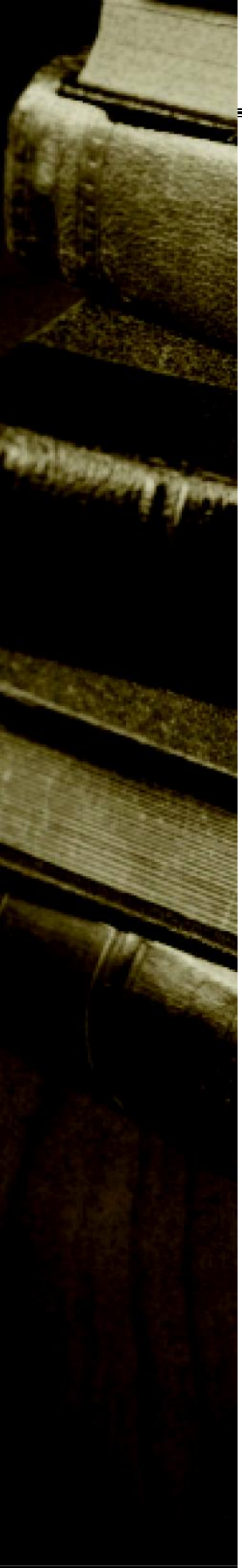

Developments in *Noerr-Pennington* – March 7, 2016 Panel Discussion

Summary by *Todd Hutchison, Drinker, Biddle & Reath LLP*

On March 7, 2016, the Exemptions and Immunities Committee, with the Health Care and Pharmaceuticals Committee as co-sponsor, presented a panel discussion of decisions in 2015 and the first two months of 2016 involving *Noerr-Pennington* issues. The author moderated the panel discussion among Heather Johnson, a Staff Attorney in the Health Care Division of the Federal Trade Commission's Bureau of Competition; Stuart Senator, a partner at Munger Tolles & Olson LLP; and Lindsey Taylor, a partner at Carella, Bryne, Cecchi, Olstein, Brody & Agnelo, PC. Special thanks to the panelists for contributing to the discussion, a recording of which is available on the ABA's Section of Antitrust Law website.

Background

Noerr-Pennington protection derives from the First Amendment and two Supreme Court decisions —*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[1] and *United Mine Workers of America v. Pennington*.[2] The doctrine immunizes parties' concerted or individual government petitioning activity from liability under the antitrust laws.[3] The doctrine covers conduct in all three branches of government — executive (or administrative), legislative, and judicial.[4] Accordingly, the doctrine applies to conduct in the course of both adjudicatory (*e.g.*, judicial or administrative actions) and policy-making (*e.g.*, legislative or executive/administrative) matters,[5] including conduct reasonably and normally attendant to the petitioning activity.[6] Although the doctrine applies in each branch, both the scope and the availability of the protection may vary depending on the context.[7] Also relevant to the panel discussion were two exceptions to *Noerr-Pennington* protection: (1) the sham exception, and (2) the *Walker Process* exception.[8]

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[1] 365 U.S. 127 (1961).

[2] 381 U.S. 657 (1965).

[3] *See, e.g.*, *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*, 806 F.3d 162, 178 (3d Cir. 2015).

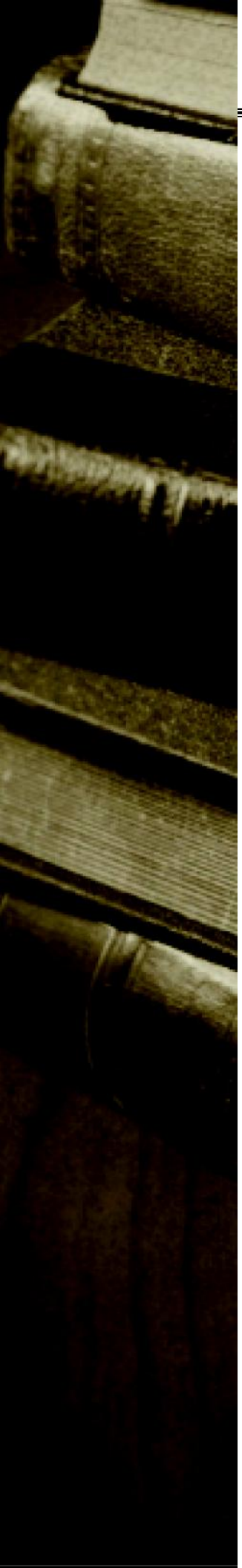
[4] *See, e.g.*, *Noer*r, 365 U.S. 127; *Pennington*, 381 U.S. 657; *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Hanover 3201 Realty*, 806 F.3d at 178.

[5] *See, e.g.*, *Noerr*, 365 U.S. 127; *Pennington*, 381 U.S. 657; *Cal. Motor*, 404 U.S. 508.

[6] *See, e.g.*, *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983); *Select Comfort Corp. v. Sleep Better Store, LLC*, 838 F. Supp. 2d 889, 896-97 (D. Minn. 2012) (collecting cases).

[7] *See, e.g.*, *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991); *see also* Stuart N. Senator & Gregory M. Sergi, *Noerr-Pennington*: *Safeguarding the First Amendment Right to Petition the Government*, 23 Competition 83, 85-89 (Spring 2014).

[8] *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) (recognizing two elements of sham exception – the activity (1) was objectively baseless, and (2) was engaged in with subjective bad faith); *Walker Process Equip., Inc. v. Food Mach. & Chem.*



The panel discussion focused on three categories of decisions from 2015 and early 2016: (1) the appropriate standard for assessing single versus serial sham petition activity; (2) whether courts should evaluate petition activity based on discrete, individual actions or holistically; and (3) when *Noerr-Pennington* defenses should be addressed.

Single Versus Serial Activity

The panel's discussion of this topic focused on the Third Circuit's decision in *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*,[9] in which the Third Circuit joined the Second, Fourth, and Ninth Circuits in recognizing a distinction between the sham standard applied to serial activity versus a single action.[10] The Third Circuit adopted the approach articulated in *California Motor*, stating that "a more flexible approach is appropriate when dealing with a pattern of petitioning."[11] Under that approach, the court "should perform a holistic review" to assess whether the series of petitions were filed with or without regard to the merit, and for the purpose of using the governmental process to harm a market rival and restrain trade."[12]

The Third Circuit declined to announce any bright-line standards for what constitutes serial activity, leaving it to lower courts to assess the scope of conduct as a whole.[13] For instance, the Third Circuit declined to set a minimum number of actions to warrant application of the *California Motor* standard (the defendant had contended four petitions were not sufficient), and advised lower courts to "perform a holistic review that may include looking at the defendant's filing success" and "other evidence of bad faith as well as the magnitude and nature of the collateral harm imposed on plaintiffs by defendants' petitioning activity."[14] The panel discussed

Corp., 382 U.S. 172, 176-78 (1965) (recognizing exception in patent context, where asserted patent was obtained through knowing and willful fraud, with intent to deceive the patent examiner, of which the defendant was aware when seeking to enforce the patent).

[9] 806 F.3d 162 (3d Cir. 2015).

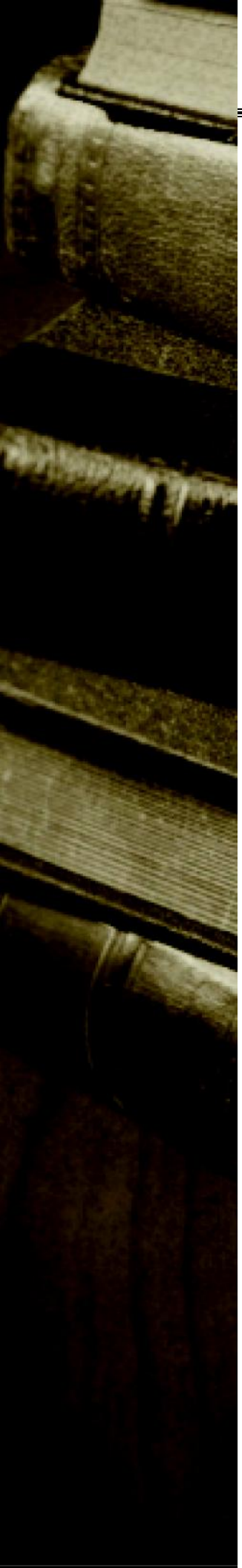
[10] *Id.* at 180 (citing *Cal. Motor*, 404 U.S. 508); *see also* FTC Staff Report, Enforcement Perspectives on the *Noerr-Pennington* Doctrine 28-36 (2006), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf.

[11] 806 F.3d at 180.

[12] *Id.*

[13] *Id.* at 181. *But see Kimberly-Clark Worldwide Inc. v. First Quality Baby Prods. LLC*, No. 14-1466, 2015 WL 1582368, *10 (E.D. Wis. Apr. 9, 2015) (declining to apply *California Motor*, characterizing alleged conduct at issue as "one primary case with two small branches").

[14] *Hanover 3201 Realty*, 806 F.3d at 180-81.



issues raised by the decision, including expectations for courts' application of the standard and how to evaluate damages within the scope of alleged serial activity.[15]

Holistic Evaluation

On a related topic, the panel discussed cases that implicated how courts analyze instances of petitioning activity—that is, whether courts take a holistic view of the activity or parse individual instances of conduct. For instance, in *S3 Graphics Co. v. ATI Technologies*,[16] the district court parsed the defendant's conduct and assessed whether each action constituted petitioning activity.[17] In another case, *IPtronics Inc. v. Avago Technologies U.S., Inc.*,[18] the district court evaluated each action initiated by different parties under the sham exception standard, supporting each antitrust defendant's right to seek *Noerr-Pennington* protection.[19]

Timing of Decision on Immunity

Finally, the panel discussed district court decisions that addressed the timing of the decision on immunity. The decisions the panel reviewed declined to resolve *Noerr-Pennington* issues on motions to dismiss, instead favoring later resolution following discovery.[20] Related to the timing issue, the panel also discussed available procedural mechanisms, such as bifurcated discovery or staying antitrust claims, to permit resolution of the underlying "petition" or action.[21]

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[15] *Cf. Transweb, LLC v. 3M Innovative Props. Co.*, 812 F.3d 1295, 1308-10 (Fed. Cir. 2016) (joining other courts of appeals and concluding that attorneys' fees incurred defending an infringement suit based on a fraudulently-obtained patent can constitute antitrust injury and form the basis of a damages award).

[16] No. 11-1298, 2015 WL 7307241 (D. Del. Oct. 21, 2015).

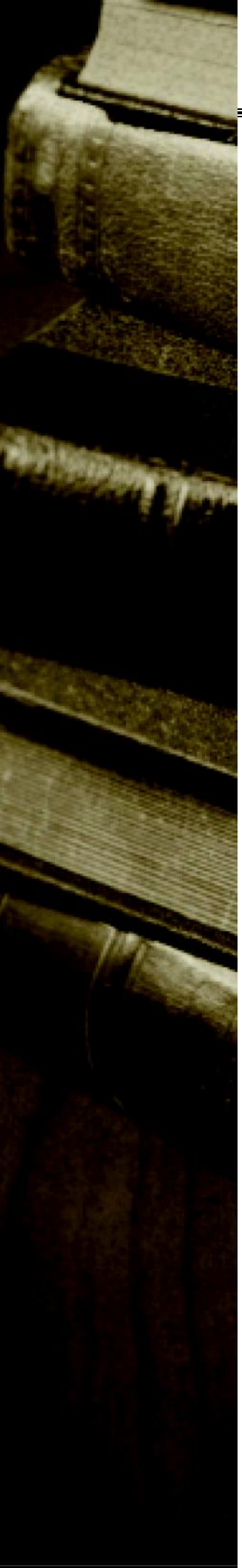
[17] *Id*. at **15-16. *Cf. Hanover 3201 Realty*, 806 F.3d at 180-81 (suggesting lower courts "perform a holistic review" that includes individualized review of the success or failure of each alleged instance of petitioning activity).

[18] No. 14-5647, 2015 WL 5029282 (N.D. Cal. Aug. 25, 2015).

[19] *Id*. at **3-9.

[20] *See, e.g.*, *Tyco Healthcare Grp. LP v. Mut. Pharm. Co.*, No. 07-1299, 2015 U.S. Dist. LEXIS 70175, **16-24 (D.N.J. May 29, 2015) (finding that failure to point to evidence that defendant's underlying claim had no factual basis justifies application of *Noerr-Pennington* on summary judgment); *Otsuka Pharm. Co. v. Torrent Pharm. Ltd.*, 118 F. Supp.3d 646, 656-58 (D.N.J. 2015) (blending two elements of *PRE* to find that *Noerr-Pennington* cannot be ruled on prior to discovery); *Source Network Sales & Mktg., LLC v. Ningbo Desa Elec. Mfg. Co.*, No. 14-1108, 2015 WL 2341063, at *8 (N.D. Tex. May 15, 2015) (non-antitrust case denoting *Noerr-Pennington* as an affirmative defense that can be argued on motion to dismiss only if it appears from the face of the complaint).

[21] *See, e.g.*, *Otsuka Pharm. Co.*, 118 F. Supp.3d at 659-60 (staying antitrust action pending resolution of patent infringement issues).



Other Cases of Interest

The panel did not have an opportunity to discuss other cases of potential interest, but readers interested should also consider reviewing:

- *MRIS v. Am. Home Realty Network, Inc.*, No. 12-0954, 2015 WL 4597529, at **7-8 (D. Md. July 6, 2015) (recognizing that petitioning activity can be funded by third parties and still qualify for immunity);

- *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc.*, No. 15-3183, 2016 U.S. Dist. LEXIS 22342, **20-25 (D. Minn. Feb. 23, 2016) (suggesting that immunity would not extend to pre-suit correspondence with third parties to litigation (*i.e.*, the plaintiff's customers)); and
- *United Tactical Sys., LLC v. Real Action Paintball, Inc.*, No. 14-4050, 2016 U.S. Dist. LEXIS 17135, at **17-21 (N.D. Cal. Feb. 10, 2016) (concluding that the alleged outcome of settlement agreements in underlying action may have exceeded foreseeable outcome of underlying litigation and, therefore, the settlements may not be sufficiently related or incidental to government petitioning activity to justify application of *Noerr-Pennington*).