OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: PROFESSIONAL REAL ESTATE INVESTORS, INC., ET AL., Petitioners v. COLUMBIA PICTURES INDUSTRIES, INC., ET AL.

CASE NO: 91-1043

PLACE: Washington, D.C.

DATE: November 2, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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PROFESSIONAL REAL ESTATE :

INVESTORS, INC., ET AL., :

Petitioners :

v. : No. 91-1043

COLUMBIA PICTURES INDUSTRIES, :

INC., ET AL. :

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Washington, D.C.

Monday, November 2, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

PATRICK J. COYNE, ESQ., Washington, D.C.; on behalf of the Petitioners.

ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 91-1043, the Professional Real Estate Investors v. Columbia Pictures Industries.

Mr. Coyne.

ORAL ARGUMENT OF PATRICK J. COYNE

ON BEHALF OF THE PETITIONERS

MR. COYNE: Mr. Chief Justice, and may it please the Court:

This Court has held repeatedly that use of the litigation process as an anticompetitive weapon, as opposed to use of the outcome of that process, violates the antitrust laws.

The question today is whether in drawing the line between legitimate and illegitimate uses of the judicial process a court can refuse to consider highly relevant evidence of intent under the Ninth Circuit's baselessness standard. Even a memorandum in a party's files admitting that the only reason a case was brought was to drive a competitor out of the market through the cost of the litigation process, regardless of the outcome, would not be admissable or even discoverable.

I would like to establish today three points. First, predatory litigation, that is, a suit that is

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brought to burden, to harass, to intimidate, to impose costs upon a competitor regardless of the outcome of the judicial process, violates the antitrust laws.

Second, the Ninth Circuit's baselessness test strips these important antitrust concerns of any realistic level of protection. A case can be more than baseless, yet still use the judicial process improperly to harm competition. The Ninth Circuit standard would immunize these predatory cases in spite of the antitrust injury they cause and in spite of the absence of any genuine intent to petition the courts for redress of grievances under the First Amendment.

Third, an inquiry into subjective intent is workable. It also does not chill the exercise of genuine First Amendment rights. Even rule 11 allows an inquiry into subjective intent of the litigant.

QUESTION: What precise intent would you say was sufficient here, Mr. Coyne?

MR. COYNE: Chief Justice, it's the intent to use the process itself to harm competition as distinct from the intent to achieve a judicial outcome as an anticompetitive tool.

QUESTION: And do you think -- what about a mixed motive case where you're rummaging through a corporation's files? You come across one thing that says

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maybe this and another thing that says maybe that.

MR. COYNE: Virtually every case is going to be a case of mixed motive. If we begin in a summary judgment setting such as this with the premise that there is an anticompetitive intent, as we have to in this case, then the predator is going to accept the kill. They will not turn it away. So, there's going to always be a willingness to accept a positive judicial result.

What the trier of fact has to do is consider all of the evidence of intent and reach a finding on whether it was motivated by an attempt to abuse the process as opposed to achieve the outcome.

QUESTION: And that's the end of the case. Is that -- one way or another, whether the case is baseless or not or whatever the outcome, intent is the sole and only determiner.

MR. COYNE: No, Justice White. We don't believe that intent is the sole determinant. There are a number of factors this Court has looked at over the years. In Allied Tube it identified the context, the source, the nature of the petition. In California Motor Transport, it looked directly at the intent with which it's brought. It also looked at the use of misrepresentations, unethical means before the Court. We would suggest that the Court direct the lower courts to look at all five factors, but

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on the element of intent, the issue is intent as to the means versus intent as to the outcome.

QUESTION: Well, when you look at all the factors, what are you trying to decide?

MR. COYNE: You're trying to decide whether the litigant, the plaintiff, in the underlying lawsuit genuinely intended to be exercising a First Amendment right.

QUESTION: So, you say that intent in the end is the determining factor.

MR. COYNE: In the way this case is presented to the courts -- Court, absolutely, yes, it is.

QUESTION: And so, if they don't have any intent -- considering all the factors, if there was no intent to harm competition, that's the end of the case.

MR. COYNE: If there were no intent to harm competition at all?

QUESTION: Yes.

MR. COYNE: Certainly, but that's not this case, and we have not yet --

QUESTION: Well, I know, but if there is intent --

MR. COYNE: -- gotten discovery to examine --

QUESTION: If there is intent to harm competition, it doesn't make any difference how well based

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the case was or even if it was won.

MR. COYNE: Assuming that fact --

QUESTION: Yes.

MR. COYNE: -- yes, there would be no basis to inject a sham argument. But here the district court did not allow any discovery into the issue of intent. It was presented on a motion for summary judgment on the issue of sham, and the petitioner is entitled to the finding on that -- in that setting, that there is an overall anticompetitive intent, an intent to harm competition.

QUESTION: You --

QUESTION: You take the view that if there were a properly conducted, successful lawsuit, but with -- conducted with improper motives, that that is covered by the Sherman Act.

MR. COYNE: Yes, Justice O'Connor, we do.

QUESTION: Is that not protected by the First Amendment?

MR. COYNE: It --

QUESTION: There's no First Amendment right to bring a lawsuit if you're indifferent to the outcome?

MR. COYNE: If you are indifferent to the outcome, no. What the First Amendment protects in terms of the right to petition is just that, petitioning the Government for redress of a grievance. If this case was

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brought for some ulterior motive, it is not a genuine petition and there is no First Amendment right to vindicate.

QUESTION: Well, there's a difference --

QUESTION: Have we held that the First Amendment protects the right to bring a lawsuit?

MR. COYNE: The First Amendment protects a right to bring a lawsuit.

QUESTION: I said have we held that.

MR. COYNE: I believe that not in those terms, but this Court has in Vendo and in Bill John's Restaurants held that a much higher standard, almost equivalent to a prior restraint standard, is necessary in the setting of trying to enjoin pending litigation.

QUESTION: Because of the First Amendment?

MR. COYNE: I believe that that -- my reading of the case is that it is, yes.

That standard, however, that would apply in a prior restraint does not necessarily convert to the standard that would apply to imposing liability after the fact, as this Court held in Vendo and in Bill Johnson's.

The third principle that I would like to leave the Court with today is that an inquiry into subjective intent is workable. The antitrust considerations that inform the Sherman Act doctrine, the Sherman Act

principles, are concerns about markets, concerns about consumers, concerns about economic freedom. Those special antitrust concerns go far beyond the concerns that inform rule 11, namely concerns about judicial efficiency and fairness to litigants. Those antitrust concerns compel a full inquiry into intent.

QUESTION: But you seldom get a summary judgment in a case like this if you can go through a corporation's files on a question of intent. The Ninth Circuit centers, at least much more easily administrable I think, than the one you're urging.

MR. COYNE: It -- Chief Justice, it is a bright line. It is admittedly easy to apply. It is also the wrong line. What it does is invades the province of competition policy unnecessarily in the guise of protecting First Amendment speech or First Amendment right to petition. In reality if that petition was not genuinely motivated, it isn't really a First Amendment petition, and there is no reason to invade competition policy to the extent that the respondents would have the Court do.

QUESTION: May I pin you down a little bit on your concept of motivation? You've spoken of not genuinely motivated, ulterior motivation, and indifference to result. If you go on just a -- an ulterior motivation

theory, every case, as I think you suggested a moment ago, is going to end up as a mixed motive case. Isn't your strongest argument that the mental state must be one of indifference to success, which is rather a different thing from simply saying ulterior motive or mixed motive?

MR. COYNE: Yes, it is. That is the standard that we urged in our brief.

QUESTION: Yes.

MR. COYNE: On reflecting further on it, what may be a more workable standard for the Court is to examine it on a but-for basis; namely, if the case would not have been brought but for the predatory motive separating out the legitimate petitioning motive from the predatory motive, if it were not brought but for the predatory motive, that case would never have been brought at all legitimately.

QUESTION: The courts are going to determine this, this very, very delicate --

MR. COYNE: Depending on the --

QUESTION: -- question of motivation?

MR. COYNE: Depending on the development of the record, Justice Scalia, yes, there are situations where the court would be well within its province to dispose of the case if there were presumptions created, for example, a nonbaseless case that was successful below. It's not

this case, but if we had such a case --

QUESTION: Right. It was successful.

So, we'd say, ladies and gentlemen of the jury, after awarding damages, whether you award it or not, you should then ask yourself in view of this counterclaim that this is predatory --

MR. COYNE: No, Justice.

QUESTION: -- whether this suit would have been brought but for the fact that it is harming a competitor.

MR. COYNE: Not every case would go to that stage. If the facts, as I just outlined, for example, a nonbaseless, successful suit below --

QUESTION: Successful, right.

MR. COYNE: -- unlike the one here --

QUESTION: Right.

MR. COYNE: -- and there were -- discovery was allowed and there were no evidence -- there was no evidence developed that the case was predatorily motivated, we would agree. We think that doctrinally that case should not -- that presumption should not be rebuttal, but the district judge would be within his province to grant summary judgment in that setting.

QUESTION: When does anybody bring suit against a competitor without hoping to harm the competitor?

MR. COYNE: Well, I would imagine very rarely.

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In this situation --

QUESTION: So, there will always be some evidence. I mean, once there's discovery, there will be something to say, boy, we're really going to get him in this suit. It will be terrific.

MR. COYNE: Stated that broadly, petitioners don't agree. What the evidence that we're saying is germane to this issue is the evidence with which -- regarding the intent behind this petition was it brought with a genuine intent to achieve the outcome that is being offered by the courts or, was it brought for some predatory motive to harass or intimidate.

QUESTION: Well, you're changing your testimony. You had a but-for test.

MR. COYNE: My suggestion is that the standard is whether the intent is genuine. In applying that standard, we suggest that a but-for test for the district courts is the most workable. The district court would consider all of the relevant evidence on that issue of intent.

QUESTION: The but-for test is different from your indifference to result test.

MR. COYNE: We have given this a great deal of thought since the briefs were prepared. We don't articulate that per se in the briefs, but we believe --

QUESTION: But you're articulating it now and it's different from the standard of indifference to result, is it not?

MR. COYNE: No, I don't believe it's different, Justice Souter. It's simply more focused and I believe more workable in terms of instructing the district courts how to handle these cases.

If the issue is indifference, what we were articulating is it's indifference between your pure motive and your evil motive. You could have a case where it would have been brought on the strength of either. That could pose problems under the first Amendment, which is why we suggest a but-for standard. If the pure motive was alone sufficient that the case would have been brought on the strength of that pure motivation alone, then it's a genuine petition.

QUESTION: One thing is clear, isn't it, that we'll never have summary judgment in one of these cases?

MR. COYNE: Not necessarily. I can imagine a number of situations in which summary judgment could be granted in these cases.

QUESTION: Somebody is going to have to be pretty careless.

MR. COYNE: Not necessarily. If the -- the court could craft presumptions based upon whether the case

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is baseless or not based upon success below. If -- as I mentioned in response to Justice Scalia's question, if the case were not --

QUESTION: Excuse me. Based on success below?

MR. COYNE: Based on the success in the underlying case. If the case were not baseless and the respondents in this case had prevailed, which they didn't here, that case might be entitled to an extremely strong presumption that it was genuinely motivated.

QUESTION: But that still isn't going to do a whit for you on summary judgment.

MR. COYNE: It would, Chief Justice. The district judge, in considering that, would allow -- then allow discovery, and if no evidence were turned up to contradict that presumption, he would be within his powers at that point to grant summary judgment.

QUESTION: But that would be true without the presumption. If after discovery no evidence of intent turns up, he doesn't need the presumption to grant summary judgment.

MR. COYNE: That is true, but in this case, no discovery was allowed.

QUESTION: Well, then isn't what I said correct?

QUESTION: Mr. Coyne, the Solicitor General supports your argument in part at least on the theory of

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the sham exception, but then goes on and suggests that in any event there should be an affirmance here on the summary judgment.

MR. COYNE: We believe that the United States is wrong in that position. We fully agree that they are correct with respect to the substantive standard.

They offered three reasons for that harmless error argument: one, that there was no proof of antitrust injury by petitioners in the case; second, that our theory of antitrust injury was not adequately pled; and third, to paraphrase the brief, that we did not show the materiality of the discovery we were seeking.

On the first point, injury, there was no summary judgment motion in this case directed to injury. The only motion filed was directed to whether this case was or was not a sham. We had requested discovery on the issue of injury and were not given it.

QUESTION: Was the argument made below for your clients basically that the suit was really baseless? Was that the focus of it all?

MR. COYNE: We had argued both points below, that the suit was baseless. When the district judge applied a baselessness standard, we had also argued to him that that standard is not correct. We had argued both in the district court and in the Ninth Circuit that the

proper standard should be to look at the genuine intent behind the petition and that the case was baseless.

We are not asking this Court to review the issue of baselessness at this point. We have asked for certiorari only on the issue of the standard.

QUESTION: Even if we accepted your view or something that was quite proximate to it, would we not have to be quite careful about suits involving intellectual property which, after all, are monopolies in themselves? And I'm not quite sure how it works to say that a monopoly holder, i.e., a copyright holder, cannot have a predatory motive. That's exactly what a copyright is for, to drive other people out.

MR. COYNE: Justice Kennedy, as long as the copyright holder or the patent owner is operating within the lawful scope of that statutory monopoly, that's fine, but for example, in this case, one of the issues we had raised that they were attempting to misuse their copyrights. When the copyright holder is trying to extend their rights beyond what the rights Congress gave them, that is misuse and that's not protected.

QUESTION: Well, but it seems to me that you're not quite consistent with your predatory motive test. Let's assume that there's some forgiveness for the suit that's in the marginal area that's reasonably grounded,

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but ultimately proves unsuccessful. Would the predatory motive there be improper?

MR. COYNE: The standard that we would urge the Court to adopt is, in terms of the test that would be applied, a but-for test. If that case would have been brought on the strength of its genuine petitioning motive alone, regardless how much more overwhelming was the predatory motive, we would concede that that case was immunized. If, however, that predatory motive that you've described became material to bringing the case in the first place, that case would not have been brought.

QUESTION: Well, but I go back to my original question. Don't all copyright owners have predatory motives that are legitimate?

MR. COYNE: The -- what this Court did under Noerr and under Pennington is to immunize it as long as that motive is a motive to achieve the predatory result through the outcome as distinct from the process.

QUESTION: But those weren't copyright suits.

MR. COYNE: I'm sorry?

QUESTION: But those were not copyright suits.

MR. COYNE: They were not, but this Court has dealt with the issue in Walker Process, in United States v. Singer, in the hand guards cases in the Ninth Circuit.

And admittedly as an intellectual property

lawyer myself, I am confused by the principles that have been applied. I believe that the antitrust issues and the immunity issue probably was not raised adequately in some of those cases, but an intellectual property case should be treated no differently than any other type of case under this doctrine. The question is whether the intent to petition was genuine.

QUESTION: Under your but-for test, would it be a strictly factual test? Would these -- this particular client and these particular attorneys have brought the case, or is there an element of reasonableness? Would a reasonable attorney have brought it?

MR. COYNE: We believe that it should be a subjective test. Now, both objective and subjective types of evidence should inform the trier of fact on that question.

QUESTION: But it's actual factual intent of these particular litigants that would be the question.

MR. COYNE: Yes, Chief Justice. That's what we would urge.

Now, for example, in the Grip-Pak case, Judge Posner and Judge Easterbrook in Premier Electrical attempted to derive objective evidence that would create an inference as to what the intent was based upon the reasonableness of bringing the case, whether it was

justified by the cost it would take to proceed with the case.

QUESTION: And this is all to be digested and found on by a jury I take it in a disputed fact question.

MR. COYNE: If there were genuine issues of material fact, yes.

QUESTION: May I ask you two questions to be sure I have your test right? Supposing a lawyer writes his client a letter assessing the desirability of filing a lawsuit, and he comes out, after talking about the costs and the probability of success, saying it's really about a 50-50 choice and I'll leave it up to you to make the judgment as you're the client. And the client writes back and says, well, 50-50, I'm willing to go ahead with it because it will impose some costs on my competitor and that makes the difference for me. That -- that's the illegal lawsuit under your view.

MR. COYNE: Yes. Under our but-for test, that anticompetitive motivation would have been material to the decision to bring the case.

QUESTION: Then the second question I have, would it not normally be true that the facts that enable one to decide whether the -- your test is met would be privileged communications?

MR. COYNE: Not necessarily. As was in the --

as in the case in Grip-Pak and Premier Electrical, there are -- there is objective evidence that should also be examined to attempt to derive an inference as to what the intent was.

With respect to privileged communications, we would urge that there's no different rule here than there is under any other type of case. If there is a waiver, if there is a crime fraud issue, that would be discoverable, but absent some reasons that would justify piercing that privilege, the plaintiff would be forced to proceed without that evidence in this case just as in any other type of case.

QUESTION: Why wouldn't it be crime fraud, I mean, if you're violating the Sherman Act?

MR. COYNE: In the --

QUESTION: I mean, any statement made to a lawyer that shows that you're bringing this suit violating the but-for case, you've been guilty of a criminal violation I suppose, wouldn't it?

MR. COYNE: The -- we would agree, though -- yes. But we would agree that the allegation alone --

QUESTION: So, there's really no problem. Justice Stevens doesn't have anything to worry about.

MR. COYNE: But the --

QUESTION: The answer is you'll be able to get

all the communications between the lawyer and the client.

MR. COYNE: That's not necessarily true, Justice Scalia. For example, the Fifth Circuit in the Burlington Northern case applied what appears to petitioners to be a very sensible approach to that very question, to look at the evidence without access to the privileged communications. If you can show that you have a probability of succeeding on that sham exception, only then does it even become discoverable. It's not necessarily even admissible at that point.

QUESTION: Mr. Coyne, why should we adopt this special rule for the Sherman Act? I mean, I guess that not just with respect to the Sherman Act, but with respect to any litigation, it is wrong and perhaps unlawful to bring a lawsuit simply for the purpose of harassing someone even if it's a successful lawsuit, even if it's a little more than baseless. Isn't that unlawful anyway to use the courts as a means of harassment?

MR. COYNE: Yes. There are two things I'd like to point out, though, Justice Scalia. Yes, it is unlawful.

One, we're not urging that the Court adopt a different standard. We're urging that the Court continue the precedent of Noerr, Pennington, Otter Tail, California Motor Transport to look at subjective intent.

QUESTION: But you contend that that's -- you contend that that standard with respect to abuse of process in the antitrust area is different from the standard everywhere else. I mean, if the rule you suggest is a sensible one, why don't we apply it to all litigation and say that you're in violation of rule 11 or you're in violation of some other court rule whenever your real motivation is not the recovery, but just to harm the defendant in the case?

MR. COYNE: I'm sorry. Perhaps I misspoke, Justice Scalia. We're not suggesting that the standard is an abuse of process standard. Abuse of process deals with certain problems, abuse of the judiciary, fairness to litigants.

The concerns in the antitrust setting go far beyond the concerns that inform those issues. There is harm to competitors, and simply slapping the litigants' wrist and fining them $400 is not going to redress the serious antitrust injury that can result from predatory litigation. Predatory litigation can increase rivals' costs. It can drive rivals out of the market.

QUESTION: I guess your answer is there's a Federal law against litigation like that.

MR. COYNE: There are Federal laws against --

QUESTION: Like the antitrust law.

MR. COYNE: Justice White, yes, that is precisely the law that we urge is contrary to it. It's a question of what damage is inflicted. If it's simply an abuse of the process, then perhaps the remedies for abuse of process would be sufficient to remedy it. Where, as in this case, we allege that antitrust injury has resulted, those remedies will not be sufficient, and the higher remedies that are available under the antitrust laws should be imposed.

Predatory litigation, unlike legislative lobbying, is inherently coercive. The party that is the victim of it does not have the option of sitting it out and waiting to see what happens. A default judgment will be entered against them.

QUESTION: May I ask you a question about your understanding of the Ninth Circuit rule? Do you understand that this baseless test that it applies applies only when there's just one piece of litigation, or would they apply the same test if they -- if you had 15 similar lawsuits?

MR. COYNE: It's unclear from the Ninth Circuit's decision in this case. My personal reading of the Ninth Circuit's precedent on it is they may be willing to go with a rule that one case is not enough. Some circuits have.

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QUESTION: Yes.

It -- that doesn't strike me as -- I mean, normally you'd think in the sham litigation that at least I'm most familiar with you have repetitive filings, and some may have some merit and some don't have any merit. But the probability of having sham litigation with one lawsuit that was sufficiently meritorious to pass the baseless test seems to me fairly remote.

MR. COYNE: It depends on the lawsuit, Justice Stevens. For example, in this case, we had reason to believe that although we were the only lawsuit that we were aware of, that these respondents had threatened a large number of other persons in the market.

QUESTION: Of course, that's standard in trademark and copyright litigation, isn't it, to put everybody on notice that you're going to defend your monopoly?

MR. COYNE: I'm not sure that the analogy is a perfect one in this setting for the precise reason the district court held below, that this was not a proper protection of the monopoly. This was well beyond copyright monopoly protection.

QUESTION: No, but if you assume they thought it was until after it had been litigated, then it would be normal behavior, wouldn't it?

MR. COYNE: Well, we're getting into the baselessness issue.

QUESTION: Right.

MR. COYNE: We think there are very serious reasons why the district court should have realized that these respondents knew they did not have the rights they were alleging. They admitted in another case --

QUESTION: No, but for our purposes we're assuming it is not a baseless lawsuit. I think that's the predicate on which we take the case.

MR. COYNE: Yes.

QUESTION: I mean, I can understand your argument. If you're willing to peak at legislative history, you'd probably find out it was baseless, but --

MR. COYNE: Or admissions in other cases.

QUESTION: Yes, but we have to assume it was not baseless, I mean, for our testing the rule.

MR. COYNE: For purposes of this inquiry, yes. We are not contesting that issue.

QUESTION: What was your claim of antitrust injury?

MR. COYNE: The injury that we allege here is, as the Ninth Circuit recognized, at a minimum having to defend the case, but petitioner, Mr. Kenneth Irwin, was also a video equipment dealer at the time this case was

brought. He was trying to sell alternative systems, alternative to Spectradyne, which is the exclusive licensee of these studio respondents. That market has largely been delayed, and in some instances like petitioner, people have been driven out of the market.

Mr. Chief Justice, I'd like to reserve the rest of --

QUESTION: Well, you would always -- he certainly has a -- apparently has a right to protect his copyright.

MR. COYNE: He does.

QUESTION: And if he thinks you're violating his copyright, he can sue you. But you say that if he really wants to injure you, he can't protect his copyright.

MR. COYNE: He has a right to protect his copyright. All we're asking is that in bringing a lawsuit to that end, that that be the real reason they're bringing it and not for a predatory purpose.

QUESTION: Well, then the copyright owner is always going to be at risk.

MR. COYNE: Not necessarily.

Mr. Chief Justice, I'd like to reserve the rest of my time.

QUESTION: Very well, Mr. Coyne.

Mr. Pincus, we'll hear from you.

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ORAL ARGUMENT OF ANDREW J. PINCUS

ON BEHALF OF THE RESPONDENTS

MR. PINCUS: Thank you, Mr. Chief Justice, and may it please the Court:

It's important at the outset, we believe, to focus on the precise nature of the question before the Court in this case. In determining the contours of the Noerr doctrine, you're interpreting the Sherman Act because Noerr and its progeny make clear that that doctrine rests squarely on a construction of the Sherman Act.

QUESTION: Noerr doesn't even mention the First Amendment, does it?

MR. PINCUS: Well, it mentions -- actually in a footnote, it states that the Court isn't reaching the First Amendment question --

QUESTION: Yes.

MR. PINCUS: -- because it's resting its decision on statutory interpretation grounds.

In -- and in construing this particular statute, the Court has broader latitude than it does in the typical statutory interpretation case because when Congress enacted the Sherman Act, it gave the courts broad responsibility for giving content to the statute's broad mandate by formulating rules of liability.

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So, we think the appropriate methodology here is clear. The Court should weigh the costs and the benefits of the contending rules and select the one that best reconciles the general goals of the Sherman Act with the particular purposes of Noerr immunity, and we think that the court of appeals did just that and that its rule is the appropriate one.

Now, Mr. Coyne has said something about the benefits of petitioners' approach in terms of the supposed enhancement of antitrust enforcement, and it certainly is possible to hypothesize examples of conduct that would be captured by petitioners' rule, but would be exempt from antitrust liability under the standard adopted by the court of appeals.

But we think that Justice Stevens' remark about probability hit the nail on the head. In considering what weight to give to these hypothetical possibilities, it's important to recognize just how unlikely the conduct that petitioners have hypothesized is in the real world. What is required is a lawsuit that petitioners could win but have no interest in winning. Certainly the overwhelming majority of lawsuits that a plaintiff can win are prosecuted at least in part to achieve that goal.

QUESTION: Well, that's not their current test anyway. It isn't that they have no interest in winning.

They have some interest in winning, but that alone wouldn't have been enough but for their desire to harm their competitor as well.

MR. PINCUS: I understand it's not their test, Justice Scalia, but in City of Columbia, the Court framed the inquiry as a lawsuit that was not genuinely aimed at procuring favorable government action at all, and Noerr was certainly --

QUESTION: Yes, because Columbia wasn't a litigation case.

MR. PINCUS: No, but it was a case about what the sham exception means. It's not clear at least that the intent should vary from context to context. The question that the Court was getting at in Noerr and that the Court was also getting at in California Motor Transport was an intent not to gain a benefit through victory in the governmental forum, but to impose costs through the process of that forum.

So, the question, it seems to us, should be the same, and Noerr and City of Columbia made clear that mixed motive cases are cases that are protected. Noerr itself says that Noerr was a mixed motive case. Part of the reason that the railroads undertook the conduct was to harm the trucking industry.

QUESTION: It is true, as the petitioners'

counsel pointed out, you might tend to sit on the sidelines or just wait it out if it's in the legislative forum, whereas if you're being sued, you have no choice but to proceed. I think that's a very substantial difference.

MR. PINCUS: Well, although your -- I mean, your interests may be affected in just -- in as much a material way. It's true that the process requires you to respond, but in the legislative context, the process may well require you to respond or you'll face the law being enacted that will harm you quite substantially.

And certainly the chilling and the First Amendment protected interest in petitioning we think are very, very powerful, and I think that's the interest that has to be weight against this cost. It's the interest that Mr. Coyne doesn't mention, but what Noerr was designed to do was to give protection to the very, very substantial First Amendment interests that underlie --

QUESTION: Well --

MR. PINCUS: -- petitioning activity generally and lawsuits in particular.

QUESTION: But Noerr, as you say, just relegates the First Amendment to a footnote. It did not rely on the first Amendment at all.

MR. PINCUS: Well, it relied on the interests,

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the petitioning interests, that were at stake there and said that one of the reasons it was -- the Court said that one of the reasons it was construing the Sherman Act the way it did was to avoid potential First Amendment problems and also on the assumption that Congress would not have wanted to come close to burdening those interests, at least without some more particular directive.

So, the Court didn't rest its decision on the First Amendment per se. It's a statutory construction case, but the Court rested its decision on the First Amendment interests that are at play in this area.

QUESTION: Of course, it involved legislative attempts, I mean, rather than judicial attempts.

MR. PINCUS: It did, and in California Motor Transport, the Court --

QUESTION: So, I mean, you know, even if you assume that it referred to First Amendment interests, it's a lot more plausible in the context of trying to cut off somebody from going to the legislature than it is cutting off somebody from going to the courts.

MR. PINCUS: Several years later, though, in California Motor Transport, the Court squarely held that the very same interests warrant that extending Noerr to the judicial petitioning to the litigation area, and the decision in Bill Johnson's --

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QUESTION: Did we mention the First Amendment there?

MR. PINCUS: Yes, you did. The Court said --

(Laughter.)

QUESTION: Well, you -- your standard is exactly that of the court of appeals, that if you've got a -- if your suit isn't baseless, that's the end of it.

MR. PINCUS: No, Your Honor. Our standard -- and we think the court of appeals standard -- is that there has to be some objective indicia, that intent -- subjective intent is not the only inquiry here, and that what has to be shown in order to inquire into subjective intent is -- what has to be satisfied is an objective standard. Baselessness is one way to satisfy that standard.

In California Motor Transport, the Court listed a variety of other conduct that would suffice, misrepresentations, bribery of judges or jurors, something --

QUESTION: So, in the end do you think intent is determinative?

MR. PINCUS: We think it's a two-part test, that there is an objective element and a subjective element, that we don't say intent -- and we don't think the court of appeals said intent -- is irrelevant. We think that

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one gets to the question of intent after showing -- after overcoming an objective threshold that provides the safeguard and prevents the chill on the First Amendment protected conduct or conduct imbued with the First Amendment interest.

QUESTION: And if you don't reach that threshold, you don't inquire into intent.

MR. PINCUS: Exactly, Your Honor. You don't get into discovery. You don't get into the problems of privilege, and you don't get into the problems of having every single case have to go to the jury.

QUESTION: But the purpose of the objective threshold is in order ultimately to show the forbidden intent?

MR. PINCUS: The purpose of the objective threshold is to eliminate the chill that would result from a wholly subjective standard. It's what the Court has done in the official immunity area in the Harlow case. It's what the lower courts have done in the predatory pricing context.

QUESTION: So, if there were unequivocal evidence of subjective intent to harass and to take predatory action only, say, by letters in the file that the plaintiff had before the discovery process began -- he somehow had them -- that would be insufficient?

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MR. PINCUS: That would be insufficient, yes. We're not advocating a discovery rule. It's a substantive rule of liability. Its purpose is to -- is just as the rule that truth is a defense to libel cases, just as the Court has required objective standards in a variety of areas where the danger of a wholly subjective standard would be to chill indisputably protected conduct.

That is the very reason why here we think there has to be an objective test so that people who have legitimate claims and legitimate intent can be sure ex ante that they will not be burden with an antitrust claim that will automatically have discovery, that will be submitted to a jury on an incredibly complicated and uncertain intent standard, and lead to very, very uncertain liability decisions.

If someone is faced with that, if someone goes to their lawyer and considering that whether to file a lawsuit and says, well, I'm thinking about filing this lawsuit, but I want to know what the risks are, in petitioners' world, the lawyer would have to say, well, one risk is that you're going to be met with an antitrust counterclaim. And let me tell you what will happen if an antitrust counterclaim is filed. First of all, the standard is extremely murky. It's a but-for intent test now, which I'm not sure how it would play out in the real

world, but I think any document that referred at all to the burden that was going to be imposed on the other side as a result of the litigation process, whether in passing or not, would certainly I think be sufficient to get to the jury in petitioners' world. And so, the person --

QUESTION: And you think your standard ought to apply in a copyright case if you've got clear unequivocal proof that you have an intent to monopolize.

MR. PINCUS: Well, Your Honor, that kind of intent, of course, is not the kind of intent that Noerr was referring to. The kind of intent that Noerr requires, that kind of intent is wholly legitimate in the copyright context. If what you're intending to do is enforce a legitimate copyright interest, that's precisely the right kind of intent that you're supposed to have.

QUESTION: Yes, and you want to put the fellow you're suing out of business because he's -- he -- you think he's using your copyright.

MR. PINCUS: And that's entirely legitimate because the way you're going -- if the way you're going to put him out of business is by getting an injunction by prevailing in a copyright proceeding, that's entirely legitimate.

What Noerr requires, the separate kind of intent, is the intent only to put him out of business

because of the burdens you're going to inflict on him in the litigation. And that's the question. And I think the Court has --

QUESTION: But, Mr. Pincus, isn't there a little difference? And maybe I don't have the case in mind. Isn't this a case in which there are several large companies that are in the business of distributing motion pictures all allegedly got together to accomplish this policy objective? It's not the simple case of a normal single owner of one copyright trying to enforce that copyright. So, the problem is limited to the case in which there's other evidence which might at least be consistent with some kind of an antitrust conspiracy.

MR. PINCUS: Well, although I think in the copyright context, you could premise it just on a single copyright because, as Justice White says, that's a monopoly in itself.

QUESTION: Yes, but --

MR. PINCUS: I mean, here there are efficiencies.

QUESTION: But that's certainly not this case.

MR. PINCUS: There are tremendous efficiencies for copyright holders to use antipiracy committees to enforce their rights because the burden on one copyright holder to do that would be tremendous, and so if the law

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permits --

QUESTION: Well, you -- if you're going to sue a person with a legitimate claim of a copyright infringement, you're always going to be imposing litigation costs on him. That's in -- unless you say, by the way, to avoid a sham claim around here, I'm going to pay your legal bills.

(Laughter.)

MR. PINCUS: Well, Your Honor, I think that's exactly the problem with petitioners' standard is that in every single case --

QUESTION: Well, it sounds just like that's your problem too.

MR. PINCUS: Well, except the only way we can enforce our copyright rights are in court. These -- they're not rights that are enforceable through self-help, and that's why the courts have recognized the special need to allow a forum for legitimate copyright claims. And under petitioners' standard, where subjective intent is the only question, a person with a legitimate -- - stipulated to have legitimate motivation and a winning claim wouldn't know what was going to happen at the end of the day.

QUESTION: Tell me in a copyright case again what would be the -- it wouldn't be the intent to

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monopolize and enforce your copyright that causes the plaintiff any trouble. What is it that's going to cause him some trouble and have the jury decide that it's a sham? What is it? What kind of intent are you talking about?

MR. PINCUS: It's the intent -- well, as the Court put it in City of Columbia, it's the intent to disrupt the defendants in the initial lawsuit, the defendants' business relationships, solely through the litigation process without any regard to prevailing --

QUESTION: Well, I know, but we're talking about a copyright, and he certainly is intending to interfere with the plaintiffs' -- with the defendants' business. That's the whole purpose of this suit.

MR. PINCUS: But only through the burdens of the litigation process and not through the ultimate judgment. That's the distinction that the Court drew in Noerr and that has followed through ever since. Burdens that --

QUESTION: I know, but if you're going to succeed in the case and get a judgment, that burden on the defendant is always going to be there.

MR. PINCUS: I agree, Your Honor. I think that's the problem with -- as exactly as

QUESTION: That's the problem with your test.

MR. PINCUS: No, I don't think it's the problem

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with our test, Your Honor, because I think that the problem -- the Court recognized in Noerr that where there's a mixed motivation, where the intention is to burden the other side through the governmental process, through the outcome of the governmental process, as well as through the process itself, that mixed motivation case is a case that's protected under Noerr. That is what the Court squarely held in Noerr because it was clear in that case that the intention of the lobbying was both to win a victory in the legislature and also through the publicity campaign to directly injure the business of the opposition.

QUESTION: Well, you say also, but before you get to intent under your standard, you have to cross an objective threshold.

MR. PINCUS: Exactly, Your Honor, and we think that -- the reason for that is that when we're weighing the costs and the benefits of the contending standards, as I was saying, the cost in terms of antitrust -- lessening of antitrust enforcement in requiring an objective test is quite low because, as Mr. Coyne said, virtually every case is going to be a mixed motive case. So, there are very few cases out there -- at least every case of a objectively reasonable lawsuit is going to be a mixed motive case. There just aren't that many case out there

of objectively reasonable lawsuits, that --

QUESTION: Especially with the level of legal fees.

MR. PINCUS: Exactly. Certainly instituting lawsuits are not cost-free.

So -- and that's in fact what the evidence bears. There isn't a case that the other side has been able to point to that would come out differently under the court of appeals standard. There just aren't any of these animals out there that we're trying --

QUESTION: Mr. Pincus, can I ask you? I don't know whether -- maybe you're just defending the Ninth Circuit rule. Is there a difference between your test and the Government's test?

MR. PINCUS: Yes. The Government's test is still entirely an ultimate subjective standard. The Government has some presumptions thrown in that would, they say, guide the jury, but the only question in -- if the jury interrogatory is is there no immunity, the only question is subjective intent. There's no question whatever about objective intent -- of objective indicia for the court to make.

In our world, there are two steps. First, the court makes an objective determination of whether -- in this case of whether there was probable cause to support

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the lawsuit. If the court finds probable cause, that's the end of the case. If the court finds no, the suit was baseless, then there's an inquiry into subjective intent. And if the requisite subjective intent is found, the intent only to inflict harm through the process, as opposed to the result, then Noerr immunity doesn't apply and the litigation can be the basis for antitrust liability.

QUESTION: Two -- one. Do you think the Ninth Circuit test would apply to repetitive lawsuits?

MR. PINCUS: Your Honor, I don't think it's clear. I think repetitive lawsuits might well be another kind of objective indicia. I think in defining what conduct satisfied the -- satisfies the objective standard, what we're searching for is a class of objective acts that are inconsistent with legitimate petitioning activity because what we want to do is give people who are engaging in legitimate petitioning activity some certainty that they'll be able to get out of the lawsuit early without being subject to a murky intent standard and discovery.

QUESTION: Mr. Pincus, does rule 11 proscribe lawsuits that are properly conducted, but brought solely to impose litigation costs on the other side?

MR. PINCUS: Rule 11 does have language prohibiting lawsuits with an improper purpose.

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QUESTION: Exactly.

MR. PINCUS: But the courts -- the lower -- it's interesting that the lower courts have interpreted that to permit proof of purpose only through objective misconduct. A number of courts -- and I can cite to the Court the Ninth Circuit's decision in the Townsend case, which is reported at 929 F.2d at 1138. This issue didn't come up in the briefing -- is a case where the court said in order to prevent chill, we're going to only -- we're not going to allow inquiry into the minds of the other side. We're going to look to the objective facts, and if through those objective facts improper purpose can be demonstrated, then we'll impose liability. But they adopt the very kind of objective standard that we're urging in this case and that the Ninth Circuit found in this case, to prevent this murky intent inquiry that will chill legitimate conduct.

QUESTION: I guess we haven't handed down anything on that point.

MR. PINCUS: You -- this Court has not addressed it, but I think the Court's decision in the Harlow case is very instructive because that was a situation in which the Court had, for official immunity, adopted a standard that required -- in order for immunity to apply, both an objective and a subjective test had to be satisfied. Subjective good faith was required. And the Court in

Harlow reformulated the standard precisely because the subjective inquiry was too burdensome and was chilling legitimate conduct, and we think that's exactly why it's the right way to go here because there will be the same kind of chill on legitimate activity.

QUESTION: On the other hand, there isn't a whole lot of social utility in allowing lawsuits for the sole purpose of causing business injury.

MR. PINCUS: Well, Your Honor, but that's not the conduct that's being protected by an objective standard. The conduct that's being projected is the legitimate conduct that is being chilled by the fear of liability.

Maybe I should turn to the chilling.

QUESTION: Before you do, if we agree that mixed motive is a safe harbor, we're really not arguing about a whole lot, are we, because if it is above the baseless level, there will almost always be a mixed motive? I mean, it's hard to imagine a case where you have a good shot at getting a recovery and yet you didn't care at all about it. Your only motive was to get the guy. So, I mean, once you agree that mixed motive is okay, it doesn't make a whole lot of difference whether you say -- go along with you or go along with your opponent except that going along with you forecloses the issue a lot earlier.

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MR. PINCUS: I think it avoids significant burdens on the people with legitimate motives and legitimate claims. And that's exactly what Noerr was designed to do, and that's exactly what the Court's jurisprudence in a host in a First Amendment areas -- for example, in New York Times against Sullivan, the Court required falsity. In other cases, the Court has required falsity and required -- precisely because it wanted to protect truthful, legitimate conduct. And I think that's exactly what's going on here.

But I think you're right, Justice Scalia, and I think to retreat from mixed motive would be a very dramatic change in the Court's jurisprudence in this area because Noerr squarely holds that mixed motives are protected. And I agree with you. Once you say that, that the antitrust enforcement benefits of petitioners' rule are negligible because those animals just don't exist.

QUESTION: May I just ask one other question? Normally, is this the only overt act in furtherance of the alleged conspiracy -- conspiracy alleged in the complaint, the pleadings, bringing the baseless lawsuit?

MR. PINCUS: There were other acts that were alleged, but the Ninth Circuit held that petitioners had not shown antitrust injury as to those, and they didn't seek certiorari as to that determination. So, those are

out of the case.

QUESTION: Of course, it would seem to me most cases in the real world of antitrust litigation -- usually the sham litigation charge is 1 of about 19 things you charge the defendants with. It's kind of rare to say the only antitrust injury that the victim of a price fixing or some other conspiracy suffered is the fact he had to defend a lawsuit. It seems to me you might have one test when it is one of many, many things that are charged against. Then you might say, well, this could increase their damages, but if this is the only incident, it's kind of a strange antitrust case.

MR. PINCUS: I agree with Your Honor.

QUESTION: But that's what this one is, isn't it?

MR. PINCUS: That's what this one is, although I should say even in the cases where there's other conduct, I think there's a danger in inferring bad intent -- what Noerr makes bad intent from anticompetitive -- alleged anticompetitive activity because the anticompetitive intent that supports the other allegations could be perfectly valid intent if the lawsuit -- in the prosecution of a lawsuit. If you're engaging in misconduct because you want to eliminate a competitor and you filed a lawsuit because if you win in the lawsuit,

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you're going to eliminate the competitor, those other acts don't necessarily mean that the lawsuit is being undertaken with bad intent. So, I think there's a danger in mixing those two situations here. But I agree with you. In the present case, it's hard to see the problem.

But let me turn to what I think should be balanced against the -- what I think is a very, very negligible benefit of antitrust enforcement, and that is most significantly the very, very heavy burden that would be imposed on the fundamental right to petition government for redress of grievances. A party with legitimate motives for filing suit, the type of person Noerr seeks to protect, would be chilled from engaging in that conduct for a number of reasons.

As I say, if that prospective plaintiff goes to a lawyer and asks what's going to happen if I file this claim, the lawyer will have to say, well, first of all, you may be met with an antitrust counterclaim. And if you are, under petitioners' standard, the only question is going to be subjective intent, and the jury is going to have to adjudicate that 9 times out of 10 because it will be very hard to prevent discovery.

And the jury's -- the outcome that the jury will reach will be very, very uncertain indeed. Professor Areeda has described the inquiry as a hazardous one

because intent is often a jumble of mixed impulses even if we succeed in identifying the particular human being whose intention is relevant, and that's especially true in the corporate context here where there are many, many decision makers and lots of documents to go through. It's going to be very, very difficult to predict how that determination is going to come out.

And moreover, the chilling effect is amplified here because of the penalties that lie at the end of the road, treble damages and attorneys' fees. And as we note in our brief, the Court has several times said that super-compensatory liability produces a heightened chilling effect on legitimate conduct.

And finally, petitioners' standard will require discovery in every case, and as was discussed earlier, sensitive questions are going to arise about the disclosure of privileged information either because the antitrust plaintiff is going to seek it or because the antitrust defendant is going to be put to the choice of maintaining his privilege and possibly being unable or being disabled from defending against the sham claim or reviewing the privileged information in order to show the legitimate basis for the lawsuit.

QUESTION: In a word or two, can you tell me what the Government's position is and how it differs from

yours?

MR. PINCUS: Certainly, Your Honor. The Government acknowledges that even unsuccessful claims should be protected, but the standard that it proposes is one that is still an ultimate intent standard. And what it basically says is that in deciding what the actual subjective intent of the antitrust defendant is, weight should be given to objective factors, which I don't think is a very surprising conclusion. But at the end of the day, the Government would have intent be the only question. So, we differ --

QUESTION: Would you characterize it as a discovery rule?

MR. PINCUS: Well, I think they haven't proposed any special discovery rule. They've said that the district courts have the power under their current authority to limit discovery.

QUESTION: I mean, is that the way it works out?

MR. PINCUS: I don't think so, Your Honor. I think they think, for example, in this case the pleading was not sufficient to entitle petitioners to discovery. But I think the way it works out for the Government is that there are presumptions that guide the fact finder in determining intent and that those presumptions may also in some cases prevent discovery where all the objective

evidence is on the antisham side of the ledger, that it may be very difficult for an antitrust plaintiff to obtain discovery.

But they rely on the regular apparatus for controlling discovery, and we think that's a very, very uncertain protection for people who are ex ante deciding whether or not to engage in this protected conduct and weighing the potential burdens. You just can't know what's going to happen down the line, whether the district judge is going to cut off discovery or not cut off discovery. It's extremely uncertain.

And we think that really does not provide the sufficient protection as the Court concluded in Harlow and, as I should say, the common law has made clear because the common law analogs, if you will, to this question both require objective indicia before there can be inquiry into subjective intent. Both malicious prosecution and abuse of process require an objective showing for precisely this reason, in order to prevent chilling of misconduct.

Let me just conclude in answering the question about the Government's position that we think their -- the problem is, as I say, their entirely subjective inquiry doesn't provide the protection that a dual objective-subjective inquiry does. And that's the problem with the

rule that they've adopted.

QUESTION: -- subjective inquiry in very many cases.

MR. PINCUS: Well, you will in the cases where the objective standard isn't met, but we think that's --

QUESTION: Well, you don't think -- you think there are really very few -- going to be very few baseless cases.

MR. PINCUS: Well, Your Honor, it's interesting. We did a survey of the cases, and petitioners haven't taken issue with it, that if one looks at the cases in which a sham has been found, even in circuits that have an entirely subjective test, there is invariably objective misconduct accompanying it. So, we don't think that the court of appeals standard is going to cut off or give some immunity to misconduct that's occurring. I think that's a red herring in this case.

Let me conclude. Let me just mention one other thing about the Government's approach because petitioners have argued that they like the Government's subjective test, but they're entitled to discovery. And if that's true, I think that reveals a considerable flaw in the Government's standard because if in this case, where there are no objective indicia of anything but a properly prosecuted lawsuit -- if in this case they're entitled to

discovery, then the Government's protection is not going to be much protection because in every case they're going to be entitled to discovery. The jury is going to make this very, very murky intent determination, and we're going to have very, very substantial chilling of legitimate -- the filing of legitimate lawsuits. And that's exactly what Noerr was designed to prevent.

Unless the Court has any further questions, thank you.

MR. PINCUS: Thank you, Mr. Pincus.

Mr. Coyne, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF PATRICK J. COYNE

ON BEHALF OF THE PETITIONERS

MR. COYNE: Thank you.

The standard that the respondents articulate is far too broad. This Court has not previously adopted. It is the respondents' test that is a radical departure from this Court's holdings in California Motor Transport and Omni Outdoor.

The standard that petitioners urge the Court to adopt would not chill First Amendment rights, at least not legitimate First Amendment rights. The Court looks to subjective intent in a variety of other settings, in the setting of rule 11. As Justice O'Connor pointed out, the rule requires an examination of intent. Chambers v.

Nasco, which the Court decided last term --

QUESTION: Would rule 11 be applied to a victor in the case?

MR. COYNE: I'm sorry?

QUESTION: Would rule 11 be applied to a prevailing party in the case?

MR. COYNE: No, I don't believe it would, Justice Scalia.

QUESTION: But you're arguing for a rule that applies even to the prevailing party.

MR. COYNE: No. I'm saying the antitrust concerns go beyond what is the basis of rule 11.

QUESTION: Whatever reason it is, I mean, you're dealing with a totally different situation when you say that even if you totally win, you can be liable under your theory. Nobody suggested rule 11 would be applied to the prevailing party.

MR. COYNE: Rule --

QUESTION: So, there is an objective component to rule 11. That isn't there.

MR. COYNE: Yes, there is, and rule 11 would not be applied in that setting. But we urge that the issue of sham litigation should be.

Under Chambers v. Nasco last term the Court sanctioned applying attorneys' fees based on subjective

intent. In the abuse of process setting, as Judge Posner pointed out in Grip-Pak, again looking at subjective intent in determining whether abuse of process has occurred. In the patent and copyright area, in Walker Process, again looking to fraud, the intent of the party. There is ample precedent that looking at subjective intent in this area will not chill legitimate First Amendment rights.

The but-for standard that petitioners urge is workable. It provides full protection for the full extent of exercise of legitimate First Amendment rights. However, unlike respondents' test, it doesn't go any broader than it needs to.

Finally, it does vindicate competition policy. These are important concerns of competition policy that the Court should be looking at. It goes far beyond the standard of rule 11.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Coyne.

The case is submitted.

(Whereupon, at 1:56 p.m., the case in the above-entitled matter was submitted.)

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BY Lynn M. May

(REPORTER)