Reforming California's Litigation Privilege

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No public policy supports extending a privilege to persons who attempt to profit from hollow threats of litigation.1

This paper aims to analyze California’s litigation privilege and its federal corollary, the so-called Noerr-Pennington doctrine.2 The primary focus of the paper is on the privileges’ application in the context of improper litigation and litigation tactics. It compares the two and critiques their substantive bases and pertinent case law, as well as the policies underlying the privileges while discussing the practical ramifications the privileges have on civil litigation. Finally, the paper proposes means for courts, attorneys, and/or the Bar to address the unsavory consequences that result from the privileges’ application with an emphasis on California litigation.

I. The Litigation Privilege

A. Introduction

The litigation privilege extends “immunity . . . even to statements made in bad faith, so long as they are related in some nontrivial way to contemplated or ongoing litigation before a tribunal.”3 The privilege was originally intended to protect lawyers from derivative liability, specifically, defamation, for their statements made in court.4 Six states, including California, provide immunity for statements “made in a legislative or judicial proceeding or in any other official proceeding authorized by law.”5 Aside from Georgia and Louisiana, every other American state has adopted through case law some form of absolute immunity for statements made during litigation. These jurisdictions have primarily relied on section 586 of the Restatement (Second) of Torts as its formulation for a litigation privilege, hence why there is apparently little variation amongst jurisdictions in how the privilege is defined (at least in its language). Section 586 provides that an attorney

may publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during

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2 The doctrine takes its name from two United States Supreme Court cases, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965), which are discussed in depth infra.
4 Id.
5 CAL. CIV. CODE § 47(b); MONT. CODE ANN. § 27-1-804(2); N.D. CENT. CODE § 14-02-05(2); OKLA. STAT. ANN. tit. 12, § 1443.1; OKLA. STAT. ANN. tit. 21, § 772; S.D. CODIFIED LAWS § 20-11-5(2); UTAH CODE ANN. § 45-2-3(2).
the course and as part of, a judicial proceeding in which he participates as
counsel, if it has some relation to the proceeding.6

However, because “every state in the nation also recognizes that ‘the question of whether
absolute privilege applies in a given case is necessarily one of law for the trial court to
determine,” courts have interpreted section 586 differently.7 While “the prevailing view
seems to be that the litigation privilege provides lawyers with an affirmative defense to
alleged misconduct within its scope,”8 and it is “‘most often used as a defense’ to civil
claims brought against an attorney”9 some courts interpret it as providing attorneys true
immunity for their communicative conduct in litigation. Regardless of whether it is an
affirmative defense or provides litigants with immunity, the scope of and the claims to
which the privilege applies varies between American jurisdictions significantly. As one
commentator notes, “courts have concentrated on the question of whether to adopt the
privilege and more on the definition of its boundaries.”10

The litigation privilege’s roots “trace back to medieval England”11 and has been
recognized in American courts since the early nineteenth century.12 Thus, the California
Supreme Court has described it as “the backbone to an effective and smoothly operating
judicial system.”13

Because of its long-standing history in Anglo-American jurisprudence, every
American jurisdiction has a litigation privilege in some form or another.14 All but two
jurisdictions, Georgia and Louisiana, consider the privilege absolute.15 In Georgia, the
privilege is absolute only in regards to pleadings; all other statements made in litigation
are only privileged so long as they are made “in good faith.”16 Louisiana provides only a

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6 Restatement (Second) Third of Torts (1977). Note, however, the Restatement
(Third) of Torts will be available in full in early 2012. AMERICAN LAW INSTITUTE,
7 Id. at 917 (quoting Surace v. Wuliger, 495 N.E. 2d 939, 944 (Ohio 1986)).
8 Douglas Richmond, The Lawyer’s Litigation Privilege, 31 AM. J. TRIAL ADVOC.
9 Thomas Borton, The Extent of the Lawyer’s Litigation Privilege, 25 J. LEGAL
584315, at *3).
10 Erno D. Lindner, Torts—Simpson Strong-Tie v. Stewart: Balancing the
Protection of Individuals with the Freedom of the Judicial Process in Tennessee Attorney
11 Richmond, supra note 8, at 283.
12 See, e.g., Hoar v. Wood, 44 Mass. 193, 194 (1841); Randall v. Brigham, 74 U.S.
523, 536 (1868).
v. Superior Court, 189 Cal. App. 3d 961, 970 (1987)).
14 Richmond, supra note 8, at 283.
15 T. Leigh Anenson, Absolute Immunity from Civil Liability: Lessons for Litigation
16 See GA. CODE ANN. §§ 51-5-8, 51-5-7(2).
qualified defamation privilege. The distinction is important as “absolute privileges differ in the respect that they ‘confer immunity regardless of motive.’”

B. Public Policy Underlying the Litigation Privilege

The public policy supporting an absolute litigation privilege is rooted in the nature of the Anglo-American adversarial system. One court has described the basic policy underlying the litigation privilege as one that permits parties engaged in litigation “to speak and write freely without the restraint of fear of an ensuing defamation action.”

According to one commentator, there are “four interrelated justifications that have been offered in support of the [absolute litigation privilege].” Those justifications are first, that the privilege has such a long and consistent history that doctrinal stability compels its continuation; second, that it provides necessary protection for litigators for the sake of the “administration of justice”; third, that it protects litigators from pernicious inquiries into the good faith of factual assertions, and avoids embroiling lawyers in unnecessary subsidiary litigation concerning their advocacy; and fourth, that alternative remedies render defamation actions against litigators unnecessary.

C. California’s Litigation Privilege

California’s Civil Code, including section 47, was originally enacted in 1872 and codified the Field Code (with minor changes), an influential model code written by David Dudley Field in 1865. Field’s Code was based on Roman law and the Civil Code of France and was originally intended for New York, but the New York legislature never enacted it into law. It was, however, enacted into law, in part or in whole, in California, Montana, South Dakota, North Dakota, and Idaho at the end of the nineteenth century.

Section 47 represents “an effort to codify existing common law absolute and conditional privileges.” Thus, California’s litigation privilege is codified in section 47(b) in Division 1, Part 2 of the Civil Code, which is titled “Personal Rights.” Section 47 originally provided a privileged publication was one made “in testifying as a witness in any proceeding authorized by law to a matter pertinent and material, or in reply to a

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17 LA. REV. STAT. ANN. § 14:49.
18 Borton, supra note 9, at 121 (quoting Gallegos v. Escalon, 993 S.W.2d 422, 424 (Tex. App. 1999)).
22 The First Half-Century of the California Civil Code, 10 CAL. L. REV. 185, 187 (1922).
question allowed by the tribunal.” Section 47 currently provides, however, “A privileged publication or broadcast is one made . . . (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law . . . .” Clause (4) is the most recent legislative amendment to subsection (b). It was added in 1979 as a legislative response to the California Supreme Court’s decision Hackenthal v. Weissbein, 24 Cal.3d 55 (1979), which held that defamatory statements made before a judicial commission of a private medical society were not covered by section 47’s protections as it then read.25

While the meaning of the words “legislative proceeding” has been litigated, the issues of what constitutes a “judicial proceeding” and when a “communication” is made therein have created a much more extensive body of case law. Although titled a “privilege,” the protections of section 47(b)(2) do not provide an evidentiary privilege but rather provide limitations on liability in civil litigation. In California, the litigation privilege is an affirmative defense.26 California courts have interpreted section 47(b)(2) to “generally protect[] an attorney from civil liability arising from words . . . uttered in the course of judicial proceedings.”27 According to the California Supreme Court, the purpose underlying the privilege “is to ensure free access to the courts, promote complete and truthful testimony, encourage zealous advocacy, give finality to judgments, and avoid unending litigation.”28 The privilege therefore applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the litigation.29

Stated more simply, section 47(b)(2) renders all statements immune from civil liability when they are “made in judicial or quasi-judicial proceedings.” Further, pre-litigation communications that are related to anticipated or potential litigation are immunized as well.30

California courts have not relied solely on the language of section 47(b)(2) in interpreting the privilege’s scope and application. Specifically, California courts have found the privilege to be based in part on a general constitutional right to petition found in both the California and United States constitutions,31 which affords litigants a right to

24 See Moore v. Conliffe, 7 Cal. 4th 634, 649 n.7 (1994).
28 Silberg, 50 Cal. 3d at 214.
29 Silberg, 50 Cal. 3d at 213.
31 See CAL. CODE CIV. PRO. § 425.16(b)(1) (“A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free
access to the courts. Because “the constitutional right to petition . . . includes the basic act of filing litigation,” it often overlaps with the scope of the litigation privilege’s protections. Indeed, Justice Baxter stated in his dissent in *Briggs v. Eden Council for Hope & Opportunity* that the California Supreme Court’s expansion of the constitutional right to petition via the “anti-SLAPP” statute could effectively supplant the litigation privilege because its scope “is seemingly coextensive with, if not broader than, the litigation privilege.”

The litigation privilege does have one clear exception: it does not cover cases of what California courts have deemed “extrinsic fraud,” which occurs “when the defrauded party was deprived of the opportunity to present his or her claim or defense to a court.” “Intrinsic fraud . . . which goes to the merits of the litigation,” including fraudulent misrepresentations, is covered by the litigation privilege, however.

1. Policies and Purposes of California’s Litigation Privilege

The rationales underlying California’s litigation privilege are best discussed in the California Supreme Court’s decision *Silberg v. Anderson*. Like other jurisdictions, the California supreme court states “the principal purpose of [the litigation 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.” A similar purpose “is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing.” Because “such open communication is ‘a fundamental adjunct to the right of access to judicial and quasi-judicial proceedings,’ the privilege encourages ‘open channels of communication and the presentation of evidence’ in judicial proceedings.”

California courts have thus consistently concluded an absolute litigation privilege is necessary to further these goals and policies. The rationale is that the privilege “eliminates the threat of liability for communications made during all kinds of truth-speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”

See, e.g., *City of Long Beach v. Bozek*, 31 Cal. 3d 527, 533 (1982); *California Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“The right to access to the courts is but one aspect of the right to petition.”).

*Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 19 (1995); *see also* *McDonald v. Smith*, 472 U.S. 479, 484 (1985) (“[F]iling a complaint in court is a form of petitioning activity.”).

CAL. CODE CIV. PRO. § 425.16.

19 Cal. 4th 1106, 1136 (Baxter, J., dissenting).


*Id.*; *see also* *Silberg v. Anderson*, 50 Cal. 3d 205, 214 (1990).

50 Cal. 3d 205.

*Id.* at 213.

*Id.* (quoting *Imag v. Ferrar*, 70 Cal. App. 3d 48, 55 (1977)).

*Id.* (quoting * McClatchy Newspapers*, 189 Cal. App. 3d at 970).
seeking proceedings” and is therefore necessary to avoid “external threat[s] of liability [... which are] destructive of [the] fundamental right [of court access] and inconsistent with the effective administration of justice.” In applying the litigation privilege absolutely, California courts intend to protect litigants, attorneys, and parties involved in litigation “from the fear of protracted and costly lawsuits which otherwise might cause them either to distort their testimony or refuse to testify altogether.” This protection also serves the dual purposes of “enhancing the finality of judgments and avoiding an unending roundelay of litigation” (which the California Supreme Court considers “an evil far worse than an occasional unfair result”) and “encouraging attorneys to zealously protect their clients’ interest.”

In summary, the intended purposes of the California litigation privilege—“ensuring free access to the courts, promoting complete and truthful testimony, encouraging zealous advocacy, giving finality to judgments, and avoiding unending litigation”—are based primarily in pragmatic concerns for efficiency. While the stated “principal purpose” of the litigation privilege is to foster “the utmost freedom of access to the courts,” which necessarily contemplates the constitutional right to petition, the thrust of it is due to considerations of judicial economy, both in terms of encouraging adversarial advocacy and reducing litigation.

2. Scope of California’s Litigation Privilege

As noted above, California, like the vast majority of American jurisdictions, considers the litigation privilege absolute. Although originally understood to provide only a privilege to the tort of defamation, “the only exception to the application [of the litigation privilege] to tort suits has been for malicious prosecution actions.” This is so because “the policy of encouraging free access to the courts . . . is outweighed by the policy of affording redress for individual wrongs when [the elements of a malicious prosecution action] are satisfied.” California litigants are therefore absolutely protected from any derivative tort liability aside from malicious prosecution for their communications made in the course of litigation. Simply put, in California there is no recourse for parties for the damages another party’s statements made in litigation may cause.

Another cause of the expansion of the privilege’s historical application, in both California and other jurisdictions, “has been neither the expansive reading of the term

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42 Id. (quoting McClatchy Newspapers, 189 Cal. App. 3d at 970).
43 Id.
44 Id. at 214
45 Id.
46 See id. at 215.
47 Id.
48 Id. (quoting Albertson v. Raboff, 46 Cal. 2d 375, 382 (1956)).
49 Silberg, 50 Cal. 3d at 212.
50 I use the term “litigation” for brevity’s sake. As noted, the privilege applies to pre-litigation communications, but it also applies to alternative dispute mechanisms, settlement discussions, and any statement made before a governmental tribunal or administrative agency.
‘judicial proceeding,’ nor the application of the privilege to other torts, but rather an exceedingly liberal construction of the necessary connection between the statement and the proceeding.”\(^{51}\) The privilege has thus been expanded beyond statements made in a judicial proceeding and now “applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved.”\(^{52}\) It even applies to statements made wholly outside of California, and even the United States.\(^{53}\) Moreover, as one California court noted, “although the express language of section 47(b) applies only to communications made in a judicial or other official proceeding, courts have applied the privilege to some communications made in advance of anticipated litigation.”\(^{54}\) Following the Restatement approach, however, California courts interestingly require that the pre-litigation communication be contemplated in good faith and the threat of litigation be seriously considered to be within the ambit of the litigation privilege.\(^{55}\)

3. The privilege taken too far: *Rusheen v. Cohen*

In early 1997, attorney Barry Cohen filed a declaration of service signed by a process server on Terry Rusheen.\(^{56}\) In it, he stated under penalty of perjury that he had personally served Rusheen with the summons, complaint, and a court order declaring Rusheen a vexatious litigant based on previous litigation where Cohen had represented the plaintiffs who had successfully sued Rusheen for a number of causes of action.\(^{57}\) The order required Rusheen to post a $15,000 cash bond to avoid a default judgment; however, Rusheen failed to do so within the time frame the court mandated.\(^{58}\) Because Rusheen had not filed an opposition to the vexatious litigation motion and did not appear at the hearing on it, Cohen moved for a default judgment against Rusheen, which the court granted.\(^{59}\) The only problem, however, was the fact Cohen had allegedly perjured his declaration of service: Cohen allegedly did not serve Rusheen with any of the documents required to obtain a default before moving for one.\(^{60}\) Because Rusheen had

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\(^{51}\) Hayden, *supra* note 30, at 998.

\(^{52}\) *Silberg*, 50 Cal. 3d at 211-12.


\(^{55}\) *See* *RESTATEMENT (SECOND) OF TORTS* § 586, cmt. E.


\(^{57}\) *Id.* The facts of the previous litigation against Rusheen are omitted because they are irrelevant.

\(^{58}\) *Id.*

\(^{59}\) *Id.*

\(^{60}\) *Id.*
failed to post the bond, Cohen’s client began an action executing on Rusheen’s property to satisfy the judgment against Rusheen.\textsuperscript{61}

Before the vexatious litigant hearing, Cohen had filed a separate suit against Rusheen. Rusheen then filed a cross-complaint against Cohen for abuse of process based on the false representations Cohen had made to the court, that is, the allegedly perjurious declaration of summons.\textsuperscript{62} In response, Cohen filed a special petition to strike under section 425.16 of the California Code of Civil Procedure (an “anti-SLAPP” motion\textsuperscript{63}), arguing his actions were absolutely privileged communicative acts under the so-called “litigation privilege” codified in section 47(b) of the California Civil Code (hereinafter “section 47(b)).\textsuperscript{64} The court agreed and granted his motion.\textsuperscript{65} On appeal, the Court of Appeal agreed the conduct was privileged; however, it found Cohen’s “participation in the alleged conspiracy to execute on the resulting improper default judgment was unprivileged, non-communicative conduct.”\textsuperscript{66}

The California Supreme Court granted review and affirmed in part and reversed in part, concluding Cohen’s actions in their entirety were absolutely privileged under section 47(b). The court reasoned section 47(b) provides an absolute privilege for any “communicative act” made in the course of litigation, which includes pleadings, such as Cohen’s subject declaration of service, regardless of their truth or purpose.\textsuperscript{67} Therefore, the court held Cohen could not be derivatively liable to Rusheen for abuse of process for filing a false declaration of service.\textsuperscript{68} The court expressly extended the litigation privilege to all “communications with ‘some relation’ to judicial proceedings,” which renders them “absolutely immune from tort liability.”\textsuperscript{69}

Rusheen forcefully demonstrates the overbroad nature of the litigation privilege’s application. Implicit—and to a degree, explicit—in the court’s decision is that a “communication” made in litigation cannot form the basis of derivative tort liability (with the exception of malicious prosecution), regardless of its falsity, purpose, or

\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Special motions to strike under section 425.16 of the California Code of Civil Procedure are colloquially known as “anti-SLAPPs” (motions to strike “strategic lawsuits against public participation” (SLAPPs)).
\textsuperscript{64} Rusheen, 37 Cal. 4th at 1054.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 1055.
\textsuperscript{67} Id. at 1057-58. The court therefore concluded Cohen’s later involvement in an alleged conspiracy to levy on the execution was also privileged because it was predicated on his alleged perjurious declaration of service. \textit{Id.} at 1062.
\textsuperscript{68} Although the trial court found Cohen had actually served Rusheen, which both the Court of Appeal and the Supreme Court affirmed, the Supreme Court went on to hold a perjurious declaration of service would nonetheless fall under the ambit of the litigation privilege. \textit{Id.} at 1058.
\textsuperscript{69} Id. at 1057 (quoting Rubin v. Green, 4 Cal. 4th 1187, 1193 (1993)).
consequences to other parties. Federal courts have not taken the Noerr-Pennington doctrine so far.70

II. The Noerr-Pennington Doctrine

A. Introduction

The federal corollary to the litigation privilege is the so-called Noerr-Pennington doctrine. Like California’s litigation privilege, “the Noerr-Pennington doctrine has been extended to preclude virtually all civil liability for a defendant's petitioning activities before not just courts, but also before administrative and other governmental agencies.”71 The doctrine “immunizes certain petitioning activity (including the bringing of a suit) from liability so long as the petitioning activity has an objective basis.”72 The purpose of the Noerr-Pennington doctrine is to balance “the right of citizens to petition the government for redress of grievances . . . the ability of the government to protect the integrity of its processes which provide the structural framework permitting a democratic form of governance, and . . . the need for competition in the marketplace in order to drive a capitalistic economy.”73

The Noerr-Pennington doctrine arose from two antitrust cases in the 1960s, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.74 and United Mine Workers v. Pennington.75 At issue in both cases was whether the antitrust laws, specifically, the Sherman Act, permit the imposition of liability for anticompetitive behavior when the alleged anticompetitive behavior is using the courts to petition or influence the government. In both cases, the Supreme Court concluded that the First Amendment right to petition “protects litigants from retaliatory countersuits when they are using the courts to petition or influence the government.”76 Because of the constitutional basis of Noerr-Pennington doctrine, its protections now extend to “any claim, federal or state, common law or statutory, which has as its basis the petitioning of the courts or other governmental entities.”77 Simply put, “the doctrine immunizes

70 Other state courts have applied the litigation privilege very broadly. See, e.g., Loigman v. Township Committee of Township of Middletown, 185 N.J. 566, 586 (2006) (discussing New Jersey’s litigation privilege, but noting “[s]eeking truthful, accurate, and non-tainted testimony . . . is the objective of every litigated case.”).
74 365 U.S. 127.
75 381 U.S. 657.
conduct encompassed by the petition clause—i.e., legitimate efforts to influence a branch of government—from virtually all forms of civil liability.”

B. The “Sham Litigation” Exception

1. Federal decisions

A subsequent antitrust case in the line of Noerr-Pennington doctrine decisions, California Motor Transport Co. v. Trucking Unlimited,\(^79\) has led some commentators to question whether the doctrine is purely one of constitutional concern or, rather, an interpretation of the relationship between the Sherman Act and the First Amendment.\(^80\) The reason for this is because the Court held the Noerr-Pennington immunity derives from the First Amendment right to petition and freedom of association.

Regardless of its substantive basis, the opinion also held an exception to the general rule of immunity for petitioning activities exists when it is a “sham.”\(^81\) The Court held that when “the petitioner's conduct is a mere 'sham,’” ostensibly directed at influencing governmental activities but intended solely to harm competitors, Noerr-Pennington immunity no longer obtains and the petitioner is subject to [derivative] antitrust liability.\(^82\)

For twenty years after California Motor, courts split on how to define and apply the sham exception. It was not until 1993, in the case of Professional Real Estate Investors v. Columbia Pictures Industries\(^83\) (hereinafter PRE) that the Supreme Court enunciated a two-prong test for determining when petitioning activity constitutes a sham undeserving of Noerr-Pennington immunity. A sham lawsuit is one that is (1) so objectively baseless that “no reasonable litigant could realistically expect success on the merits” and (2) “an attempt to interfere directly’” with a competitor's business relationships through the ‘use [of] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.”\(^84\) The sham exception therefore does

\(^{79}\) 404 U.S. 508 (1972). In this case, the plaintiffs alleged the defendants had initiated a number of state and federal actions as part of a conspiracy to monopolize trade in the trucking industry. Id. at 508.
\(^{81}\) 404 U.S. at 516.
\(^{82}\) Abrams, supra note 69, at 573.
\(^{83}\) 508 U.S. 49 (1993). In this case, the plaintiff sued the defendant for copyright violations over the allegedly illegal transmission of its movies in hotel rooms. Id. at 50. Defendant counterclaimed, alleging the plaintiff’s copyright action was a mere sham to cloak “acts of monopolization and conspiracy to restrain trade.” Id. On appeal, the Court affirmed the Ninth Circuit’s decision upholding the district court’s grant of summary judgment to the plaintiff on the ground its copyright action was not objectively baseless. Id.
\(^{84}\) Id.
not protect litigation conduct that amounts to an abuse or misuse of the courts. If the lawsuit has an objectively reasonable basis for success, then it is not objectiveless baseless and the court need not inquire into the litigant’s subjective motivation in filing the suit.

Some courts have questioned whether the sham exception is consistent with the First Amendment principles underlying the Noerr-Pennington doctrine, especially in light of the Court’s ruling in California Motor, in which Justice Douglas specifically described the Noerr-Pennington protections as “First Amendment rights.” Regardless, the sham litigation exception makes one thing abundantly clear: the right to petition is not absolutely protected under the Noerr-Pennington doctrine. Further, some courts have concluded First Amendment rights are not even implicated by sham litigation because “it is not an exercise of first amendment rights.”

While the Court did not overrule or even seemingly discount California Motor in PRE, the tests in each case for the sham litigation exception are hard to reconcile. In California Motor, the Court focused on the party’s subjective motivation in bringing the alleged sham proceeding(s), which the Court defined as those “with or without probable cause, and regardless of [its] merits.” However, in PRE, the Court made explicit that the first step in the analysis was to determine whether the alleged sham proceeding(s) was “objectively baseless,” that is, whether it had probable cause. More importantly, however, the Court reaffirmed PRE’s two-part test in BE&K Construction Co. v. NLRB in such a way as to cast significant doubt on the continuing validity of the one-part test of California Motor that only assesses the litigant’s subjective intent. The Court stated that, “for a suit to violate the antitrust laws, then, it must be a sham both objectively and subjectively.” It seems, then, that PRE’s two-part test is the appropriate test for the sham litigation exception.

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85 See California Motors, 404 U.S. at 516 (finding defendant’s numerous and repetitive lawsuits shams because they served no purpose but to interfere with plaintiff’s business).
86 See Justice Stewart’s concurring opinion in California Motors. 404 U.S. 508, 516 (“Today the Court retreats from Noerr, and in the process tramples upon important First Amendment values. For that reason I cannot join the Court's opinion.”) (Stewart, J., concurring in the judgment). See also Robert A. Zauzmer, Note, The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases, 36 STAN. L. REV. 1243, 1253 (1984).
87 404 U.S. at 514.
88 Clipper Exxpress v. Rocky Mountain Motor Tariff, 690 F.2d 1240, 1255 (9th Cir. 1982).
90 408 U.S. at 512.
92 Id. (emphasis in original).
There is a factual difference between *California Motor* and *PRE* that the Supreme Court seemingly considered unimportant in discussing the sham litigation exception: the former concerned a number of allegedly sham lawsuits whereas the latter concerned only a single lawsuit. In discussing the sham litigation exception, the Court has therefore never established whether a single lawsuit may qualify as a sham. However, as one commentator notes, “although *PRE* involved a single lawsuit alleged to be sham, nothing in the Court's reasoning indicates that the number of lawsuits makes any difference.”93 This presumably explains why some federal courts have found a single instance of sham litigation may remove *Noerr-Pennington* immunity.94

Even if a lawsuit may have merit and thus not be “objectively baseless,” fraudulent litigation tactics may disqualify it from immunity under the *Noerr-Pennington* doctrine. The fraud category of the sham litigation exception was first enunciated in *California Motor* where the Court explained, “misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.”95 The Court reiterated this sentiment in *Allied Tube & Conduit Corp. v. Indian Head*, noting “unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.”96 Moreover, the Court in *PRE* explicitly (and seemingly intentionally) left the question open, stating it “need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations.”97 However, a few federal courts of appeals,98 as well as the Federal Trade Commission99 have agreed and have adopted it, but limit it exclusively to adjudicatory proceedings. The Ninth Circuit, for instance, states the fraud exception applies where the allegedly unlawful conduct “consists of making intentional misrepresentations to the court” and those misrepresentations or the “party's knowing fraud upon . . . the court deprive the litigation of its legitimacy.”100 Other circuits agree the fraud exception exists but only to the limited extent that the alleged fraud or misrepresentations “affect the core” of the litigation’s legitimacy.101

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95 404 U.S. at 510-11.
97 508 U.S. at 61, n.6.
98 See, e.g., Kottle v. Northwest Kidney Ctrs., 146 F. 3d 1056, 1060 (9th Cir. 1998); Whelan v. Abell, 48 F. 3d 1247, 1254-55 (D.C. Cir. 1995); Mercatus Group, LLC v. Lake Forest Hosp., 641 F. 3d 834, 842 (7th Cir. 2011); Potters Medical Center v. City Hosp. Ass'n 800 F.2d 568, 580 (6th Cir. 1986); Ottensmeyer v. Chesapeake & Potomac Tel. Co. of Md., 756 F.2d 986, 994 (4th Cir. 1985); Israel v. Baxter Labs., Inc., 466 F.2d 272, 278 (D.C. Cir. 1972).
99 In the Matter of Union Oil Co. of Cal., 138 F.T.C. 1, 25 (2004).
100 Kottle, 146 F. 3d at 1060.
Similarly, while the Supreme Court has not ruled on the issue, many federal courts hold the sham litigation exception may apply in spite of the seemingly required element of objective baselessness under PRE. This category of the sham litigation exception’s application may be referred to as “pattern sham litigation.” The concept is drawn from Justice Stevens’s concurring opinion in PRE, wherein he stated the sham litigation exception should extend not only to litigation lacking probable cause, but should apply equally to:

a case, or series of cases, in which the plaintiff is indifferent to the outcome of the litigation itself, but has nevertheless sought to impose a collateral harm on the defendant by, for example, impairing his credit, abusing the discovery process, or interfering with his access to the governmental agencies. 103

Justice Stevens explained that, “litigation filed or pursued for such collateral purposes [of harming a competitor] is fundamentally different from a case in which the relief sought in the litigation itself would give the plaintiff a competitive advantage.” 104 Thus, according to Justice Stevens, “the distinction between abusing the judicial process to restrain competition and prosecuting a lawsuit that, if successful, will restrain competition must guide any court's decision whether a particular filing, or series of filings, is a sham.”105

Justice Stevens’s proposition in PRE was not the first time the idea had been iterated. In California Motor, the Court held that “a pattern of baseless, repetitive claims . . . which leads a factfinder to conclude that the administrative and judicial processes have been abused . . . cannot acquire immunity by seeking refuge under the umbrella of ‘political expression.’” 106 However, because the issue of whether a pattern or series of litigation represents a sham is an issue of fact, there is no clear-cut numerical value of litigation that would lead a court to apply the exception under the pattern litigation category. Courts have therefore varied significantly in their conclusions on when it is applicable, but their make clear it exists.

For example, in USS-POSCO Industries v. Contra Costa County Building & Trades Council, AFL-CIO, the Ninth Circuit held the plaintiff’s fourteen unsuccessful suits against the defendant out of twenty-nine total did not constitute sham litigation. 107 However, the Second Circuit held the defendant’s hundreds of “concerted, baseless, signal-strength challenges brought under the Satellite Home Viewer Act” constituted an actionable claim for sham petitioning undeserving of Noerr-Pennington immunity. 108

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102 See generally id.
103 Professional Real Estate, 508 U.S. at 67 (Stevens, J., concurring).
104 Id.
105 Id.
106 404 U.S. at 513.
107 31 F.3d 800 (9th Cir. 1994).
108 Primetime 24 Joint Venture v. NBC, 219 F. 3d 92, 94 (2nd Cir. 2000).
one case, however, the district court held that the defendant’s nine subject lawsuits were sufficient for the sham litigation exception to apply.  

In a recent case, *Kaiser Foundation Health Plan, Inc. v. Abbott Laboratories, Inc.*, the Ninth Circuit summarized the applicable case law and explained three scenarios in which the sham litigation exception may apply. Sham litigation occurs when (1) a “lawsuit is objectively baseless and the defendant’s motive in bringing it was unlawful”; (2) a “party’s knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy;” and (3) a “series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for unlawful purpose.”

2. California’s Application of the Sham Exception
The California Supreme Court has all but explicitly stated the sham litigation exception applies in litigation in California courts. In *Blank v. Kirwan*, the supreme court discussed the sham exception at length, but found it inapplicable. In that case, the cause of the plaintiff’s alleged injury was action undertaken by the government itself, thus the *Noerr-Pennington* doctrine was entirely inapplicable as it did not involve the defendants’ actions related to government action. Similarly, in *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, the supreme court discussed the sham exception but also found it inapplicable to the facts of the case. Again, in *Wilson v. Parker, Covert & Chidester*, the supreme court discussed the sham litigation exception. In *Wilson*, the trial court sustained the defendants’ demurrer and dismissed plaintiff’s malicious prosecution action on the grounds that, in the alleged malicious prosecution, the trial court had denied the plaintiff’s special motion to strike. The Court of Appeal affirmed, finding that the trial court’s denial of a defensive special motion to strike is dispositive proof of a plaintiff’s cause of action having probable cause, which defeats a malicious prosecution action. On review, the supreme court affirmed. Seemingly referencing the sham litigation exception to the *Noerr-Pennington* doctrine as persuasive analogous authority, the court cited a case from the Northern District of Illinois that held “the denial of summary judgment in the underlying action . . . demonstrate[s] the action was not a sham” to support its conclusion in the matter.

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110 552 F. 3d 1033 (9th Cir. 2009).
111 *Id.* at 1045 (quoting Sosa v. DIRECTV, Inc., 437 F. 3d 932, 938 (9th Cir. 2006)).
113 50 Cal. 3d 1118, 1133-34 (1990).
115 *Id.* at 816.
116 *Id.*
117 *Id.* at 820 (citing Harris Custom Builders, Inc. v. Hoffmeyer, 834 F. Supp. 256, 261-62 (N.D. Ill. 1993)).
Following these decisions, California courts of appeal have undoubtedly found the sham exception applicable in California litigation.\(^{118}\) However, as of the writing of this paper, *Hi-Top Steel Corp. v. Lehrer* remains the only published decision (to my knowledge) where a California court has applied the sham litigation exception and found the defendant’s subject activity was a sham.\(^{119}\) Interestingly, the case involved no litigation whatsoever. One plaintiff, Hiuka America Corporation (Hiuka) and defendants were two automobile scrap steel export companies that attempted to negotiate a joint venture between their operations.\(^{120}\) Ultimately, Hiuka rejected the defendants’ proposal and opted to pursue an agreement with another automobile shredding company, Weiner Steel (d.b.a. Hi-Top Steel Corporation), who also became a plaintiff in the case.

Shortly after Hiuka entered into a contract with Weiner Steel, the defendant contacted the city government in which Weiner Steel’s facilities were located and made “false statements about the installation of the automobile body shredding equipment at [the facilities].”\(^{121}\) A month later, the defendants then sent a city councilwoman a letter also “containing false statements concerning the [facility].”\(^{122}\) Two months later, the defendants “circulated a flyer to residents of [the city where the facility was located] and the surrounding communities . . . [, which] contained false statements about the automobile body shredding equipment and encouraged the residents to oppose [the facility’s] design.”\(^{123}\) However, the city government’s review board unanimously affirmed the approval of the facility’s design for upgrades with new machinery.\(^{124}\)

The defendants then filed an appeal of the review board’s decision.\(^{125}\) One defendant then told Weiner Steel that he “would attempt to delay further installation of the automobile body shredding equipment by asking [local authorities] to require . . . an environmental impact report.”\(^{126}\) The defendant also explicitly told a local governmental authority that his opposition to Weiner’s plans to upgrade its machinery was to represent the interests of his clients.\(^{127}\) Defendants also concurrently initiated plans to buy the same exact equipment Weiner Steel sought to install at the facility even though the defendants’ supposed opposition to the facility was due to the plaintiff’s proposed equipment.\(^{128}\)

The plaintiffs brought suit against defendants (the scrap export company and one of its employees) alleging unfair competition and intentional interference with contractual


\(^{120}\) *Id.* at 572-73.

\(^{121}\) *Id.* at 573.

\(^{122}\) *Id.*

\(^{123}\) *Id.*

\(^{124}\) *Id.*

\(^{125}\) *Id.*

\(^{126}\) *Id.* at 574.

\(^{127}\) *Id.*

\(^{128}\) *Id.*
relations and prospective economic advantage.\textsuperscript{129} The trial court noted that no California court had ever applied the sham exception under the \textit{Noerr-Pennington} doctrine, but only discussed it in dicta.\textsuperscript{130} The trial court therefore did not apply it and found that the defendants’ conduct was legitimate petitioning activity protected under the California Constitution.\textsuperscript{131} Thus, the trial court granted the defendants’ judgment on the pleadings on the grounds the plaintiff could not state a cause of action.

The Court of Appeal disagreed. Applying the sham exception, the court reversed.\textsuperscript{132} The court found “no impediment to applying the sham exception in California” because “it is not inconsistent with the California Constitution” and explicitly found “applicable in California.”\textsuperscript{133} While the court agreed the defendants’ conduct was a form of petitioning generally protected under the California Constitution, the court concluded the “defendants undertook petitioning activity solely to delay or prevent plaintiffs' entry into the shredded automobile body market through use of ‘the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.’”\textsuperscript{134} The court found this apparent because (1) the defendants’ appeal disregarded the merits of the facility’s design plan; (2) the defendants explicitly threatened to create administrative obstacles to delay the project; and (3) the defendants had no genuine concern for the environment as evidenced by the fact that they were attempting to buy the exact same machinery they purportedly claimed was environmentally hazardous.\textsuperscript{135} Accordingly, the court reversed the trial court’s decision, concluding that the plaintiffs stated a cause of action under the sham litigation exception.\textsuperscript{136}

How \textit{Hi-Top} relates to the sham litigation exception is subject to a few potential interpretations and limitations. First, the case relied on, \textit{inter alia, California Motor} in its discussion of the sham exception instead of \textit{PRE}, even though it was decided a year after \textit{PRE}.\textsuperscript{137} However, it is easy to see how \textit{PRE}’s two-prong test would be satisfied here: the defendants admitted their intent was to delay and interfere with the plaintiffs’ business, which demonstrates both the objective baselessness and improper motive of its conduct. Thus, it should not be discounted on the ground that it arguably applied the incorrect standard for sham litigation as the result should have been the same under \textit{PRE}.

Second, while the case involved misrepresentations and potentially fraud, the court did not discuss the fraud category of the sham litigation exception, presumably because the doctrine had not developed by the time the case had been decided in 1994. Further, as noted, \textit{Hi-Top} did not concern fraud or misrepresentations made in an adjudicatory proceeding, but rather it concerned the defendants’ subject conduct that

\textsuperscript{129} \textit{Id.} at 578.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} at 583.
\textsuperscript{133} \textit{Id.} at 579.
\textsuperscript{134} \textit{Id.} at 582-83 (quoting Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991)).
\textsuperscript{135} \textit{Id.} at 583.
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.}
occurred entirely in the legislative branch or in public. The Hi-Top court, relying on California Motor, did not consider this important, holding the “Noerr-Pennington doctrine applies in administrative and judicial as well as legislative contexts.”\textsuperscript{138} However, as discussed above, the issue of when the fraud category exception applies has resulted in a circuit split as to when, if at all, it applies, and whether it applies exclusively in an adjudicatory setting or in any activity directed to any branch of the government.\textsuperscript{139} Thus, whether the defendants’ alleged misrepresentations in Hi-Top provide a sound basis for the court finding them undeserving of Noerr-Pennington immunity is up to debate. Arguably, the sham exception could also have applied under Indian Head, which held antitrust violations may occur when “unethical and deceptive practices constitute abuses of administrative or judicial processes” (emphasis added) as the Hi-Top defendants all but admitted they were abusing the local governmental authorities.\textsuperscript{140}

Third, and relatedly, the precedential value of Hi-Top is debatable in that the facts of the case were extraordinary. Specifically, the fact that the defendants told the plaintiffs that they would use the local authorities for the explicit purpose of causing the plaintiffs delay and otherwise unnecessary administrative costs is presumably uncommon. This fact-specific nature of Hi-Top provides an easy case to distinguish from other scenarios and thus may limit the case’s applicability and precedential value.

Finally, another glaring issue with the case (at least for the purposes of this paper) is the complete absence of any discussion of the litigation privilege. From the opinion alone, it does not appear that the defendants argued that the privilege applied. The court of appeal only discussed the plaintiffs’ contention that the trial court erred in holding the plaintiffs could not state a cause of action because the Noerr-Pennington doctrine applied, which barred the plaintiffs’ claims in their entirety because the court did not agree the sham litigation exception applied in California.\textsuperscript{141}

At least in regards to the statements made to the governmental bodies, the defendants clearly could have made an argument that the litigation privilege applied, which almost certainly would have been successful under then-established precedent. “Section 47(b) of the Civil Code creates a ‘broad and comprehensive’ privilege for publications in legislative proceedings before all legislative bodies, federal, state, and municipal.”\textsuperscript{142} Thus, their statements to the city government officials would have precluded any derivative tort liability to the plaintiffs regardless of the defendants’ ulterior motives and false misrepresentations.\textsuperscript{143} Whether the false statements to the public could have formed the basis for derivative tort liability is beyond the scope of this paper.

\textsuperscript{138} Id. at 576.
\textsuperscript{139} See supra notes 98-99.
\textsuperscript{140} 486 U.S. 492 (1988).
\textsuperscript{141} Hi-Top, 24 Cal. App. 4th at 574, 578.
\textsuperscript{142} ANN TAYLOR SCHWING, 2 CAL. AFFIRMATIVE DEF. § 41:5 (2011).
\textsuperscript{143} See id.
III. Noerr-Pennington and California’s Litigation Privilege

The Noerr-Pennington doctrine and California’s litigation privilege seem to be directly at odds. Specifically, it is hard to reconcile the sham litigation exception and its contours, namely, the fraud category of the exception, with the litigation privilege’s immunity against derivative tort liability.

The claims to which Noerr-Pennington immunity and/or a state’s litigation privilege apply is not entirely clear in all circumstances. Noerr-Pennington undoubtedly applies to federal claims. Further, a state’s litigation privilege may not operate as a bar to federal statutory claims. However, one federal district court, in discussing Pennsylvania’s litigation privilege, noted that “there is an argument . . . that privilege rules are evidentiary and procedural. Therefore, federal privilege law should determine whether the privilege applies.” The court went on to state, however, that “a federal court may defer to a state privilege as a matter of comity,” which it did in this case concerning a state law claim for defamation because “‘defamation privileges are an integral part of the law of defamation.’” That a federal court would not defer to California’s litigation privilege is unlikely given its genesis in defamation law and its broad substantive application.

Nonetheless, “various jurisdictions have extended the [Noerr-Pennington] doctrine to other areas of law, including state law tort liability.” The Federal Circuit has reasoned that “the same First Amendment policy reasons that justify the extension of Noerr immunity to pre-litigation conduct in the context of federal antitrust law apply equally in the context of state-law tort claims.” Similarly, the Fifth Circuit held “there is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust.” The Ninth Circuit agreed with these cases in Theme Promotions, Inc. v. News America

144 See, e.g., Empress LLC v. City & County of S.F., 419 F. 3d 1052, 1056 (9th Cir. 2005) (“Although the Noerr-Pennington doctrine originally immunized individuals and entities from antitrust liability, Noerr-Pennington immunity now applies to claims under § 1983 that are based on the petitioning of public authorities.”).
145 See, e.g., Pardi v. Kaiser Foundation Hospitals, 389 F. 3d 840, 851 (9th Cir. 2004) (“We have previously held that California's statutory litigation privilege does not apply to bar an action brought under 42 U.S.C. § 1983.”).
147 Id. (quoting Baravati v. Josephthal, Lyon & Ross, 28 F. 3d 704, 707 (7th Cir. 1994)).
150 Video Int'l Prod., Inc. v. Warner-Amex Cable Comme'ns, Inc., 858 F. 2d 1075, 1084 (5th Cir. 1988).
Marketing FSI, but noted in a footnote that California’s litigation privilege might apply in the same way as the Noerr-Pennington doctrine did in that case, but did not reach the issue because it held the latter barred the plaintiff’s intentional interference claim.\textsuperscript{151} The California Supreme Court has also held the Noerr-Pennington doctrine applies to California law claims.\textsuperscript{152} As discussed, California’s litigation privilege precludes liability in tort with the only exception being malicious prosecution.

Although the Hi-Top court applied the Noerr-Pennington doctrine and its sham exception, it seems reasonable to conclude California’s litigation privilege, if applied, should have led the court to affirm the trial court’s dismissal of the plaintiffs’ tort-based claims. The Noerr-Pennington doctrine, after all, is not constitutionally compelled: “If the California version of the immunity is broader than the version required under federal constitutional law, that broader version [applies to] state law claims.”\textsuperscript{153} Therefore, the Hi-Top decision seems wrongly decided under past and present applicable California law because it relied on the sham litigation exception, which is irreconcilable with California’s litigation privilege in so far as it permits derivative tort liability beyond malicious prosecution. In fact, one California court of appeal explicitly held the litigation privilege immunizes sham litigation.\textsuperscript{154}

IV. The Problem

In immunizing fraudulent conduct California courts are not only sanctioning, but also fostering unjust results. The California Supreme Court has condoned this as an acceptable result on the grounds it is necessary to “enhanc[e] the finality of judgments and avoid ... an unending roundelay of litigation,” which it considers “an evil far worse than an occasional unfair result.”\textsuperscript{155} Such a blanket approval of misconduct in litigation undermines the integrity of the justice system entirely and encourages perjury and abuse of the judiciary. “People will lie, erroneous decisions will be made in reliance on the lies, and innocent parties will bear undeserved costs and harms.”\textsuperscript{156}

That the litigation privilege is based in part on the First Amendment’s guarantees of the right to petition, which contemplates the right to court access,\textsuperscript{157} also militates against the privilege’s overbroad protections. “Just as false statements are not immunized by the First Amendment freedom of speech . . . baseless litigation is not immunized by the First Amendment right to petition.”\textsuperscript{158} While there are arguments against permitting derivative liability on statements made in the exercise of the right to petition (namely, concerns for efficiency), the wholesale immunization the litigation

\textsuperscript{151} 546 F.3d 991, 1008 n.7 (9th Cir. 2008).
\textsuperscript{152} Blank, 39 Cal.3d at 320-321 (1985) (holding Noerr-Pennington doctrines applies to Cartwright Act); PG&E, 50 Cal.3d at 1130-37.
\textsuperscript{153} Gen-Probe, Inc. v. Amoco Corp., Inc, 926 F.Sup. 948, 956 (S.D. Cal. 1996).
\textsuperscript{155} Silberg, 50 Cal. 3d at 214.
\textsuperscript{157} California Motor, 404 U.S. at 510.
\textsuperscript{158} Bill Johnson’s, 461 U.S. at 743.
privilege renders the right to petition to be wielded as a weapon, not a defense, in California.

_Berman v. RCA Auto Corp._ demonstrates this, as well as the potentially perverse effects of immunizing false statements in litigation under the litigation privilege.\(^{159}\) In that case, the plaintiff brought a malicious prosecution suit against the defendant, who had sued the plaintiff in a prior proceeding due to the alleged misrepresentations he had made in litigation.\(^{160}\) In the prior proceeding, the court had dismissed the suit on the grounds that the alleged misrepresentations were immune from liability under the litigation privilege.\(^{161}\) The court then held that dismissal based on the litigation privilege was a “favorable termination” for the plaintiff, which allowed him to bring a malicious prosecution suit. _Berman_ thus demonstrates that a litigant may not only be immunized from making false statements in court, but could also potentially profit from them if subsequently sued for them in a malicious prosecution action.

By applying the litigation privilege so (over) broadly, California courts are condoning and sanctioning wrongful conduct that leads to unjust results in the name of judicial economy. As it stands, California law immunizes attorneys from tort liability for behavior the California legislature has determined to be unprofessional, unethical, and worthy of disciplinary action and/or court sanctions.\(^{162}\) This is demonstrated by the fact that perjury and filing false declarations are no longer actionable under _Rusheen_. California courts are doing a disservice to California citizens and litigants. California courts should rescind the protections the litigation privilege currently provides under _Rusheen_ to mirror the _Noerr-Pennington_ doctrine. Specifically, California should follow the _Hi-Top_ court and its application of the sham exception and its contours to permit recovery beyond malicious prosecution.

A. A Problem With the Problem

Part of the reason California courts have applied the litigation privilege so broadly is due to concerns for judicial efficiency and to protect individuals from facing liability for exercising their right to court access.\(^{163}\) Thus, California courts consider the litigation

\(^{159}\) 177 Cal. App. 3d 321 (1986).

\(^{160}\) _Id._ at 322.

\(^{161}\) _Id._

\(^{162}\) See _CAL. BUS. & PROF. CODE_ § 6068(d) (a lawyer must “never [] seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law”) and § 6068(g) (a lawyer must not “encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.”); see also _CAL. CIV. CODE_ § 128.5 (sanctions permissible for “bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay); _CAL. CODE CIV. PROC._ § 128.7(d) (“A sanction . . . shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated.”)

\(^{163}\) See Part I.C.1 _infra_.

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privilege necessary to avoid needless litigation and to protect litigants from underserved claims against them.\footnote{See, e.g., Silberg, supra note 12, at 213 (discussing the policies underlying the litigation privilege).}

Both of these are, of course, serious and legitimate concerns. The privilege certainly should exist—and exist broadly—to ensure that litigation does not come with the constant threat of derivative liability. But these policies do not justify an absolute privilege in all circumstances (except for malicious prosecution). As Judge Sloviter noted in dissent in \textit{Cheminor Drugs v. Ethyl Corp.}, when such conduct is immunized, a party then has free reign to “intentionally use fraud and misrepresentation to transform a claim that is otherwise weak and unlikely to prevail, although not ‘objectively baseless,’” into one that succeeds.\footnote{168 F.3d at 131 (Sloviter, J., dissenting).} As a matter of public policy, the privilege should not apply in cases where an attorney commits an indisputably illegal and unethical act, such as alleged in \textit{Rusheen}. Doing so not only immunizes but encourages attorneys to lie and cheat—things for which lawyers are already notorious and disliked.

California’s litigation privilege needs to be reigned in.

V. Solutions

A. Should California Replace \textit{Noerr-Pennington} With its Litigation Privilege?

When it comes to protections and immunities for a party’s communications made to the government, whether it be the legislative or judicial, the \textit{Noerr-Pennington} doctrine is much more limited than California’s litigation privilege. Although the litigation privilege is (not surprisingly) applied primarily in the context of litigation and judicial proceedings, the language “any official proceeding authorized by law” found in Section 47(b) has made the privilege applicable to proceedings of “administrative boards and quasi-judicial and quasi-legislative bodies,” which include statements at a disciplinary hearing of the Board of Dental Examiners,\footnote{Ellenberger v. Espinosa, 30 Cal. 4th 943, 952 (1994)} statements to a school district credentialing commission,\footnote{Picton v. Anderson Union High School Dist., 50 Cal. 4th 726, 736 (1996).} and submissions to a city of a forged building permit.\footnote{Pettitt v. Levy, 28 Cal. App. 3d 484, 488 (1972).}

The litigation privilege’s overbroad protections essentially render the \textit{Noerr-Pennington} doctrine meaningless in California courts. The First Amendment principles underlying the doctrine of the right to petition the government simply are not served when false and perjurious statements made to the government receive absolute immunity. The rationale of the \textit{Noerr-Pennington} doctrine’s protections is to preserve the integrity of the political and judicial systems by encouraging and fostering genuine efforts to effect change through the arm of the government, even though potentially harmful to others. California courts should apply the sham exception and therefore refuse to extend immunity for communications made to the government in two situations: 1. Where the communications are not contemplated in good faith and are merely an attempt to harm
others via the judiciary and 2. Where the communications are fraudulent and/or misleading.

This would permit tort recovery beyond malicious prosecution. As discussed, under California law the only permissible derivative tort liability a party may face for communications made to any branch of the government is for malicious prosecution. The tort of malicious prosecution, however, is limited exclusively to communications made to the judicial branch. Specifically, a malicious prosecution action is premised entirely on the “commencement of a civil proceeding . . . [,which] harms the individual against whom the claim is made, and . . . threatens the efficient administration of justice.” It then requires the aggrieved party to prove that it received a “favorable termination” in the malicious prosecution and prove it was brought without probable cause and with malice. Thus, due to the litigation privilege, an aggrieved party may not recover under California law for any statements made to any branch of government with the exception of a malicious lawsuit, regardless of the consequences or the declarant’s intent.

It requires that the entire lawsuit itself is malicious as opposed to specific pleadings, for example. Thus, if a litigant files a lawsuit with the most minimal probable cause, under California law it then simply cannot be held derivatively liable for any of its actions in the remainder of the litigation despite its potential harm on others. Even, blatant, intentional and malicious misrepresentations contained therein receive absolute immunity.

Although the sham litigation exception is sometimes encompassed by the tort of malicious prosecution—and thus its application would permit recovery for aggrieved parties in the same way a malicious prosecution could—malicious prosecution is an exceedingly limited and difficult tort to prove. Moreover, it results in protracted litigation, and thus has become a “disfavored cause of action” in California courts. It simply is not a viable remedy for parties harmed by unethical litigation tactics.

B. Sanctions

Sanctions are certainly a viable remedy courts may (and of course do) use when attorneys act unethically in the courtroom. However, although they may discourage such behavior, they nonetheless do not provide an effective solution for parties aggrieved by unethical litigation tactics because sanctions cannot always rectify the harm a party may suffer. Thus, sanctions are only part of the solution because they function primarily as deterrents to bad faith litigation tactics; however, they do not adequately compensate aggrieved parties.

The initiation of a frivolous lawsuit in and of itself may harm a party and sanctions against the plaintiff cannot provide an adequate remedy. The problem of so-

171 Crowley v. Katleman, 8 Cal.4th 666, 680 (1994)
172 See Cal. Code Civ. Pro. § 2023.030 (court may order party engaging in misuse of discovery process to pay other party’s attorney’s fees and costs).
called “Neo Trolls” presents a perfect example of this dilemma. Neo Trolls are corporations that disrupt the operation of patent sellers and licensors through initiating litigation. In *iLeverage v. Limelight*, iLeverage, a patent broker, asserted Limelight had disrupted its patent auction by filing a declaratory judgment action against the patent holder. Limelight sued the patent holder in federal court the day before the auction was to take place and sent iLeverage a copy of the complaint even though it was not a party to it. According to iLeverage, the patent seller was forced to grant Limelight a license pursuant to a negotiation between the two parties and call the auction off, which stripped iLeverage of a $2.4 million commission.

The complaint was ultimately dismissed as the federal litigation was held protected activity under California’s litigation privilege. Assuming the truth of iLeverage’s complaint, the situation demonstrates a concrete problem with the litigation privilege: courts can become anti-competitive weapons—legally. Federal courts have recognized this problem with the sham litigation exception to the *Noerr-Pennington* doctrine to address litigants’ misuse of the judiciary for improper reasons.

C. Revive Abuse of Process for Sham Litigation

A potential solution would be to remove the privilege’s absolute bar against a cause of action for abuse of process. “To succeed in an action for abuse of process, a litigant must establish two elements: that the defendant (1) contemplated an ulterior motive in using the process; and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings.” Allowing this cause of action would be an effectively broad solution to address the number of different scenarios in which the litigation privilege has been (and could be) applied wrongly.

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174 I was introduced to this case while serving as a judicial extern to the Hon. Judge Busch of the San Francisco Superior Court, who presided over the case. The discussions and opinions of the matter and anything relating to it are entirely my own and do not reflect those of Judge Busch in any way, shape, or form.

175 iLeverage’s complaint is available at [http://www.iam-magazine.com/blog/articles/DelawareVLimelightJan2011.pdf](http://www.iam-magazine.com/blog/articles/DelawareVLimelightJan2011.pdf). For the purposes of this paper, I have assumed the facts iLeverage alleged in its complaint are true.

176 Id. ¶30-31.

177 Id. ¶55-56, 61.


180 Id.
If California courts do not rescind the litigation privilege to avoid these results, the legislature may—and should—do so. The California legislature could simply amend section 47 to provide that sham litigation is not protected under the litigation privilege. California courts could then look to both the Hi-Top decision and federal courts for guidance on application of the sham litigation exception to the Noerr-Pennington doctrine.

As it stands, litigants aware of the extent of the privilege’s protections may advantageously use it as a sword instead of the shield it was intended to be. As a result, parties damaged by litigants intentionally abusing the privilege for their benefit—in litigation or elsewhere—have little to no recourse due to the protections the privilege affords.

The United States Supreme Court has unequivocally held that litigants cannot and should not be able to utilize the courts as a weapon through sham litigation. California courts should follow its lead and apply the Noerr-Pennington doctrine in their interpretation of California’s litigation privilege. Specifically, California courts should recognize sham litigation and refuse to protect it as the Hi-Top court did. As Justice Kennard of the California Supreme Court so eloquently and forcefully stated in her dissent in Moncharsh v. Heily & Blase, this must occur because

The object of government is justice. “Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit.” As the preamble to the United States Constitution affirms, our country was founded to “establish justice.”

Justice is a special obligation of the judiciary. Every court has the power and the duty to “amend and control its process and orders so as to make them conform to law and justice.” When they construe statutes, courts are enjoined to do so in a way that will promote justice. And, because the very purpose of our legal system is to do justice between the parties the interests of justice are paramount in all legal proceedings. In short, justice is the “sole justification of our law and courts.”

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181 Gallegos, 158 Cal. App. 4th at 961 (“We acknowledge that, in so concluding, our Supreme Court left open the possibility that the Legislature could create exceptions to the litigation privilege for both parties and non-parties to the prior proceedings.”).

182 3 Cal. 4th 1, 34 (1992) (citations omitted).