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9th Circuit reaffirms expansive First Amendment petition rights in real estate lawsuit

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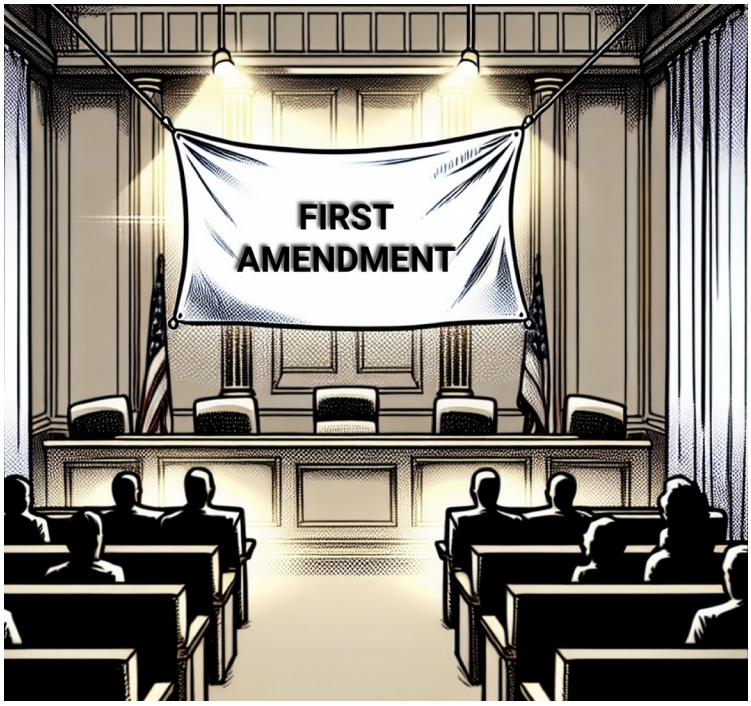

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In recognition of the fundamental First Amendment right "to petition the Government for a redress of grievances," the *Noerr-Pennington* doctrine confers immunity on a wide variety of petitioning activity—including lawsuits—from a host of subsequent legal claims. But *Noerr-Pennington* does *not* extend its protection to "sham" litigation. The contours of this "sham" litigation exception, however, have faced uncertainty in the courts over the years, particularly when it comes to repeat filers. Earlier this month, in *Relevant Group, LLC v. Nourmand*, No. 23-55574, the 9th U.S. Circuit Court of Appeals provided some clarity, reiterating that a showing of "objective baselessness" of the underlying lawsuit(s) is required in most circumstances and effectively reducing the universe of lawsuits eligible for the "sham" litigation exception. While the ruling achieves the important end of emboldening the right to petition, it may also have the effect of emboldening litigants to file a greater number of improperly motivated lawsuits down the line.

In *Relevant*, real estate developer Relevant filed suit against a rival developer, Nourmand. Relevant alleged Nourmand abused the processes available under the California Environmental Quality Act to block Relevant's development projects and extort settlement funds, in violation of the Racketeer Influenced and Corrupt Organizations Act. Affirming the district court's grant of summary judgment to the defendants, the court held that the *Noerr-Pennington* doctrine provided immunity to Nourmand's petitioning activities—which consisted of challenges to four of Relevant's hotel projects, including numerous administrative objections and appeals and three petitions in state court—and that the sham exception to such immunity did not apply. This was so despite evidence that Nourmand had an improper motive for bringing these actions—even going so far as to allegedly tell Relevant: "[Y]ou know the drill. It will take a check to make this go away."

In its ruling, the 9th Circuit addressed the scope of *Noerr-Pennington* immunity in situations involving repeat litigants, an issue that has been the source of considerable uncertainty among courts across the country. Under the formulation of the sham exception articulated by the Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (*"PREI"*), 508 U.S. 49 (1993), a plaintiff seeking to defeat a *Noerr-Pennington* defense must first show that a lawsuit is "objectively baseless." Only if the plaintiff clears that high bar first may a court then examine evidence of the defendant's improper motive in bringing suit. While the 1st and 7th Circuits have read *PREI* as mandating this two-step inquiry in every sham litigation case, the 9th Circuit, along with several others, employs a more flexible analysis when a "series" of repeat lawsuits is at issue. Under this alternative "series" test, a plaintiff can successfully invoke the sham litigation exception by demonstrating a "pattern or practice of successive filings undertaken essentially for purposes of harassment." USS-POSCO *Indus. v. Contra Costa Cnty. Bldg. & Const. Trades Council*, 31 F.3d 800, 811 (9th Cir. 1994). However, courts have not been clear on when each test applies, and the 9th Circuit has never defined how many lawsuits constitute a "series."

The court in *Relevant* did not establish a precise number either, but it did hold for the first time that four lawsuits were not enough. In so holding, the court underscored that the series test—and the sham exception more generally—is an extremely limited carveout to the broad protections conferred under the First Amendment. The court's decision suggests that going forward, the two-step standard from *PREI* will apply in nearly all cases except those involving a (perhaps very) large number of lawsuits. As

a result, plaintiffs seeking to overcome a *Noerr-Pennington* defense will almost always need to clear the objective baselessness hurdle before evidence of improper motive will even be allowed to come into play.

The practical implications of the court's ruling on the prevalence of improperly motivated lawsuits remain to be seen. But there is at least some reason to believe the decision may embolden litigants—especially high-frequency litigants and those filing challenges with administrative agencies—to be more aggressive in pursuing extortionary tactics. For example, in determining whether the series test applied, the court refused to tally up each individual action taken in the administrative proceedings as a separate "lawsuit," noting that "actions Defendants had to take to exhaust their administrative remedies should not be counted for purposes of the 'sham' exception." That conclusion seems equally applicable in other agency contexts and may provide further cover for parties to engage in widespread petitioning activities before administrative agencies.

On the other hand, there is reason to believe the court's ruling will have little practical impact on the pursuit of improper litigation. For one thing, the court didn't break much new ground in holding that four lawsuits are not enough to invoke the series test—indeed, this holding is in line with several district cases. *See, e.g., Coca–Cola Co. v. Omni Pac. Co.*, 1998 U.S. Dist. LEXIS 23277 (N.D. Cal. Dec. 9, 1998). And the two-step objective baselessness test has applied when there was just a single improperly motivated suit ever since *PREI* was decided. The court's ruling may also have the impact of *discouraging* parties facing improperly motivated lawsuits from settling—thereby discouraging the filing of such lawsuits to begin with. Objective baselessness requires a showing that no reasonable litigant could expect success on the merits. In concluding that Relevant failed to make such a showing, the court relied on the fact that two of the four lawsuits at issue settled, noting, "settlement indicates a lawsuit is not objectively baseless." That reasoning may make at least some parties facing improper lawsuits think twice before settling.

Exactly how this will play out is an open question. If nothing else, *Relevant* illustrates that plaintiffs face an uphill battle in bringing lawsuits against those exercising even improperly motivated petitioning activity. In striking a balance between protecting the First Amendment right to petition and limiting the proliferation of extortionary lawsuits, the 9th Circuit appears to be siding with the First Amendment for now.

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