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Noerr-Pennington, Implied Immunity Bar CFTC Related Antitrust Claims. *U.S. Futures Exch, LLC v. Bd. of Trade*, 953 F.3d 955 (7th Cir. 2020) (Manion, J.).

Brief Summary: *U.S. Futures* arose from the failure of a then-novel “electronic-based futures trading platform.” *U.S. Futures*, 953 F.3d at 958. Plaintiffs, the entities that “set out to offer” the new exchange, claimed that the Chicago Board of Trade (“CBOT”) and the Chicago Mercantile Exchange had violated, *inter alia*, the Sherman Act by “by delaying the regulatory approval process and enacting [and convincing the Commodity Futures Trading Commission (“CFTC”) to approve,] ... an internal rule that deprived the new exchange of liquidity.” *Id* at 958-59. The Seventh Circuit affirmed the district court’s grant of summary judgment to defendants, holding that the *Noerr-Pennington* doctrine barred plaintiff’s claims based on defendants allegedly “flood[ing] the [CFTC] with frivolous objections [and requests to postpone a public hearing] ... in order to stall ... approval ... [of, and thereby harm. the new exchange],” *id.* at 959-66, and that defendants were shielded by implied immunity from plaintiffs’ claim based on defendants convincing the CFTC to enact a rule that compelled transfer of CBOT’s “open interest” to the Chicago Mercantile Exchange, thereby depriving the new exchange of liquidity. *Id* at 966-69.

Why *U.S. Futures* Matters: Regulatory approvals and/or actions can have enormous consequences and frequently are hotly contested. *U.S. Futures* sets forth the Seventh Circuit’s most recent analysis governing *Noerr-Pennington* and implied immunity defenses to antitrust claims arising from advocacy before an administrative agency, in this case the CFTC.

Among the notable holdings: the CFTC application review proceeding is “legislative” rather than “adjudicative” for *Noerr-Pennington* purposes based on an analysis, discussed below, that likely applies (at least in significant part) to a great many regulatory proceedings; the Seventh Circuit agreed with the First Circuit (and disagreed with four other courts of appeal) that both prongs of the “sham lawsuit” test (“objectively baseless” litigation, brought “to interfere directly with the business relationships of a competitor through the use of the governmental process ... as an anticompetitive weapon”) apply regardless of the number of allegedly “sham” proceedings at issue; and the four part test for implied antitrust immunity of *Credit Suisse Securities v. Billing*,

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551 U.S. 264 (2007) applies not just in the securities context but in all regulatory settings. *See infra*.

Key Points:

1. CFTC Application Review Proceeding Is “Legislative” For *Noerr-Pennington* Purposes.

The CFTC application review proceeding is “legislative” rather than “adjudicative” for *Noerr-Pennington* purposes – which means that the “fraudulent misrepresentation” exception to *Noerr-Pennington* does not apply thereto – based on the “general nature” of the review (including *ex parte* meetings, providing public notice and seeking public comment); the use of an “an informal fact-finding process” (including a “record” unbound “by any strict rules of relevance and admissibility” and “freedom to base ... actions on information ... from any source, including ... the public”); “the weight afforded to *ex parte* communications and public comment [which thus] subjected ... fact finding ... to political influence”; and the absence of “testimony under oath, affirmation, or penalty of perjury from the petitioning [d]efendants.” *Id.* at 960-63.

2. Certain Adjudicatory Aspects Of Application Review Proceeding Insufficient To Render Proceedings Adjudicatory. In light of the foregoing, none of the following altered the conclusion that the CFTC review proceedings were legislative::

- a. *denial* of an application is reviewed through an adjudicatory procedure, under different rules;
- b. false statements in the application are subject to prosecution under 18 U.S.C. § 1001 and similar statutes; and,
- c. the new exchange “had to demonstrate it met and would continue to comply with more than twenty statutory requirements” and CFTC’s “assessment ... was subject to judicial review, albeit through a distinct proceeding...”

Id.

3. Two-Prong “Sham Lawsuit” Test Always Applies; Seventh Circuit Sides With First Circuit.

Both prongs of the test for the fraud exception to *Noerr-Pennington* based on “sham” litigation apply in all cases. The Seventh Circuit rejected the argument that the first prong of the test, the requirement that a suit be “objectively baseless,” should be dispensed with – and the applicability of the exception turn solely on the subjective motivation of the litigant – where multiple lawsuits or petitions were filed, agreeing with the First Circuit² and disagreeing with the Second, Third, Fourth and Ninth Circuits.³ In any event, the application review proceedings at issue comprised a single proceeding for purposes of “sham lawsuit” analysis, with “individual

² *See Puerto Rico Telephone Co. v. San Juan Cable LLC*, 874 F.3d 767 (1st Cir. 2017).

³ *See Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162 (3d Cir. 2015); *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354 (4th Cir. 2013); *Primetime 24 Joint Venture v. Nat'l Broad. Co.*, 219 F.3d 92 (2d Cir. 2000); and *USS—POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL—CIO*, 31 F.3d 800 (9th Cir. 1994).

lobbying efforts” during the application review analogous to separate motions filed in a single lawsuit, not separate proceedings.

4. **Credit Suisse Implied Antitrust Immunity Test Applies Regardless Of Regulatory Context.** The four-part test for implied antitrust immunity set forth in *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007) applies “across regulatory boundaries.” *Id* at 968. The Seventh Circuit rejected the argument that the test articulated in *Credit Suisse* was limited to determining the existence of implied antitrust immunity in the securities context and that the Seventh Circuit’s own decision in *Am. Agric. Movement, Inc. v. Bd. of Trade of the City of Chicago*, 977 F.2d 1147 (7th Cir. 1992), issued years before *Credit Suisse*, warranted application of a different test for implied antitrust immunity in the commodities context. Instead, “implied immunity is neither a securities doctrine nor a commodities doctrine. It is an antitrust doctrine. ... The regulatory setting—securities, commodities, or something else— simply provides the backdrop against which the template is applied.” *Id* at 966-69.

Review In Depth:

The court “divided” plaintiff’s antitrust claims “into two theories” the “delay theory,” “whereby [d]efendants flooded the [CFTC] with frivolous objections in order to stall ... approval and harm” the new exchange and “the ‘open interest theory,’” under which “[d]efendants conspired to deprive [the new exchange] of liquidity by [proposing, and convincing the CFTC to adopt, a rule mandating] transferring [the Chicago Board of Trade’s] open interest” to the Chicago Mercantile Exchange, thereby depriving the new exchange of liquidity. The court held that *Noerr-Pennington* barred liability under the first theory (neither form of the fraud exception to *Noerr-Pennington*, fraudulent misrepresentations or sham lawsuits, applied) and that implied immunity barred liability under the second theory. *Id* at 959-69.

A. Noerr-Pennington

1. *Noerr-Pennington* “extends absolute immunity under the antitrust laws to businesses and other associations when they join together to petition legislative bodies, administrative agencies, or courts for action that may have anticompetitive effects” and “flows from First Amendment origins ... antitrust laws do not supersede the people’s right to petition their government in favor of a desired monopoly.” *Id* at 959-60 (citations and quotation marks omitted).

1. “Fraud Exception”

2. “*Noerr-Pennington* ... [does not, however, protect] ... fraudulent misrepresentations or ... sham lawsuits.” *Id* at 960.

a. *Noerr- Pennington* Fraud Exception Based On Fraudulent Misrepresentation; Legislative Or Adjudicative Proceedings?

3. The *Noerr-Pennington* exception based on fraudulent misrepresentations “does not apply ... outside of adjudicative proceedings.” *Id* at 960. Thus, while “[f]raudulent misrepresentations in

an adjudicative proceeding before an administrative agency are not" immune, those "made in a legislative, political setting" before such an agency are immune. *Id.*

4. Whether a proceeding is adjudicative or legislative “for *Noerr-Pennington* purposes” is determined by considering: “(1) the general nature of the authority exercised by the agency; (2) the formality of the agency’s fact-finding process; (3) the extent to which fact gathering is subject to political influence; (4) whether the agency received any testimony made under oath, affirmation, or penalty of perjury; and (5) whether the agency acted ultimately as a matter of discretionary authority or instead acted in accordance with more definite standards subject to judicial review.” *Id.* at 960 (citing *Mercatus Grp. LLC v. Lake Forest Hosp.*, 641 F.3d 834, 845 - 46 (7th Cir. 2011))⁴

5. The CFTC’s review of the new exchange’s application was “legislative instead of adjudicative,” with the following four factors supporting this conclusion:

- a. the “general nature” of the review – “which include[d] entertaining *ex parte* meetings on proposed rules, providing notice to the public, and seeking comment before promulgating, amending, or repealing a rule” (That the CFTC employs adjudicatory procedures when reviewing the *denial* of an application did not alter this analysis);
- b. CFTC used “an informal fact-finding process” – compiling a “record” the contents of which “were not bound by any strict rules of relevance and admissibility” – and “was free to base its actions on information and arguments that came to it from any source, including information, opinion, and argument submitted by the public”;
- c. “the weight afforded to *ex parte* communications and public comment subjected the [CFTC’s] fact-finding efforts to political influence—a hallmark of the legislative process”;
- d. CFTC “received no testimony under oath, affirmation, or penalty of perjury from the petitioning [d]efendants....” (That facts set forth in the application were presented with the understanding that “intentional misrepresentations” could result in “federal prosecution” did not alter this analysis given that “the [CFTC] also devoted significant consideration to unsworn public opinions, diluting the importance of truthful and accurate information inherent in adjudicative settings”)

Id. at 960-63 (italics, brackets, internal quotation marks and citations omitted).

6. That the final factor (whether CFTC “ultimately acted” from discretion or “in accordance with more definite standards subject to judicial review”) arguably suggested adjudicative proceedings – the new exchange “had to demonstrate it met and would continue to comply with more than

⁴ And even if proceedings are “adjudicative,” plaintiff “still must demonstrate the alleged misrepresentation ‘(1) was intentionally made, with knowledge of its falsity; and (2) was material, in the sense that it actually altered the outcome of the proceeding.’” *Id.* at 960 n. 7 (quoting *Mercatus*, 641 F.3d at 843).

twenty statutory requirements,” CFTC had “no discretion to deny an application that meets the statutory requirements” and CFTC’s “assessment ... [of the] ... application was subject to judicial review, albeit through a distinct proceeding...” – was insufficient to render the proceedings adjudicative. While “[t]hese details illustrate[d] several adjudicative aspects of the ... application review process ...,” “[t]he agency process in this case involves a combination of legislative and adjudicative features ... [and] ... the [CFTC’s] exercise of rulemaking-like authority, the encouragement of lobbying and *ex parte* influence, a tolerance for petitions made outside perjury’s confines, and informal fact gathering render the ... application review process a legislative one.” *Id* at 962-63.

b. *Noerr-Pennington*: Fraud Exception
Based On “Sham” Lawsuits

7. The “sham lawsuits ... exception holds liable objectively baseless lawsuits brought in 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 anti-competitive weapon.” *Id* at 963 (citations, internal quotation marks omitted; emphasis in original).

8. This exception is “extraordinarily narrow”: “(1) only if challenged litigation is objectively meritless may a court (2) examine the litigant’s subjective motivation.... [A]n antitrust plaintiff must disprove the challenged lawsuit’s legal viability before proceeding to the second, subjective step.” *Id* at 963 (citations, internal quotation marks omitted).

9. “Objectively reasonable” suits – a suit “reasonably calculated to elicit a favorable outcome” – “enjoy *Noerr-Pennington* immunity regardless of the reasons for their filing.” “[A] *successful* action self-proves its reasonableness.” *Id* at 963 (citations, internal quotation marks omitted; emphasis in original).

10. “Baseless, frivolous [suits], as distinct from colorable suits brought in bad faith, receive no protection” *Id* at 963 (citations, internal quotation marks omitted).

11. The Seventh Circuit rejected plaintiffs’ argument that whenever there is more than one lawsuit or petition (i.e., a “pattern” of sham filings), the Supreme Court’s decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) mandates discarding the first factor of sham test – whether the challenged litigation is “objectively meritless” – and proceeding “only with the second step’s evaluation of subjective motive.” *Id* at 965.

12. In this regard, the Seventh Circuit rejected the reasoning of four courts of appeals⁵ and instead sided “with the First Circuit”⁶: “Faced with only one alleged sham lawsuit, at no point

⁵ See *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162 (3d Cir. 2015); *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354 (4th Cir. 2013); *Primetime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92 (2d Cir. 2000); and *USS—POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL—CIO*, 31 F.3d 800 (9th Cir. 1994).

⁶ See *Puerto Rico Telephone Co. v. San Juan Cable LLC*, 874 F.3d 767 (1st Cir. 2017).

did the ... [Supreme] Court [in *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993)(“*PRE*”), a more recent decision than *California Motor Transport*] link its ruling to the number of suits or suggest the outcome would be different if it encountered multiple actions. We, too, find ‘little logic’ in concluding a petitioner loses the right to file an objectively reasonable petition merely because it chooses to exercise that right more than once in the course of pursuing its desired outcome the Ninth ... Second, Third, and Fourth Circuits all reconciled *California Motor* and *PRE* ‘by reading them as applying to different situations’ ... Nothing in either opinion indicates as much.” *Id* at 965 (citations, except *PRE*, omitted).

13. Moreover, “[t]his case is not characterized by a wide ranging ‘pattern’” but instead “involves a *single* legislative proceeding within which [d]efendants made multiple efforts to influence the [CFTC’s] decision regarding one overarching issue: whether to approve [the new exchange’s] application. Just as motions within a lawsuit support the lawsuit's objective, individual lobbying efforts play a part in obtaining the ultimate desired legislative action. But in neither scenario do multiple filings, submissions, or other efforts transform one lawsuit or proceeding into many.” *Id* at 965-66

14. The Seventh Circuit rejected plaintiffs’ argument that their “success in obtaining approval undermine[s] the reasonableness of [d]efendants' fifty-four objections submitted in response to the application ... especially ... because [d]efendants themselves knew the application would be approved in the end”: “Although a successful, winning petition proves its own reasonableness, it does not follow that a petition lacks merit simply because it did not prevail. Besides, the petitioning here was colorable [d]efendants' ... scheduling letters persuaded the [CFTC] to postpone the public hearing on ... [the] ... application in light of legitimate and well-documented conflicts ... [and] ... [b]efore granting ... [the] ... application, the [CFTC] held [the new exchange] to several remedial efforts ... undert[aken] in response to [d]efendants' objections ...” *Id* at 966.

15. “[W]hether [d]efendants believed or ‘knew’ ... [the] ...application would succeed does not change our analysis. Even if petitioners believe a regulator may ultimately approve an application that does not eliminate their right to encourage the governing body to consider shortcomings in the application. Proving sham petitioning in a legislative context like this one is virtually impossible, and the record does not meet that high bar.” *Id* at 966.

B. Implied Antitrust Immunity

16. The Seventh Circuit also affirmed the district court’s holding that implied antitrust immunity barred plaintiffs’ claim arising from defendants proposing, and convincing the CFTC to adopt, a rule that compelled CBOT to move its “open interest,” thereby depriving the new exchange of liquidity. *Id* at 966-69.

17. “Implied antitrust immunity has its roots in securities case law. In its most recent discussion of the doctrine, the Supreme Court in *Credit Suisse [Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007)] identified a four-part test for implied immunity: (1) the existence of clear and adequate regulatory authority to supervise the activity in question; (2) evidence that the responsible regulatory entities exercise that authority in an active and ongoing manner; (3) a

resulting risk that the antitrust laws and those governing the challenged activity, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct; and (4) whether the questioned activity lies squarely within the heartland of the regulated area.” *Id* at 967.

18. “The facts here satisfy *Credit Suisse's* criteria easily”:⁷

- a. “the [CFTC] has clear and adequate regulatory authority to approve exchange rules”
- b. “the [CFTC] ... exercised this regulatory authority by approving ... [the] ... proposed rule ... [and] ... [CFTC’s] overall regulation in this area ... was both active ([CFTC] staff reviewed the proposal for over a month, soliciting and considering more than a dozen comment letters) and ongoing (the same competition concerns raised by [... [the] proposed rule ...] had been studied during the previous year through a [CFTC] roundtable and report)”
- c. “the [CFTC] approved ... [the proposed rule] ... *in spite of* potential anti-competitive effects, creating conflict with the antitrust laws. Per statute, the [CFTC] must ‘take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means’ when approving exchange rules Keeping with this mandate, the [CFTC] considered and acknowledged comment letters raising anticompetitive concerns but nonetheless deemed those concerns outweighed by ...innovative gains ...”

Id at 967 (citations omitted).

19. The court rejected plaintiffs’ argument that “the district court erred by applying the four-part test from *Credit Suisse* — a securities case — instead of [the Seventh Circuit’s reasoning in its earlier decision in] *American Agriculture*⁸ [— a commodities case —] that immunity may be implied so long as the challenged action receives ‘active, intrusive, and appropriately deliberative’ scrutiny and approval from the relevant agency.” *Id* at 967-68. Plaintiffs “... rel[y] on the Court’s statement in *Credit Suisse* that implied immunity determinations ‘may vary from statute to statute ... but that language does not make *Credit Suisse's* factors irrelevant beyond the securities context. While the ultimate *determination* might depend on the regulations in play, the analysis does not. *Credit Suisse's* test applies across regulatory boundaries and nothing in that opinion points to the contrary. Implied immunity is neither a securities doctrine nor a commodities doctrine. It is an antitrust doctrine. And the question of whether it applies in a given case is answered ably by *Credit Suisse*. The regulatory setting—securities, commodities, or something else— simply provides the backdrop against which the template is applied.” *Id* at 967-68 (citations omitted; emphasis in original).

⁷ Plaintiffs did not challenge the district court’s findings on the fourth *Credit Suisse* factor, “whether the questioned activity lies squarely within the heartland of the regulated area.” *Id* at 967.

⁸ *Am. Agric. Movement, Inc. v. Bd. of Trade of the City of Chicago*, 977 F.2d 1147 (7th Cir. 1992).