KILPATRICK TOWNSEND

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UPDATE - Balancing Hatch Waxman and the Sham Litigation Exception

by Cynthia B. Rothschild , April Abele Isaacson

As previously reported on March 31, 2021, AbbVie Inc. has petitioned the U.S. Supreme Court for a writ of certiorari to review the Third Circuit's ruling [1] determining the biopharma company's patent infringement suit was a sham litigation. Petitioners argue the Third Circuit's decision effectively nullifies the subjective prong of the *Noerr-Pennington* doctrine's sham litigation exception. The *Noerr-Pennington* doctrine allows litigants to petition the government for redress of grievances, including by litigating against a competitor without fear of antitrust liability and attendant treble damages. This immunity does not, however, extend to suits filed simply to harass a competitor, i.e., as a sham litigation. The test for identifying sham suits requires a plaintiff prove: (1) the challenged lawsuit was objectively baseless; and (2) the antitrust defendant was subjectively motivated by an improper purpose in bringing the challenged suit.[2]

In separate amicus briefs, the U.S. Chamber of Commerce, patent law professors and trade groups, The Pharmaceutical Research and Manufacturers of America (PhRMA) and The Biotechnology Innovation Organization (BIO), back AbbVie's petition for a writ of certiorari. The Chamber of Congress argues the Third Circuit improperly conflated the objective and subjective prongs of the test by allowing "*satisfaction* of the first prong to satisfy *proof* of the second: subjective intent,"[3] and emphasized the importance of ensuring the sham exception is not used to "swallow *Noerr-Pennington* immunity."[4] The brief further argues that the *Noerr-Pennington* doctrine is important not just for civil litigation, but protects petitioning the government through administrative proceedings.[5]

The law professors argue that the Third Circuit "inferr[ed] subjective bad faith from a finding of objective baselessness" which threatens innovators' property rights and is an "attempt by the FTC to dictate that so-called 'reverse-payment' settlement agreements . . . are necessarily anti-competitive." [6] The law professors argue the approach adopted by the Third Circuit is "particularly ill suited in the context of the Hatch-Waxman Act"[7] and will discourage pharmaceutical innovation and negatively affect patent litigation and settlement agreements.

Similarly, PhRMA and BIO argue the Court of Appeals' ruling will chill innovation in the biopharmaceutical industry[8] and the decision would deter patent owners from relying on the Hatch-Waxman Act to protect patent rights.[9] Please contact the authors with any questions and stay tuned for updates regarding this important topic.

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Footnotes

[1] FTC v. AbbVie Inc., 976 F.3d 327 (3d Cir. 2020), *petition for cert. docketed*, No. 20-1293 (3d Cir. Mar. 18, 2021).

[2] Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61 (1993).

[3] Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioners at 5, AbbVie Inc. v. FTC, No. 20-1293 (3d Cir. Apr. 19, 2021).

[4] *Id.* at 3.

[5] *Id.* at 7.

[6] Brief of *Amici Curiae* Law Professors in Support of Petition for a Wirt of Ceriorari at 2, AbbVie Inc. v. FTC, No. 20-1293 (3d Cir. Apr. 19, 2021).

[7] *Id.* at 3.

[8] Brief for the Pharmaceutical Research and Manufacturers of America and Biotechnology Innovation Organization as *Amicus Curiae* in Support of Petition for a Writ of Certiorari at 3-5, AbbVie Inc. v. FTC, No. 20-1293 (3d Cir. Apr. 19, 2021).

[9] *Id.* at 8-10.