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Noerr-Pennington Immunity and
Consent Decrees

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I. INTRODUCTION

For over two decades, courts have considered the applicability of the *Noerr-Pennington* doctrine to immunize an antitrust defendant from liability where the defendant engages in protected First Amendment petitioning activity, including petitioning before a court.² Despite this long history, *Noerr-Pennington* immunity remains a controversial and somewhat untested area of law, often subject to novel questions. These novel questions frequently take place at the interstitial spaces of law and may not be clearly within settled categories of protected activities. Rather, in these situations, a judge may need to engage in an interpretive exercise to consider whether a particular form of petitioning falls within the rubric of protected conduct.

Different judges may approach these issues in different ways; there is no “rulebook” neatly summarizing every form of petitioning and classifying it as a ball or strike. Rather, judges must undertake some interpretive exercise, considering whether the questioned activity more closely resembles protected or unprotected activity. Unlike Ronald Dworkin’s fictional Judge Hercules,³ the U.S. district courts lack the time and resources to consider the entire spectrum of law to arrive at a single “right answer” in every case. Rather, our real-life jurists have to wade through competing principles to arrive at the best possible answer, and different judges will, of necessity, weigh these considerations differently.

When deciding these difficult questions—so-called “hard cases”—it is our view that in the real world there is often no single right answer, and certain forms of petitioning activity may reside permanently in these interstices, perhaps subject to case-by-case adjudication. A recent case decided in the U.S. District Court for the District of Massachusetts is illustrative. In *In re Nexium (Esomeprazole) Antitrust Litigation*,⁴ the court considered the applicability of *Noerr-Pennington* immunity to consent decrees. Here, we discuss the court’s well-articulated decision, and also provide an alternative argument that illustrates the ambiguity in doctrinal interpretation.

We do not suggest that the applicability of the *Noerr-Pennington* doctrine in *Nexium* was clear, or that, as a general matter, the activity at issue should or should not be protected. Like

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² *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669–70 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); see also *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (extending *Noerr-Pennington* immunity to petitioning before a court).

³ RONALD DWORIN, *LAW’S EMPIRE* (1986).

⁴ 2013 WL 4832176 at *1 (D. Mass., Sept. 11, 2013).

Schrödinger's Cat, both alive and dead at the same time,⁵ we suggest that in this case it might appear to be both, depending on the interpretation of *Noerr-Pennington*'s strictures by the court. That is, much of the ultimate determination is informed by the observer/judge, who will then decide whether the cat is "dead or alive," i.e., whether the petitioning activity is protected or not protected. While all this may be redolent of the metaphysical, we attempt to disentangle the various arguments below, not to suggest that any particular view is correct, but to support our notion that practitioners must embrace the inherent ambiguity.

II. SCHRÖDINGER'S CAT IS DEAD: THE PETITIONING ACTIVITY IN QUESTION IS NOT PROTECTED

A brief description of the facts underlying *Nexium* will suffice for our purposes. In *Nexium*, plaintiffs alleged they paid higher prices for a brand name drug because less expensive generic versions were prevented from entering the market due to defendants' settlement with three generic manufacturers. Defendants moved to dismiss the complaint on a number of grounds, arguing that regardless of whether they could be held liable under the antitrust laws for such conduct, the settlement with the generic manufacturers was immune from antitrust liability under *Noerr-Pennington* because it was entered as a consent judgment, formalized by a New Jersey federal district court, as opposed to a settlement agreement, memorialized only by agreement of the parties. The court denied defendants' motions to dismiss in part because it found that the consent judgments memorializing the reverse payment settlement agreements were not entitled to *Noerr-Pennington* immunity.⁶

In reaching this conclusion, the court noted that there was "little guidance" as to whether *Noerr-Pennington* should apply to consent judgments, and relied largely on a thirteen-year old article by Professor Raymond Ku (now at Case Western Reserve University School of Law) published in the *Indiana Law Review* suggesting a test for determining when *Noerr-Pennington* immunity should apply. Ku proposes a means/source test, where immunity attaches when the following conditions are met:

1. "the conduct represents valid petitioning. Valid petitioning is defined as a formal or informal attempt to persuade an independent governmental decision maker consistent with the rules of the political forum in question, and
2. any anticompetitive harms flow directly or indirectly from those persuasive efforts."⁷ Ku then notes that this test can be simplified and "collapsed into a single inquiry: Is the private conduct a valid effort to influence government?"⁸

The court adopted Ku's test, holding that "entry of a consent judgment cannot be construed as conduct that is 'incidental' to litigation."⁹ The court also found that the defendants

⁵ For a good example of Erwin Schrödinger's famous 1935 thought experiment, see <http://news.nationalgeographic.com/news/2013/08/130812-physics-schrodinger-erwin-google-doodle-cat-paradox-science/>. Alternatively, for a quick explanation by that esteemed physicist, Sheldon Cooper, on the sitcom *The Big Bang Theory*, view this YouTube clip, <http://www.youtube.com/watch?v=LFBrrKnJMq4>.

⁶ *Nexium*, 2013 WL 4832176 at *1.

⁷ Raymond Ku, *Antitrust Immunity, the First Amendment and Settlements: Defining the Boundaries of the Right to Petition*, 33 IND. L.REV. 385, 404 (2000).

⁸ *Id.* at 421.

could have “simply stipulat[ed] to a dismissal” and, moreover, that a “decision of a court that serves merely to memorialize a bargained-for agreement that could have otherwise been resolved without judicial intervention ought not benefit from the exemption allowed by *Noerr-Pennington*.”¹⁰

It is interesting to consider how the court arrived at this decision. Certainly, no established precedent directed the result. Given this lack of precedent, the court needed an interpretive foundation to guide its decision. Here, the court weighed the competing theories and principles at stake and focused on the degree of judicial entanglement with the activity at issue, holding that “where a judge plays nothing more than a perfunctory role in branding a privately ordered settlement with the imprimatur of law, the protections of *Noerr-Pennington* are not implicated.”¹¹

The key distinction here was found to be the “meaningful difference between action that is truly governmental in substance and action that is simply governmental in form.”¹² In order to come to this position, the court needed to consider two countervailing principles: the protected First Amendment right to petition, and the inherently limited nature of *Noerr-Pennington* immunity.

The court’s reasoning leaned heavily on Professor Ku’s contention that consent decrees are often orchestrated by the parties and presented to the court as a “*fait accompli*.”¹³ Thus, the court appeared to place the burden on the defendants to demonstrate that the consent decrees were subject to judicial deliberation; something more than a “perfunctory role in branding a privately ordered settlement with the imprimatur of law . . .”¹⁴ On the record, the court found that defendants did not demonstrate that the consent decree was subject to substantive judicial scrutiny.

We do not opine here on the court’s decision on the facts, or even the substance of the opinion. We note that the court chose to take a narrowly cabined view of the doctrine, adopting Professor Ku’s view that a consent decree does not require the court to “approve the substance of the agreement.”¹⁵ As a matter of principle and legal theory, the court predicated its decision on concerns that “[a]dopting the alternative view would provide litigants with an avenue wholly impervious to antitrust scrutiny simply by seeking out a court’s rubber-stamped approval.”¹⁶ We next turn to a different analytical framework, one that credits consent decrees with more net value.

⁹ *Nexium*, 2013 WL 4832176 at *19.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 18 (citing Ku, 33 IND. L.REV. at 428).

¹⁴ *Nexium*, 2013 WL 4832176 at *20.

¹⁵ *Id.* (citing Ku, 33 IND. L.REV. at 429)

¹⁶ *Id.* at 19.

III. SCHRÖDINGER'S CAT IS ALIVE: THE PETITIONING ACTIVITY IS PROTECTED: *Is there a meaningful distinction between private settlement agreements and consent judgments?*

As discussed above, the interpretative turn in this case focuses on the distinction, or lack thereof, between a private settlement and a consent decree; a distinction which the court described as “far from obvious and modest at best.”¹⁷ It is true, as both the court and Professor Ku note, that private settlement agreements leading to the dismissal of a suit under Rule 41(a)¹⁸ do not generally qualify for *Noerr-Pennington* immunity, but others may find the distinction less modest.

On this view, a broader distinction between the two might focus on other factors. For example, dismissals under Rule 41 do not require court approval to be effected, “[do] not imply judicial approval of the underlying settlement agreement,” and “impl[y] no view of the merits of the agreement and confer[] no immunities on the settling parties.”¹⁹ Moreover, private settlement agreements are not judicial orders, and may be properly characterized as private contractual arrangements.

The difference between consent judgments and private settlements has been long recognized by courts. In 1932, the Supreme Court in *United States v. Swift* “reject[ed] the argument . . . that a decree entered upon consent is to be treated as a contract and not a judicial act.”²⁰ Consent decrees have been held to be more certain than private settlement agreements, and thus afforded more deference, primarily because of the judicial oversight involved and the recourse available to parties for any failure to abide by the agreement.²¹ As the Fifth Circuit in *United States v. Miami* noted, “the only penalty for failure to abide by [a settlement] agreement is another suit. . . . A consent decree, although founded on the agreement of the parties, is a judgment.”²²

A number of other circuits have followed suit. In *Rowe v. Jones*, the Eleventh Circuit found that “because consent decrees are entered by the court and are judicially enforceable, they function like any other court order or judgment and thus *may be enforced by judicial sanctions, including citation for contempt if [they are] violated.*”²³ The Ninth Circuit in *SEC v. Randolph* likewise held that a consent judgment has “the force of res judicata, and it may be enforced by judicial sanctions, including, as in this case, citations for contempt.”²⁴

The lack of judicial oversight for settlements under Rule 41 versus the attention given consent judgments makes sense. While a simple dismissal for monetary value is unlikely to affect

¹⁷ *Id.* at 18.

¹⁸ Fed. R. Civ. P. 41(a).

¹⁹ *SmithKline Beecham Corp. v. Pentech Pharms.*, 261 F. Supp. 2d 1002, 1008 (N.D. Ill. 2003).

²⁰ 286 U.S. 106, 115 (1932).

²¹ See *Schering-Plough*, 402 F.3d at 1072 (“Veritably, the Commission's opinion would leave settlements, including those endorsed and facilitated by a federal court, with little confidence.”).

²² 664 F.2d 435, 439-40 (5th Cir. 1981).

²³ 483 F.3d 791, 797 (11th Cir. 2007) (internal quotation marks omitted) (emphasis added).

²⁴ 736 F.2d 525, 528 (9th Cir. 1984).

third parties or require the involvement of the judge, consent decrees “virtually by definition will contain equitable provisions” that a judge must evaluate before entering a judgment.²⁵

As discussed above, both the court in *Nexium* and Professor Ku take a more skeptical view of a court’s role in approving a consent decree. Professor Ku goes so far as to suggest that a reviewing court will merely “wink at them or tacitly approve[] them” because they would be “hard-pressed to reject” such agreements.²⁶ Indeed, the court in *Nexium* noted that “it is unclear how much of the content found within the consent judgments is properly attributable to the New Jersey District Court judge’s deliberation” and it therefore could not, in the court’s view, be fairly said that the judge “endorsed the terms of the settlement agreements.”²⁷

A jurist might take a more sanguine view of the role of the courts in approving consent decrees, considering that “[i]n the absence of clear evidence to the contrary, courts presume that public officers [such as judges] properly discharge their duties” and thus “consent decrees . . . are reasonably presumed valid and in conformity with the law.”²⁸ As noted by Judge Posner in *SmithKline Beecham Corp. v. Pentech Pharms.*, before entering a consent judgment, “the judge issuing it **must** determine that it does not offend public policy, as by harming third parties, before he can approve it.”²⁹ This requires judges to evaluate whether the agreement is “fundamentally fair, adequate and reasonable.”³⁰

Given this presumption that a court exercised its due diligence in approving a consent order, a court might find the question resolved, since this would more closely resemble any other court filing, rather than a private contract.³¹ As the Ninth Circuit held in *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, “deconstructing the decision-making process to ascertain what factors prompted the various governmental bodies to erect the anticompetitive barriers . . . runs afoul of the principles guiding the *Parker* and *Noerr* decisions.”³² If we follow this line of reasoning, the alleged harm in *Nexium* would at least be indirectly related to the petitioning activity, and *Noerr-Pennington* immunity should attach.

²⁵ *Donovan v. Robbins*, 752 F.2d 1170, 1176 (7th Cir. 1985).

²⁶ 33 IND. L. REV at 433.

²⁷ *Id.* at 20.

²⁸ See *Kohli v. Gonzales*, 473 F.3d 1061, 1068 (9th Cir. 2007); *Abdul-Akbar v. Watson*, 4 F.3d 195, 205 (3d Cir. 1993).

²⁹ 261 F. Supp. 2d at 1008 (emphasis added).

³⁰ *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990).

³¹ Indeed, *Noerr-Pennington* immunity has been extended to many forms of petitioning only indirectly related to a court filing, including settlement offers, pre-litigation threats of suit, and other activity “reasonably and normally attendant upon effective litigation.” See *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 208 F.3d 885, 890 (10th Cir. 2000) (internal quotations omitted); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992) (holding that “threats, no less than the actual initiation of litigation, do not violate the Sherman Act”); *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 944 F.2d 1525, 1528 (9th Cir. 1991) (holding that a “decision to accept or reject an offer of settlement is conduct incidental to the prosecution of the suit and not a separate and distinct activity which might form the basis for antitrust liability”); *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983) (“If litigation is in good faith, a token of that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute.”).

³² 17 F.3d 295, 300 (9th Cir. 1994).

IV. SCHRÖDINGER'S CAT IS BOTH ALIVE AND DEAD: HARD CASES

As demonstrated above, there is no precedent or authority providing a clear answer as to whether consent orders are protected by *Noerr-Pennington* immunity. Courts will take different views of the amount of deference due to any sort of petitioning activity, and whether such petitioning falls within the penumbra of protected activities. It may be that upon consideration by an appellate court, one view or the other will take hold.³³

In the meantime, litigants and practitioners will need to consider that, until the box is opened, certain types of petitioning activities will reside in two states of being, and the judge may decide which one applies on a case-by-case basis.

³³ The Supreme Court did not reach this issue in *FTC v. Actavis, Inc.*, 570 U.S. ____ (2013), despite an opportunity to do so.