

NOERR-PENNINGTON AND REVERSE PAYMENT AGREEMENTS: A MATCH NOT MADE IN HEAVEN

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INTRODUCTION

The Hatch-Waxman Act's¹ enactment in 1984 incentivized generic pharmaceutical companies to challenge branded pharmaceutical companies' patents that cover some of the most profitable drugs.² When a generic company files an abbreviated new drug application ("ANDA") with the Food and Drug Administration, the branded company may file a patent infringement suit against the generic.³ If the parties then decide to settle that litigation, a settlement could result from the generic and branded company negotiating over a potential generic entry date based upon their assessments of the strength of the patent being litigated.

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1. Hatch-Waxman Act, Pub. L. No. 98-417, 98 Stat. 1585 (1984).

2. If the generic company is the first to file an abbreviated new drug application, then they potentially are allowed a 180-day exclusivity period if the drug is approved by the FDA. This period could be worth millions of dollars. *See* 21 U.S.C. § 355(j)(5)(B)(iv) (2013).

3. In its ANDA, the generic filer must certify in one of four ways why the FDA should approve the application and why the branded drug's patents would not be a barrier to producing the generic form of the drug. *See* 21 U.S.C. § 355(j)(2)(A)(vii) (2013). Most, if not all, patent infringement litigation between branded and generic drugs has to deal with paragraph IV certifications. The filing of the application constitutes an act of patent infringement, enabling the patent-holder to sue the generic manufacturer. *See* 35 U.S.C. § 271(e)(2) (2010). Once in litigation, the branded and the generic often settle their dispute using various types of terms and exchanges of value, including cash, delayed launch dates, agreement by the branded company not to launch a competing generic, litigation gag clauses, launch date acceleration clauses, non-product hopping clauses, and others.

However, over the last several years, many settlements have been consummated with some sort of payment or consideration from the branded company going to the generic company in return for the generic's acceptance of a later entry date than otherwise would have been agreed to in the absence of the consideration. In a nutshell, these pay-for-delay agreements split monopoly profits between the branded and the generic in exchange for a later generic entry date. The U.S. Supreme Court recently determined that these types of settlements, generally called pay-for-delay agreements, could be anticompetitive and violate the antitrust laws.⁴

In its 2013 *FTC v. Actavis* decision, the U.S. Supreme Court resolved a circuit split, finding that reverse payment agreements could be anticompetitive.⁵ In his opinion for the majority, Justice Breyer stated that these agreements could potentially delay generic competition, cause harm to consumers, and be anticompetitive. However, to show anticompetitive effects would require balancing certain factors. The "likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payer's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification."⁶ The Court noted that its set of factors was not exhaustive, leaving it to the lower courts to structure a workable framework for analyzing the pay-for-delay agreements.⁷ However, defendants are now seeking to thwart that review by claiming that pay-for-delay agreements are immunized from antitrust review by the *Noerr-Pennington* doctrine, a doctrine designed to protect citizens' right to petition the government for redress of grievances.⁸

4. *FTC v. Actavis*, 133 S. Ct. 2223, 2227 (2013).

5. *Id.* at 2235.

6. *Id.* at 2237.

7. *Id.* at 2238. *Actavis* itself involved unique co-marketing and standby agreements. Many other courts have recognized that cash payments are not necessary to find anticompetitive effects in reverse payment agreements. See *In re Niaspan Antitrust Litig.*, 13-MD-2460, 2014 WL 4403848, at *10 (E.D. Pa. Sept. 15, 2014); *In re Nexium Antitrust Litig.*, 968 F. Supp. 2d 367, 392 (D. Mass. 2013); *In re Lipitor Antitrust Litig.*, No. 3:12-cv-02389, 2014 WL 4543502, at *18 (D.N.J. Sept. 12, 2014).

8. In fact, defendants in pay-for-delay agreement cases are attempting to use *Noerr-Pennington* as shields to protect their agreements from antitrust scrutiny, even though *FTC v. Actavis* explicitly holds they can be subject to antitrust liability. Though the *Noerr-Pennington* doctrine began as immunity for petitioning activity, the circuit courts have expanded *Noerr-Pennington* to apply outside of direct petitioning activities, such as lobbying and the filing of a lawsuit, to indirect petitioning activities, such as patent infringement letters sent before litigation and some other pre-litigation communications. See *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 933 (9th Cir. 2006). Yet, courts have generally

Part I of this paper provides a brief overview of the *Noerr-Pennington* doctrine, tracking its evolution through the Supreme Court and the basic policies that animate *Noerr-Pennington* protection. Part II will analyze three recent court cases in which defendants have raised a *Noerr-Pennington* defense with regard to their pay-for-delay agreements. Part III will discuss general arguments made by defense counsel as to why pay-for-delay agreements should be protected and then apply some of the current *Noerr-Pennington* paradigms to the agreements. Finally, Part IV will highlight some California-specific issues regarding application of the similarly motivated litigation privilege under California law (California Civil Code Section 47), and its application to pay-for-delay agreements.

I. THE RISE OF *NOERR-PENNINGTON*

The *Noerr-Pennington* doctrine was first articulated in three cases dating back to the 1960s.⁹ The policy behind the *Noerr-Pennington* doctrine, as conceived in the seminal *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.* and authored by Justice Black, was the protection of petitioning activity. Justice Black explained that in a representative democracy, the government acts on behalf of the people and depends upon the ability of the people to make their wishes known to the government. Because of this, “to hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity.”¹⁰ “Of at least equal significance,” Justice Black further explained, was that allowing such a construction of the Sherman Act—one that would allow for the regulation of political activity—would impute to Congress an intent to invade the right to petition.¹¹ Ultimately, Justice Black read the Sherman Act as limited to competition and the business world, while not affecting political activity.

In *United Mine Workers of America v. Pennington*,¹² Justice White delivered the opinion of the Court, in which he reaffirmed the *Noerr* decision and stated that joint efforts to influence public officials for

declined to apply *Noerr-Pennington* to settlements or consent judgments. See *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 13 (1979).

9. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

10. *Noerr*, 365 U.S. at 137.

11. *Id.*

12. *United Mine Workers*, 381 U.S. at 670.

legislation or action do not violate the Sherman Act. Building upon *Noerr*, Justice White's opinion for the Court further refined the doctrine by holding that the Sherman Act did not reach activities aimed at influencing public officials even if the intention was to eliminate competition.¹³ Thus, the *Noerr-Pennington* doctrine was established with these two cases. Standing on the pillars of encouraging an informed government and equally important, protecting the right to petition the government, *Noerr-Pennington* originally embodied the right of citizens to approach their government officials and seek changes in the laws without fear of repercussions. It provided blanket protection from the Sherman Act for activity aimed at lobbying the government for change, regardless of the purpose, intent, or harm.

In 1972, the Supreme Court in *California Motor Transport Co. v. Trucking Unlimited* both expanded and limited the reach of *Noerr-Pennington* to include petitioning and appealing to administrative agencies and courts.¹⁴ The Court recapped the underpinnings of the doctrine, which rested on the representation by the government and the right to petition.¹⁵ The Court explained that the same philosophy governed the approach of citizens petitioning administrative agencies, citing *Pennington* as an example.¹⁶ Then, the Court pronounced:

[I]t 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.¹⁷

Thus, the *Noerr-Pennington* doctrine was expanded beyond its simple petitioning of the executive and the legislature to include the courts as well as federal and state agencies. However, the Court also limited the doctrine's binary or absolute nature, establishing that it would not protect petitioning activity, whether single or multiple petitions, where the process was being abused or misused to achieve an anticompetitive effect.¹⁸ "Misrepresentations, condoned in the political arena," the Court

13. *Id.*

14. *Cal. Motor Transp.*, 404 U.S. at 509–11.

15. *Id.* at 510 (citing *Noerr*, 365 U.S. at 137).

16. *Id.*

17. *Id.* at 510–11.

18. *Id.* at 512–513.

wrote, “are not immunized when used in the adjudicatory process.”¹⁹ Not only did the Court limit the doctrine’s absolute protection by subjecting it to an exception, but the statement also creates a different type of analysis between the legislature and executive branches—the political arena—and the judiciary.

In the following years, the Supreme Court made some further refinements. In 1988, Justice Brennan’s opinion for the Court held, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, that the scope of *Noerr-Pennington* protection depends on “the source, context, and nature of the anticompetitive restraint at issue.”²⁰ In *Allied Tube*, Defendants collectively agreed to pack the meeting of a quasi-governmental body that set product standards and codes related to fire protection with new members whose only goal was to vote against the respondent’s proposal. The quasi-governmental body was the National Fire Protection Association, which routinely established the National Electrical Code that was habitually adopted into law by a substantial number of state and local governments.²¹ In the majority opinion, Justice Brennan concluded that even though the conduct was indirect petitioning, the activity did not take place in the open political arena, where partisanship is the hallmark of decision-making, but took place within the confines of a private standard-setting process.²² The Court could not “agree with the petitioner’s absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action.”²³ But rather “the scope of this [*Noerr*] protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue.”²⁴ The Court concluded that the *Noerr-Pennington* doctrine is meant to protect political activity that hurts competition, and not to protect anticompetitive actions that have political ramifications.

In 1993, in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, the Supreme Court crystallized the sham exception to *Noerr-Pennington*. In the majority opinion, Justice Thomas articulated the standard for determining when petitioning activity may be a sham and thus, not protected by *Noerr-Pennington*.²⁵ Specifically, he announced a two-part test to determine whether the petitioning activity

19. *Id.* at 513.

20. *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 499 (1988).

21. *Id.* at 495–96.

22. *Id.* at 506.

23. *Id.* at 503.

24. *Id.* at 499.

25. *Prof'l Real Estate Investors v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993).

in question was a sham. “First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.”²⁶ Only after making sure the lawsuit is objectively baseless can the reviewing court turn to the second part. “Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals ‘an attempt to interfere directly with the business relationships of a competitor,’ through the ‘use [of] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.’”²⁷ If the two-part test is met, then the petition would not be entitled to *Noerr-Pennington* protection.

Ironically, eighteen years later, Justice Thomas and Justice Scalia raised doubt as to the reach of *Noerr-Pennington* and its application to lawsuits in general. In 2011, the Supreme Court issued its opinion in *Borough of Duryea v. Guarnieri*, in which a police chief alleged that directives issued upon his reinstatement as police chief were retaliation for petitioning activity that was protected under the First Amendment.²⁸ While the case did not specifically discuss the *Noerr-Pennington* doctrine, the case is informative when interpreting *Noerr-Pennington* as it cites to *California Motors* for guidance on the evolution of the protections provided by the petition clause.²⁹ While the entire majority opinion focuses on the growth and limits of the petition clause in both private and public spheres, the separate opinions by Justice Thomas and Justice Scalia shed the most light on the *Noerr-Pennington* doctrine. Justices Scalia and Thomas each acknowledge holding serious doubts that “lawsuits are ‘petitions’ within the original meaning of the Petition Clause of the First Amendment.”³⁰ Scalia explains that the court has never actually held that lawsuits are constitutionally protected under the First Amendment, and that the cases cited by the majority are nothing but statutory interpretations decisions construing the National Labor Relations Act against the backdrop of the Petition Clause.³¹ Scalia describes the long historical backdrop of how the petition clause was a codification of preexisting individual rights, which only included petitioning the executive and legislative branches.³²

26. *Id.* at 60.

27. *Id.* at 60–61 (citations omitted).

28. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2492 (2011).

29. *Id.* at 2494.

30. *Id.* at 2501 (Thomas, J., concurring); *Id.* at 2503 (Scalia, J., dissenting) (“I find the proposition that a lawsuit is a constitutionally protected ‘Petition’ quite doubtful.”).

31. *Id.* at 2503.

32. *Id.* Even more powerful is the fact that Scalia states that the *Noerr-Pennington* doctrine is a gloss on the Sherman Act that was created to immunize certain lobbying (*legislature-petitioning*) activity. *Id.*

The dissent by Scalia suggests that *Noerr-Pennington* protection should only extend to lobbying and petitioning that was directed at the legislative and executive branches. Other than this handful of older cases and *Duryea*, the Supreme Court has said little about the current standing of the *Noerr-Pennington* doctrine. While we know the doctrine rests on the need for the government to be informed and the First Amendment right to petition, there is a difference between petitioning the legislature and the executive, and petitioning the judiciary as explained in *California Motors*.³³ These are the principles that inform and guide lower courts as to how to apply *Noerr-Pennington* to novel and complicated issues.

II. REVERSE PAYMENTS AND *NOERR-PENNINGTON*: RECENT CASES

Recently, three defendants in pay-for-delay agreement challenges have argued that *Noerr-Pennington* immunity should apply to these agreements between generic and branded pharmaceutical companies.³⁴ In each of the cases, the defendants have argued varying permutations of one basic position. Each posited that since the judge in their respective cases reviewed and approved the settlement at some level, then the *Noerr-Pennington* doctrine should apply. If the settlement is part of petitioning activity and stems from the government's consent judgment, then the pay-for-delay agreement is immune under *Noerr-Pennington*. Putting aside case law that states private settlements are not protected by *Noerr-Pennington* immunity, the defendants' arguments disregard the basic backbone that underlies the *Noerr-Pennington* doctrine. Moreover, as pointed out by Judge Thrash in *Androgel*, application of the doctrine would largely eliminate the Supreme Court's *Actavis* opinion.³⁵ While each of the three cases addressed the same basic arguments, it is worth analyzing the individual variances that each case demonstrates.

A. *In re Nexium*

In *In re Nexium*, a group of wholesale drug distributors and health and welfare benefit funds brought a putative class action against the branded and generic drug manufacturing of the branded drug, Nexium,

33. See *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

34. See *In re Effexor XR Antitrust Litig.*, No. 11-5479, 2014 WL 4988410 (D.N.J. Oct. 6, 2014); *In re Androgel Antitrust Litig. (No. II)*, No. 1:09-CV-955, 2014 WL 1600331 (N.D. Ga. Apr. 21, 2014); *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367 (D. Mass. 2013).

35. *Androgel (No. II)*, 2014 WL 1600331, at *7.

alleging that Defendants entered into pay-for-delay agreements to keep cheaper generic versions of the drug out of the market.³⁶ Defendants moved to dismiss the complaint, arguing in part that the challenged conduct was immune from antitrust liability under *Noerr-Pennington*.³⁷ At the heart of their argument, Defendants stated that under the agreements, the settling parties were only obligated to persuade the United States District Court for the District of New Jersey to enter a consent judgment ending the ongoing patent lawsuit.³⁸ Defendants elaborated that each agreement between them would become effective only when the consent judgment was entered as an order by the district court.³⁹ Because of these two requirements, Defendants argued that the anticompetitive effects of the agreements alleged by Plaintiffs “could not have occurred unless and until the district court made an affirmative decision to enter the consent judgments.”⁴⁰ “That is because the alleged anticompetitive effects result from the district court’s decision to enter the consent judgments as orders of the court—an ‘intervening government action [that] breaks the casual chain’ between settlement agreements and the alleged harm.”⁴¹

In a nutshell, Defendants argued that because the pay-for-delay agreement between them would not be binding until the court entered it as a consent judgment, the settlement constituted petitioning activity that was protected by *Noerr-Pennington*. In his September 11, 2013 opinion, Judge Young disagreed, and ruled that *Noerr-Pennington* did not protect the pay-for-delay agreement at issue.⁴² He explained that private settlement agreements are generally not shielded from antitrust liability by *Noerr-Pennington*. While finding little guidance on the question of whether entry of a consent judgment falls within the scope of *Noerr*,⁴³ Judge Young found the analytical framework from a thirteen-year-old law review article instructive in guidance through the murky waters.⁴⁴

36. *Nexium*, 968 F. Supp. 2d at 375–76.

37. AstraZeneca Defendants’ Memorandum in Support of their Motion to Dismiss the Direct Purchasers’ Consolidated Amended Complaint at 4, *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367 (D. Mass. 2013) (No. 1:12-md-02409), Doc. No. 135.

38. *Id.* at 5.

39. *Id.*

40. *Id.* at 6. To a lesser extent, Defendants argued that it was the New Jersey District Court’s injunction that formally enjoined the generic companies from offering the generic version of Nexium. *Id.*

41. *Id.*

42. *Nexium*, 968 F. Supp. 2d at 395–98.

43. *Id.* at 395.

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

Using the framework, Judge Young concluded that consent judgments could not be construed as conduct that is incidental to litigation or as direct petitioning since the parties were not trying to persuade “a judicial officer to obtain a redress of grievances.”⁴⁵ Rather, Judge Young stated that *Noerr-Pennington* could apply only if the “anticompetitive harm is caused by the decision of a court, even though granted at the request of a private party,” seeing that “no private restraint of trade occurs because the intervening government action breaks the casual chain.”⁴⁶ But in this case, Judge Young could not afford the consent judgment immunity under *Noerr-Pennington* since nothing in the record suggested that the New Jersey District Court “actually played an independent role in drafting the terms in the consent judgments.”⁴⁷ Judge Young partly based his decision on the fact that in instances where judges played nothing more than a ministerial or cursory role in approving or entering a privately ordered settlement, *Noerr-Pennington* immunity could not attach to the settlements.⁴⁸ Since the judge entering the consent judgment did not play an independent role, Judge Young did not extend *Noerr-Pennington* immunity to Defendants’ agreements.

B. *In re Androgel*

In *In re Androgel*, Defendants made similar arguments as to why *Noerr-Pennington* should apply to their pay-for-delay agreement that was entered as a consent judgment in 2006.⁴⁹ Specifically, Defendants argued that since they petitioned the court for a “judgment and order of permanent injunction” to achieve “finality and certainty,”⁵⁰ and because the settlement is different from a Rule 41(a) voluntary settlement, their 2006 settlement should be entitled to *Noerr-Pennington* immunity.⁵¹ Par and Paddock, in their motion to dismiss, discuss at length one unpublished case, *Medimmune, Inc. v. Genentech, Inc.*, in which the court upheld a consent judgment as being protected by *Noerr-Pennington*

45. *Nexium*, 968 F. Supp. 2d at 397.

46. *Id.* at 397–98 (citing *Andrx Pharm., Inc. v. Biovail Corp. Int’l*, 256 F.3d 799, 818 (D.C. Cir. 2001)).

47. *Id.* at 398.

48. *Id.*

49. *In re Androgel Antitrust Litig.* (No. II), CA No. 1:09-CV-955-TWT, 2014 WL 1600331 (N.D. Ga. Apr. 21, 2014).

50. Memorandum of Law in Support of Defendants’ Par Pharmaceutical Companies, Inc. and Paddock Laboratories, Inc.’s Motion to Dismiss the Second Amended Complaint at 5, *In re Androgel Antitrust Litig.* (No. II), CA No. 1:09-CV-955, 2014 WL 1600331 (N.D. Ga. Apr. 21, 2014) (No. 1:09-CV-955), 2009 WL 2773683.

51. *Id.* at 5–7.

immunity.⁵² According to Defendants, *Medimmune* stands for the proposition that when Defendants seek out consent judgments, rather than “settlements that merely require compulsory filings, ministerial agency actions, or inconsequential court orders such as Rule 41(a) dismissals,” the anticompetitive harms resulting from those consent judgments are protected by *Noerr-Pennington* since they stem from “the government exercising its discretion to create an anticompetitive result.”⁵³ Since consent judgments are not entered into automatically, but “instead require judicial evaluation of the public’s interest and the agreement’s fairness and lawfulness,” then *Noerr-Pennington* should protect consent judgments, according to *Medimmune*.⁵⁴

It wasn’t until 2014 that Judge Thrash issued his opinion in *Androgel*, denying Defendants’ motion to dismiss on the grounds that *Noerr-Pennington* did not apply to consent judgments. Judge Thrash began the analysis by stating that *Noerr-Pennington* “immunity [also] attaches to efforts seeking governmental action from the courts.”⁵⁵ He then analyzes three cases in which consent judgments in patent settlement cases have been considered for *Noerr-Pennington* immunity. Two of the cases, *In re Nexium* and *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, denied the immunity. They each found that because the court’s role in the consent judgment was nothing more than applying a rubber stamp and there was no showing of the judge acting as an independent actor in drafting the consent judgment terms, *Noerr-Pennington* did not apply.⁵⁶ Judge Thrash then distinguished *Medimmune, Inc. v. Genentech, Inc.*, on which Defendants heavily relied,

52. *Id.* at 7–16 (discussing *Medimmune, Inc. v. Genentech, Inc.*, No. CV 03-2567, 2003 WL 25550611 (C.D. Cal. Dec. 23, 2003)).

53. *Id.* at 11.

54. *Id.* at 14.

55. *Androgel (No. II)*, 2014 WL 1600331, at *4 (citing *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Prof'l Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49 (1993) (petitioning activity before a court is protected from antitrust scrutiny unless the conduct was objectively baseless and motivated by an improper subjective motivation to harm competitors simply through litigation); *Andrx Pharm., Inc. v. Elan Corp., PLC*, 421 F.3d 1227, 1234 (11th Cir. 2005) (noting that “the Sherman Act cannot be read to impede a litigant from seeking to defend constitutionally-permitted patent rights . . . [and] engaging in litigation to seek an anticompetitive outcome from a court is a First Amendment activity that is immune from antitrust liability,” but nevertheless subjecting the settlement agreement ending the litigation to antitrust scrutiny)). Judge Thrash also analyzes consent judgments under the *Allied Tube* Court decision, stating that *Allied Tube* also does not support expanding *Noerr-Pennington* protection to consent judgments. *Androgel (No. II)*, 2014 WL 1600331 at, *7–9 (stating that pay-for-delay agreements were “the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves”).

56. *Androgel (No. II)*, 2014 WL 1600331, at *4–5.

stating that the “parties reached an agreement, and then they worked with Judge Chesney of the Northern District of California to develop an order and judgment which Judge Chesney signed.”⁵⁷ The fact that the judge in *Medimmune* played a critical role in “developing the consent judgment, and because the judgment itself did more than make a settlement arrangement between parties,” made *Noerr-Pennington* immunity appropriate in Judge Thrash’s view.⁵⁸

C. *In re Effexor XR*

Finally, in *In re Effexor XR*, Defendants made multiple attempts to convince the court that *Noerr-Pennington* should apply to the underlying consent judgments entered by the previous court. Defendants raised the same arguments as in the other two cases, stating that because the judge ordered the consent decrees, immunity should be applied.⁵⁹ Unique to *Effexor*, though, is Defendants’ additional argument that since the consent judgments were supplied to the FTC for review by the district court judge before the consent decree entered, the agreements were also not anticompetitive. The district court judge in the underlying patent infringement litigation created a mechanism for the FTC to review the proposed consent judgments and agreements, and ordered any objections to the agreement to be briefed for the judge to review before entering the consent judgment.⁶⁰ Since no such objections were made by the FTC, this silence, Defendants contended, led to the consent judgment being entered into and was yet another reason why the agreement should be covered by *Noerr-Pennington*.

As of this writing, Judge Sheridan has not issued an opinion that discusses the applicability of *Noerr-Pennington* to the alleged pay-for-delay agreements, but on October 6, 2014, Judge Sheridan dismissed the

57. *Id.* at *5.

58. *Id.* at *6. In fact, in *Medimmune* the court not only entered a consent judgment but also simultaneously entered an order that overturned the Patent and Trademark Office Board of Patent Appeals and Interferences priority decisions, which could not have been accomplished without the court’s approval.

59. Memorandum in Support of Teva Defendants’ Motion to Dismiss All Direct Purchaser Complaints at 6, *In re Effexor XR Antitrust Litig.*, No. 11-5479, 2014 WL 4988410 (D.N.J. April 6, 2012) (No. 11-05479), 2012 WL 1204314, at*6. In a July 11, 2014 letter to Judge Sheridan, Defendants claim that the mechanism established by the judge in the underlying patent action—a mechanism that allowed the FTC to raise antitrust concerns—and the petitioning Defendants undertook in that action were grounds for *Noerr-Pennington* protection. See Letter From Liza M. Walsh to Judge Peter G. Sheridan, U.S.D.J., at *1 (April 28, 2014) (on file with author).

60. *In re Effexor XR Antitrust Litig.*, No. 11-5479, 2014 WL 4988410, at *11–12 (D.N.J. Oct. 6, 2014).

majority of the complaint for other reasons. Judge Sheridan noted in his statement of the underlying facts that the FTC was ordered to raise any objections to the parties' earlier submitted patent settlement agreement by the presiding judge. The FTC responded to the order on December 1, 2005 stating that because the settling parties—Wyeth and Teva—did not intend “to independently raise with the Court the competitive implications of their proposed settlement agreement,” they would not file an objection.⁶¹ Judge Sheridan's portrayal of the facts coupled with the lack of discussion as to any involvement with the creation of the consent judgment by the overseeing judge in the patent litigation would lead one to expect the possible decision to fall more in line with *In re Nexium* and *In re Cipro*, which denied *Noerr-Pennington* protection, rather than the *Medimmune* case direction.

III. APPLICATION OF *NOERR-PENNINGTON* PROTECTION TO PAY-FOR-DELAY AGREEMENTS

Carefully reviewing the arguments in the three previously mentioned cases shows that two main points are espoused by defendants as to why *Noerr-Pennington* should apply to pay-for-delay agreements: 1) that the pay-for-delay agreement is incidental to petitioning activity or is direct petitioning activity; and/or 2) that the anticompetitive harm stemming from such agreement comes from government action, mainly the court-ordered consent judgment. Each of these premises misinterprets a fundamental part of the policy behind *Noerr-Pennington* and how the Supreme Court has interpreted it.⁶² While settlements are generally part of the normal lifecycle of a lawsuit, the idea that their content is direct or indirect petitioning activity is unsupported by the policy behind *Noerr-Pennington*.⁶³ As explained below in part III.B.2, the reasoning behind

61. *Id.* at *11. Yet, the decision not to file by the FTC was not to be taken as a determination of any kind as to the possible antitrust violations. *Id.* at *12.

62. Again, the entire foundation of *Noerr-Pennington* applying to lawsuits has been called into question with Justice Scalia and Justice Thomas dissents in *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011). In it, Justice Thomas states that “[he] seriously doubt[s] that lawsuits are ‘petitions’ within the original meaning of the Petition Clause of the First Amendment.” *Borough of Duryea*, 131 S. Ct. at 2501.

63. Some have stated that *Noerr-Pennington* immunity applies to the decision to settle a lawsuit as much as it protects the decision to initiate a lawsuit, citing *Columbia Picture Industries, Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528 (9th Cir. 1991). But even under current case law in the Ninth Circuit, the protection only goes so far as to protect the simple act of the decision, not the anticompetitive results of the settlement agreement itself. It would be contrary to the policy behind *Noerr-Pennington* to

the *Noerr-Pennington* doctrine and the recent case law including the Supreme Court in *FTC v. Actavis* do not support expanding the doctrine to protect consent judgments. Even further, not extending *Noerr-Pennington* protection to consent judgments does not eradicate or harm the people's right to petition their government in any way. Rather, expanding the doctrine to include consent judgments would simply allow potentially egregious anticompetitive agreements to be shielded from any liability.

A. *Settlements, in the form of consent judgments or otherwise, are not within Noerr-Pennington's petitioning scope*

Addressing whether pay-for-delay agreements based on consent judgments are incidental to, or direct, petitioning activity, *Noerr-Pennington* jurisprudence establishes that protecting petitioning activity is intended to encourage the populace to inform the government of its desires and additionally, to protect the people's First Amendment right to petition.⁶⁴ Thus, any protection afforded to consent judgments should be well grounded in, and further, these policies. While *California Motors Transport Co. v. Trucking Unlimited* expanded the right to petition to include access to the courts and administrative agencies, no Supreme Court precedent, and few other cases, have directly dealt with the settlement of petitioning activity and possible *Noerr-Pennington* protection. The few cases mentioning settlements being incidental to petitioning activity all seem to cite to one case, *Columbia Picture Industries, Inc. v. Professional Real Estate Investors, Inc.*, in which the Ninth Circuit stated, "[A] decision to accept or reject an offer of settlement is conduct incidental to the prosecution of the suit."⁶⁵ Two things are interesting about this sentence. First and foremost, it does not state that the decision to accept or reject an offer of settlement is aptly considered part of the petitioning activity, but rather just incidental to it.⁶⁶ And secondly, and more importantly, the Ninth Circuit cites to *Aircapital Cablevision, Inc. v. Starlink Communications Group, Inc.* to support the statement.⁶⁷ The *Aircapital* case however, does not discuss

apply blanket protection to the settlement agreement terms based on the sole fact that the decision was made to settle a lawsuit.

64. See *supra* Part I.

65. *Columbia Picture Indus., Inc.*, 944 F.2d at 1528, *aff'd*, 508 U.S. 49 (1993).

66. Not to mention that the language limits the protection to the decision to settle and not the contents of the settlement itself.

67. *Aircapital Cablevision, Inc. v. Starlink Commc'ns Grp., Inc.*, 634 F. Supp. 316, 326 (D. Kan. 1986).

any settlement or decisions to settle that implicate *Noerr-Pennington*. Rather, it discusses threats of litigation made to a competitor's customer.⁶⁸ It further explains *Noerr-Pennington* and its applicability to well-publicized litigation threats.⁶⁹ It is unclear how the *Aircapital* case addresses the notion that settlements are incidental to petitioning activity. Thus, any holding that settlements are incidental to petitioning activity and protected by *Noerr-Pennington* is tenuous at best, as the *Aircapital* case cite is less than supportive, and settlements do not advance the policies behind *Noerr-Pennington*.⁷⁰

The decision of whether to settle has little to no bearing on the people's right to petition its government. It also has no effect on the people's right to inform their government. Applying *Noerr-Pennington* immunity to settlement agreements, even those embodied by a consent judgment, furthers neither policy behind *Noerr-Pennington*. For instance, if *Effexor* rejected *Noerr-Pennington*'s application to the consent judgments, the resulting incentive would simply allow potentially injured plaintiffs to go to trial, and would not abridge any right to petition the government for redress—whether it be through engaging in a lawsuit or withdrawing a lawsuit. Conversely, if *Effexor* had applied *Noerr-Pennington*, it would simply sanction a private agreement by parties with incentives to collude to split monopoly profits and leave injured parties without any meaningful recourse.

A consent judgment usually begins with the two opposing parties meeting and discussing how to settle the lawsuit, and then approaching the judge for the order. From the beginning of the settlement process, the parties are not petitioning the government for their needs, but rather withdrawing their original petition, in which they were to make their wishes made.⁷¹ Although the withdrawal of a lawsuit is not a “separate

68. *Id.*

69. *Id.*

70. This does not even consider the fact that the original idea of the petition clause did not encompass lawsuits, as they were a distinct and separate creature to petitioning during the First Amendment's passing. See *Borough of Duryea*, 131 S. Ct. at 2503 (Scalia, J., dissenting); Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORDHAM L. REV.* 2153, 2182 (1998) (“[P]etitioning provided not just a method where by individuals . . . might seek reversal of harsh treatments by public authority, judicial or otherwise, but also a method whereby such individuals could seek employment of the public power to redress private wrongs that did not fit neatly into categories of action giving rise to a lawsuit.”)

71. See *Cascades Computer Innovation LLC v. RPX Corporation*, No. 12-CV-1143, 2013 WL 6247594, at *16. (N.D. Cal. December 3, 2013) (“[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.” (quoting *Columbia*

and distinct activity that might form the basis for antitrust liability,” it cannot be said that the consent judgment is petitioning the government as well, as that was accomplished by filing the lawsuit in the first place. In short, private settlements do not implicate any First Amendment freedoms or block the people’s right to inform their government, as described by *Noerr Motor Freight*.⁷² Furthermore, parties withdrawing a lawsuit based on a consent judgment could be viewed as withdrawing information from the petitioned government, in sharp contrast to the policy goals of *Noerr-Pennington* to inform the petitioned entity of the needs and requirements of the populace. When the court is not being asked to make a decision, it has no need for information, so this information prong has little application. But the failure to satisfy this prong of the *Noerr-Pennington* underpinnings is particularly troubling when dealing with patent consent decrees, which are imbued with great public interest.⁷³ Because the parties are incentivized in these settlements to collude, extend, and share the branded company’s monopoly at the public’s expense, they have no incentive to inform the court of the damages that their collusive agreement is having on the public.⁷⁴ From either perspective, *Noerr-Pennington* policy does not support finding consent judgments as incidental or direct petitioning activity.

B. Since consent judgments are not petitioning activity, Noerr-Pennington immunity to pay- for-delay agreements should not apply

Pictures Indus., Inc. v. Profl Real Estate Investors, Inc., 944 F.2d 1525, 1528 (9th Cir. 1991)).

72. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961).

73. See *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 100–101 (1993) (explaining the “importance to the public at large of resolving questions of patent validity”); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (noting that patent laws embody “a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy”); *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 234 (1892) (“It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly.”); *Kaspar Wire Works, Inc. v. Leco Eng’g & Mach., Inc.*, 575 F.2d 530, 540 (5th Cir. 1978).

74. *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003) (“[O]nce they reach the settlement stage, incentives have shifted and there is the danger of collusion.”).

Even if settlements were to be considered a separate petitioning activity, it has been held that restraints of trade that are incorporated into a settlement agreement are not immunized from antitrust liability.⁷⁵

1. *Medimmune* is an outlier in expanding *Noerr-Pennington* immunity for a pay-for-delay agreement, and employed an erroneous standard

Despite the Supreme Court precedent that private settlements cannot be immunized from antitrust liability and the well-reasoned opinions in *Nexium* and *Cipro*, the district court in *Medimmune* suggested in an unpublished case that a consent judgment that was “crafted” by a judge was immune to antitrust liability under *Noerr-Pennington*.⁷⁶ However, the *Medimmune* case not only disregarded precedent, but applied an incorrect standard not supported by *Noerr-Pennington* jurisprudence and policy.

Aside from contradicting Supreme Court precedent,⁷⁷ the court in *Medimmune* focused on the fact that the judge played a substantial role in crafting the consent judgment. *Medimmune* involved an agreement between Genentech and Celltech settling a priority dispute between their conflicting patents. Both Genentech and Celltech, in the 1980s, filed similar patents that were issued by the PTO on the same day. Genentech advised the PTO of the conflict in subject matter between the patents. In 1991, the PTO declared patent interference between both the patents, and in 1998, the PTO awarded priority to Celltech. Genentech then commenced an action to overturn the PTO’s priority determination, which was heard by Judge Maxine Chesney. Judge Chesney denied Genentech’s summary judgment motion. After the hearing, Genentech and Celltech engaged in mediation conducted by a retired judge, and entered into a settlement agreement with each other, as well as an amended license agreement. On March 6, 2001, Genentech and Celltech filed a Notice of Settlement and Joint Request for Entry of Settlement Instruments. A week later, both parties participated in a telephonic status conference before Judge Chesney in which revised versions of the

75. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 13 (1979) (“Of course, a consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties.”); *see also Cantor v. Detroit Edison Co.*, 428 U.S. 579, 602 (1976) (stating that government action that “amounts to little more than approval of a private proposal” is not protected).

76. *Medimmune, Inc. v. Genetech, Inc.*, No. CV 03-2567, 2003 WL 25550611, at *5 (C.D. Cal. Dec. 23, 2003).

77. *See Aircapital Cablevision, Inc.*, 634 F. Supp. at 326.

proposed order and judgment were submitted by Celltech and Genentech. The order was then executed on March 16, 2001.⁷⁸

Judge Pfaelzer, in her opinion, found that *Noerr-Pennington* protected the consent judgment between Genentech and Celltech because

defendants did not merely present their settlement to Judge Chesney for approval; they sought a Judgment and an Order as well. The documents that she signed accomplished results, such as overturning the Board's priority decision, which could not have been accomplished through private agreement. It was these documents—the results of the Defendants' petitioning and Judge Chesney's order—that resolved the issue of priority.⁷⁹

Judge Pfaelzer's decision seems to hang on the fact that the resulting actions, mainly the overturning of the PTO board decision, from the consent judgment could not have occurred without the judge. But this is not the standard or policy behind *Noerr-Pennington*. Rather *Noerr-Pennington* is intended to apply to activities that inform the government of the parties' wishes and are protected by the First Amendment. It does not matter that the judge signed documents that caused events that could otherwise not happen. Genentech and Celltech did not hope to spur the government to action with their submitted settlement papers or request any decision, but rather wished to withdraw their existing petition, and prevent the court from making a decision on the merits of the case.

Viewed more closely, Judge Chesney's actions in the underlying *Medimmune* patent action reflect, at best, a fairly passive involvement in the crafting of the private parties' consent judgment. Judge Pfaelzer, in passing, glosses over Judge Chesney's review of the parties' presented consent judgment, stating that there was one telephone conference about it, and instead focuses on the fact that the consent decree "overturned" the PTO board's decision. But this is really no different from private settlements done on appeal of a lower court decision, in which the parties decide on some result differing from that of the lower body. It was not the act of Judge Chesney that vacated or ignored the PTO ruling, but the parties' agreement to disregard it and reach a different result. There is little in Judge Pfaelzer's opinion about how exactly the consent judgment was crafted, but rather that it was presented and discussed in a telephone conference then was approved. This mere presentation of the

78. *Medimmune*, 2003 WL 25550611, at *1–3.

79. *Id.* at *7.

facts suggests that Judge Chesney just stamped the court's approval without a thorough understanding of what the court was approving. Of course, at no time was there any representation of the public's interest in the resolution of the patent priority dispute.

In *California Motors*, the Court stated that the "right of access to the agencies and courts to be heard on application . . . is part of the right of petition protected by the First Amendment."⁸⁰ Simultaneously, the purpose of the judicial branch is to define the law and enforce the laws written by Congress.⁸¹ Thus for *Noerr-Pennington* protection to apply to a petition to a court, only the application to the court itself and the ultimate interpretation of the law by the presiding judge should be deemed immune by *Noerr-Pennintgon*. Conversely, when a judge is asked to dismiss a case pursuant to a consent judgment where the terms have already been decided by the moving parties, the judge is not fulfilling his or her role as a judge—in which he or she would make an ultimate decision on the merits of the case at hand by applying the law to the facts presented—but rather acting as an intermediary to withdraw the petition from the court at the request of the parties.⁸² Consent judgments do not end lawsuits with an interpretation of law or an application of law to fact in which parties present and represent different views—as a judge's opinion does. Rather, a consent judgment resolves a private claim with a private arrangement, in which the judge acts as an intermediary. As stated in *Allied Tube*, the scope of *Noerr-Pennington* protection depends on the source, content, and nature of the restraint, and these consent judgments are bargained for in private spheres, not in the open political arena.⁸³

2. Noerr-Pennington policy and recent case law dictate that consent judgments cannot be protected by the Noerr-Pennington doctrine

The *Medimmune* court applied an incorrect standard that is not supported by the policy of *Noerr-Pennington*, and ultimately reached an

80. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 517 (1972).

81. *United States v. Goldenberg*, 168 U.S. 95, 102–03 (1897); *United States v. First Nat'l Bank of Detroit*, 234 U.S. 245, 260 (1914).

82. When parties submit a consent judgment and ask for a dismissal of the case, the parties at this point are not adversarial, but actually on the same side trying to persuade the judge to dismiss the case. *See Vollmer*, 350 F.3d at 660. The Judicial system is founded, and relies, on the adversarial system to provide the courts with substantial information on both sides in search of the truth. When the parties are no longer adversarial, the incentive to provide full and balanced information is removed, and replaced with an incentive to act collusively in order to convince the court to dismiss the case.

83. *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 499–500 (1988).

erroneous conclusion as to the applicability of *Noerr-Pennington*. It is also a decision at odds with the several district courts holding that *Noerr-Pennington* has no application to consent judgments filed in the context of pay-for-delay agreements.⁸⁴ These courts have recognized that neither the policies nor the safeguards of *Noerr-Pennington* jurisprudence can be met in these cases. While there is no singular standard for the invocation of *Noerr-Pennington*, the courts have made it clear that its application is subject to a number of fundamental prerequisites. As referenced in Part I, *Noerr-Pennington* protection applies to petitioning for redress in front of any of the three different branches. Courts have recognized that *Noerr-Pennington* applies to the original filing of the petition.⁸⁵

To be clear, *Noerr-Pennington* does not apply to petitioning activity because of the method of adjudication the government uses to address the petitioning, but applies to legitimate petitioning activity due to the dual policies identified in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*⁸⁶ Petitioning is a fundamental right that has been in existence since the inception of the Constitution, and is not impeded lightly by any court or the legislature. Because *Noerr-Pennington* provides blanket immunity and a consent judgment potentially covered by such immunity could irrevocably harm consumers in the form of higher drug prices—granting pharmaceutical companies millions in profits—the courts should be rigorous in their scrutiny of pay-for-delay agreements embodied in consent judgments, and skeptical of any argument in favor of granting *Noerr-Pennington* protection.

After careful review of Supreme Court precedent with regard to *Noerr-Pennington*, it is clear that consent judgments are not valid petitioning activity since consent judgments do not further any policy that *Noerr-Pennington* promotes. In fact, as mentioned above, consent judgments are a withdrawal of the parties' original petition to the judiciary. Why should *Noerr-Pennington* apply to the parties' request to withdraw its petition through the use of a consent judgment? At the settlement stage, the parties, in most situations, have aligned incentives to make sure the judge approves the consent judgment, which adds pressure on the parties to not provide full information nor consider any public interest that may be affected by their consent judgment.⁸⁷ Granting *Noerr-Pennington* immunity to consent judgments then would

84. See *supra* Part II; see also *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 213 (E.D.N.Y. 2003); *In re Cardizem CD Antitrust Litig.*, 105 F. Supp.2d 618, 642 (E.D. Mich. 2000).

85. *Cal. Motor Transp. Co.*, 404 U.S. at 515–16.

86. 365 U.S. 127, 138 (1961).

87. See *supra* Part III.A; see also *Vollmer*, 350 F.3d 656.

allow aligned parties to cloak their potential anticompetitive settlements with a shroud of government approval.

More importantly, denying *Noerr-Pennington* immunity to consent judgments does not eradicate, or lessen the incentive of, the parties' right to petition the government for redress. The *Noerr-Pennington* doctrine is based on the right to petition and the right of the people to inform the government.⁸⁸ Neither of these policies would be undercut by denying *Noerr-Pennington* immunity to consent judgments. People would still be able to effectively petition and inform the government of their wants and needs. On the other hand, if *Noerr-Pennington* immunity was applicable to consent judgments, the doctrine would be providing protection to parties' withdrawal of a petition, which cuts against the reason for the doctrine in the first place. Even more so, *California Motors* limited the *Noerr-Pennington* doctrine to petitions that do not abuse the process.⁸⁹ If *Noerr-Pennington* immunity is extended to consent judgments, the doctrine could be protecting potential consent judgments that abuse the process itself. This would be in stark contrast to the Supreme Court's holding in *California Motors*.⁹⁰

Finally, if consent judgments are allowed immunity by the *Noerr-Pennington* doctrine, then the entire Supreme Court opinion in *FTC v. Actavis* would be rendered moot.⁹¹ Touched on by Judge Thrash in *In re Androgel*, the recent Supreme Court case *FTC v. Actavis*, which ruled that pay-for-delay agreements could be anticompetitive, implicitly supports the proposition that these consent judgments should be subject to liability.⁹² The current Justices of the Supreme Court are well versed in *Noerr-Pennington* law—with at least two Justices writing two major *Noerr-Pennington* decisions—and since they found that pay-for-delay agreements could be anticompetitive, it would seem quixotic to turn around and find them all to be protected by the *Noerr-Pennington* doctrine because they were embodied in a consent judgment.⁹³

Yet *Medimmune* and, to an extent, the Ninth Circuit opinion in *Columbia Picture Industries, Inc. v. Professional Real Estate Investors, Inc.* both promote the application of *Noerr-Pennington* immunity to

88. See *supra* Part I.

89. *Id.*

90. See *Cal. Motor Transp. Co.*, 404 U.S. 508.

91. *FTC v. Actavis*, 133 S. Ct. 2223 (2013).

92. *In re Androgel Antitrust Litig.* (No. II), 1:09-CV-955, 2014 WL 1600331, at *7 (N.D. Ga. Apr. 21, 2014); see *supra* Introduction.

93. Justice Scalia wrote the majority opinion in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), and Justice Thomas wrote the majority opinion in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

consent judgments due to two reasons.⁹⁴ *Medimmune* incorrectly based its decision on the consent judgment's ability to reach an ending that required judicial action, the overturning of the PTO decision, while *Columbia Pictures* spontaneously pronounced that settlements are incidental petitioning activity, supporting the proposition with dubious citation.⁹⁵ Neither of these cases discuss how an expansion of *Noerr-Pennington* is, or would be, supported by the dual policies of the doctrine or how these holdings help promote the same policies. Rather, the cases are outliers that misappropriate concepts or ideas, and ineffectually apply *Noerr-Pennington* to non-petitioning activities.

Not only is denying *Noerr-Pennington* protection to consent judgments the correct outcome since consent judgments are not petitions, but in high stakes situations, such as pay-for-delay agreements, it helps protect millions of consumers. Pay-for-delay agreements that are anticompetitive would not only stifle future competition and innovation between generics and branded companies, but also harm millions of consumers that purchase said drugs. For instance, recently Pfizer has been embroiled in a lawsuit in which the plaintiffs allege, among other things, a pay-for-delay agreement that delayed entry of a generic version of Lipitor.⁹⁶ Lipitor is the all-time bestselling drug.⁹⁷ If the agreement is found anticompetitive, Pfizer would have reaped billions in unmerited profits, and millions of patients who took Lipitor would have paid billions in excess charges.

IV. THE LITIGATION PRIVILEGE IN CALIFORNIA

Since many of the pay-for-delay agreement lawsuits include various state law claims, it is helpful to look at state constitutions and laws. In California, the California Constitution protects petitioning activity as *Noerr-Pennington* does, but also has a unique litigation privilege section. The California Constitution, article I, section 3 states that "the people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common

94. See *supra* Part III.A & Part II.B.1.

95. See *supra* Part III.A & Part II.B.1

96. *In re Lipitor Antitrust Litig.*, 3:12-cv-02389, 2014 WL 4543502 (D.N.J. Sept. 12, 2014).

97. Simon King, *The Best Selling Drugs of All Time*, FORBES (January 28, 2013), available at <http://www.forbes.com/sites/simonking/2013/01/28/the-best-selling-drugs-of-all-time-humira-joins-the-elite/>.

good.”⁹⁸ Coupling section 3 with the litigation privilege, which covers communications published or broadcasted in judicial proceedings, among others, raises the question of whether California state law is different than its federal cousin.⁹⁹ The California Supreme Court has held that the *Noerr-Pennington* doctrine applies to California state law claims.¹⁰⁰ But there are no cases that discuss how petitioning under article I, section 3 of the California Constitution relates to the right to petition under the U.S. Constitution. It also leaves the question as to how the litigation privilege, under California Civil Code Section 47, operates to protect communications in conjunction with judicial proceedings.

The Ninth Circuit, in *Theme Promotions, Inc. v. News America Marketing FSI*, footnoted that the litigation privilege may also apply in conjunction with the *Noerr-Pennington* doctrine.¹⁰¹ Yet, since the court held that *Noerr-Pennington* barred the claims at issue in *Theme Promotions*, they did not address the question as to whether the litigation privilege applied as well or was different in scope. The case involved pre-litigation threats and actions that communicated the parties’ intention of a future lawsuit, as well as an ongoing lawsuit, between the parties.¹⁰² It seems clear then that the reason for the application of the litigation privilege to the case would be due to the direct and plain meaning of California Civil Code Section 47(b) protecting publications or broadcasts made in judicial proceedings or in the initiation or course of any other proceeding authorized by law.¹⁰³ In fact, there do not seem to be any cases that apply the litigation privilege with respect to settlement terms or consent judgments. Thus, the litigation privilege would not be applicable to consent judgments under California law.¹⁰⁴

98. CAL. CONST. art. I, § 3. Originally the provision in 1849 stated that the people only had the right to petition the legislature, but was later expanded to government in 1974.

99. CAL. CIV. CODE § 47(b)(2) (last modified Feb. 16, 2015).

100. *Blank v. Kirwan*, 703 P.2d 58, 63–65 (Cal. 1985); *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 791 P.2d 587, 592–98 (Cal. 1990).

101. *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1008 n.7 (9th Cir. 2008).

102. *Id.* at 1007–08.

103. CAL. CIV. CODE § 47(b) (last modified Feb. 16, 2015).

104. Furthermore, the legislature has expressly prohibited settlement agreements that violate the Cartwright Act. California Business and Professional Code § 16722 explicitly states that “any contract or agreement in violation of this chapter is absolutely void and is not enforceable at law or in equity.” CAL. BUS. AND PROF’L CODE § 16722 (last modified 2015). Under California law as well, the courts have stated that whenever any public rights are implicated by settlement agreements and the adversarial system has not functioned to expose potentially collusive settlements, a third party whose interests are affected may invoke the illegality of the said agreement. *See River Garden Farms, Inc. v. Super. Ct.*, 26 Cal. App. 3d 986, 997, 1000 (1972).

This is further reinforced by the purpose of the litigation privilege. The principal purpose of the privilege is “to afford litigants and witnesses . . . the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.”¹⁰⁵ The privilege “further promotes the effectiveness of judicial proceedings by encouraging attorneys to zealously protect their clients’ interests.”¹⁰⁶ Also, the privilege “places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation.”¹⁰⁷ The policy of the litigation privilege is to free advocates and parties in court, to allow them to vehemently argue their side and to incentivize parties to adequately vet witnesses, facts, and all other evidence that comes about during trial. None of these policies would be supported or are applicable to consent judgments in any context.

V. CONCLUSION

The *Noerr-Pennington* doctrine is supposed to promote and protect petitioning activity directed at the government. It is in the interest of the government to have an active and vocal citizenship, but in the context of consent judgments, none of the policies or case law support *Noerr-Pennington* protection. In fact, one might say that extending *Noerr-Pennington* immunity to consent judgments that embody pay-for-delay agreements would be contrary to the policies of *Noerr-Pennington*, since it would deny the right of citizens to petition the judicial branch against these types of agreements. Effectively, it would cut off all avenues of redress from those consumers that are severely and irrevocably harmed through higher drug prices by these pay-for-delay agreements.

Furthermore, as Judge Thrash so eloquently described in *In re Androgel*, holding these agreements to be immunized by *Noerr-Pennington* would cut contrary to the Supreme Court’s decision in *FTC v. Actavis*.¹⁰⁸ The holding in *In re Androgel* indicates that *Noerr-Pennington* should not protect the pay-for-delay agreements, and holding the opposite would “largely eviscerate the ruling in *Actavis*” and guarantee that “subsequent patent settlements would always include a consent judgment.”¹⁰⁹ Conversely, the *Medimmune* case found that *Noerr-*

105. Silberg v. Anderson, 786 P.2d 365, 369–70 (Cal. 1990) (citations omitted).

106. *Id.* at 214 (citations omitted).

107. *Id.*

108. *In re Androgel* Antitrust Litig. (No. II), 1:09-CV-955, 2014 WL 1600331, at *7 (N.D. Ga. Apr. 21, 2014).

109. *Id.*

Pennington immunity did apply to consent judgments, but applied an incorrect standard. The *Medimmune* case aside, *Noerr-Pennington* is meant to protect legitimate petitioning activity, and not conduct that withdraws petitions from the government according to the parties' negotiated terms, which may be anticompetitive.

Supreme Court, circuit, and district case law all support the denial of *Noerr-Pennington* protection over consent judgments. Further, analyzing the history of the petitioning clause coupled with the policies of the *Noerr-Pennington* doctrine lead to the conclusion that consent judgments are not petitioning activity, and thus, should not be protected by *Noerr-Pennington*. If the opposite was held, and consent judgments were allowed protection, parties would flock to have judges stamp their anticompetitive settlement agreements with an imprimatur of the law. Thus, since there is no harm stemming from denying *Noerr-Pennington* protection to consent judgments, the balance of incentives also tips in favor of not extending *Noerr-Pennington* protection to consent judgments.