proper standard of pleading and proof is for sham litigation. Part III includes proposed standards that address these unsettled issues and provides a framework for evaluating antitrust cases alleging abusive litigation. The standard draws heavily from Rule 11, other federal law, and state tort standards for abusive litigation, while giving consideration to the competing First Amendment and antitrust values that underpin *Noerr-Pennington*.

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[11] Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 907, 910 (1990).

## I. THE DEVELOPMENT OF NOERR-PENNINGTON IMMUNITY

The Supreme Court first established antitrust immunity for efforts to petition the government in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[12] In *Noerr*, a group of truck operators and its trade association filed an antitrust suit against twenty-four railroads, a railroad trade association, and a public relations firm. The truckers claimed that the defendants had conspired to restrain trade in and to monopolize the long-distance freight business, in violation of sections 1 and 2 of the Sherman Act.[13] The truckers alleged that the defendants were engaging in a lobbying and publicity campaign designed to discredit the trucking industry and to encourage the passage of laws harmful to them. According to the truckers, the sole purpose of this campaign was to destroy them as competitors in the long-distance freight business. The lobbying was also alleged to be deceptive, because the railroads used the "third-party technique," sponsoring publicity that falsely appeared to originate from independent third parties.[14]

After conducting extensive hearings, the district court found that the defendants had violated the Sherman Act, given the improper motivation of their lobbying efforts and the deceptive nature of the third-party technique. A divided court of appeals affirmed the district court's findings.[15]

Justice Black, writing for a unanimous Supreme Court, reversed, holding that the defendants had not violated the Sherman Act.[16] The opinion rested on two principal grounds. First, as a

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[12] 365 U.S. 127 (1961).

[13] Section 1 of the Sherman Act provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1988)).

Section 2 of the Sherman Act provides as follows:

> 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 . . . .

Sherman Act, ch. 647, § 2, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 2 (1988)).

[14] *See Noerr*, 365 U.S. at 129-30. For a discussion of the deceptive lobbying techniques employed by the railroads, see Minda, *supra* note 11, at 914-18.

[15] *Noerr*, 365 U.S. at 132-35.

[16] *Id.* at 145.

matter of statutory interpretation, Justice Black noted that the Sherman Act does not apply to valid exercises of governmental power.[17] Thus, otherwise unlawful actions mandated by the federal government or by the states do not violate the Sherman Act.[18] Because the Sherman Act does not reach these possibly anticompetitive governmental actions, it should not reach a private party's legitimate efforts to urge the government to take such an action.[19] In the Court's view, these lobbying efforts are essentially dissimilar to the types of anticompetitive behavior normally condemned under the Sherman Act; the Sherman Act regulates business activity, not political activity.

In addition to this legislative interpretation, the Court rested its decision on a second ground. Justice Black observed that the Sherman Act would create serious constitutional problems if the Court interpreted it to reach the railroad's lobbying efforts.[20] Legitimate lobbying efforts fall squarely within the protections of the First Amendment right to petition government,[21] and the Court

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[17] *See id.* at 136.

[18] Regarding federally mandated actions, this principle was established in United States v. Rock Royal Coop., 307 U.S. 533, 559-60 (1939) (holding that agriculture secretary's order, issued pursuant to federal statute, did not violate the Sherman Act even if it fixed prices and resulted in a monopoly). As for actions mandated by the states, see Parker v. Brown, 317 U.S. 341, 350-52 (1943) (holding that, as a valid exercise of its legislative authority, state's agricultural prorate program did not violate the Sherman Act). The scope of *Parker v. Brown* immunity has been the subject of numerous later cases. *See, e.g.*, City of Columbia v. Omni Outdoor Advertising, Inc., ___ U.S. ___, 111 S. Ct. 1344 (1991) (holding that authority given to city by state to regulate land use and buildings included authority to displace competition); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) (holding that anticompetitive conduct at issue fell within the "state action" exemption to the federal antitrust laws); Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) (holding collective rulemaking activities, although not compelled by the respective states, immune from federal antitrust liability under the state action doctrine); Hoover v. Ronwin, 466 U.S. 558 (1984) (holding that when a state legislature adopts legislation, its actions are exempt from operation of the antitrust laws); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (holding that state policy must be clearly articulated and actively supervised to gain exemption from federal antitrust laws); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (holding that state action exemption does not automatically exempt cities from the operation of the antitrust laws).

For the Court's latest discussion of the interaction between *Noerr* and *Parker*, see *infra* notes 47-55 and accompanying text.

[19] *Noerr*, 365 U.S. at 136.

[20] *See id.* at 137-38.

[21] The First Amendment, in pertinent part, provides as follows: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I.

was unwilling to interpret the Sherman Act in a manner that would trample on that right.[22]

Having established the limits of the Sherman Act—both legislative and constitutional—the opinion proceeded to determine whether the defendants had done anything that could properly be condemned under the Sherman Act. Justice Black focused first on the assertion that the defendants' sole purpose in conducting their lobbying efforts was to destroy the trucking industry as a competitor in long-distance freight hauling. The Court's unqualified rejection of this argument is relevant to any assessment of the *Noerr-Pennington* doctrine:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend on their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.[23]

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[22] *See Noerr*, 365 U.S. at 137-38. Commentators have debated whether *Noerr* is based solely on an interpretation of the Sherman Act in light of First Amendment considerations or whether Justice Black actually reached the constitutional issue. *Compare* 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, 84 n.32 (1977) (arguing that later precedents indicate *Noerr* resolved the First Amendment issue) *with* Milton Handler, *Twenty-Five Years of Antitrust*, 73 COLUM. L. REV. 415, 434-35 (1973) (arguing that *Noerr* did not reach the constitutional issue) *and* Robert A. Zauzmer, Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243, 1250 & n.33 (1984) (same). The Court's opinion in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972), expressly states that *Noerr* rests on both Sherman Act and First Amendment grounds.

In addition to the right to petition, the First Amendment freedom of association would seem to protect the defendants' right to gather and to confer among themselves for the purpose of petitioning the government. For a discussion of the free association aspects of the *Noerr-Pennington* doctrine, see Fischel, *supra*, at 97-98; *see also* Litton Sys., Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 806 n.29 (2d Cir. 1983) (noting free association aspects of *Noerr*).

[23] *Noerr*, 365 U.S. at 139.

Thus, even assuming that the defendants' lobbying efforts were motivated solely by anticompetitive purposes,[24] their actions were immune from liability under the Sherman Act. This analysis, which is difficult to dispute in the context of lobbying, presents one of the difficult issues that courts have faced in assessing when "sham" litigation violates the Sherman Act—the role of intent in applying the sham exception to the *Noerr-Pennington* doctrine.[25]

Finally, the Court rejected the argument that the defendants' use of the third-party technique rendered their actions unlawful. Justice Black agreed that the tactic was both unethical and deceptive, but noted that if the Sherman Act establishes a code of ethics at all, "it is a code that condemns trade restraints, not political activity."[26] Hence the use of the third-party technique as part of the defendants' lobbying efforts did not violate the Sherman Act.

The Court next addressed petitioning immunity in *United Mine Workers v. Pennington*,[27] the other decision that gave its name to the *Noerr-Pennington* doctrine. There, the United Mine Workers ("UMW") retirement fund sued Phillips Brothers Coal Company and its owners, seeking to recover payments owed to the fund under a wage agreement. Phillips responded that the UMW and certain large coal companies had conspired to restrain and monopolize commerce in violation of sections 1 and 2 of the Sherman Antitrust Act. The UMW's wage agreement allegedly had the effect of squeezing out small coal producers, such as Phillips. The large coal companies and the UMW, acting jointly, had successfully persuaded the Secretary of Labor to adopt a high minimum wage for employees of companies selling coal to the Tennessee Valley Authority ("TVA"). They also had approached TVA officials, persuading them to change the TVA's coal purchasing policies in a manner detrimental to small coal operators.[28]

The jury rendered a verdict, which was upheld by the court of appeals, against the UMW. The Supreme Court, after determining that the labor exemption did not apply to the agreements between

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[24] *See id.* at 138 n.18. Justice Black assumed that the district court's finding of anticompetitive purpose was correct even though he viewed the evidence on this point as being weak at best.

[25] *See infra* notes 198-232 and accompanying text.

[26] *Noerr*, 365 U.S. at 140.

[27] 381 U.S. 657 (1965).

[28] *See id.* at 659-61.

the UMW and the large coal operators,[29] reached the *Noerr-Pennington* issue. The Court applied the immunity announced in *Noerr* to the defendants' attempts to influence the actions of the Secretary of Labor, TVA administrators, and executive branch and agency officials.[30] In addition, Justice White's majority opinion reaffirmed the principle that an anticompetitive purpose does not vitiate the immunity: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."[31]

The Supreme Court's next major decision—and the one central to sham litigation issues—was *California Motor Transport Co. v. Trucking Unlimited*,[32] which involved a dispute between two competing groups of trucking firms. The complaint alleged that the defendant truckers had conspired to monopolize and restrain trade by preventing and delaying the plaintiffs' efforts to apply for, transfer, and register carrier operating rights. The defendants accomplished their objective by filing lawsuits in state and federal court, including applications for review of agency decisions, appeals, and court rehearings. The defendants sought dismissal of the suit based on *Noerr-Pennington* immunity.[33]

Justice Douglas's opinion for the Court began by noting that immunity for petitioning executive and legislative officials is based on two grounds: (1) a legislative interpretation of the Sherman Act as reaching business but not political activity and (2) a constitutional constraint on the antitrust laws based on the right to petition.[34] Not surprisingly, the Court found that immunity for petitioning activity should extend to efforts seeking redress in the courts.[35] Still, the immunity is not absolute:

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[29] *See id.* at 661-69. Justices Goldberg, Harlan, and Stewart, dissenting from the opinion but concurring in the result, believed that the labor exemption for collective bargaining activity protected the UMW's actions from antitrust scrutiny. *See id.* at 700-735.

[30] *See id.* at 669-72.

[31] *Id.* at 670. Justice White noted that evidence of this type might still be introduced to show the purpose and character of the defendants' actions. *See id.* at 670 n.3.

[32] 404 U.S. 508.

[33] *See id.* at 509.

[34] *See id.* at 510.

[35] The Court stated:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

*Id.* at 510-11.

> We said . . . in *Noerr* that there may be instances where the alleged conspiracy "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."[36]

The difficult question, of course, is distinguishing "sham" litigation from legitimate claims and defenses. The Supreme Court offered some criteria for defining litigation immunity, as distinguished from immunity for lobbying of legislators and executive branch members. Most importantly, the Court noted that the purposes of the present defendants' litigation strategy, as alleged in the complaint, were to drive out competitors, create barriers to entry, and establish a monopoly. Even though *Noerr* and *Pennington* had indicated that a party's anticompetitive purpose or intent would not vitiate the immunity for lobbying efforts, the Court held that predatory *litigation* strategies were not immune from the Sherman Act.[37]

Unfortunately, rather than offering widely applicable guidelines, the Court offered fact-specific situations in which the sham exception to *Noerr-Pennington* would apply. First, on the facts of *California Motor Transport*, the Court concluded that the complaint sufficiently alleged sham because it alleged predatory intent combined with "access barring."[38] Rather than being an attempt to influence public officials, the defendants' actions allegedly "sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process. It is alleged that [the defendants] 'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.' "[39] The defendants' unethical conduct and intent, which might be tolerated in the lobbying arena, would not be protected in the adjudicatory context.

Second, the Court offered examples of conduct, other than "access barring," that would not be immune under *Noerr-Pennington*: perjury of witnesses, use of a fraudulently obtained patent to exclude competitors,[40] conspiracy with government

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[36] *Id.* at 511 (citation omitted).
[37] *See id.* at 511-13.
[38] *Id.* at 511.
[39] *Id.* at 512.
[40] *See, e.g.*, Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S.

officials,[41] and bribery.[42] Justice Douglas observed that this list of impermissible conduct was not exclusive or exhaustive, stating: "There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."[43] Accordingly, litigation behavior is evaluated under a different, more exacting standard than is lobbying behavior.

Finally, Justice Douglas wrote that baseless litigation can fall within the sham exception to *Noerr-Pennington*:

> One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz.*, effectively barring [competitors] from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."[44]

*California Motor Transport* is the landmark Supreme Court case dealing with the sham litigation exception to *Noerr-Pennington*. Nonetheless, its vague discussion of anticompetitive intent, "access barring," and patterns of baseless, repetitive claims, raised many more issues than it resolved. In the two decades following the decision, the lower federal courts have repeatedly grappled with these issues, often reaching inconsistent results.

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172, 175-77 (1965). *Walker Process*, a classic patent fraud case, is discussed *infra* at notes 99-101, 138-40 and accompanying text.

[41] *See, e.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 (1962) (holding that conspiracy with government official to eliminate a competitor may result in antitrust transgression); Harman v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964) (holding that Sherman Act violation may be found when defendants allegedly induced Attorney General to place financial institution into receivership). The Supreme Court has clarified and limited the scope of the "conspiracy" doctrine. *See Omni Outdoor Advertising*, ___ U.S. at ___, 111 S. Ct. at 1350-56.

[42] *See, e.g.*, *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851, 862 (9th Cir. 1965) (bribery of public official may violate section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act).

[43] *California Motor Transp.*, 404 U.S. at 513. One commentator has argued that lobbying efforts directed toward the legislative and executive branches are potentially more harmful than sham litigation. *See* Minda, *supra* note 11, at 930-31.

[44] *California Motor Transp.*, 404 U.S. at 513.

Subsequent Supreme Court rulings in the *Noerr-Pennington* area have not provided many new insights into the standards for the sham exception. In *Otter Tail Power Co. v. United States*,[45] the Court was presented with a petitioning immunity argument in connection with the filing of lawsuits by Otter Tail, allegedly to prevent or delay establishment of competing distributors of electric power. Because the district court had held that *Noerr* does not apply to litigation (as opposed to lobbying), the Court did not reach the issue, instead remanding it for further consideration in light of *California Motor Transport*.[46]

The most recent Supreme Court decision in this area is the 1991 decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*[47] Omni, an outdoor billboard firm, sued a competitor (Columbia Outdoor Advertising, Inc.) and the city of Columbia, South Carolina, claiming that the city council enacted a restrictive billboard ordinance that was designed to benefit Columbia Outdoor Advertising and to limit Omni's ability to compete with that company, which dominated the local market.[48] The major issues in the case involved possible immunities from Sherman Act liability. With regard to the city council's action, the state action doctrine of *Parker v. Brown*[49] provided immunity. As to its successful lobbying efforts before the city council, Columbia Outdoor Advertising claimed *Noerr-Pennington* immunity.[50] A principal focus of Justice Scalia's opinion was whether there was a "conspiracy" exception to *Noerr-Pennington* and to its logical counterpart, state action immunity under *Parker v. Brown*. Prior to *Omni Outdoor Advertising*, several circuits had held that the state action and petitioning immunities should not apply if the private firm and a government

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[45] 410 U.S. 366, 368-72 (1973).

[46] *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 379-80 (1973). On remand, the district court held that the sham exception to *Noerr-Pennington* squarely applied to the case:

> Upon consideration of the arguments and briefs, and upon a reconsideration of the pertinent portions of the record, I find that the repetitive use of litigation by Otter Tail was timed and designed principally to prevent the establishment of municipal electric systems and thereby to preserve defendant's monopoly. I find the litigation comes within the sham exception to the *Noerr* doctrine as defined by the Supreme Court in *California Transport* . . . .

*United States v. Otter Tail Power Co.*, 360 F. Supp. 451, 451-52 (D. Minn. 1973), *aff'd*, 417 U.S. 901 (1974) (affirming summarily the district court's judgment).

[47] ___ U.S. ___, 111 S. Ct. 1344 (1991).

[48] *Id.* at ___, 111 S. Ct. at 1347-48.

[49] 317 U.S. 341 (1943).

[50] *Omni Outdoor Advertising*, ___ U.S. at ___, 111 S. Ct. at 1348.

official had conspired or acted in concert, because the government decision would thus have been tainted by improper influence.[51]

The Court rejected this line of reasoning, specifically holding that there is no conspiracy exception to either the state action or the petitioning immunities. As to the state action doctrine, Justice Scalia observed that a conspiracy exception would be impractical: "Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a 'conspiracy' charge."[52] Noting that "*Parker* and *Noerr* generally present two faces of the same coin,"[53] the Court concluded that the same considerations mandated rejection of a conspiracy exception to *Noerr*.

Finally, Justice Scalia elaborated on the sham exception to *Noerr*:

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[51] *See, e.g.*, Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733, 746 (8th Cir. 1982) (finding conspiracy exception to state action doctrine), *cert. denied*, 461 U.S. 945 (1983); Whitworth v. Perkins, 559 F.2d 378, 379-81 (5th Cir. 1977) (same), *vacated sub nom.* 435 U.S. 992, *aff'd on reh'g*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). For examples of cases recognizing a possible conspiracy exception to *Noerr-Pennington* immunity, see Oberndorf v. Denver, 900 F.2d 1434, 1440 (10th Cir. 1990) (holding evidence of conspiracy insufficient to warrant that such exception be considered); Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, 663 F.2d 253, 264-65 & n.11 (D.C. Cir. 1981) (holding evidence insufficient to establish conspiracy but noting some courts' adoption of conspiracy exception), *cert. denied*, 455 U.S. 928 (1982).

[52] *Omni Outdoor Advertising*, ___ U.S. at ___, 111 S. Ct. at 1351.

[53] *Id.* at ___, 111 S. Ct. at 1355. The Court's conclusion was based on considerations of policy and practicality:

> As we have described, *Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics . . . . The *Noerr*-invalidating conspiracy alleged here is just the *Parker*-invading conspiracy viewed from the standpoint of the private-sector participants rather than the governmental participants. The same factors which . . . make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impractical or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials. . . . And if the invalidating "conspiracy" is limited to one that involves some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws. In *Noerr* itself, where the private party "deliberately deceived the public and public officials" in its successful lobbying campaign, we said that "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned."

*Id.* at ___, 111 S. Ct. at 1355-56 (citations omitted).

> The "sham" exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license applications of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, not one "who 'genuinely seeks to achieve his governmental result, but does so *through improper means*.'"[54]

The Supreme Court's discussion of the sham exception again offers a general rule, but little guidance for assessing claims of predatory litigation. In particular, Justice Scalia's last statement concerning improper means seems inapplicable to litigation, as opposed to other forms of petitioning activity. The Court in *California Motor Transport*, for example, held that misrepresentations and other improper actions would not be condoned in the courts.[55]

In summary, the *Noerr-Pennington* doctrine provides antitrust immunity for legitimate attempts to petition the government, including litigation before courts and administrative bodies. The Supreme Court has recognized, however, that not all petitioning activity is entitled to First Amendment protection and Sherman Act immunity. When the defendant's actions constitute a sham and are not genuine efforts to petition the government, then *Noerr-Pennington*'s immunity does not apply. Even if this immunity is stripped away, it is important to note that the defendant is not yet liable.[56] The antitrust plaintiff must still meet the affirmative elements of its claim, which are discussed below in Part II.A.

## II. SHAM LITIGATION AS A PREDATORY PRACTICE

### A. *Defining Predatory Behavior*

Under the governing standards of section 2 of the Sherman Act, the offense of monopolization involves two principal elements:

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[54] *Id.* at ___, 111 S. Ct. at 1354 (citations omitted) (emphasis in original).

[55] *See California Motor Transp.*, 404 U.S. at 513.

[56] *See* CVD, Inc. v. Raytheon Co., 769 F.2d 842, 851 (1st Cir. 1985) (holding that plaintiff must also prove elements of a Sherman Act violation to succeed), *cert. denied*, 475 U.S. 1016 (1986); Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1247 n.7, 1259 (9th Cir. 1982) (holding that if antitrust plaintiff establishes that *Noerr* immunity does not apply, it must then establish elements of a Sherman Act violation), *cert. denied*, 459 U.S. 1227 (1983).

"(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."[57] If the firm has not attained a monopoly position, it may still be liable for attempted monopolization if the plaintiff can prove (1) a specific intent to control prices or to destroy competition; (2) anticompetitive or predatory conduct designed to achieve this goal; (3) a dangerous probability of success; and, (4) antitrust injury causally linked to the violation.[58] If the litigation involves concerted exclusionary behavior by two or more competitors, it may violate section 1 of the Sherman Act as well.[59] Finally, predatory litigation can be an unfair trade practice, violating section 5 of the Federal Trade Commission Act.[60]

It is sometimes difficult to distinguish predatory, anticompetitive behavior from legitimate competition on the merits. Lawrence Sullivan describes competition on the merits as behavior designed to "win the field by greater efficiency, better services, or lower prices reflective of cost savings or modest profits."[61] Predatory behavior, on the other hand, involves "inhibit[ing] others in ways independent of the predator's own ability to perform effectively in the market . . . calculated to impose losses on other firms, not to garner gains for itself."[62] As Sullivan notes, "Businessmen and

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[57] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[58] Rickards v. Canine Eye Registration Found., Inc., 783 F.2d 1329, 1335 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986); *see also* Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1288 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985).

[59] *See generally* United Mine Workers v. Pennington, 381 U.S. 657, 659-60 (1965) (addressing claims under sections 1 and 2 of Sherman Act); Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, 663 F.2d 253, 256 (D.C. Cir. 1981) (involving section 1 claim), *cert. denied*, 455 U.S. 928 (1982); Feminist Women's Health Ctr., Inc. v. Mohammad, 586 F.2d 530, 538-39 (5th Cir. 1978) (involving claims under sections 1 and 2), *cert. denied*, 444 U.S. 924 (1979).

[60] *See* 15 U.S.C. § 45 (1988). The FTC has brought few sham litigation cases. *See* L.G. Balfour Co. v. FTC, 442 F.2d 1, 14-16 (7th Cir. 1971); *In re* New England Motor Rate Bureau, Inc., No. 9170, at 44-49, 1989 FTC LEXIS 62 (August 18, 1989) (filing of tariffs with regulatory agencies).

[61] LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 111 (1977).

[62] *Id.* at 111. Robert Bork defines predatory behavior as follows:

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

judges think they know it [predatory behavior] when they see it. Economists tend to doubt that it occurs, at least very often, because it is likely to cost the firm using it more than can be gained from it."[63] The Supreme Court, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[64] adopted a fairly helpful, albeit general, definition of predation:

> The question whether . . . [a defendant's] conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on . . . [the plaintiff]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been "attempting to exclude rivals on some basis other than efficiency," it is fair to characterize its behavior as predatory.[65]

There has been considerable debate in academic circles concerning the extent and severity of predatory behavior. Many commentators, particularly those associated with the Chicago School, contend that exclusionary behavior rarely occurs because it would rarely pay off.[66] Others, including many adherents of the Harvard School, believe that predation can and does occur with some frequency.[67]

### B. *Economic Analysis of Predatory Behavior*

A predatory or exclusionary practice is a practice designed primarily to destroy or harm competitors, rather than to increase sales or otherwise to succeed in the marketplace. The most common exclusionary practice discussed in antitrust law is predatory pricing. Traditionally, predatory pricing occurs when a firm sets its price

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inconvenient or threatening.

BORK, *supra* note 10, at 144.

[63] SULLIVAN, *supra* note 61, at 109 (citing GEORGE J. STIGLER, THE ORGANIZATION OF INDUSTRY 113-18 (1968); L.G. Telser, *Cutthroat Competition and the Long Purse*, 9 J.L. & ECON. 259 (1966)); *see also* Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 972 (1986) (noting difficulty in distinguishing competitive from exclusionary conduct by monopolists).

[64] 472 U.S. 585 (1985).

[65] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) (citations omitted).

[66] *See, e.g.*, BORK, *supra* note 10, at 144-60; RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 92-93, 171 (1976).

[67] *See generally* ABA ANTITRUST SECTION: MONOGRAPH NO. 18, NONPRICE PREDATION UNDER SECTION 2 OF THE SHERMAN ACT (1991) [hereinafter ABA NONPRICE PREDATION MONOGRAPH]; STRATEGY, PREDATION, AND ANTITRUST ANALYSIS (Steven C. Salop ed., 1981).

below "cost,"[68] in order to drive a weaker competitor or competitors out of business. If the firm can successfully eliminate or at least weaken its competitors, then it can establish a monopoly position in the relevant market, raise prices, and recoup the losses it suffered while implementing the predatory pricing strategy.

Many commentators, particularly those associated with the Chicago School, have contended that predatory pricing is not a viable strategy in many cases.[69] In order for a predatory pricing strategy to be successful, one must make three assumptions. The practice must successfully eliminate or discipline rivals in the short run; then the firm must be able to raise prices in the long run sufficient to recoup its losses; and finally, the firm must be able to prevent new competitors from entering the market while it maintains the artificially high price levels. Unless all three of these conditions are met, it is unlikely that predatory pricing is a profitable or rational strategy. Thus, a predatory pricing strategy is unlikely to be attempted, let alone succeed, except in a market characterized by high barriers to entry in which a firm has "deep pockets." Entry barriers enable the firm to prevent new entry, and deep pockets are needed to underwrite this costly course of action.

High entry barriers are particularly important to the success of an exclusionary practice, such as predatory pricing. Unless barriers are high, the vanquished firm may reenter the market (or again adopt a competitive strategy) once price levels rise. New firms,

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[68] The possible measures of "cost" include marginal cost, average variable cost, and average total cost. The appropriate measure of a firm's cost has been the subject of much litigation. *See, e.g.*, Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 233 (1st Cir. 1983) (involving price that exceeded both average total cost and incremental cost); Transamerica Computer Co. v. International Business Machs. Corp., 698 F.2d 1377, 1384-86 (9th Cir.) (rejecting per se rule that price above average variable cost is conclusively presumed legal), *cert. denied*, 464 U.S. 955 (1983); International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714, 724 (5th Cir. 1975) ("Thus, a firm's pricing behavior can be considered anti-competitive when it sells at a price below its average variable cost."), *cert. denied*, 424 U.S. 943 (1976).

For commentary on this issue, see Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); F.M. Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976).

[69] *See* Ronald H. Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1970-71); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958) (concluding that Standard Oil rarely, if ever, engaged in predatory pricing); Richard A. Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506 (1974); Telser, *supra* note 63, at 259; Richard Zerbe, *The American Sugar Refinery Company 1887-1914: The Story of a Monopoly*, 12 J.L. & ECON. 339 (1969).

spotting a profit opportunity because of supracompetitive pricing in the relevant market, might also enter the market.[70] Thus, a linchpin of a successful exclusionary practice is the presence of high entry barriers to prevent these firms from entering the market and competing effectively with the dominant firm.

This view of predatory pricing has largely been accepted by the Supreme Court, as reflected in its 1986 decision *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[71] The Court noted that any firm that engages in a price war must bear the cost of its strategy—considerably lower prices than would otherwise prevail.[72] To make a profit, the firm must be able to maintain a monopoly in the relevant market: "For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."[73]

An additional problem with predatory pricing is that the long-term gain from such a strategy must be discounted to present value. Using a standard cost-benefit type of analysis, the firm must decide if the long-term gain, properly discounted, outweighs the short-term costs, which receive little or no discounting because they involve up-front costs. In essence, the firm is "investing" in predation, which means it will invest less in other activities, such as research and development, advertising, new equipment, or capital improvements to the firm's plants.[74] Before making this investment decision, the firm must conclude that its money is better spent on predation than on one of these alternative uses. Such a result is by no means certain.

The common wisdom regarding the short-term "bottom line" orientation of many large, publicly held corporations also sheds some doubt on the view that long-term predation occurs frequently. Whether or not it is an accurate view,[75] many believe that modern

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[70] Much of the credit for introducing this line of economic reasoning into legal analysis goes to Robert Bork and Frank Easterbrook. *See* BORK, *supra* note 10, at 144-60; Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

[71] 475 U.S. 574 (1986).

[72] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589-90 (1986).

[73] *Id.*

[74] The potential return from these other investments is factored into the present value determination by selecting an appropriate discount rate. If the return from these other investments is high, the discount rate should be higher, which means the present value payoff from a long-term predation strategy will decrease.

[75] The argument that corporations, including both corporate management and shareholders, fail to consider long-term investments certainly seems overstated and should not

American corporations do not look sufficiently at the big picture—at the benefits of investing in research and development, capital improvements, and other strategies that create long-term benefits.[76] Yet, the predatory strategies discussed here require a long-term view. How can it be that large corporations have a short-term bias for corporate law purposes, but a long-term orientation for antitrust law purposes? One response might be that only firms that have a monopoly or dominance in a particular market can take the long-term view (these are the very firms that could engage in exclusionary behavior). Although there is some plausibility to this argument (the largest firms probably are in the best position to take the long-term view), the common wisdom is that these same large corporations still suffer from a short-term bias, perhaps even in larger doses than smaller corporations.[77] Moreover, a logical implication of the alleged short-term bias of large corporations is that these firms have an unusually high discount rate.[78] Because the expected payoff, in present value terms, would be lower than if a lower discount rate were used, such a firm would be less predisposed to engage in a long-term predatory strategy.

Some commentators have argued that predatory behavior may offer firms strategic advantages sufficient to justify the expense of pricing below cost.[79] This line of reasoning is typical of some recent

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be taken as gospel. That criticism tends to ignore many situations in which the long view was taken. It also adopts a "20/20 hindsight" mentality because firms that miscalculate are viewed as short-sighted even if their decisions were highly defensible at the time they were made. Finally, the unfavorable comparison often made between American corporations versus Japanese and European (mainly German) companies ignores or underplays many other factors that explain the success of these foreign entities, such as cultural differences, government subsidies, successful specialization, and historical accident or good luck. This comparison also ignores many American success stories, including the fact that Europe and Japan are still "catching up" with America in many respects. America's failure to continue to dominate the world economy, as it did in the 1950s and 1960s, should be viewed as an inevitable (and probably desirable) development.

[76] This view is so widespread that it really does not require any citations. But, for a discussion, see Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 205-13 (1991) (discussing the short-term bias in many corporate settings).

[77] Martin Lipton and Steven A. Rosenblum, for example, focus on the high percentage of institutional ownership among Fortune 500 corporations as a major cause of short-term bias. *See* Lipton & Rosenbloom, *supra* note 76, at 205-06.

[78] *See, e.g.*, Jeremy C. Stein, *Takeover Threats and Managerial Myopia*, 96 J. POL. ECON. 61, 62-63 (1988).

[79] *See, e.g.*, F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 560 (2d ed. 1980); Steven C. Salop, *Strategic Entry Deterrence*, 69 AM. ECON. REV. 335 (1979); Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977-78); *see also* POSNER, *supra* note 66, at 184-87.

thinking in the economic literature that focuses on the effect of strategic behavior and employs dynamic, rather than static, models of economic behavior. Under this approach, a firm would rationally adopt a predatory pricing strategy in order to establish a reputation for aggressively responding to competitors. This reputation, once established and inculcated in the minds of actual and potential competitors, should deter possible new entrants from entering the market, as well as deter existing competitors from breaking ranks. Moreover, a firm that has established its aggressive reputation in one market may be able to "carry over" that reputation into other markets in which it competes, thus gaining additional advantages from the predatory strategy.[80]

This strategy relies on imperfect information regarding the dominant firm's motivations and cost structure. Once again, this type of predatory strategy also requires the firm to endure short-term losses with the expectation of some long-term gain. Moreover, the long-term gain from a "wild man" strategy is even more speculative than the gain from a simpler strategy of eliminating competitors through predation. And, the costs of engaging in such a strategy remain high because the incumbent firm must maintain a credible threat by accepting every challenge from potential competitors.

There are probably some situations in which a firm will engage in a short-term losing strategy in order to establish a reputation for tough bargaining. The paradigm example of this strategy is an insurance company that refuses to pay arguable or even meritorious claims in order to attain a "tough" reputation. The insurer incurs the short-term losses because it expects to recoup its expenses through reduced policyholder claims and better settlement results.

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[80] For an exposition of this argument, see George A. Hay, *A Confused Lawyer's Guide to the Predatory Pricing Literature, in* STRATEGY, PREDATION, AND ANTITRUST ANALYSIS, *supra* note 67, at 155, 160-61:

> It can be argued that it pays a firm to absorb losses even beyond what it could ever expect to recoup in the market at hand, if by doing so this firm will establish a credible threat to pursue the same policy in any market in which an entrant appears. If the threat is truly credible, it need not be exercised beyond the first time, since future would-be entrants will elect not to challenge the monopolist, figuring that it is a hopeless cause. To make this model work requires only good information (i.e., the story of the predation in the first market has to be communicated to the future would-be entrants), and some nontrivial costs of entry and exit (so that unsuccessful entry attempts are not costless).

There may be other prerequisites for this reputational strategy to be successful. *See supra* notes 69-70 and accompanying text.

A second example is a firm that has a dominant position in several markets.[81] The firm's aggressive strategy in one of those markets may pay off in the other markets in which it competes.

The question, as a matter of antitrust policy, is whether and in what circumstances it is desirable to condemn possible predatory behavior. As the Supreme Court noted in *Matsushita*, legitimate competition on the merits can easily be labeled exclusionary.[82] A skillful advocate can quickly transform aggressive price competition into a prima facie case of predatory pricing. The danger, then, is that broad condemnation of these practices might deter legitimate competitive strategies, thus harming efficiency and consumer welfare. Some commentators contend that this problem justifies a narrow definition of predatory behavior under section 2 of the Sherman Act, as well as various screening devices for winnowing the truly anticompetitive practices.[83] Further, the use of a narrow definition of predatory behavior, combined with screening devices, reduces administrative costs because many predation claims then can either be summarily resolved or will not be brought in the first place.

As the foregoing discussion illustrates, there has been considerable debate and commentary regarding the efficacy, likelihood, and nature of predatory pricing. James D. Hurwitz and William E. Kovacic have summarized the far-flung debate:

> No fewer than nine standards or frameworks for addressing predation have been proposed since 1975. In complexity these proposals range from no standard at all—since according to these proponents no problem exists—to a full-scale, rule of reason analysis of all pertinent factors in each individual case. Between these extremes, some proposals recommend adoption of short-term or long-term marginal costs as the threshold floor for lawful pricing. Others, in balancing the need for simplicity against the need for a more sophisticated economic analysis, urge a preliminary evaluation of structural and other factors to determine at the outset whether the market in question is conducive to profitable predation. Some approaches examine the strategic qualities of the predator's behavior to determine whether the conduct would be profit-maximizing for the predator and would enhance

[81] *See supra* note 80 and accompanying text.

[82] *See Matsushita*, 475 U.S. at 593-94.

[83] *See, e.g.*, Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 219-20 (1979).

consumer welfare in general, even if it did not have any obvious entry-deterring or exit-inducing effects. Still other proposals, also focusing on strategic considerations, adopt a "business as usual" requirement, either limiting the established firm to its trend-adjusted output for the pre-entry period or permitting only price decreases that will not be reversed for a substantial period.[84]

Discussion of non-price predation has not been as comprehensive.[85] One of the most frequently discussed types of non-price exclusionary behavior is predatory innovation, the introduction or redesign of a product in a manner that harms competitors, typically by raising their costs or eliminating them as competitors. Courts rarely uphold predatory innovation claims because the design changes generally involve product improvements and because antitrust claims might chill legitimate innovation.[86] Other possible forms of non-price predation include the maintenance of excess production capacity to deter potential entrants,[87] tying arrangements,[88] brand proliferation,[89] and "excessive" advertising.[90]

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[84] James D. Hurwitz & William E. Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63, 75-77 (1982) (footnotes omitted). Although these authors include some discussion of non-price predation, *see id.* at 113-39 (discussing predatory innovation and promotion), the article's primary focus is on predatory pricing. For a survey of the predatory pricing literature, see Hay, *supra* note 80.

[85] For an excellent new survey of non-price predation, see ABA NONPRICE PREDATION MONOGRAPH, *supra* note 67.

[86] *See, e.g.*, California Computer Prod. v. International Business Machs. Corp., 613 F.2d 727, 744 (9th Cir. 1979) (involving beneficial design changes); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 281 (2d Cir. 1979) (holding that introduction of new products without advance disclosure to competitors is not predatory), *cert. denied*, 444 U.S. 1093 (1980); Transamerica Computer Co. v. International Business Mach. Corp., 481 F. Supp. 965, 1002-08 (N.D. Cal. 1979) (holding that some design changes legitimate and others not), *aff'd*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983). For a summary of the literature, see ABA NONPRICE PREDATION MONOGRAPH, *supra* note 67, at 26-45.

[87] *See, e.g.*, B. Curtis Eaton & Richard G. Lipsey, *The Theory of Market Preemption: The Persistence of Excess Capacity and Monopoly in Growing Spatial Markets*, 46 ECONOMICA 149 (1979); A. Michael Spence, *Entry, Capacity, Investment and Oligopolist Pricing*, 8 BELL J. ECON. 534 (1977).

[88] *See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); Gary Myers, Note, *Tying Arrangements and the Computer Industry*, 1985 DUKE L.J. 1027.

[89] *See, e.g.*, Richard Schmalensee, *On the Use of Economic Models in Antitrust: The Realemon Case*, 127 U. PA. L. REV. 994 (1979); Richard Schmalensee, *Entry Deterrence in the Ready-to-Eat Breakfast Cereal Industry*, 9 BELL J. ECON. 305 (1978).

[90] *See, e.g.*, William S. Comanor & Thomas A. Wilson, *The Effect of Advertising on Competition: A Survey*, 17 J. ECON. LIT. 453 (1979). There have been relatively few cases centering on this type of claim. *See Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981).

These types of non-price predation can be analyzed in a manner similar to predatory pricing. The strategies depend on taking short-term losses in the hopes of long-term gain. The dominant firm may have to bear costs as high as those imposed on its competitors, although the costs may not be as high as in the case of predatory pricing.[91] Once again, this strategy will not be cost-justified unless the long-term payoff is large or the dominant firm can reap the benefits of a reputation for aggressive behavior. Finally, the rebuttal to this argument is that the dominant firm's bluff may be called, forcing it to either expend more resources on its costly strategy or to abandon the effort.

### C. *Purposes of Predatory Litigation*

Abusive litigation, like any predatory practice, might serve several anticompetitive purposes: eliminating competitors, disciplining competitors, raising rivals' costs, or creating barriers to entry.

#### 1. *Eliminating Competitors*

The most extreme type of predatory practice is one designed to drive a competitor out of business. For example, a firm might engage in predatory pricing in order to weaken competitors that are unable to match the firm's low prices or that cannot sustain those low prices for an extended period of time. If a firm engaging in predatory pricing maintains these low prices for a sufficiently long period of time, the competitors may succumb. The weaker firms might either leave the market entirely or might merge with a stronger competitor (perhaps the firm that initiated the price war). In addition to literally driving competitors out of a market, a firm may weaken a competitor, forcing it to agree to a merger on favorable terms. This avoids a continued price war and eliminates the target as an independent factor in the market.

Litigation can be a much more effective method of eliminating competitors than predatory pricing and other strategies that depend for success on "wearing down" the target firm in the marketplace. A general illustration of the effectiveness of litigation is *Polaroid Corp. v. Eastman Kodak Co.*,[92] the famous battle of the photography titans. Polaroid's claim that Kodak infringed on its patents

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[91] *See infra* notes 148-49 and accompanying text.

[92] 17 U.S.P.Q.2d (BNA) 1711 (D. Mass. 1991) *modifying* 16 U.S.P.Q.2d (BNA) 1481 (D. Mass. 1990).

for instant photography was successful and likely brought in a good faith effort to enforce Polaroid's valid patents. For purposes of this Article, the important point is the extent of Polaroid's stunning victory: the court ordered Kodak to pay $873 million in damages and enjoined Kodak from the instant photography market.[93] *Polaroid* demonstrates the power of litigation as a means of eliminating competition and the threat with which a competitor must deal when it is the target of litigation. Although not every case is as meritorious as Polaroid's, many have produced similar results for potential competitors.

The effectiveness of *predatory* litigation as a means of eliminating competitors is illustrated by *Otter Tail Power Co. v. United States*,[94] in which Otter Tail, an electric utility, successfully employed a pattern of litigation in order to prevent the entry of competitors and to maintain its monopoly.[95] In *Federal Prescription Service, Inc. v. American Pharmaceutical Association*,[96] a mail-order pharmacy claimed that a pharmacy trade association and others had conspired to eliminate the plaintiff's mail order drug business.[97] Because Federal operated its business through the mail, it was able to offer lower prices than traditional retail druggists. The defendants allegedly employed various tactics, including lawsuits and administrative proceedings, in an attempt to eliminate Federal.[98]

In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*,[99] Food Machinery obtained a patent on equipment used in sewage treatment systems. Food machinery threatened to enforce its patent against Walker Process, a competitor. When Walker entered the market, Food Machinery brought suit, claiming patent infringement. Walker counterclaimed, asserting that Food Machinery was attempting to monopolize the market. Walker alleged that the patent was fraudulently obtained because Food Machinery had attested that "the invention had not been in public

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[93] *See* Polaroid Corp. v. Eastman Kodak Co., 17 U.S.P.Q.2d (BNA) 1711, 1714 (D. Mass. 1991) *modifying* 16 U.S.P.Q.2d (BNA) 1481 (D. Mass. 1990).

[94] 410 U.S. 366 (1973).

[95] *See id.* at 368.

[96] 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

[97] *See id.* at 256-57.

[98] *See id.* at 259-60. The court of appeals concluded that although the defendants "engaged in a number of activities violative of the spirit of the antitrust laws," Federal's injuries were not caused by those activities or that government intervention immunized the actions. *See id.* at 272.

[99] 382 U.S. 172 (1965).

use in the United States for more than one year prior to filing its patent application when, in fact, Food Machinery was a party to prior use within such time."[100] The Supreme Court held that Walker had properly stated a claim for relief under section 2 of the Sherman Act and that it could recover upon showing that the patent was obtained by intentional fraud and by establishing the elements of a monopolization claim.[101]

Finally, in *Semke v. Enid Automobile Dealers Association*,[102] a group of automobile dealers allegedly sought to eliminate the plaintiff's car-buying service. The defendant dealers claimed that the plaintiff was competing as a new car dealer without the appropriate licensing, and they induced a regulatory agency to file suit to enjoin Semke.[103]

Each of these cases illustrates the potential power of litigation as a means of eliminating competition. Many other cases have involved allegations that litigation was used to eliminate or attempt to eliminate competition.[104]

### 2. *Disciplining Competitors*

A second purpose for predatory behavior is to discipline competitors.[105] Typically, a large or dominant firm, or a group of

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[100] Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174 (1963).

[101] *See id.* at 177.

[102] 456 F.2d 1361 (10th Cir. 1972).

[103] *See* Semke v. Enid Auto. Dealers Ass'n, 456 F.2d 1361, 1364-65 (10th Cir. 1972). The court ultimately found that this activity was protected under *Noerr* and was not sham. *See id.* at 1366-67.

[104] *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 509 (1972) (involving allegations that trucking firms used litigation to eliminate competition from other truckers); *Rickards*, 783 F.2d at 1332 (holding litigation was part of conspiracy to eliminate a group of competing veterinarians); Litton Sys., Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 789 (2d Cir. 1983) (involving allegation that AT&T sought to eliminate Litton as a competitor in market for telephone terminal equipment through regulatory actions), *cert. denied*, 464 U.S. 1073 (1984); Energy Conservation, Inc. v. Heliodyne, Inc., 698 F.2d 386, 387, 389 (9th Cir. 1983) (addressing claim that litigation and related adverse publicity were used to eliminate competitor); Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 471 (7th Cir. 1982) (involving allegation that trade secret litigation was used to eliminate competitor), *cert. denied*, 461 U.S. 958 (1983); Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 987-89 (9th Cir. 1979) (presenting claim that defendant brought unsuccessful patent infringement claims to eliminate competitor in market for disposable plastic gloves), *cert. denied*, 444 U.S. 1025 (1980); *Feminist Women's Health Ctr.*, 586 F.2d at 535, 542 (addressing allegation that various forms of petitioning activity by doctors, including letters to agencies and defense of litigation, were employed to eliminate competition from an independent abortion clinic); Mountain Grove Cemetery Ass'n v. Norwalk Vault Co., 428 F. Supp. 951, 952 (D. Conn. 1977) (involving claim that litigation was used to eliminate competitor in market for burial facilities).

[105] *See generally* DOUGLAS F. GREER, INDUSTRIAL ORGANIZATION & PUBLIC POLICY 343-

firms, will seek to discipline competitors in order to facilitate collusion. James D. Hurwitz has noted that First Amendment protection for petitioning activity can serve as both an invitation to collude and as a shield from antitrust scrutiny.[106] Firms may well use *Noerr-Pennington*'s immunization of collaborative petitioning, including the conduct and settlement of litigation, to facilitate price fixing and normally unlawful joint action. Several cases have included allegations that a group of existing firms used predatory litigation while also engaged in a conspiracy to fix prices.[107]

### 3. *Raising Rivals' Costs*

A third possible purpose of predatory behavior is to raise rivals' costs.[108] *Pennington*, for example, could be viewed as a case in which large coal producers, acting in concert with the UMW, sought to increase the minimum wage and create other arrangements that would raise the cost of doing business for smaller coal firms.[109]

The filing and conducting of a lawsuit (or the defense of a lawsuit) impose a variety of direct and indirect costs on the target of the litigation. *Alexander v. National Farmers Organization*[110] provides an illustration. The overall case involved reciprocal anti-

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44 (1980) (discussing predatory pricing as a means of disciplining competitors and citing examples from various industries).

[106] *See* James D. Hurwitz, *Abuse of Government Process, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 75 (1985).

[107] *See* Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, 814 F.2d 358, 368, 376 (7th Cir. 1987) (involving litigation used to further price-fixing scheme); Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1246, 1251 (9th Cir. 1982) (discussing sham litigation used, as part of a price-fixing conspiracy, to prevent price cutting by competitor), *cert. denied*, 459 U.S. 1227 (1983); Alexander v. National Farmers Org., 687 F.2d 1173, 1181, 1200-03 (8th Cir. 1982) (addressing allegations of price fixing and harassment through litigation), *cert. denied*, 461 U.S. 938 (1983); *Feminist Women's Health Ctr.*, 586 F.2d at 535 (involving allegations of price fixing, group boycott, and various types of petitioning activity); First Nat'l Bank v. Marquette Nat'l Bank, 482 F. Supp. 514, 517 (D. Minn. 1979) (featuring alleged use of litigation to prevent price competition and to discipline competitor), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981); *see also* Hurwitz, *supra* note 106, at 75-76 (citing other cases and commentary).

[108] *See generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986); Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. PAPERS & PROC. 267 (1983).

[109] *See Pennington*, 381 U.S. at 659-60; Salop & Scheffman, *supra* note 108, at 267.

[110] 687 F.2d 1173 (8th Cir. 1982).

trust claims brought among several dairy farmer groups that were engaged in fierce competition in the midwestern United States.[111] One of the dairy groups, the National Farmers Organization ("NFO"), claimed that two dairy cooperatives had engaged in a pattern of litigation, threatened litigation, and harassment against NFO customers in an effort to "break NFO's back" and to make NFO's milk "too hot to handle."[112] Specifically, the court

> recognize[d] that the litigation directly against NFO was intended in part to hamper NFO's ability to compete. The burdensome cost of litigation was one factor. Notes from internal [dairy cooperative] meetings and corroborating testimony show, for example, that senior [dairy cooperative] officials considered sponsorship of additional third-party litigation against NFO in the hope that the added cost of such litigation would "break NFO's back."[113]

Although court costs and attorneys' fees are only the starting points, these items can, by themselves, be substantial. If even partially and temporarily successful, a lawsuit may entail a damage award, temporary injunctive relief that hampers the target's ability to compete, and other remedies. A target firm may be forced to divulge proprietary information, such as trade secrets, new product developments, and marketing strategies in the course of discovery. While a suit is pending, the target firm may also be forced to disclose its contingent liability to creditors, accountants, and others. This revelation would hamper its ability to obtain the funds necessary to compete.[114] The contingent liability can harm the target firm's credit rating, raising the interest rate that the target must pay for needed capital to compensate lenders for the increased risks. Finally, litigation often generates adverse publicity,[115] which

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[111] *See id.* at 1179.

[112] *Id.* at 1200-01.

[113] *Id.* at 1200.

[114] *See, e.g., Handgards,* 743 F.2d at 1296 (noting that litigation hampered plaintiff's ability to raise capital); *see also Otter Tail,* 410 U.S. at 372 (noting that litigation hampered bond financing). Michael W. Bien contends that the use of litigation can effectively drive away lenders or raise the cost of financing, a feat that an individual firm could probably not accomplish by any other means. *See* Michael W. Bien, *Litigation as an Antitrust Violation: Conflict Between the First Amendment and the Sherman Act,* 16 U.S.F. L. REV. 41, 43 n.5 (1981).

[115] *See, e.g., Energy Conservation,* 698 F.2d at 387, 389 (involving litigation that allegedly generated adverse publicity and television coverage, causing plaintiff competitive harm).

may hamper the target's ability to deal with customers and suppliers, as well as creditors.

For example, an incumbent firm may sue an entrant, alleging violation of its trade secrets and of covenants not to compete. The target firm will be forced to retain defense counsel and to bear the cost of defense. The incumbent may even obtain a temporary restraining order or preliminary injunction preventing the entrant from entering the market. During discovery, the entrant may be required to reveal its business plan, employee and customer lists, and its method of operating. This information would be relevant to the incumbent firm's claim that trade secrets are about to be used or that former employees are about to commence competition with the incumbent. Even if this information is subject to a protective order or confidentiality agreement, disclosure can harm the entrant in several ways.[116] Further, most upstart businesses already face difficult challenges in obtaining financing, challenges that will be exacerbated by the need to disclose the pending lawsuit by a dominant firm.[117] Finally, once the litigation is over, and even though it may be resolved in favor of the entrant, the newcomer's entry into the market may have been delayed by weeks, months, or even years.

Another way in which predatory litigation can raise rivals' costs is through onerous or burdensome settlement terms. A rival may agree to settle a case, paying lump sum damages or a stream of payments, rather than bear the burden and expense of defending the strike suit. For instance, the Supreme Court has noted that the target of a weak patent infringement case may agree to pay royalties to the patent holder rather than litigate.[118] These royalty payments constitute an additional cost that the target will be forced to pay, perhaps for the duration of a seventeen-year patent. The patent holder may even establish a track record of favorable settlements with smaller rivals, which would lend further credence to the validity of its patent claim.[119]

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[116] At a minimum, the incumbent firm may obtain information about its potential competitor that it would not otherwise have discovered. The entrant may also be forced to change some of its business methods simply to regain the element of surprise.

[117] *See supra* note 114 and accompanying text.

[118] *See* Blonder-Tongue Labs., Inc. v. University of Illinois Found., 402 U.S. 313, 338 (1971). As another court has observed, "To take a license, calling for small royalty payments, frequently involves less expense than prolonged litigation" Kleinman v. Kobler, 230 F.2d 913, 914 (2d Cir.), *cert. denied*, 352 U.S. 830 (1956).

[119] The acceptance of royalty agreements by competitors, which indicates that they

An example of a successful cost-raising strategy occurred in *CVD, Inc. v. Raytheon Co.*[120] Several employees of Raytheon, a large diversified electronics firm, left that firm and formed CVD. CVD began competing with Raytheon in the manufacture of zinc-based materials used in infrared windows and other high precision optical devices. The employees had signed confidentiality agreements, promising not to divulge Raytheon trade secrets. Raytheon thereafter threatened litigation, claiming violation of its trade secrets. CVD denied that Raytheon had any protectable trade secrets on the ground that the technology was published in government reports and thus was in the public domain. Nonetheless, Raytheon insisted upon and obtained a royalty agreement from CVD, under which it would receive eight to fifteen percent royalties from the new firm.[121] CVD then sued Raytheon, alleging an antitrust violation. The jury rendered a verdict in favor of CVD, finding that the defendant had asserted its trade secret claim in bad faith and used its bargaining power to force CVD into an agreement that unlawfully restrained trade; the court of appeals affirmed.[122] *CVD* presents a classic case of a dominant firm asserting weak (if not completely baseless) claims in an effort to raise the costs of a new entrant into the market. Again, there are many other examples.[123]

#### 4. *Deterring or Delaying Entry*

Finally, predatory behavior may be used to deter potential competitors from entering a market. This strategy is most effective

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have acquiesced to the enforceability of the patent claim, can then be used as evidence to defend the validity of the patent against a later challenge. *See* Uniroyal, Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044 (Fed. Cir.), *cert. denied*, 488 U.S. 825 (1988); Robert W. Harris, *The Emerging Primacy of "Secondary Considerations" as Validity Ammunition: Has the Federal Circuit Gone Too Far?*, 71 J. PAT. & TRADEMARK OFF. SOC'Y 185 (1989).

[120] 769 F.2d 842 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

[121] *See* CVD, Inc. v. Raytheon Co., 769 F.2d 842, 847-48 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

[122] *See id.* at 860.

[123] *See, e.g., Premier Elec. Constr. Co.*, 814 F.2d at 368 (addressing litigation employed as part of scheme to raise rivals' costs); *Rickards*, 783 F.2d at 1335 (same); *Litton Sys.*, 700 F.2d at 798, 811 (involving claims that AT&T imposed costly regulatory burdens on an entrant in the telephone terminal equipment market during a ten-year period); *Clipper Exxpress*, 690 F.2d at 1247, 1265 (featuring plaintiff seeking damages for costs imposed by sham litigation); Ad Visor, Inc. v. Pacific Tel. & Tel. Co., 640 F.2d 1107, 1108-09 (9th Cir. 1981) (discussing 63 state court collection actions allegedly brought "as a bludgeon to retain a monopoly and to interfere with the business relationships of a competitor"); Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18, 19 (2d Cir. 1980) (involving alleged sham litigation causing increased costs and lost profits totalling $14,200,000); Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 843 (9th Cir. 1980) (addressing litigation that allegedly increased cost of doing business).

in regulated markets, such as transportation and utilities. In fact, two of the major Supreme Court decisions in this area arose from the regulatory context: *California Motor Transport Co. v. Trucking Unlimited*,[124] which concerned the long-distance trucking market, and *Otter Tail Power Co. v. United States*,[125] which involved electrical utilities. In both cases, the dominant incumbent firm (or firms) allegedly employed litigation and administrative strategies for the purpose of preventing or at least delaying the entry of new competitors into the regulated market. The predation strategy involved repeated administrative and judicial challenges, appeals from adverse rulings, and advocacy of litigation positions regardless of the merits.[126]

Another regulatory case is *Litton Systems, Inc. v. American Telephone & Telegraph Co.*[127] In that case, AT&T allegedly employed various anticompetitive means to eliminate Litton as a competitor in the telephone terminal equipment market. AT&T's principal weapon was its bad faith opposition to certification standards and the filing of tariff applications with the Federal Communications Commission (FCC). AT&T was able to employ these tactics during a ten year period, ultimately succeeding in driving Litton from the market.[128]

The use of regulatory schemes to deter competition may be a widespread phenomenon, but entry deterrence strategies are by no means limited to traditionally regulated industries. Some elements of regulation can be found in almost every segment of the economy. Hospitals, for example, need certificates of need from state authorities in order to enter a market. In one case, a hospital first sought regulatory approval in 1975, was denied approval in 1980, obtained relief in the courts in 1982, and finally began construction on the hospital building in 1984.[129] Retail businesses need zoning

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[124] 404 U.S. 508.

[125] 410 U.S. 366 (1973).

[126] *See id.* at 368-72; *California Motor Transp.*, 404 U.S. at 509-12.

[127] 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

[128] *See id.* at 789-90, 798, 811-12. Another regulated industry case is MCI Communications Corp. v. American Tel. & Tel. Co., 462 F. Supp. 1072, 1096-97 (N.D. Ill.) (litigation used to hamper financing and delay or prevent entry of competitor in telecommunications market), *aff'd on other grounds*, 594 F.2d 594 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979).

[129] *See* Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 564-65 (6th Cir.) (involving antitrust claim based on alleged conspiracy to deny certificate of need and other regulatory approval), *cert. denied*, 479 U.S. 885 (1986); *see generally* NEIL L. CHAYET & MICHAEL R. SONNENREICH, CERTIFICATE OF NEED: AN EXPANDING REGULATORY CONCEPT 1

variances, building permits, and other (sometimes discretionary) approvals from local government before they can be built.[130] Many business and professional entrants need licenses in order to begin competition. In each of these situations, incumbent firms may employ administrative and judicial mechanisms in an effort to deter or delay entry of new competitors.

Interestingly, there have been a number of sham litigation cases involving competing shopping centers.[131] For instance, in *Landmarks Holding Corp. v. Bermant*,[132] the plaintiffs, who were real estate developers, alleged that two existing shopping centers had conspired to prevent them from opening a competing shopping center in Hampden, Connecticut. The existing firms began a persistent and eventually successful campaign to prevent the plaintiffs from developing a competing mall. Their tactics included fourteen (mostly baseless) lawsuits, multiple appeals from adverse decisions, appearances at zoning hearings, litigation delaying tactics, and massive publicity campaigns. Atypically, one of the defendants admitted in a deposition that the existing centers would oppose the new entrant by every means possible, with a view to either defeating entry or at least delaying it for as many years as possible; even if the existing firms lost, they "could delay the development of this property a minimum of three to five years."[133] Although the developers of the proposed new mall prevailed against these attacks, the court noted that their "courtroom victories proved Pyrrhic, for the protracted delays had by then forced them to abandon the development."[134] In the developers' subsequent antitrust suit, the Second Circuit concluded, not surprisingly, that the defendants' litigation fell within the sham exception as delineated in *California*

(1978) (discussing growth in health care regulation); MARTIN THOMPSON, ANTITRUST AND THE HEALTH CARE PROVIDER 28 (1979) (same).

[130] *See infra* notes 131-36 and accompanying text; *see also* Bien, *supra* note 114, at 43 n.6 (citing various examples of regulatory entry barriers).

[131] In addition to the case discussed in the text, see *Miracle Mile Assocs.*, 617 F.2d at 19-21 (addressing allegation by developers of proposed shopping center that the largest mall in a Rochester suburb used baseless litigation and administrative action to delay and hinder their development); *Hahn*, 615 F.2d at 833-34, 836 & n.7 (involving allegation that defendants instituted nine baseless lawsuits and covertly financed four others in an attempt to prevent development of a shopping center in downtown Santa Rosa, California in order to retain monopoly in the market); Ross v. Bremer, 1982-2 Trade Cas. (CCH) ¶ 64,746 (W.D. Wash. 1982) (featuring allegation that defendant used litigation to delay plaintiff's development of a shopping center).

[132] 664 F.2d 891, 892-95 (2d Cir. 1981).

[133] Landmarks Holding Corp. v. Bermant, 664 F.2d 891, 892 (2d Cir. 1981).

[134] *Id.* at 895.

*Motor Transport*.[135] Although the extent of the predatory litigation in *Landmarks* may seem extreme, it is not unique,[136] and it dramatically illustrates the value of the courtroom as a sword to deter entry into a market.

Many cases of possible entry deterrence have involved the vigorous and sometimes unjustified enforcement of intellectual property rights: patents, copyrights, trademarks, and various state law theories.[137] In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*,[138] the Supreme Court addressed an antitrust counterclaim based on threats of litigation and a meritless patent infringement suit.[139] The alleged fraud involved Food Machinery's filing of a patent application despite its knowledge that the invention had been in public use for more than one year, a fact that bars patentability. The Court held that this entry deterrence strategy could violate section 2 of the Sherman Act.[140] In *Handgards, Inc. v. Ethicon, Inc.*,[141] Ethicon, the patent holder, had a ninety percent share of the relevant market[142] and sought to prevent entry of Handgards as a competitor. The jury found that Ethicon knew that its patents were invalid on several grounds, that the patent suit was brought in bad faith, and that Ethicon had met the other elements of an attempted monopolization claim. The court of appeals affirmed the verdict and the award of $3.6 million

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[135] *See id.* at 895-98.

[136] *See also supra* note 131.

[137] For examples of cases besides those discussed in the text, see *CVD*, 769 F.2d at 847 (involving bad faith assertion of trade secret violation); *Grip-Pak*, 694 F.2d at 468 (involving actual and threatened patent suits); Hydro-Tech Corp. v. Sundstrand Corp., 673 F.2d 1171, 1172-73 (10th Cir. 1982) (addressing existing firm that brought trade secret claim and threatened a patent claim in an attempt to deter new competitor); *Handgards*, 601 F.2d at 987-89 (involving defendant that brought unsuccessful patent infringement claims); Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 418 (10th Cir.) (addressing patent and unfair competition claims), *cert. denied*, 344 U.S. 837 (1952). *See also* Business Guides, Inc. v. Chromatic Communications Enters., ___ U.S. ___, 111 S. Ct. 922, 925-26 (1991) (Rule 11 case in which incumbent firm brought copyright claim without reasonable investigation); *cf.* Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 875-78 (Fed. Cir. 1985) (affirming finding that patent suit was not brought in bad faith); Columbia Pictures Indus. v. Redd Horne, Inc., 749 F.2d 154, 161 (3d Cir. 1984) (finding copyright claim brought in good faith); Aydin Corp. v. Loral Corp., 718 F.2d 897, 903 (9th Cir. 1983) (finding no evidence that trade secret action was a sham given that it was still pending at time of district court's decision).

[138] 382 U.S. 172.

[139] *See id.* at 173-75.

[140] *See id.* at 174.

[141] 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985).

[142] The market was that for heat-sealed plastic gloves.

in damages, $1.1 million in attorneys' fees, and $3 million in post-judgment interest.[143]

Litigation can have a particularly detrimental effect on the ability of a new firm to obtain financing. Generally, lenders will be reluctant to provide funds to a venture that is the target of a lawsuit brought by a powerful competitor. In *Otter Tail*, for example, the target utility firms were unable to sell bonds necessary for financing their operations while the anticompetitive lawsuits were pending. Before the bonds could be issued and sold, the new entrants needed to obtain legal opinions assuring investors that no pending or threatened litigation would impair the legality or value of the bonds.[144] Otter Tail's litigation strategy thus completely thwarted the financing effort and prevented entry until the litigation ended.

Financing also played a role in *CVD*, where a new entrant agreed to sign a royalty agreement with Raytheon. The entrant believed that it would not be able to obtain the necessary financing if it were sued by Raytheon for violation of trade secrets.[145] Finally, in *Ernest W. Hahn, Inc. v. Codding*,[146] a shopping center case, the existing competitor allegedly knew that the thirteen lawsuits it filed or secretly sponsored would prevent the marketing of bonds necessary to finance a new shopping center development.[147] As these cases demonstrate, a competitor's entry into a market can effectively be delayed or even prevented altogether through use of the litigation process.

### *D. Economic Analysis of Predatory Litigation*

The concerns that led the Supreme Court to be skeptical of predatory pricing claims in *Matsushita* do not apply as persuasively to claims of anticompetitive litigation. In many respects, abusive litigation is very different from predatory pricing.

Predatory litigation does not have a direct effect on price levels, although it may raise costs in an industry. Rather, it is a strategy

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[143] *See Handgards*, 743 F.2d at 1285-300.

[144] *See Otter Tail*, 410 U.S. at 372. Another case involving the target's inability to obtain bond financing is Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484, 486 (8th Cir. 1985) (involving litigation that allegedly prevented issuance of bonds and ultimately caused target firm to go into bankruptcy), *later proceeding*, 817 F.2d 455 (8th Cir. 1987).

[145] *See CVD*, 769 F.2d at 855.

[146] 615 F.2d 830 (9th Cir. 1980).

[147] *See id.* at 840-41.

that is designed to achieve other exclusionary results in the marketplace. In this manner, it resembles other forms of non-price predation, such as predatory innovation.

Litigation may be a more effective means of predation than other tactics, such as predatory pricing and innovation. Michael W. Bien points out, for example, that litigation may not be as costly for the dominant firm as predatory pricing.[148] If the new entrant's cost structure is relatively similar to that of the dominant firm, predatory pricing requires the dominant firm to incur substantial losses in deterring entry. Moreover, because the dominant firm has a larger share of the market than its target, the larger firm will be forced to bear the cost of its predatorily low prices over a higher volume of sales than that of the target.[149] Accordingly, the dominant firm's losses from predatory pricing will normally exceed the target's losses.

Predatory litigation, on the other hand, should not cost the predator more than it does the target. In fact, litigation may allow the dominant firm to impose asymmetrical costs on the entrant through the effective use of burdensome discovery requests.[150] As James D. Hurwitz has noted, "Legal claims are often far easier to make than to refute, especially when the requirements for obtaining summary disposition are demanding and strict."[151] He observes that this asymmetry is particularly severe in regulated industries where the target must demonstrate a "need" for its product or service. Because a target, with everything to lose from an adverse decision, will feel the need to spend heavily on its defense, the incumbent's cost of objecting to the target will be lower than the target's cost of responding to those objections.[152]

The litigation process itself may be weighted in favor of the initiating party. The predator is almost always the "plaintiff"; the target is normally a "defendant."[153] Under normal rules of pro-

[148] *See* Bien, *supra* note 114, at 42 n.2.

[149] *Id.*

[150] *Id.* According to Bien, the dominant firm can use depositions, document requests, interrogatories, and requests for admissions to force the small entrant to expend attorneys' fees and managerial time. *See also* Hurwitz, *supra* note 106, at 70-73 (discussing cost asymmetries created by litigation and other petitioning activity).

[151] Hurwitz, *supra* note 106, at 71.

[152] *Id.* For example, AT&T imposed considerable costs on Litton, a potential competitor in the market for telephone terminal equipment, through its alleged abuse of the regulatory process. *See supra* notes 127-28 and accompanying text.

[153] There have been few cases in which the *defense* of lawsuits has been viewed as sham. *See In re* Burlington N., Inc., 822 F.2d 518, 532-33 (5th Cir. 1987) (holding that

cedure, the plaintiff selects the forum, the preliminary issues to be resolved, and often the initial direction of discovery. The defendant must respond and frame a defense based on all available grounds. If the defendant believes the claim is baseless, it bears a heavy burden in seeking summary disposition. Given modern rules of notice pleading and liberal discovery,[154] lawsuits do not go away overnight. A motion to dismiss will not be granted unless, as a matter of law, the complaint fails "to state a claim upon which relief can be granted."[155] Courts assume the truth of all factual allegations in the complaint, drawing all inferences in favor of the plaintiff. If any set of facts consistent with the allegations in the complaint states a claim for relief, courts will not grant the motion to dismiss.[156]

Similarly, the defendant will not be able to obtain summary judgment unless it can show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[157] Although the Supreme Court relaxed the standards for federal court summary judgment in a 1986 trilogy of cases,[158] the plaintiff can still defeat the motion by demonstrating that material issues of fact exist, a showing that the plaintiff can easily make in many cases.[159] Thus, by virtue of the laudable desire

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firm's actions in defending litigation can fall within the sham exception if the defense was "not significantly motivated by an honest and reasonable desire to influence the court's decision"), *cert. denied*, 484 U.S. 1007 (1988); *cf. Feminist Women's Health Ctr.*, 586 F.2d at 543 (holding that, in instant circumstances, defense of antitrust action cannot be basis for finding of sham litigation); *MCI Communications Corp.*, 462 F. Supp. at 1097 (same).

[154] *See, e.g.*, FED. R. CIV. P. 8(a)(2) (stating that complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief"); FED. R. CIV. P. 56(f) (allowing party to obtain discovery prior to grant of summary judgment).

[155] FED. R. CIV. P. 12(b)(6).

[156] *See* Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

[157] FED. R. CIV. P. 56(c). The court will not make credibility determinations, *see* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745 n.11 (1983), which means the plaintiff can often force relatively weak cases to trial simply by obtaining testimony contradicting the defendant on a material issue.

[158] *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); *Matsushita*, 475 U.S. at 574.

[159] The court in Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977), discussed this problem in the context of antitrust litigation, but its point is applicable here as well:

> [I]t takes little to establish a conflict of evidence as to a material fact. And if the defendants, by affidavits . . ., show that the case is without merit, and if fear of perjury (a rather uncommon fear among the makers of affidavits) prevents the filing of directly conflicting affidavits, Rule 56 still gives the

to allow plaintiffs to have their day in court, procedural rules may enable an incumbent firm to ensnare a competitor in protracted and costly litigation, with the effect of delaying or deterring entry, imposing costs on the target, or even completely eliminating the competitor.

It would seem that a predatory litigation strategy would be particularly effective if the dominant firm faces repeated challenges, because many of the litigation documents could be reused. This "economy of scale"[160] does not appear in the case of other predatory strategies, such as predatory pricing and predatory innovation. Those practices require a new devotion of resources every time a dominant firm confronts a competitor—a renewed "price war" or other costly course of action.

These factors indicate that predatory litigation may cost somewhat less than other anticompetitive strategies. At the same time, the benefits of abusive litigation may be as great or greater than those of other techniques. As has been demonstrated, predatory litigation can effectively accomplish several anticompetitive objectives, from raising rivals' costs, to disciplining competitors, to delaying or deterring entry, to completely eliminating a competitor.[161]

A central argument adopted by the Supreme Court in *Matsushita* is that predatory pricing is rare because few firms can reasonably expect to maintain and exercise monopoly power.[162] As soon as prices go up, the argument goes, new competitors are drawn into the market by the profit opportunity. Yet, predatory litigation may be more effective in deterring competition. A new potential competitor may fear that the dominant firm will use the same litigation tactics that were employed against the first target firm, especially because the incumbent's costs of doing so may drop because its litigation documents are already prepared.[163]

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> plaintiffs an escape hatch. They can claim they won't know the facts until they have had discovery and get action on the motion postponed.

*Id.* at 1083.

[160] *See* Hurwitz, *supra* note 106, at 71 (noting that a predator "may be able to reduce its average litigation costs by modifying and reusing prior filings").

[161] *See supra* part II.C.

[162] *See Matsushita*, 475 U.S. at 589.

[163] The new entrant may reduce its cost of defense by seeking a law firm with expertise in the field (and hence with its own bank of litigation documents). The problem with this approach is that attorneys with such expertise, developed through representation of other clients, might charge a premium or might have higher billing rates that reflect the attorneys' developed expertise and reputation. Thus, the benefits of retaining experienced counsel may be counterbalanced by their increased cost.

A predatory strategy that depends on establishing a "tough" reputation is subject to several criticisms. Most importantly, the bluff must be successful in deterring later entrants. An aggressive potential entrant may be willing to call the bluff, at which point the original firm must either continue the predatory practices and take further losses or else abandon the strategy. Abandoning the strategy as to one entrant in the market would signal to all others that the path is now clear for entry. Therefore, because a second or subsequent lawsuit may be less costly than the first suit, a threat of predatory litigation may be more credible than threat of other actions.

Bien also notes that the dominant firm can divert potential customers away from the entrant by threatening to add them to the lawsuit.[164] This threat is credible, for example, in a trade secret suit in which the dominant firm can claim that the customers purchased and used products with full knowledge that they were produced by improperly usurping the dominant firm's trade secrets. Other methods of drawing away customers, such as price reductions, are likely to be costlier than the threat of litigation, particularly if the predatory lawsuit is already pending against other defendants.

Further, predatory litigation may be more difficult to detect and penalize than a predatory pricing strategy or other means of direct interference in the marketplace. Most enforcement activity, by both private plaintiffs and the government, is focused in other areas. Among predation strategies, predatory pricing and certain forms of non-price predation receive more attention.[165] Litigation is, of course, a protected First Amendment petitioning activity, and it can also further whatever interests are served by the underlying litigation, at least if the lawsuit has some merit. Thus, resorting to litigation does not readily conjure up accusations of predation. Given the uncertain legal standards governing sham litigation and the complexity of analysis necessary to evaluate particular fact situations, a firm that believes it is the target of exclusionary behavior through the courtroom may choose not to bring an antitrust claim, particularly if the claim will involve sat-

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[164] *See* Bien, *supra* note 114, at 42 n.2.

[165] *See* Salop & White, *supra* note 1, at 1006-08 (analyzing private antitrust litigation and finding that less than one percent of these cases involves unlawful inducement of government action); *see also supra* note 60 (noting the small number of reported decisions involving FTC allegations of sham litigation).

ellite litigation, further draining the target firm's assets and energies. The target firm may also be deterred from seeking redress under the Sherman Act by the high hurdles that must be surmounted, including proof that the sham exception applies and proof of the underlying Sherman Act violation.

Finally, some of the dangers of overly aggressive antitrust enforcement in the pricing and product innovation areas do not apply in the litigation arena. The Supreme Court, as well as lower courts and commentators, has expressed concern that legitimate price competition would be chilled if courts too readily found a particular price cut to be predatory.[166] Similarly, courts have been wary of condemning product changes as exclusionary, fearing that such a rule would deter desirable research and development.[167] These arguments reflect the more general fear, which the Supreme Court expressed in *Monsanto Co. v. Spray-Rite Serv. Corp.*,[168] that the antitrust laws may inadvertently deter procompetitive behavior, such as certain vertical agreements, aggressive price cutting, or product innovation.[169]

Litigation can serve a variety of beneficial purposes, such as furthering the policies underlying a party's claim and allowing the exercise of First Amendment rights, but it also presents a good opportunity for abuse. Although distinguishing predatory conduct from legitimate competition is difficult when applied to most types of business conduct, courts and judges are probably best equipped to make this determination in the area of sham litigation. The business of the courts, after all, is litigation. Every good judge is a good lawyer and should be able to spot abusive litigation. Thus, if we trust the judiciary (and lay jurors) to decide whether a particular pricing strategy is predatorily below some measure of cost or whether the introduction of a new product is anticompetitive, we should more readily trust them to determine whether a lawsuit has been instituted or conducted as a form of predation.

In short, the economic rationales for skepticism against predatory pricing claims, which the Supreme Court adopted in *Mat-*

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[166] *See Matsushita*, 475 U.S. at 594-95 (citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762-64 (1984)); *Barry Wright*, 724 F.2d at 234 ("[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition."). *See generally* BORK, *supra* note 10, at 155 (arguing that antitrust enforcement can "dampen the vigor of price competition").

[167] *See supra* notes 85-86 and accompanying text.

[168] 465 U.S. 752 (1984).

[169] *See id.* at 762-64.

*sushita*, are not as persuasive in the case of predatory litigation. A litigation-based strategy costs less, is potentially more effective, and is less likely to be detected than a strategy based on pricing competitors out of business. Further, the danger of chilling pro-competitive behavior does not appear as severe when courts address predatory litigation.

### *E. Predatory Litigation: Economic Models*

A simple economic model can be used to illustrate a firm's decision to implement litigation. In a garden variety lawsuit, a plaintiff will bring a claim only if the expected benefits of the lawsuit exceed the costs. The expected benefits of the suit would typically be the anticipated value of the money judgment and injunctive relief, "J," discounted by the probability of winning the case, "x." The expected costs are the plaintiff's costs of engaging in litigation, "C," including attorneys' fees, court costs, expert witness fees, time spent by employees on the litigation, travel, and other miscellaneous expenses. The risk-neutral plaintiff will consider filing suit only if

$$xJ > C.$$

If this condition is not met, the lawsuit will lead to a net expected loss. For example, if the plaintiff has a sixty percent chance of prevailing and obtaining a $1,000,000 judgment, while expending $120,000 in litigation costs, the expected benefits of the lawsuit ($600,000) exceed the costs ($120,000). On the other hand, *ceteris paribus*, if the plaintiff has only a ten percent chance of victory, the rational and risk-neutral plaintiff will not bring suit because the expected recovery, $100,000, is less than the $120,000 that would be spent on the case.[170]

Even if the above condition is satisfied, a plaintiff may not bring the suit because of risk aversion. A risk averse plaintiff, one that prefers a bird in the hand over two in the bush, would be unlikely to invest in a lawsuit with a high risk of failure, even though the expected return is positive.[171]

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[170] Judge Richard Posner's opinion in *Grip-Pak*, 694 F.2d at 472-73, discusses the relevance of cost-benefit analysis to predatory litigation claims.

[171] A risk-neutral person is concerned only with the expected payoff amounts. Risk-averse persons, on the other hand, will consider the variation between outcomes because they wish to avoid large losses. In order to analyze the behavior of a risk averse person, it is necessary to translate the dollar payoffs into utility ("U"), where U is determined by

The predation value of a lawsuit changes these equations dramatically. If an additional benefit arising from the litigation is that the plaintiff obtains some type of market advantage (or places the new market entrant at a disadvantage), then the suit will have collateral benefits not directly related to the recovery of a money judgment. These expected benefits, discounted to present value, must be added to the balance. The following equation includes a variable, "L," that reflects the anticipated marketplace profit from the litigation:

$$xJ + L > C.$$

The addition of a marketplace profit factor means that some lawsuits that would not otherwise have been economically justifiable may be pursued because they will produce monopolistic gains in the marketplace. The example above that involved a ten percent chance of recovery provides an illustration. According to the model, the lawsuit would not be brought because the expected net return from the money judgment is negative. Yet, if the filing and prosecution of that lawsuit would produce a stream of additional monopoly profits (or increased prices) equal to $100,000 in present value, the litigation would become attractive to the rational, profit-maximizing firm: (.10 x $1,000,000) + $100,000 - $120,000 = $80,000. The expected rate of return would be ($100,000 + $100,000 - $120,000) / $120,000 = 67%. Suddenly, a meritless lawsuit becomes a profit opportunity that a firm would be reluctant to miss.

From an economic viewpoint, of course, the lawsuit should not be brought. The gains from monopolistic or increased prices are not socially desirable, given that they lead to the same deadweight losses and wealth transfers from consumers that any monopolistic behavior causes.[172] Moreover, the litigation costs expended by the

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both the payoff and the riskiness of the activity, i.e., U = f (Payoff, Risk). Risk-preferring persons, on the other hand, actually prefer to take risks in the hope of obtaining a higher payoff.

The assumption of risk neutrality in this model is a reasonable one, given that the relevant parties are corporate entities that are likely to have substantial assets, allowing them to absorb the costs of engaging in a predatory litigation strategy. Of course, the higher the stakes, the less reasonable it is to assume risk neutrality.

[172] There have been many studies demonstrating that monopoly creates deadweight losses, including not only the distortion caused by supracompetitive pricing but also the monopolist's expenditure of resources to maintain its market position. *See, e.g.*, HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 19-24 (1985); FREDERIC M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 459-71 (2d ed. 1980); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975). Of course, monopoly pricing also results in higher prices for consumers.

plaintiff *and the defendant* would not be incurred but for the prospect of ill-gotten gains. These expenditures are made solely because the dominant firm seeks to maintain its monopoly position, a socially undesirable use of scarce resources.

This economic model suggests several conclusions relevant to claims of predatory litigation. First, it is important to distinguish cases in which a lawsuit is cost-justified from those in which a lawsuit is not. If the lawsuit is cost-justified in terms of the expected recovery (in present value terms), discounted by the likelihood of success and reduced by the cost of bringing the suit, then the litigation is presumptively efficient and should not be deterred. The litigation is in fact efficient if the underlying legal claim involves a wealth-maximizing legal rule. For purposes of this model, one must assume that the underlying legal rule is efficient, and there is no reason to dispute that assumption.[173] Further, the First Amendment's right to petition mandates that a lawsuit with a reasonable prospect of success not be penalized, unless it is brought in bad faith or pursued for an improper motive.

If the expected payoff from the litigation is negative, the firm is likely to have engaged in predation. The antitrust plaintiff can confirm this suspicion by showing that the defendant obtained some marketplace benefit from the litigation, typically through the maintenance and exercise of a monopoly or of market power. The defendant presumably was able to raise prices, increase profits, and reduce output in the relevant market. The defendant engaged in predatory litigation for its anticompetitive effect in the market, not for the anticipated courtroom recovery. Thus, this economic model suggests that litigation that would not have been brought absent collateral market effects is inefficient and should be deterred by the antitrust laws. The antitrust laws can deter and prevent this presumptively inefficient litigation by creating appropriate enforcement mechanisms, primarily treble-damage private antitrust claims.

A more sophisticated model of a firm's decision to engage in predatory litigation can now be introduced. It includes the threat of an antitrust claim by the target firm. This last model is an

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[173] For example, if a patent infringement lawsuit is likely to generate a net positive recovery, i.e., if $xJ - C > 0$, this model assumes that the lawsuit is efficient. The validity of this assumption depends on the efficiency of patent law rules and the ability of the legal system to resolve disputes correctly. Whether the many possible theories of recovery that a dominant firm might use are in fact economically efficient is beyond the scope of this Article.

application and modification of the general model developed by economists Steven C. Salop and Lawrence J. White.[174] The model introduces several additional variables:

s = Probability of antitrust claim (as perceived by predator);
p = Probability that target would prevail in the antitrust case (as perceived by predator);
B = Benefits from predation until final judgment in the antitrust case;
Cp = Cost of target's antitrust claim;
Cd = Cost of predator's defense of antitrust claim;
m = Damages multiplier for successful antitrust claims; and
D = Provable antitrust damages suffered by target firm.

Applying a variation of the Salop and White model, the predator firm will commit the violation if:

$(1\text{-}s)(xJ+L) + s(1\text{-}p)(xJ+L) + s(p)(B) \geq C + sCd + s(p)(mD+Cp)$.[175]

To explain this equation more fully, the first term, (1-s)(xJ+L), represents the expected gains from undetected predatory litigation, discounted by the probability that the target firm will not sue. The second term, s(1-p)(xJ+L), represents the same expected gain, discounted by the probability that the plaintiff will bring, but lose, an antitrust claim. The third term, s(p)(B), accounts for whatever gain occurs if the target brings a successful antitrust claim.[176]

On the other side of the equation, the first term, C, represents the cost of the anticompetitive strategy, which the predator will incur in every case (thus, it is not discounted). The second term, sCd, represents the predator's cost of defending an unsuccessful antitrust claim, which is discounted by the probability that the target will bring suit. The last term, s(p)(mD+Cp), is the predator's loss if the target brings a successful antitrust claim.[177]

Using the modified Salop and White model, the prospect of treble damages increases the expected cost of a predatory strategy,

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[174] *See* Salop & White, *supra* note 1, at 1053-54.

[175] *Cf. id.* (providing model that explains the interaction between antitrust violations and lawsuits).

[176] *Id.*

[177] *Id.*

as would the availability of attorneys' fees for the successful antitrust plaintiff. As Salop and White note, moreover, these remedies are likely to increase "s," the probability that the target will bring an antitrust claim in the first place.[178] An increase in that variable reduces the expected benefits and substantially increases the expected costs of an exclusionary strategy, making it less likely to occur. Thus, if predatory litigation is to be deterred effectively, antitrust law standards must identify situations in which the practice occurs and permit the antitrust plaintiff to prove it.

### *F. Prevalence of Predatory Litigation*

There is some disagreement about the degree to which predatory litigation is a problem. Robert Bork views sham litigation as a serious threat to free competition:

> There is, of course, no way of estimating precisely how much competition is crippled or stifled each year through the abuse of governmental processes. However, the number of cases beginning to arise in this relatively new field of litigation (as well as some practical experience with local businessmen) leads one to believe that this form of predation may be common and that the aggregate annual loss to consumers may be very large. The antitrust laws can make a major contribution both to free competition and to the integrity of administrative and judicial processes by catching up with this means of monopolization.[179]

Others contend that predatory litigation rarely occurs.[180]

One way to measure the increase in the volume of antitrust cases alleging anticompetitive sham litigation is to determine the number of cases decided over the last two decades in which such a claim was raised. The figures in the table below are the results of searches conducted on the LEXIS computerized data base, requesting all reported federal antitrust cases involving sham litigation and citing *California Motor Transport*. This raw compilation of cases has then been manually verified and supplemented.

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[178] *See id.* at 1054 (noting that "s" is affected by several other variables in their model).

[179] BORK, *supra* note 10, at 348-49.

[180] *See* Christopher C. Klein, *Predation in the Courts: Legal versus Economic Analysis in Sham Litigation Cases*, 10 INT'L REV. L. & ECON. 29, 29 & n.3 (1990) (citing commentary).

TABLE 1: REPORTED CASES INVOLVING CLAIMS OF PREDATORY LITIGATION

| *Time Period* | *Supreme Court* | *Court of Appeals* | *District Court* | *Total* |
|---|---|---|---|---|
| 1971-75 | 3 | 1 | 4 | 8 |
| 1976-80 | 1 | 11 | 28 | 40 |
| 1981-85 | 1 | 32 | 27 | 60 |
| 1986-90 | 0 | 16 | 19 | 35 |

This information reveals that there have been approximately 145 reported opinions concerning sham litigation during the last twenty years.[181] In addition to this substantial body of cases, numerous cases involving sham litigation have undoubtedly been brought and resolved without a published opinion.[182] Thus, the actual number of predatory litigation cases brought in the last twenty years is likely to be much higher. There is no indication that litigation in this area is declining, although slightly fewer reported decisions may ultimately be published in the most recent five year period. This decline may be the result of decisions by the courts of appeals establishing "the law of the circuit," resulting in an increased rate of settlement.

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[181] As mentioned, the information in the table is based on research conducted using the LEXIS computerized data base and searching for opinions that refer to "sham litigation" and *California Motor Transport*. Searches for cases decided before *California Motor Transport*, a 1972 decision, substituted citations to *Noerr*. This research was conducted on November 7, 1991.

[182] Christopher C. Klein has conducted a helpful analysis of cases involving sham litigation claims. His study notes that there were approximately 200 claims of sham litigation filed prior to 1984, and that 196 cases were brought between January 1982 and September 1985. *See* Klein, *supra* note 180, at 30 n.5. Klein found the following allegations concerning the purpose of predatory litigation: imposing litigation costs - 63.5%; preventing expansion - 25.2%; delaying expansion - 16.5%; preventing entry ("target enjoined") - 14.7%; raising business costs - 12.2%; causing lost sales - 12.2%; eliminating a competitor - 7.0%. *See id.* at 35. Klein acknowledges that his sample of cases might suffer from problems of selection bias—the reported cases may not be representative of all cases filed because some types of cases (close cases) may be more likely to reach a reported decision. *See id.* at 34. Still, Klein notes that this problem may not be too severe because strategic behavior by litigants can lengthen the proceedings, even in cases that are not close or where the parties expectations about the outcome are similar. *See id.* Klein concludes his paper with a statistical analysis supporting his hypothesis that successful cases (i.e., cases surviving a motion to dismiss) alleging sham litigation tend to have indicia of predatory behavior, as defined by economic theory. *See id.* at 39-40.

## III. SHAM LITIGATION STANDARDS: APPLYING THE MODEL

### A. *Selecting a Standard for Sham Litigation*

As discussed earlier, the Supreme Court has provided only general guidelines for application of the *Noerr-Pennington* doctrine and its sham exception.[183] The task of applying these general standards in specific cases has thus been left to the lower courts.

As Christopher C. Klein has observed: "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."[184] One of the theses of this Article is that cost-benefit analysis can help provide definition to the sham exception, offering guidance to courts and parties in resolving whether a firm's litigation activities can be viewed as sham or as legitimate petitioning. Some courts have adopted legal standards that incorporate this cost-benefit test, or tests that lead to similar results. Other courts, however, have taken a very narrow approach to finding cases of "sham." These courts have failed to give sufficient consideration to the danger predatory litigation poses to competition and to the potential for abuse of courtroom processes.

Courts agree with the general notion that whether litigation is genuine or sham is a question of fact.[185] Generally, courts have also held that the antitrust plaintiff has the burden of establishing that the litigation is unprotected sham; in other words, litigation is presumed to be a genuine petitioning activity unless the antitrust plaintiff presents sufficient evidence to the contrary.[186] Courts differ considerably, however, in defining what constitutes "sham" litigation.

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[183] *See supra* part I.

[184] Klein, *supra* note 180, at 29.

[185] *See, e.g.*, Aydin Corp. v. Loral Corp., 718 F.2d 897, 903 (9th Cir. 1983); Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1371 (5th Cir. 1983); Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 674 F.2d 1240, 1252, 1253, 1264 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

[186] *E.g.*, *Aydin*, 718 F.2d at 903; MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1155 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). In the Fifth Circuit, the defendant has the initial burden of production, requiring it to demonstrate that it is entitled to immunity; the plaintiff then has the burden of establishing that the defendant's conduct falls within the sham exception. *See Coastal States Mktg.*, 694 F.2d at 1372 n.46; *cf.* Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1566 & n.6 (5th Cir. 1984) (en banc) (approving jury instructions placing burden on antitrust defendant to establish that petitioning was genuine), *cert. denied*, 474 U.S. 1053 (1986).

At one extreme is *Hydro-Tech Corp. v. Sundstrand Corp.*,[187] a Tenth Circuit decision. Hydro-Tech's antitrust claim was based on Sundstrand's prior institution of an unsuccessful trade secret claim against it, which Hydro-Tech alleged was lacking in probable cause and was brought for the purpose of interfering with its business and maintaining Sundstrand's monopoly.[188] The Tenth Circuit held that "sham litigation" involves a gross abuse of process, requiring *more* than the filing of a baseless lawsuit with anticompetitive intent.[189] Although acknowledging that its list was not exclusive, the court stated that the antitrust plaintiff must show "a pattern of baseless actions . . . [or] bribery, perjury, denial of access to the courts, or the like, as those several matters are referred to in *California Motor Transport*."[190]

Other courts have also required the target firm to overcome high hurdles to establish that the sham exception is applicable. Some of these courts have required the target to show a pattern of repetitive claims, indicating that a single lawsuit is not sufficient to support a finding of sham.[191] Others have focused on the need to show improper activity, like bribery or perjury, such as the Ninth Circuit's brief opinion in *Ad Visor, Inc. v. Pacific Telephone & Telegraph Co.*[192] According to the court:

> Although baseless, repetitive and sham claims may be an abuse, multiplicity, by itself, does not vitiate *Noerr-Pennington* protections. . . . No case can be found which finds multiple claims brought with the purpose of interfering with others' business relationships to be unprotected by *Noerr-Pennington*. In each case of "sham," an improper interference with administrative or judicial process is found.[193]

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[187] 673 F.2d 1171 (10th Cir. 1982).

[188] *See* Hydro-Tech Corp. v. Sundstrand Corp., 673 F.2d 1171, 1174-75 (10th Cir. 1982).

[189] *See id.* at 1176 & n.6.

[190] *Id.* at 1175 (citing California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972)). Although not as extreme, the Ninth Circuit's opinion in Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980), has a similar effect. There the court held that "the commencement and maintenance of related infringement actions in what the jury found to be bad faith" did not violate the Sherman Act because the jury should have been instructed that litigation is presumed to be brought in good faith and that such presumption can be overcome only if the antitrust plaintiff can establish clear and convincing evidence of bad faith. *See id.* at 995-96.

[191] *See infra* notes 233-53 and accompanying text.

[192] 640 F.2d 1107 (9th Cir. 1981).

[193] Ad Visor, Inc. v. Pacific Tel. & Tel. Co., 640 F.2d 1107, 1109 (9th Cir. 1981). The

Finally, some courts, again drawing from Justice Douglas's language in *California Motor Transport Co. v. Trucking Unlimited,*[194] have insisted on a showing that the predator's actions constituted "access barring," depriving the target of meaningful access to a tribunal or agency.[195] This formulation is particularly troubling because the concept of access barring, which was meaningful in the regulatory context in which it arose in *California Motor Transport*, does not make sense when applied to litigation. In a regulated industry, a dominant firm can prevent its target from getting access to operating licenses and other regulatory approvals that are necessary *to obtain access to the relevant market.* In litigation, however, the predatory firm generally does not seek to prevent its target from gaining access to the courts or to judicial relief; rather, the predatory firm seeks to misuse the legal process to inflict collateral harm on the target. In a sense, the predatory

court's startling statement may be partially explained by the unusual facts of the case, which involved the filing of 63 collection actions. *See id.* at 1108. Although repetitiveness would normally be a strong indicator of predatory litigation, *Ad Visor* may be distinguishable because the filing of numerous collection actions is a normal and justifiable business practice. Still, other courts have focused on the need for a showing of ethical misconduct. *See, e.g.*, First Nat'l Bank v. Marquette Nat'l Bank, 482 F. Supp. 514, 521 (D. Minn. 1979) ("[T]he institution of a single lawsuit without any allegations that the lawsuit involves ethical misconduct similar to the abuses described in *California Motor Transport* is not sufficient to bring the defendants' actions within the 'sham exception' to the *Noerr-Pennington* doctrine."), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981); Mountain Grove Cemetery Ass'n v. Norwalk Vault Co., 428 F. Supp. 951, 954-56 (D. Conn. 1977) (discussing need for showing of "corrupt" practices).

[194] *See* 404 U.S. at 512.

[195] *See, e.g.*, Hufsmith v. Weaver, 817 F.2d 455, 459 (8th Cir. 1987) (requiring access barring or improper acts); *Affiliated Capital Corp.*, 735 F.2d at 1567-68 (holding that sham exception involves denial of meaningful access to a government entity) (dictum); Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18, 21 (2d Cir. 1980) ("'[A]ccess-barring is the cornerstone to the sham exception.'") (quoting Wilmorite, Inc. v. Eagan Real Estate Inc., 454 F. Supp. 1124, 1134-35 (N.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1372 (2d Cir.), *cert. denied*, 439 U.S. 983 (1978)); *First Nat'l Bank*, 482 F. Supp. at 520-21 (requiring either access barring or ethical misconduct); *see also Handgards*, 601 F.2d at 998 (Kennedy, J., concurring) ("*Franchise Realty* might be interpreted to require . . . that the defendant's conduct was designed to cause competitive injury by exacting such extraordinary costs that meaningful use of an agency or tribunal was barred. . . ."); Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1080-81 (9th Cir. 1976) (implying that plaintiff must show access barring), *cert. denied*, 430 U.S. 940 (1977).

Commentators have been critical of these decisions. *See* Hurwitz, *supra* note 106, at 101-02 & n.163 (citing commentators); *see also* Thomas A. Balmer, *Sham Litigation and the Antitrust Laws*, 29 BUFF. L. REV. 39, 47-48 (1980) (arguing persuasively that later Supreme Court decisions reject a requirement that the antitrust plaintiff show access barring).

firm may want the target to get its "day in court"—in fact as many days in court as possible, so that the target will incur additional costs, will be hampered in its ability to raise capital and to compete, and will perhaps be driven from the market entirely.

Each of these judicial formulations of the sham exception appears to be too strict, at least in the context of predatory litigation. The economic analysis developed in this Article suggests that a litigation strategy that is not cost-justified except by virtue of its anticompetitive effect should fall within the sham exception. In other words, if the predator would not have sued "but for" the exclusionary benefits of the suit, then that firm's actions should not be immune from antitrust scrutiny.

Most often, this cost-benefit test would lead to the same result as a standard requiring that the litigation be "baseless," "abusive," "frivolous," or "lacking in probable cause," all formulations that courts have adopted.[196] As the economic model developed in Part II illustrates,[197] the expected recovery from litigation must be discounted for the risk of failure. If the claim is very weak or completely frivolous, any expected recovery must be heavily discounted, making it unlikely that a baseless lawsuit would ever be cost-justified, particularly given that litigation is never inexpensive. For example, if a legal claim has only a ten percent chance of success and if litigation costs amount to $100,000, a risk-neutral plaintiff would not bring the claim unless it realistically expected to obtain at least $1,000,000 if it prevailed at trial. As the probability of success falls, say to five percent, the expected judgment must be $2,000,000. In this manner, the legal concept of "baselessness" and the economic cost-benefit standard dovetail. Depending on the particular factual setting and the sophistication of the audience, one or the other characterization may be more useful. Moreover, there is no bright line beyond which a claim fails to

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[196] *See In re* Burlington N., Inc., 822 F.2d 518, 529-30 (5th Cir. 1987) (holding that claim must have reasonable basis and be brought in good faith to be immune), *cert. denied*, 484 U.S. 1007 (1988); Litton Sys., Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 811 (2d Cir. 1983) (adopting baseless or abuse of process standard), *cert. denied*, 464 U.S. 1073 (1984); Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 470-73 (7th Cir. 1982) (adopting lack of probable cause or improper purpose standard), *cert. denied*, 461 U.S. 958 (1983); *Clipper Exxpress*, 690 F.2d at 1252-54 (addressing claims brought without regard to merits and unsuccessful claims brought for anticompetitive purposes); Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, 663 F.2d 253, 262-63, 266 (D.C. Cir. 1981) (adopting baseless, frivolous, or abuse of process standard), *cert. denied*, 455 U.S. 928 (1982).

[197] *See supra* part II.E.

satisfy these legal and economic standards. Rather, individual cases must be decided on their particular facts, and some cases will present questions that the judge or jury must resolve as the finder of fact.

*B. Role of Intent*

The courts have not fully delineated the role that a competitor's intent or purpose should play for purposes of *Noerr-Pennington* immunity. Part of the confusion stems from the Supreme Court's earliest discussion of the immunity in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* Justice Black, writing for the Court, indicated that the railroad lobbying efforts at issue in that case were immune from antitrust liability even if the railroads' actions were motivated solely by their desire to destroy or injure the fledgling trucking industry. "It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors."[198] As long as the lobbying effort involved a genuine effort to influence legislation, the railroads' actions were immunized. The only zone of liability for lobbying would be a situation in which the lobbying was conducted without any expectation of success—a very unlikely scenario.

Applying this analysis to sham litigation presents a challenge. There are four broad types of cases. The easiest case would be the lawsuit that is brought for the legitimate purpose of seeking redress and that is well grounded in law and fact. Obviously, no liability would attach, regardless of whether the suit is ultimately successful or not. At the other extreme, a case might be brought for illegitimate reasons (creating entry barriers, delaying or deterring entry of a competitor, or harming or destroying a competitor) and could be groundless or frivolous. In this case, the lawsuit would fall within the sham exception and could lead to antitrust liability, assuming the other requisites for a Sherman Act violation.

The two intermediate cases present more difficult problems. One is the groundless or frivolous lawsuit that appears to be brought in good faith. Although the groundless nature of the suit may be an indicator of bad faith, it is possible that a firm might institute or maintain a lawsuit through mistake, poor legal counsel,

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[198] Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961).

lack of proper investigation, or some other error. Should the lawsuit fall within the sham exception? The result might depend on the degree to which the claim was baseless and the manner in which the party bringing the litigation behaved. Courts would be skeptical of the party's claim of good faith if it protracted the proceedings, if its reliance on counsel was unreasonable, or if the circumstances otherwise weakened its claim of good faith.[199] Moreover, under the frivolousness or baselessness standard that many courts have adopted,[200] the party would not be immune from the Sherman Act. This approach is also consistent with the objective standard of reasonableness contained in Rule 11 of the Federal Rules of Civil Procedure.[201]

The last case, and perhaps the most difficult one, involves the lawsuit that is well grounded in law and fact but that is brought primarily for an illegitimate purpose. To bring the case close to the *Noerr* fact pattern, suppose the firm bringing the lawsuit was motivated solely by a desire to harm or destroy its competitor. This type of evidence might be obtained by admission, by a "smoking gun," or by overwhelming circumstantial evidence. In *Noerr*, for example, a secretary apparently purloined more than 200 documents that demonstrated the anticompetitive nature of the railroad lobbying campaign. The secretary sent these documents to the truckers, along with a cover letter explaining their importance.[202]

If the lawsuit is well grounded in law and fact (or is not frivolous), should it be treated as "sham" because it was brought or maintained for improper purposes? Under *Noerr*'s approach to lobbying, a firm could lawfully bring a claim against a competitor solely for the purpose of injuring the competitor, as long as the lawsuit was genuine, which would presumably mean that it was well grounded in law and fact.[203] Further, in *United Mine Workers*

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[199] *See* Hurwitz, *supra* note 106, at 98-99 (discussing objective and subjective evidence of intent).

[200] *See supra* note 196.

[201] FED. R. CIV. P. 11 ("The signature of an attorney or party constitutes a certificate by the signer . . . that to the best of the signer's knowledge, information, and belief formed *after reasonable inquiry* it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . .") (emphasis added); *see* Business Guides, Inc. v. Chromatic Communications Enters., ___ U.S. ___, 111 S. Ct. 922, 929-33 (1991) (discussing objective standard of reasonable inquiry under Rule 11); GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTATIVE MEASURES §§ 5.01-6.05, at 295-480 (Supp. 1991).

[202] Minda, *supra* note 11, at 918 n.37 (citing *The Railroad-Trucker Brawl*, FORTUNE, June 1953, at 139).

[203] *See supra* notes 12-26 and accompanying text.

*v. Pennington*, the Court indicated that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."[204] *California Motor Transport*, however, stresses the importance of intent in assessing the sham exception in the litigation context. The Court noted: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."[205] If a firm's litigation behavior constitutes an abuse of process, the Court concluded that its actions would not be immune from Sherman Act scrutiny.[206] The Supreme Court placed additional emphasis on the role of the litigant's intent in *Otter Tail Power Co. v. United States*, the sham litigation case decided one year after *California Motor Transport*. The *Otter Tail* Court noted that litigation brought with "the purpose of delaying and preventing" entry can constitute sham.[207]

In *California Motor Transport*, the Court also expressed concerns about the institution and maintenance of litigation regardless of the merits.[208] For example, if a firm engaged in a practice of automatic protests to an administrative agency or immediate resort to litigation whenever a competitor entered the market or competed aggressively, the firm should be subject to antitrust liability even though a few of those challenges had some merit or plausibility. There would be strong circumstantial evidence from which a jury could conclude that the litigation was sham, intended to produce anticompetitive results completely separate from the outcome in the courtroom. For instance, in *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*,[209] one of the antitrust defendants "would automatically protest any [proposed tariff rate for the transportation of freight], regardless of the rate's legality or competitive justification."[210] The court held that these protests, because they were made without regard to their possible success, were

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[204] United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965).

[205] *California Motor Transp.*, 404 U.S. at 513.

[206] *See id.*; *see also* Hurwitz, *supra* note 106, at 93 & n.122, 95 (discussing bad faith concept of sham, as used in *California Motor Transport*).

[207] *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 379 (1973). The Court noted that the sham exception may apply "where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims." *Id.* at 380.

[208] *See California Motor Transp.*, 404 U.S. at 512.

[209] 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

[210] *Id.* at 1253.

therefore not intended to obtain relief from the regulatory body. Thus, the court concluded, the protests were sham as a matter of law.[211]

One of the major appellate decisions regarding sham litigation is *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*,[212] an opinion by Judge Richard Posner. The plaintiff, Grip-Pak, sought to enter the market for plastic beverage holders used on "six-packs" of beer and other drinks. Illinois Tool Works, the dominant firm in the industry with a ninety percent market share, allegedly sought to deter and eliminate competition through a variety of anticompetitive practices, including patent accumulation, threatened patent litigation, three sham lawsuits, acquisition of a competitor, division of markets, and filing a fraudulent patent application.[213] One of Illinois Tool Works' lawsuits was brought against Grip-Pak, claiming that Grip-Pak had misappropriated trade secrets.

For *Noerr-Pennington* purposes, the issue in the case was whether it was necessary for the trade secret suit to be lacking in probable cause for it to be the basis for Grip-Pak's antitrust claim. Judge Posner concluded that a lawsuit brought for anticompetitive purposes could be considered "sham" even though not wholly lacking in merit:[214] "[L]itigation 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."[215] In resolving this issue, the Seventh Circuit noted that several courts had reached the same conclusion, although at least one had not.[216] Since 1982, several courts have followed *Grip-Pak*'s reasoning, although the circuits remain split.[217]

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[211] *See id.* at 1254.

[212] 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983).

[213] *See id.* at 468.

[214] *See id.* at 472-73.

[215] *Id.* at 472.

[216] *Compare* Rex Chainbelt, Inc. v. Harco Prods., Inc., 512 F.2d 993, 1004-07 (9th Cir.) (holding that bad-faith lawsuit can violate antitrust law), *cert. denied*, 423 U.S. 831 (1975) *and* Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 424-25 (10th Cir.) (finding violation based on showing of bad faith), *cert. denied*, 344 U.S. 837 (1952) *with* Alexander v. National Farmers Org., 687 F.2d 1173, 1200 (8th Cir. 1982) (concluding that litigation was not groundless, despite evidence of improper purpose), *cert. denied*, 461 U.S. 937 (1983).

[217] *See In re Burlington N.*, 822 F.2d at 529-30 (holding that claim must have reasonable basis *and* be brought in good faith to be immune); Sunergy Communities, Inc. v. Aristek Properties, Ltd., 535 F. Supp. 1327, 1331 (D. Colo. 1982) (holding that success before a

Another important Seventh Circuit decision is *MCI Communications Corp. v. American Telephone & Telegraph Co.*,[218] decided one year after *Grip-Pak*. In that case, MCI brought a massive antitrust suit against AT&T, alleging that the latter had engaged in exclusionary practices to secure and maintain a monopoly in the long-distance telephone market. The jury found that AT&T had instituted tariff filings in a bad faith attempt to impose costs on MCI and to eliminate it as a competitor.[219] In affirming the jury's determination, Judge Cudahy noted:

> "Without a doubt, the intention to harm a competitor is not sufficient to make litigation or administrative proceedings a sham. That anticompetitive motive is the very matter protected under *Noerr-Pennington*. Rather, the requisite motive for the sham exception is the intent to harm one's competitors not by the *result* of the litigation but by the simple fact of the *institution* of litigation."[220]

The Supreme Court, in its latest *Noerr-Pennington* decision, endorsed this general approach, noting: "The 'sham' exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon."[221]

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political or adjudicative body is only one factor to be considered); *see also Clipper Exxpress*, 690 F.2d at 1254 (holding that success or failure of litigation is not determinative of whether party genuinely intended to seek redress); *Federal Prescription Serv.*, 663 F.2d at 263 n.9 (discussing abuse of process based on improper motive). *But see* Columbia Pictures Indus. v. Redd Horne, Inc., 749 F.2d 154, 161 (3d Cir. 1984) (finding it impossible for plaintiff to show bad faith because defendant's underlying litigation was successful); Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484, 487-88 (8th Cir. 1985) (holding litigation not sham, regardless of motive), *later proceeding*, 817 F.2d 455 (8th Cir. 1987).

A case that ultimately found that the defendant engaged in sham litigation neglected strong evidence of exclusionary intent because it believed certain legal claims were not "so groundless as to come within the 'sham litigation' exception." *Alexander*, 687 F.2d at 1200. This portion of *Alexander* is arguably inconsistent with *Grip-Pak* and—given the extensive evidence of bad faith—seems to be incorrect. This opinion is less troubling only because it found that other litigation and threatened suits by the same party did fall within the sham exception. *Id.* at 1200-03.

[218] 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

[219] *See* MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1157-58 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

[220] *Id.* at 1156 (quoting City of Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258, 1265-66 (S.D. Fla. 1980) (emphasis in original)); *cf. Clipper Exxpress*, 690 F.2d at 1255 ("[T]his activity, disguised as petitioning, is simply an effort to interfere directly with a competitor.").

[221] City of Columbia v. Omni Outdoor Advertising, Inc., ____ U.S. ____, 111 S. Ct. 1344, 1354 (1991) (emphasis in original).

The economic approach developed in this Article suggests that a lawsuit brought with some probable cause may have both anti-competitive effects and purposes. Judge Posner, writing in *Grip-Pak*, seems to adopt a cost-benefit based approach:

> 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—except that it wanted to use pretrial discovery to discover its competitor's trade secrets; or hoped that the competitor would be required to make public disclosure of its potential liability in the suit and that this disclosure would increase the interest rate that the competitor had to pay for bank financing; or just wanted to impose heavy legal costs on the competitor in the hope of deterring entry by other firms.[222]

Thus, if institution of the lawsuit was not cost-justified, it might have been brought for some other purpose, such as to exclude or harm competition. This view is consistent with the underlying concept of sham: a lawsuit is sham if the target is harmed primarily by the institution and maintenance of the lawsuit, not by its ultimate outcome or judgment. The lawsuit thus is not a genuine effort to influence the government[223] and should not enjoy *Noerr-Pennington* immunity.

Other courts have formulated a similar standard using different language. For example, the Second Circuit focuses on whether the litigant had a "reasonable expectation" of obtaining relief.[224] In the Fifth Circuit, courts have indicated that *Noerr* immunity applies "so long as a genuine desire for judicial relief is a significant motivating factor underlying the suit."[225] The Ninth Circuit has indicated that the plaintiff must allege "some abuse of process, although not necessarily access barring."[226] And the District of Columbia Circuit has indicated that sham means the litigation was

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[222] *Grip-Pak*, 694 F.2d at 472.

[223] *See supra* notes 36-44 and accompanying text.

[224] *See Litton Sys.*, 700 F.2d at 810.

[225] *Coastal States Mktg.*, 694 F.2d at 1372.

[226] *Clipper Exxpress*, 690 F.2d at 1259.

"baseless or frivolous," an abuse of process, or a denial of meaningful access to the courtroom.[227]

The approach taken in Rule 11 and related types of cases may provide some guidance in resolving this issue. Under Rule 11, "The signature of an attorney or party constitutes a certificate by the signer . . . that [the pleading, motion, or paper] is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[228] As many courts have recognized, a party or attorney can violate this portion of Rule 11 even if the paper or pleading is not frivolous, because it was still brought for an improper purpose.[229] Similarly, a federal statute, 28 U.S.C. § 1927, provides relief against attorneys for bad faith tactics during litigation.[230] Finally, many states recognize the tort of abuse of process, under which a party can be liable for litigation brought for improper purposes.[231]

Thus, a party can violate Rule 11 or § 1927, or commit the tort of abuse of process, by filing or maintaining a colorable lawsuit for an illegitimate purpose. By analogy, it can be argued that litigation should not be immune from antitrust scrutiny if it is brought primarily for an exclusionary purpose. To meet this standard, the antitrust plaintiff must show more than the presence of mixed motivations; if the lawsuit is brought partly to harm competition, but also to vindicate a substantial right or to obtain significant monetary or injunctive relief, then it is not sham. On the other hand, if predation appears to be the sole or primary

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[227] *See Federal Prescription Serv.*, 663 F.2d at 266.

[228] FED. R. CIV. P. 11.

[229] *See* Patterson v. Aiken, 841 F.2d 386, 387 (11th Cir. 1988); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1084 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); Robinson v. National Cash Register Co., 808 F.2d 1119, 1130 (5th Cir. 1987); Whittington v. Ohio River Co., 115 F.R.D. 201, 208 (E.D. Ky. 1987); *cf.* VAIRO, *supra* note 201, § 4.01[b][ii], at 203 (citing conflicting authorities). The Supreme Court recently held that federal courts also have the inherent power to impose sanctions for bad faith litigation. *See* Chambers v. Nasco, Inc., ___ U.S. ___, 111 S. Ct. 2123, 2132-33 (1991).

[230] *See* 28 U.S.C. § 1927 (1988) ("Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."); United States v. Associated Convalescent Enters., 766 F.2d 1342, 1346 (9th Cir. 1985) (holding that § 1927 requires showing of recklessness or bad faith).

[231] *See* Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715 (1973); *see also Clipper Exxpress*, 690 F.2d at 1254-59 (holding that abuse of process falls within the sham exception). For a general discussion of the tort of abuse of process, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 121, at 897-900 (5th ed. 1984).

motivation behind the lawsuit—its raison d'être—then the sham exception should be applied.

In evaluating this issue, courts should look to whether the lawsuit was cost-justified for at least three reasons. First, the lack of a reasonable likelihood of obtaining a sufficiently large recovery to merit litigation is circumstantial evidence of predatory intent. Why bring a lawsuit if it seems to be a losing cause from the start? Second, if the plaintiff can adduce evidence that the real purpose and effect of the litigation was to achieve discernable anticompetitive ends in the marketplace, then the inference of improper purpose becomes even stronger. Third, from a societal point of view, if the lawsuit costs more than it generates in the form of an expected recovery, it probably should be discouraged.

This approach will not chill meritorious, good faith litigation. If a lawsuit is successful or at least involves an arguable claim, *Noerr-Pennington* immunity should presumptively apply. As several courts have noted, success in the courtroom is a good indicator of the party's good faith and of the genuineness of its petitioning activity.[232] Finally, most successful or arguable claims will *ex ante* be warranted under the cost-benefit test because the likelihood of recovery will justify the expected costs of the litigation.

## C. *Can One Lawsuit Constitute Sham?*

Another unsettled *Noerr-Pennington* issue is whether a single lawsuit (or administrative petition) can satisfy the sham exception. The Supreme Court engendered some confusion in *California Motor Transport* when it discussed the contours of the sham exception. According to Justice Douglas: "One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused."[233] Most courts have interpreted Justice Douglas's discussion of the sham exception as illustrative, rather than exhaustive.[234] This view is almost certainly correct. A careful reading of *California Motor Transport* indicates that Justice Douglas's mention of a "pattern

[232] *See Aydin*, 718 F.2d at 903 ("Success or failure might be helpful as one indication of [a party's] intent in bringing the action . . . ."); *Clipper Exxpress*, 690 F.2d at 1254 (same); Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 841 n.13 (9th Cir. 1980) (same); *see also* Bien, *supra* note 114, at 78-79.

[233] *California Motor Transp.*, 404 U.S. at 513.

[234] *See, e.g., Clipper Exxpress*, 690 F.2d at 1252.

of baseless, repetitive claims" was only an illustration of sham litigation. His opinion includes a list of several specific forms of litigation misconduct, such as perjury, patent fraud, and bribery. It then notes that "[t]here are many other forms of illegal and reprehensible practice" that may be unlawful,[235] one of which involves the pattern of litigation, which is what the antitrust plaintiffs had alleged in the instant case.[236]

Still, whether a single lawsuit is sufficient to establish "sham" has not been decisively resolved. Courts in several circuits have concluded that, in the proper circumstances, one lawsuit can suffice to meet *California Motor Transport*'s sham litigation exception.[237] These courts view a pattern of multiple lawsuits as highly persuasive evidence, making it considerably easier for the antitrust plaintiff to prove that the sham exception applies.[238] A number of courts, however, have reached the opposite conclusion, holding that one lawsuit generally cannot constitute a sham.[239] Commentators, in contrast, have almost uniformly endorsed the view that one lawsuit can be sufficient to satisfy the sham exception.[240]

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[235] *See California Motor Transp.*, 404 U.S. at 512-13.

[236] *See id.* at 511-12.

[237] *See Aydin*, 718 F.2d at 903; *MCI Communications Corp.*, 708 F.2d at 1154-55; Energy Conservation, Inc. v. Heliodyne, Inc., 698 F.2d 386, 388 (9th Cir. 1983); *Clipper Exxpress*, 690 F.2d at 1254-57; Feminist Women's Health Ctr., Inc. v. Mohammad, 586 F.2d 530, 543 n.6 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); *First Nat'l Bank*, 482 F. Supp. at 520.

[238] *See, e.g.*, *Coastal States Mktg.*, 694 F.2d at 1369 n.37; *Clipper Exxpress*, 690 F.2d at 1255 n.22.

[239] Havoco of America, Ltd. v. Hollobow, 702 F.2d 643, 650 (7th Cir. 1983) (holding that pattern of baseless, repetitive claims required under *California Motor Transport*); *Hydro-Tech*, 673 F.2d at 1177 ("A sham action . . . is something more than an action instituted without probable cause."); Huron Valley Hosp., Inc. v. City of Pontiac, 612 F. Supp. 654, 663 (E.D. Mich. 1985) (holding that single suit would be insufficient), *aff'd on other grounds*, 792 F.2d 563 (6th Cir.), *cert. denied*, 479 U.S. 885 (1986); MCI Communications Corp. v. American Tel. & Tel. Co., 462 F. Supp. 1072, 1103 (N.D. Ill.) (requiring a series of claims), *aff'd on other grounds*, 594 F.2d 594 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *Mountain Grove Cemetery Ass'n*, 428 F. Supp. at 955-56 (holding that claims must have been repetitive); Central Bank v. Clayton Bank, 424 F. Supp. 163, 167 (E.D. Mo. 1976) (holding that one lawsuit was insufficient), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977); *see also Razorback Ready Mix Concrete Co.*, 761 F.2d at 487 (holding that single suit does not fall within sham exception absent evidence of access barring, i.e., ethical misconduct); Omni Resource Dev. Corp. v. Conoco, Inc., 739 F.2d 1412, 1414-15 (9th Cir. 1984) (requiring showing of pattern of litigation or grave misconduct); *Handgards*, 601 F.2d at 996 (requiring pattern of baseless litigation and access barring); *First Nat'l Bank*, 482 F. Supp. at 521 (holding that single suit is not sham, absent evidence of ethical misconduct, defined as perjury, fraud, or bribery).

[240] *See* Balmer, *supra* note 195, at 55-56; Fischel, *supra* note 22, at 109-10; Hurwitz, *supra* note 106, at 101 & n.161 (citing several commentators).

There are several strong arguments supporting the view that one lawsuit can be sufficient to satisfy the sham exception. First, later Supreme Court precedent indicates that four of the Justices have expressly endorsed this view. In *Vendo Co. v. Lektro-Vend Corp.*,[241] the Supreme Court addressed the scope of a federal court's power to enjoin state court proceedings under the antitrust laws, in light of the Anti-Injunction Act's general prohibition against such injunctions.[242] The Court was badly divided on the issues in the case, but two of the Justices' opinions addressed predatory litigation issues. Justice Stevens, dissenting as to the Anti-Injunction Act issues and writing for three other Justices, specifically indicated that a single lawsuit can fall within the sham exception to *Noerr-Pennington*.[243] Only Justice Blackmun, joined in a concurring opinion by Chief Justice Burger, found that a single lawsuit was insufficient and that a "pattern of baseless, repetitive claims" must be alleged.[244] Justice Rehnquist's three-Justice plurality opinion did not clearly address the issue.[245] Several courts and commentators have read *Vendo* to imply that a single lawsuit can fall within the sham exception.[246] At a minimum, *Vendo* indicates that *California Motor Transport* did not resolve the single-suit issue and that the view expressed here has considerable support among the Justices.

Second, there is nothing in the economic model of predatory litigation suggesting that more than one lawsuit would be necessary for a dominant firm to achieve its anticompetitive purpose. Although repeated litigation may be needed in order to fend off several rivals or to successfully attack one strong rival, there are many situations in which one lawsuit would accomplish the dominant firm's goal. In fact, each of the possible goals of predatory litigation can be satisfied by the use of a single suit. If the anticompetitive suit is sufficiently burdensome, a dominant firm can eliminate a competitor, discipline a rival, raise a rival's costs, or

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[241] 433 U.S. 623 (1977).

[242] *See* 28 U.S.C. § 2283 (1988).

[243] *See* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 661-62 (1977) (Stevens, J., dissenting).

[244] *See id.* at 645 (Blackmun, J., concurring).

[245] *See id.* at 635 n.6 (discussing *California Motor Transport* but not addressing the single-suit issue). Justices Stewart and Powell joined Justice Rehnquist's opinion.

[246] *See MCI*, 708 F.2d at 1154; *First Nat'l Bank*, 482 F. Supp. at 520 (citing cases); Balmer, *supra* note 195, at 49-56; *see also Clipper Exxpress*, 690 F.2d at 1256 n.24 (discussing *Vendo* and concluding that a single suit can be sufficient).

delay or deter entry of new competition. Indeed, if the dominant firm's strategy is particularly successful in deterring further challenges, no additional predatory lawsuits will be necessary.

Finally, as several courts have recognized, a pattern of baseless litigation, although not necessary or essential for proof of sham, is still highly persuasive evidence that the antitrust defendant's actions fall within the sham exception.[247]

Some commentators and litigants contend that to allow a finding of sham based on the filing of one baseless lawsuit provides insufficient protection to the exercise of the First Amendment right to petition.[248] This argument implicitly assumes that the First Amendment requires a firm to get a "free bite at the apple," an unsanctioned opportunity to litigate against a target firm, regardless of the merits. This notion is foreign to constitutional analysis, for there is no reason why a single lawsuit cannot be abusive and wholly unprotected by the First Amendment. Although the threat of antitrust liability can have a chilling effect on the exercise of First Amendment rights, the solution is to have heightened protection for the exercise of those rights. Thus, in the defamation area, the rule of *New York Times Co. v. Sullivan*[249] precludes liability for defamatory statements made regarding public officials and public figures absent a showing of actual malice. Similarly, in the antitrust field, a firm is not liable for its petitioning activity absent a showing of sham. In both areas, the focus is on the heightened standard for liability, not on a requirement that the unlawful activity be *repeated* in order for constitutional immunity to cease. Once the antitrust plaintiff demonstrates that the litigation was initiated or conducted in bad faith and with predatory intent, the defendant's actions should be stripped of First Amendment protection.[250]

A practical difficulty with the use of a single lawsuit as a basis for a finding of sham is that it presents heightened evidentiary problems. It is certainly easier to discern an anticompetitive pur-

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[247] *See, e.g., Feminist Women's Health Center*, 586 F.2d at 546 n.6.

[248] *See, e.g.*, Christina M. Spitzer, *The Sham Exception to the Noerr-Pennington Doctrine*, 11 HASTINGS CONST. L.Q. 329, 345-47 (1984). Spitzer's argument is based on her view that liability for a single act of petitioning will have a chilling effect unless the single act involves illegality or access barring. *See id.* at 351. The argument was also made in Rickards v. Canine Eye Registration Foundation, Inc., 783 F.2d 1329, 1334 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986).

[249] 376 U.S. 254 (1964).

[250] *See Rickards*, 783 F.2d at 1334; *Clipper Exxpress*, 690 F.2d at 1261-62.

pose when there has been a pattern of baseless claims. Still, a single lawsuit can be brought with anticompetitive intent and can wreak havoc on the victim of the lawsuit. Moreover, if the predatory lawsuit successfully deters other potential competitors (or disciplines existing competitors), the dominant firm will have no reason to bring another lawsuit. In some of the worst cases of predatory litigation, therefore, there may be no pattern of baseless claims upon which comfortably to reach a conclusion that the sham exception should apply.

An example of a case in which a single lawsuit should generally not be the basis for a claim of sham is a situation in which a party has secured a patent from the Patent & Trademark Office. Assuming that the patent was not obtained fraudulently or in bad faith, the patent holder should be allowed an opportunity to enforce its patent in federal court. Even if that court ultimately finds that the patent should never have been granted and that the incumbent firm's patent claim is thus without merit, the firm should not suffer from antitrust liability for seeking enforcement of a facially valid patent.[251] On the other hand, if the patent is obtained by fraud on the patent office, then one illegitimate patent infringement suit should be enough to invoke the Sherman Act.[252]

The patent example may, however, be somewhat unique because the Patent Office serves as a gatekeeper, preventing obviously baseless patent applications from receiving approval.[253] In other areas, in which there is little or no screening by an entity like the Patent Office, the justification for allowing a "first bite at the apple" seems weaker. For instance, no government entity places its imprimatur on trade secret claims before those claims wind up in court. The single trade secret claim may be clearly baseless, brought solely for exclusionary purposes. Similarly, although the Copyright Office accepts applications for copyright protection, there is practically no review on the merits prior to issuance of copyright certificates. When there is little or no oversight by an impartial (and governmental) third party, the case for allowing

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[251] *Cf. Handgards*, 601 F.2d at 992-96 (discussing predatory patent litigation).

[252] *See supra* notes 99-101 and accompanying text.

[253] *See generally* PETER D. ROSENBERG, PATENT LAW FUNDAMENTALS §§ 15.01-.15 (2d ed. 1990) (discussing patent application, examination, and appeal process). On the other hand, Patent Office proceedings are generally *ex parte*, and its decisions involve conclusions of law with which the courts may disagree. *See* Lear, Inc. v. Adkins, 395 U.S. 653, 670 (1969).

antitrust scrutiny is solid, assuming the target firm can meet the evidentiary hurdles in proving its claim.

Another situation in which a single lawsuit might not be deemed a sham is a case brought to vindicate a legitimate principle of law. If a firm accused of predatory litigation can demonstrate that it brought the lawsuit in a good-faith attempt to vindicate a legal principle, it should escape liability even though the lawsuit may not have been justifiable on a strict cost-benefit basis. For example, a firm might bring a trade secret suit based on the taking of proprietary information by "improper means." The suit fails because the court takes a narrow view of "improper means," but the court acknowledges that the plaintiff's broader approach is plausible. Although this lawsuit may have had limited monetary potential, the plaintiff should be able to demonstrate that it sought—in a single case—to expand trade secret law in good faith. If the firm can make this showing, it should not be liable for predatory litigation.

### *D. Standard of Proof and Pleading Requirements*

Two final issues of considerable importance are the standards of proof and pleading that the antitrust plaintiff must meet in order to invoke the sham exception. Courts place the burden of proving sham on the plaintiff[254] but are divided regarding whether the plaintiff must meet a preponderance standard or a stricter standard, such as clear and convincing evidence.

Several courts have held that the antitrust plaintiff must establish sham by clear and convincing evidence, at least in cases where the underlying claim involves enforcement of a patent.[255] Although the patent law and First Amendment considerations these courts express are serious, they do not warrant application of a higher burden of proof on antitrust plaintiffs. The standards for proving sham litigation are already fairly strict, requiring at a minimum that the plaintiff prove the litigation was abusive, frivolous, or brought in bad faith. A plaintiff that can adduce evidence of this

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[254] *See supra* note 186 and accompanying text.

[255] *See* CVD, Inc. v. Raytheon Co., 769 F.2d 842, 849-50 (1st Cir. 1985) (noting that, in cases involving patent litigation, courts require clear and convincing evidence that patent was fraudulently obtained or sought), *cert. denied*, 475 U.S. 1016 (1986); Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 876-77 (Fed. Cir. 1985) (same); *Handgards*, 601 F.2d at 996 (same); *see also Aydin*, 718 F.2d at 903 (noting that district court required "convincing proof" of sham).

nature, combined with evidence of a substantive antitrust violation, should be entitled to prevail if it meets the preponderance standard. As the Supreme Court has noted, sham litigation "by definition does not involve a bona fide grievance, [and therefore] it does not come within the first amendment right to petition."[256] The Fifth Circuit, citing the major Supreme Court cases in the area, has noted that none of those decisions indicates the need for a higher burden of proof.[257]

Another hurdle that some courts have placed on antitrust claims based on predatory litigation is a heightened pleading standard. The Ninth Circuit, for example, requires "more specific allegations than would otherwise be required,"[258] in predatory litigation cases because of the potential chilling effect that antitrust liability might have on petitioning activity protected by the First Amendment.

This view is troubling because it creates a new exception to the rules of pleading in federal court. Rule 8(a) of the Federal Rules of Civil Procedure provides the general rule of notice pleading.[259] Rule 9(b) contains a list of exceptions to the general rule; matters falling under Rule 9(b) must be pled with specificity.[260] Courts that have fashioned a special exception to the normal pleading rules are engrafting an additional exception to Rule 8(a) even though an exclusive list of exceptions is already provided in the Federal Rules. As a matter of policy and legal interpretation, the approach taken in these cases seems wrong. The better view, as expressed in a number of decisions,[261] is that the normal pleading requirements of Rule 8(a) apply to allegations of sham litigation. The normal pleading requirements of Rule 8(a) still require that the antitrust plaintiff allege the facts entitling it to relief; a conclusory allegation of "sham" would be insufficient to withstand a motion to dis-

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[256] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983) (quoting Balmer, *supra* note 195, at 60). In essence, the Court views sham litigation as one of several categories of unprotected activity, such as false and defamatory statements.

[257] *See Feminist Women's Health Ctr.*, 586 F.2d at 543 n.6.

[258] *Franchise Realty*, 542 F.2d at 1083.

[259] FED. R. CIV. P. 8(a) ("A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."); *see also Franchise Realty*, 542 F.2d at 1089 (Browning, J., dissenting) (criticizing majority's adoption of special pleading rule).

[260] *See* FED. R. CIV. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

[261] *See, e.g.*, Sage Int'l, Ltd. v. Cadillac Gage Co., 507 F. Supp. 939, 943-44 (E.D. Mich. 1981) (applying Rule 8(a) and citing other decisions); *MCI*, 462 F. Supp. at 1102.

miss.[262] The normal pleading rules thus provide sufficient notice to the defendant and protection of the First Amendment interests recognized in *Noerr-Pennington.*

## *E. Proposed Screening Devices*

The greatest virtue of the predatory pricing test that Philip Areeda and Donald Turner developed in 1975[263] is its relative simplicity. Their benchmark for determining whether a price is predatory is based on the firm's average variable cost, as opposed to the theoretical concept of marginal cost. Because the Areeda-Turner test focuses upon a measurable variable, it provides a fairly effective rule of decision for the courts. For the same reason, the test gives businesses *ex ante* guidance concerning the likely legal treatment of their courses of action. The test has generally been well received by courts and commentators.[264]

It would be desirable to have similar screening devices for assessing sham litigation, to minimize the amount of argument over whether an earlier suit constitutes a sham.[265] Such screening devices can be derived from the cost-benefit test described in this Article. In particular, the strength of the underlying (and allegedly sham) claim and the likelihood of anticompetitive gain should be evaluated.

### 1. *Strength of the Underlying Claim*

#### *a. Successful Litigation*

If the underlying litigation was successful, it is difficult to imagine that a court would conclude that it was predatory. Unless there is evidence of fraud, misrepresentation, perjury, or similar misconduct, successful litigation should be conclusively presumed to be immune from the Sherman Act.

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[262] *See, e.g.*, Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168, 172-73 (D. Del. 1979) (dismissing parts of a claim of sham petitioning alleged in conclusory terms).

[263] *See* Areeda & Turner, *supra* note 68, at 732-33.

[264] *See supra* note 68.

[265] *Cf.* Hurwitz, *supra* note 106, at 122-25 (proposing screening devices for sham petitioning generally).

*b. Litigation That Survives Motions for Summary Judgment or for Directed Verdict*

If the underlying litigation survives a motion for summary judgment or directed verdict, it probably presents a legitimate claim for relief. Such litigation should enjoy a rebuttable presumption of legality, which could be overcome by evidence of fraud, misrepresentation, perjury, or *improper purpose.* Partial success in the courtroom, unless it is the product of improper or unethical tactics,[266] should immunize the litigant from later antitrust liability. For example, in *Adolph Coors Co. v. A & S Wholesalers, Inc.*,[267] the Tenth Circuit was faced with an antitrust counterclaim based on Coors's attempt to enforce territorial and customer limitations against a distributor. The court held that Coors's attempt to enforce these restrictions was not sham in light of *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[268] the Supreme Court's then-recent decision recognizing that these types of vertical restrictions are often legitimate and procompetitive.[269]

The Supreme Court, in *Bill Johnson's Restaurants, Inc. v. NLRB*,[270] a labor case involving claims of sham litigation, indicated that surviving summary judgment may immunize a party from liability, at least under federal labor law. In the antitrust context, if the underlying litigation involved a genuine dispute over material facts, the litigation should be presumed genuine. Still, the antitrust plaintiff should be given an opportunity to establish that the litigation was brought for anticompetitive purposes or that the plaintiff survived the motion for summary judgment by resorting to improper tactics, such as fraud, misrepresentation, or perjury.[271]

*c. Litigation Resolved By Summary Judgment or Dismissal Motions*

If the underlying litigation ends on a successful motion for summary judgment or for dismissal on the pleadings, the litigation

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[266] For examples of cases involving allegations of unethical practices, see *Clipper Exxpress*, 690 F.2d at 1247, 1252 n.17, 1259-63 (involving submission of false information); *Alexander*, 687 F.2d at 1205 (involving destruction of documents).

[267] 561 F.2d 807 (10th Cir. 1977).

[268] 433 U.S. 36 (1977).

[269] *See* Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807, 812 (10th Cir. 1977).

[270] 461 U.S. 731, 745-46 (1983).

[271] In particular, the non-movant may have avoided summary judgment through self-serving, if not false, affidavits. *See supra* note 159.

may have heightened potential for being predatory. This result would be persuasive evidence of sham litigation, particularly if the predatory firm had brought more than one unmeritorious suit.

### *d. Litigation in Violation of Rule 11*

At the other extreme, litigation that violates Rule 11 of the Federal Rules of Civil Procedure (or one of the companion rules and similar statutory provisions)[272] should be presumed to be sham, absent a showing that the violation was unrelated to the antitrust claim or was not substantial. If the litigation was frivolous or was conducted in bad faith in violation of Rule 11, it should also be deemed a sham for *Noerr-Pennington* purposes.

This rule would not transform every Rule 11 violation into a claim under the Sherman Act—it would merely remove the cloak of *Noerr* immunity, allowing the antitrust plaintiff to proceed to prove the other elements of a section 2 Sherman Act claim (such as market definition, monopoly power, and exclusionary behavior).

### 2. *Likelihood of Anticompetitive Gain*

The likelihood of anticompetitive gain would be probative in assessing whether the antitrust defendant's litigation activity was predatory. First, market conditions must be favorable to the acquisition or maintenance of monopoly power or power over price. Thus, the plaintiff should be required to adduce evidence of market definition, market power, and barriers to entry.

Second, the plaintiff should be required to show that the litigation is in some manner exclusionary. The simple fact that a firm's behavior in court was unjustified does not mean that the litigation is exclusionary in the marketplace. The plaintiff should be required to show that the litigation had the effect—actual or potential—of excluding competition in the relevant market. In some cases, this evidence will be obvious, such as the case of an incumbent firm that attempts to entangle potential competitors in a morass of regulatory and administrative challenges designed to prevent the entrants from obtaining licenses or other prerequisites for entering the market. On the other hand, the mere institution of a lawsuit that imposes costs on a competitor but that has not

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[272] *See, e.g.*, FED. R. CIV. P. 26(g) (governing discovery); FED. R. CIV. P. 37 (same); *see also supra* notes 228-31 and accompanying text.

had significant effect in the marketplace should not fall within the domain of the Sherman Act. If every baseless lawsuit against a competitor (or other market participant) could be transformed into an antitrust claim, the Sherman Act would become a partial fee-shifting statute, rather than a charter of free competition.

Judge Frank Easterbrook has argued that predatory behavior typically takes one of two forms.[273] One is predatory pricing, in which one would expect to see prices fall initially, then rise once rivals have been driven away or disciplined. The other strategy, which is relevant to predatory litigation, involves raising rivals' costs. In this case, Easterbrook argues, one would expect to see market prices increase, output to fall, and the predator's market share to rise.[274] In identifying a case of predatory litigation, one would expect these indicia to be present. Thus, the plaintiff should come forward with evidence of market performance that reflects the increased prices, reduced output, and increase in the predator's market share. This evidence not only helps establish the elements of a section 2 violation, but also goes a long way toward establishing that the plaintiff suffered harm as a result of the strategy.[275]

## CONCLUSION

As Philip Areeda and Donald Turner have observed, ordinary contract and tort complaints should not be transformed into antitrust claims.[276] This observation can be extended to cases in which plaintiffs seek antitrust remedies as a method of fee shifting or otherwise to compensate themselves for defending an unsuccessful lawsuit. At the same time, there can be no doubt that litigation can be an anticompetitive tool. The need, then, is for a legal standard that allows treble damage recoveries when a firm's litigation activities palpably harm competition. The "sham" exception to *Noerr-Pennington* provides courts and private parties with only a general principle—genuine litigation efforts are immune from the Sherman Act, while non-genuine or sham lawsuits are not. Not surprisingly, courts have had considerable difficulty in defining the

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[273] *See* Easterbrook, *supra* note 63, at 974.

[274] *See id.*

[275] All of these screening devices are consistent with the elements of a section 2 Sherman Act violation, which requires a showing of market power and exclusionary behavior. *See supra* notes 57-58 and accompanying text.

[276] *See* 2 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 331b2, at 150 (1978).

circumstances in which litigation activity should be subject to antitrust scrutiny.

This Article has developed an economic model of predatory litigation. Predatory litigation can serve several possible anticompetitive functions, including eliminating competitors, disciplining competitors, raising rivals' costs, and delaying or deterring entry into a market. When a litigant brings suit for one of these reasons, rather than to prevail in the courtroom, the suit is predatory and threatens competition. Litigation can be as effective as any other strategy of predation, and it may be less costly and harder to penalize than other forms of price or non-price predation. In particular, a dominant firm may be able to impose asymmetrical costs on its target because litigation can be costly to defend and difficult to resolve summarily.

A cost-benefit test can assist courts to identify exclusionary litigation. If the present value of the expected recovery, discounted by the probability of victory, is less than the cost of litigation, then a rational firm would normally not bring suit. A dominant firm may sue, however, if it expects to get a competitive advantage merely from the filing and prosecution of the suit. As a general matter, litigation that is frivolous or that is brought primarily for an improper purpose will not be cost-justified unless anticompetitive consequences of the suit increase the predator's expected return.

The sham litigation exception to *Noerr-Pennington* immunity should permit antitrust scrutiny in these cases. Litigation that is frivolous or brought in bad faith should not be immune. Courts should not require antitrust plaintiffs to make any additional showing, such as a "pattern of baseless, repetitive claims," "access barring," or fraud, in order to invoke the sham exception.

Finally, this Article suggests a number of screening devices to assist courts and private parties in identifying predatory litigation. These screening devices attempt to distinguish between situations in which predatory litigation is probable and those in which the litigation is unlikely to have anticompetitive effects or motivations. These devices focus on the strength of the underlying litigation and on characteristics of the relevant market. A claim of predatory litigation is plausible if the underlying suit or suits were baseless and if the litigation gave the predatory firm some competitive advantage over the target firm. If the plaintiff's antitrust claim satisfies these screening devices and meets the flexible test for the sham exception suggested above, it is likely that the defendant's litigation tactics were anticompetitive and should be deterred.