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1974 (“ERISA”).⁶⁷⁰ The fund administrator argued that Rule 64 triggered ERISA’s own anti-abridgment rule.⁶⁷¹ Citing the Rules Enabling Act’s anti-abridgment provision, the court held that “[i]f [the administrator’s] argument were correct, the upshot would be to give birth to a new, independent cause of action,”⁶⁷² which “would obviously affect substantive rights and thus alter substantive law” in contravention of the Rules Enabling Act.⁶⁷³ If the Federal Rules cannot trigger a federal statute’s “anti-abridgment” provision, it would certainly seem that they cannot trigger the antitrust laws’ immunity doctrines.⁶⁷⁴

⁶⁷⁰ 29 U.S.C. § 1001 et seq. (1994).

⁶⁷¹ ERISA’s anti-abridgment rule is found at section 514(d), 29 U.S.C. § 1144(d) (1994), which provides that ERISA shall not “be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law.”

⁶⁷² *McCoy*, 950 F.2d at 21.

⁶⁷³ *Id.* at 21. Other cases have similarly held that no federal cause of action arises from the violation of the Federal Rules of Civil Procedure, because to do so would enlarge substantive rights in violation of the Rules Enabling Act. See *Port Drum Co. v. Umphrey*, 852 F.2d 148 (5th Cir. 1988) (Rule 11); *Rogers v. Furlow*, 729 F. Supp. 657 (D. Minn. 1989) (Rule 35).

⁶⁷⁴ *McCoy* is consistent with the views of commentators who see a primary purpose of the Rules Enabling Act as regulating the allocation of power between the Supreme Court and Congress. See Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 *Notre Dame L. Rev.* 693, 700 (1988) (arguing that “there can be no doubt that the major purpose of those who wrote and defended the bill that became the Enabling Act was to allocate power to make federal law prospectively between the Supreme Court as rulemaker and Congress”); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 *U. Pa. L. Rev.* 1015, 1106 (1982) (“Nothing could be clearer from the pre-1934 history of the Rules Enabling Act than that the procedure/substance dichotomy in the first two sentences was intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress.”); Karen N. Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 *Hastings L.J.* 1039, 1043 (1993) (agreeing with Professor Burbank’s historical argument “that the major purpose of the limiting language in the Rules Enabling Act was to confine the Court to the procedural arena and restrain it from making substantive law, which was to remain the prerogative of Congress”); Note, *The Conflict Between Rule 68 and the Civil Rights Attorney’s Fees Statute: Reinterpreting the Rules Enabling Act*, 98 *Harv. L. Rev.* 828, 834-35 (1985) (“The real purpose of the Enabling Act—allocating power between the Court and Congress—dictates that the Court not exercise its rulemaking authority to nullify ‘important’ statutorily created rights.”).

The Supreme Court, however, has interpreted the Rules Enabling Act largely in the context of diversity cases, in which the conflict between a Federal Rule and some state rule, law, or practice raised federalism concerns. See *Hanna v. Plumer*, 380 U.S. 460 (1965); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941). Moreover, in *West v. Conrail*, 481 U.S. 35 (1987), the Court ignored the Rules Enabling Act in holding that when a

Some might argue that this interpretation of the Rules Enabling Act renders all class actions suspect because they inevitably abridge substantive rights under the antitrust laws by regulating how lawyers and others must conduct themselves in litigation, i.e., how participants in the system may compete. This argument misperceives the role of the Federal Rules of Civil Procedure. The Rules are a regulatory system. They regulate the rights of litigants in federal court. More important for our purposes, they regulate the conduct of lawyers in litigation. They tell lawyers what papers to file, what deadlines to meet, what motions to make, and so on. The Rules may incidentally affect various markets, even the market for lawyers, as long as the primary purpose of any Rule is to regulate litigation activity.

In this sense the Rules are like the zoning laws at issue in *City of Columbia v. Omni Outdoor Advertising*.⁶⁷⁵ They restrict access to, and use of, the federal courts just as zoning laws restrict access to, and use of, land. Just as access to land is necessary for the provision of various goods and services, so access to litigation in federal court is necessary for the provision of various services.

Rule 23 restricts the right of people to bring suits individually in federal court by allowing these suits to be combined. But class actions are not antitrust violations. They “abridge” procedural rights which are themselves defined by the Rules in the first instance. Rule 23, like all the other Rules, is intended to further the fair and orderly administration of justice in the federal courts. With that aim it modifies to some extent the right to bring an individual suit, which is a right delineated by the other Federal Rules of Civil Procedure. It is just one in a series of restrictions on access to the courts that together make up the Rules, an overall scheme of regulated access akin to zoning regulation and no more violative of substantive antitrust rights than zoning laws are.

federal court must borrow a statute of limitations from another federal statute, Rule 3 determines whether an action has been commenced within the borrowed limitations period, and so is not barred. *Id.* at 39. Although it is possible to read these decisions as rendering the Rules Enabling Act irrelevant in federal question cases, we have difficulty seeing how such a reading is either necessary to these cases or compatible with the language and intent of the statute.

⁶⁷⁵ 499 U.S. 365 (1991).

On the other hand, as we argued above, the market for lawyer services in a private administrative system is not the same as the market for litigation in federal court. That does not mean that a court lacks the authority to approve a class action settlement that has effects in a market outside of litigation in federal court. Rather, it means that other law can regulate these effects. Thus, when a court approves a settlement that regulates lawyer fees outside of litigation in federal court, the validity of that provision of the settlement under the antitrust laws cannot, under the Rules Enabling Act, depend on the fact that the court approved it.

The question of class counsel fees is only slightly harder. Rule 23 allows the court to approve class counsel and set class counsel's fee. Moreover, Rule 23 does not require the court to adopt any particular method for appointing class counsel and setting fees, such as Judge Walker's auction method discussed above.⁶⁷⁶ These decisions by the court affect procedural rights; they regulate by restricting access to the court.⁶⁷⁷ But the court's approval cannot abridge the substantive right of competing lawyers and consumers to be free from collusion outside of litigation. If court reporters collude to fix prices, the fact that the court chooses one and pays the price does not immunize the conduct. If one lawyer breaks the knees of another and renders her unavailable to be class counsel, the court's appointment of the first lawyer to be class counsel does not immunize the wrongful conduct from prosecution. Similarly, if lawyers collude to rotate class counsel appointments, the court's appointment of the anointed lawyers cannot, under the Rules Enabling Act, immunize the anticompetitive conduct from antitrust scrutiny.

⁶⁷⁶ See *supra* notes 148-152 and accompanying text.

⁶⁷⁷ Some commentators have suggested that any judicial rulemaking on fees violates the Rules Enabling Act because it affects substantive rights. See Resnik, Curtis & Hensler, *supra* note 14, at 296, 328 n.99 (1996). Whatever the merits of that position, the argument we are making here does not depend on its acceptance.

D. Nor is it Noerr

Under the doctrine established in *Eastern R.R. Presidents Conference v. Noerr Motor Freight*,⁶⁷⁸ private efforts to restrain trade by petitioning government officials are generally immune from antitrust liability.⁶⁷⁹ The immunity applies whether the private actors petition the legislature, courts or administrative agencies.⁶⁸⁰ Lawyers involved in anticompetitive conduct in seeking appointment as class counsel or in drafting class action settlements might claim that their submission of proposals to the court for approval constitute petitions to the government immune from the antitrust laws. Such a claim is untenable, however, in light of the purposes of the *Noerr* doctrine.

In *Noerr*, the Court unanimously held that “the Sherman Act does not prohibit . . . persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.”⁶⁸¹ The immunity applies despite any anticompetitive purpose the private actors might have,⁶⁸² despite (at least in the legislative arena) any deceptive or unethical practices the private actors might use⁶⁸³ and despite any “incidental” anticompetitive effects the private actors might “directly” cause.⁶⁸⁴ The *Noerr* Court gave two reasons justifying this immunity. First, it found that applying the antitrust laws to “political activity” through which “the people . . . freely inform the government of their wishes” would “substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade,” a result that Congress did not intend.⁶⁸⁵ In this sense, petitioning immunity is deriva-

⁶⁷⁸ 365 U.S. 127 (1961).

⁶⁷⁹ *Id.* at 136.

⁶⁸⁰ *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

⁶⁸¹ *Noerr*, 365 U.S. at 136.

⁶⁸² *Id.* at 138-40. The Court reaffirmed that anticompetitive intent alone is insufficient to defeat *Noerr* immunity in *Professional Real Estate Invs. v. Columbia Pictures Indus.*, 508 U.S. 49, 55-60 (1993).

⁶⁸³ *Noerr*, 365 U.S. at 140-41 (Although the means used by defendants was “one which falls far short of the ethical standards generally approved in this country,” this did not affect the determination of whether the activity constituted an antitrust violation.).

⁶⁸⁴ *Id.* at 142-44.

⁶⁸⁵ *Id.* at 137.

tive of state action and federal regulatory immunity.⁶⁸⁶ Second, the Court sought to avoid an interpretation of congressional intent that could result in a clash between the value of competition underlying the antitrust laws and the value of political participation underlying the First Amendment's right to petition.⁶⁸⁷

Noerr recognized one exception to petitioning immunity: the "sham" exception. The Court stated that there would be no immunity when petitioning activity, "ostensibly directed toward influencing government action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."⁶⁸⁸ The Court declined to apply the exception it had recognized on the facts in *Noerr* itself. The fact that a publicity campaign by railroads seeking legislation harmful to truckers was "not only genuine but also highly successful," demonstrated for the Court that the railroads' efforts were genuine, not a sham for cover.⁶⁸⁹

The Court now interprets the sham exception quite narrowly. It has defined sham activity, "in whatever forum," as "private action that is not genuinely aimed at procuring favorable government action."⁶⁹⁰ In practical terms, this means that the sham exception can apply only when the alleged restraint is the act of petitioning itself and not the result of that petitioning; that is, sham activity must involve the "use [of] the governmental process—as opposed to the *outcome* of that process—as an anti-competitive weapon."⁶⁹¹

In *California Motor Transport*, the Court held that the sham exception applied to a complaint alleging that a group of truckers filed repeated objections to competitors' license applications before an administrative agency "with or without probable

⁶⁸⁶ The *Noerr* Court in fact cited *Parker v. Brown*, 317 U.S. 341 (1943), twice, emphasizing the link the Court saw between the doctrines. *Noerr*, 365 U.S. at 136 n.15, 137 n.17.

⁶⁸⁷ *Id.* at 138.

⁶⁸⁸ *Id.* at 144.

⁶⁸⁹ *Id.* at 144.

⁶⁹⁰ *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500 n.4 (1988). The Court rejected a broader definition of sham activity as conduct by one "who 'genuinely seeks to achieve his governmental result, but does so *through improper means*.'" *Id.* at 508 n.10 (quoting *Sessions Tank Liners v. Joor Mfg.*, 827 F.2d 458, 465 n.5 (1987)).

⁶⁹¹ *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 380 (1991).

cause, and regardless of the merits of the cases.”⁶⁹² Although the Court stressed the truckers’ improper purpose to deny their competitors meaningful access to governmental entities,⁶⁹³ its more recent view of the case is that the truckers could not reasonably have expected their filings to produce a result favorable to them.⁶⁹⁴ In *Professional Real Estate*, the Court confirmed this newer and more restrictive understanding of the sham exception, holding that litigation could not be deemed a sham unless the lawsuit is “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.”⁶⁹⁵

Under this definition of sham, class action lawyers who seek court approval of a fee arrangement or settlement are not engaging in sham activity. Though their intentions might be to exclude competitors, they are genuinely seeking the “outcome” of the governmental process, namely, court approval. And assuming that the *Professional Real Estate* standard would apply to court approvals of class action settlements, the lawyers’ petitions would almost never be “objectively baseless” in the sense that they could not realistically expect the court to approve the settlement.

⁶⁹² *California Motor Transport*, 404 U.S. at 512.

⁶⁹³ *Id.* at 512 (noting that the truckers had “sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process” and referring to the truckers’ “purpose to deprive . . . competitors of meaningful access to the agencies and courts”).

⁶⁹⁴ See *Omni*, 499 U.S. at 380-82. “A classic example [of a ‘sham’] is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay.” *Id.* at 380 (citing *California Motor Transport*). In *Omni*, the Court limited *California Motor Transport* to its facts, *id.* at 382, and held that the denial of “‘meaningful access to the appropriate city administrative and legislative fora’” might “render the manner of lobbying improper or even unlawful, but does not necessarily render it a ‘sham.’” *Omni*, 499 U.S. at 381.

⁶⁹⁵ *Professional Real Estate*, 508 U.S. at 60. This rule is actually somewhat inconsistent with *California Motor Transport* in that the defendants in that case had actually prevailed in over half the cases filed. See Einer Elhauge, Making Sense of Antitrust Petitioning Immunity, 80 Cal. L. Rev. 1177, 1184 (1992). Professor Elhauge harmonizes the two cases somewhat by asserting that, although the defendants won 21 of 40 cases, “the crux of the complaint was that the defendants were instigating litigation automatically, without regard to whether the litigation had merit or not.” *Id.* This, however, does not fully answer the inconsistency that most of the cases filed in *California Motor Transport* were probably not “objectively baseless” under the rule of *Professional Real Estate*.

The narrow “sham” exception is not, however, the only way around *Noerr*—a fact the Court has explicitly recognized.⁶⁹⁶ The sham exception now applies only to conduct that is anticompetitive solely because it abuses some government process. But what if private parties engage in conduct that is anticompetitive apart from any government action, and seek to use government endorsement of that conduct to cloak the private conduct in petitioning immunity? The Court has held in two recent cases that even though such conduct does not qualify as “sham” petitioning, *Noerr* immunity does not apply.

In the first case, *Allied Tube & Conduit Corporation v. Indian Head*,⁶⁹⁷ steel conduit makers stacked a meeting of the National Fire Protection Association, a private standard-setting association, to defeat the approval of rival plastic conduit for inclusion in the group’s National Electric Code.⁶⁹⁸ The Court held that this activity was not immune from antitrust liability, despite the fact that the association regularly submitted the code to state legislatures and local governments, which routinely adopted it with little or no change. The Court first held that the source of the restraint was “private action,” because it was “imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition.”⁶⁹⁹ Next, the Court decided that the essential character of the conduct was not political, but rather that it was “commercial activity that has traditionally had its validity determined by the antitrust laws.”⁷⁰⁰ The steel conduit makers and their supporters were “economically interested part[ies] exercis[ing] decisionmaking authority.”⁷⁰¹ Finally, the Court noted that the defendants “can, with full antitrust immunity, engage in concerted efforts to influence . . . governments through direct

⁶⁹⁶ See *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 503 (1988) (noting that although the sham exception does not apply, “[w]e cannot agree with [the] absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action.”).

⁶⁹⁷ 486 U.S. 492 (1988).

⁶⁹⁸ *Id.* at 495-97.

⁶⁹⁹ *Id.* at 502.

⁷⁰⁰ *Id.* at 505.

⁷⁰¹ *Id.* at 509.

lobbying, publicity campaigns, and other traditional avenues of political expression.”⁷⁰²

The second case, *Federal Trade Commission v. Superior Court Trial Lawyers Association*,⁷⁰³ involved what was essentially a strike for higher wages by court-appointed lawyers representing indigent criminal defendants in Washington, D.C.⁷⁰⁴ Holding the lawyers’ conduct to be a per se illegal boycott,⁷⁰⁵ the Court rejected the lawyers’ claim to *Noerr* immunity in three short sentences. The Court stated that

in the *Noerr* case the alleged restraint of trade was the intended *consequence* of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation. The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted. In *Noerr*, the desired legislation

⁷⁰² Id. at 510.

⁷⁰³ 493 U.S. 411 (1990).

⁷⁰⁴ Id. at 414-18. Section 6 of the Clayton Act states:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Clayton Act, ch. 323, § 6, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 17 (1994)).

Section 20 of the Clayton Act provides:

No restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employees, . . . involving, or growing out of, a dispute concerning terms and conditions of employment . . .

And no such restraining order or injunction shall prohibit any . . . persons, . . . in concert, from . . . ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; . . . nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Clayton Act, ch. 323, § 20, 38 Stat. 738 (1914) (current version at 29 U.S.C. § 52) These statutes represent the so-called “statutory labor exemption” from the antitrust laws. Hovenkamp, *supra* note 136, § 19.7, at 662. The lawyers did not try to argue that they qualified for this exemption. See *Superior Court Trial Lawyers Ass’n v. Federal Trade Comm’n*, 856 F.2d 226, 230 n.6 (D.C. Cir 1988). See also 1 Phillip Areeda & Donald F. Turner, *Antitrust Law* § 229c, at 195-98 (1978) (focus of Clayton Act only on bona fide labor organizations and not on independent contractors or entrepreneurs).

⁷⁰⁵ *Trial Lawyers*, 493 U.S. at 422-23.

would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.⁷⁰⁶

In the remainder of the opinion, the Court rejected the lawyers' argument that their boycott deserved First Amendment protection because it was "political" and contained an "expressive component."⁷⁰⁷

Allied Tube and *Trial Lawyers* stand for exactly the same proposition for which we have argued the state action and federal regulatory immunity cases stand: namely, that private anticompetitive conduct does not become immunized from antitrust liability simply because a governmental entity approves the result of that conduct. Both *Allied Tube* and *Trial Lawyers* involved private anticompetitive conduct that was separable from petitioning conduct—"private" in the sense that the conspirators had a financial interest in restraining competition but no public authority to do so; "separable" in the sense that the anticompetitive conduct could be punished without at the same time punishing the type of petitioning that *Noerr* seeks to protect.⁷⁰⁸ In *Allied Tube*, the Court condemned the steel conduit makers' self-interested corruption of a standard-setting association's decisionmaking process. As the Court noted, the steel conduit makers could lobby all they wanted for a statute banning plastic conduit.⁷⁰⁹ In *Trial Lawyers*, the Court condemned lawyers'

⁷⁰⁶ *Id.* at 424-25.

⁷⁰⁷ *Id.* at 429-32. The Court finally concluded that:

In sum, there is thus nothing unique about the 'expressive component' of respondents' boycott. A rule that requires courts to apply the antitrust laws 'prudently and with sensitivity' whenever an economic boycott has an 'expressive component' would create a gaping hole in the fabric of those laws. Respondents' boycott thus has no special characteristics meriting an exemption from the *per se* rules of antitrust law.

Id. at 431-32.

⁷⁰⁸ The source of this notion of "separability" is *Noerr* itself, in which the Court rejected the argument that an antitrust plaintiff could recover for "direct injury" that was an "incidental effect" of petitioning because holding the conduct causing the direct injury to be unlawful would "be tantamount to outlawing" the petitioning activity itself. *Noerr*, 365 U.S. at 143-44. Thus, as long as subjecting specific anticompetitive activities to the antitrust laws would not "be tantamount to outlawing" petitioning activity, *Noerr* does not stand in the way of the antitrust claim.

⁷⁰⁹ *Allied Tube*, 486 U.S. at 510 ("Petitioner . . . can, with full antitrust immunity, engage in concerted efforts to influence . . . governments through direct lobbying, publicity campaigns, and other traditional avenues of political expression.").

concerted refusal to deal, which served their private financial interests. Nothing prevented the lawyers from lobbying to their hearts' content for higher wages. Thus, in neither case were the defendants punished for asking for something from the government; they were punished for doing something other than petitioning. The power to petition remained in both cases.

In this crucial respect, anticompetitive lawyer conduct in class actions strongly resembles the conduct at issue in *Allied Tube* and *Trial Lawyers*. Lawyers who rig bids in vying for the position of class counsel, and lawyers who write class action settlement agreements containing fee caps and other restraints, are economically interested actors engaging in anticompetitive conduct that is separable from petitioning activity. Condemning such activity would do nothing to hinder the ability of such lawyers to lobby state legislatures or Congress, or even supreme courts with rulemaking authority, for exactly the same types of anticompetitive restraints.⁷¹⁰

The fact that the lawyers' self-interested activity affects petitioning activity that is protected under *Noerr*—the filing and litigating of class action lawsuits—does not in itself establish *Noerr* immunity. In *Allied Tube*, the fact that the steel conduit makers' self-interested activity affected the standard-setting association's code—the submission of which to state legislatures was protected under *Noerr*—was likewise insufficient. And in *Trial Lawyers*, the fact that the lawyers' self-interested activity affected the representation of indigent criminal defendants in court—certainly protected activity under *Noerr*—was also insufficient. In effect, *Allied Tube* and *Trial Lawyers* establish a kind of “*Noerr* standing” requirement. The steel conduit makers could not usurp the petitioning rights belonging to the standard-setting association by corrupting the association's decisionmaking process. The trial lawyers could not assert the constitutional rights of their clients to justify self-interested behavior that was at best imperfectly correlated with the clients' interests. Simi-

⁷¹⁰ For example, if class action lawyers prevailed upon a bar association to lobby for a change in the state's Rules of Professional Conduct that permitted such restraints, this activity would be fully protected by *Noerr*. See *Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1383 (7th Cir. 1992), cert. denied, 510 U.S. 992 (1993) (citing *Allied Tube*, 486 U.S. at 499, for the proposition that “those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint”).

larly, class action lawyers cannot piggy-back on their clients' petitioning rights to justify self-interested behavior. Moreover, these lawyers are exercising decisionmaking authority in a way that corrupts the procompetitive benefits of class actions (the amalgamation of small claims that could not be brought individually), just as the steel conduit makers exercised their ability to affect the decisionmaking process to corrupt the procompetitive benefits of private standard-setting associations.

There are, of course, differences between anticompetitive conduct in class actions and the conduct at issue in *Allied Tube* and *Trial Lawyers*. In particular, in *Allied Tube* and *Trial Lawyers*, the private restraint preceded, and caused harm independent from, the government action. In *Allied Tube*, the exclusion of plastic conduit from the National Electric Code preceded legislative approval of the code, and caused immediate, independent harm by stigmatizing plastic conduit. In fact, the Court decided the case based on the court of appeals' judgment that the plaintiff "did *not* seek redress for any injury arising from the adoption of the [Code] by the various governments,"⁷¹¹ but merely for damages arising from the stigma that the restraint caused in states that allowed the plaintiff's product to be used. In *Trial Lawyers*, the boycott preceded the government's acceptance of higher wages, and caused immediate, independent harm by disrupting the normal functioning of the criminal defense system.⁷¹²

⁷¹¹ *Allied Tube*, 486 U.S. at 498 n.2 (quoting *Allied Tube*, 817 F.2d 938, 941 n.3 (1987) [bracketed text and emphasis in original]. See also *id.* at 500 (noting that "no damages were imposed for the incorporation of th[e] Code by any government"); *id.* at 502 (referring to petitioner's argument that "the effect that exclusion [from the code] had of its own force in the marketplace [was] incidental to a valid effort to influence government action"); *id.* at 509-10 (holding that "where, as here, an economically interested party exercise decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace").

⁷¹² *Trial Lawyers*, 493 U.S. at 418.

Within 10 days, the key figures in the District's criminal justice system 'became convinced that the system was on the brink of collapse because of the refusal of CJA lawyers to take on new cases.' [Shortly thereafter,] they hand-delivered a letter to the Mayor describing why the situation was expected to 'reach a crisis point' by early the next week and urging the immediate enactment of a bill increas[ing] all CJA rates"

Id. at 418.

In the class action situation, by contrast, the alleged anticompetitive harm does not precede governmental action and does not cause harm independent of the governmental action. In general, neither the charging of class counsel fees nor the charging of fees under the private administrative system occurs without court approval.⁷¹³

In our view, these differences are not sufficient to create immunity in the class action context. Although the Court in *Allied Tube* emphasized that the only injury for which the plaintiff recovered was the stigmatizing effect of the defendant's anticompetitive conduct in states that had not adopted the code, much of the Court's reasoning is consistent with allowing damages even in states that had adopted the code.⁷¹⁴ Even if the Court intended to suggest it would not allow damages in states that had adopted the code, such a judgment might stem, not from *Noerr*, but from the fact that there would be serious difficulties trying to separate out damages caused by valid government action—the adoption of the code—from damages caused by the private action. But the more passive the government's role, the easier it would be to make this separation, because the chances are greater that, but for the anticompetitive private conduct, the government's action would be different.⁷¹⁵ Govern-

⁷¹³ In *Georgine*, the class action defendants were “operating to settle claims under the terms of the Stipulation” some seven months before the court approved the settlement agreement. *Georgine*, 157 F.R.D. at 286. Moreover, side agreements between the defendants and class counsel purported to bind class counsel to critical terms of the settlement regardless of court approval. See Koniak, *supra* note 15, at 1128-36.

⁷¹⁴ E.g., *Allied Tube*, 486 U.S. at 502 (“But where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action.”); *id.* at 505 (noting that “the context and nature of petitioner’s activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves”); *id.* at 507 (“Although one could reason backwards from the legislative impact of the Code to the conclusion that the conduct at issue here is ‘political,’ we think that, given the context and nature of the conduct, it can more aptly be characterized as commercial activity with a political impact.”).

⁷¹⁵ Professor Hovenkamp posits the following hypothetical variation on *Allied Tube*. Suppose all state legislatures simply adopted the code pursuant to statutes that said: “the standard for electric installations in this state is that promulgated by the National Fire Protection Association.” Hovenkamp, *supra* note 136, § 18.5, at 647. He writes:

The question then becomes whether those private market participants engaged

ment is at its most passive when its role is simply to evaluate private agreements. The fact that in *Allied Tube* the Court favorably cited *Pennsylvania R.R.*⁷¹⁶ suggests that *Noerr* does not bar suits when the government simply acts to approve private conduct.

As for the *Trial Lawyers* case, although the reasoning in that opinion does seem to emphasize the anticompetitive effect of the boycott before the government acted, it is hard to believe that the Court intended to suggest that such an independent effect is necessary when the government is buying goods and services,⁷¹⁷ as it is effectively doing in the *Oracle*-type bid rigging

in standard setting or rule making have a kind of "fiduciary duty" to the public—and, if so, whether the duty is to be enforced by the antitrust laws. As the degree of government abdication grows stronger, so does the case for denying *Noerr* immunity. . . . In [the hypothetical case posed above], corruption of the NFPA that results in the exclusion of plastic conduit should not enjoy *Noerr* immunity even if the injury results entirely from subsequent government "enactment" of the NFPA standard. The government's "pre-commitment" has effectively made its act nothing more than ministerial.

Hovenkamp, *supra* note 136, § 18.5, at 647. But cf. *Massachusetts School of Law v. American Bar Ass'n*, 937 F. Supp. 435 (E.D. Pa. 1996) (suit by law school denied ABA accreditation barred by *Noerr* on the ground that the only injury to the school stemmed from state statutes allowing only graduates from ABA-accredited schools to sit for their bar examinations). Professor Hovenkamp does not argue that reason for reduced *Noerr* protection in the "government abdication" case is that it would be easier to prove causation and damages, but that is one possible justification for his view. Whatever the justification, however, we note that Professor Hovenkamp's argument would have particular force for lawyers who engage in "rule making" in class action settlements, as these lawyers certainly owe a "fiduciary duty" to the class and face, in the form of the high settlement approval rate, a high degree of "government abdication."

⁷¹⁶ *Allied Tube*, 486 U.S. at 503. See also *id.* at 508 n.10 (stating that "the types of activity we describe *supra*, at 503-504, could not be immune under *Noerr*"). Of course, *Noerr* had not yet been decided at the time *Pennsylvania R.R.* was decided. But nothing in *Noerr* suggests the Court meant to cast any doubt on any of its prior cases. The citation of *Pennsylvania R.R.* in *Allied Tube* merely confirms this point.

⁷¹⁷ It is also hard to believe the Court meant what it said in *Trial Lawyers* when it said that the boycott "would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted." *Trial Lawyers*, 493 U.S. at 425. If by "that period," the Court meant the fixed number of days the boycott actually lasted, the statement is technically true, but misleading. If no legislation had been enacted, or if legislation unsatisfactory to the lawyers had been enacted, the boycott might have lasted longer, resulting in additional anticompetitive consequences. More important, the Court found that "[i]n *Noerr*, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint." *Id.* at

situation. If such an independent effect were necessary, the government could never sue for damages for price fixing against the government. But the Clayton Act specifically contemplates such an action.⁷¹⁸

But even if the fact that the restraint preceded, and was independent from, governmental action really did matter in *Allied Tube* and *Trial Lawyers*, this fact should not matter in the class action context. In *Allied Tube* and *Trial Lawyers*, the defendants directed their alleged petitioning activity to legislative bodies,⁷¹⁹ which traditionally have enjoyed the strongest degree of *Noerr* immunity.⁷²⁰ More important, in both cases, the relevant legislative body enacted legislation that enjoyed state action immunity. This fact provides an additional explanation of why the Court seemed to take pains in the two cases to separate the private conduct from the government conduct.⁷²¹

In the class action context, however, the problem the Court implicitly recognized in *Allied Tube* and *Trial Lawyers* does not exist. Lawyers in class actions are not seeking anticompetitive legislation or rulemaking; they seek approval of private conduct from a court acting in a quasi-administrative capacity. We have already demonstrated why court approval in this context confers neither state action nor federal regulatory immunity. Thus, if

425. Again, the Court's statement is a little misleading, because if, as the Court acknowledged later in the opinion, the lawyers were engaged in price fixing, the government action did not end the restraint (though it did end the boycott); rather, the governmental action adopted the restraint, namely the higher wages.

⁷¹⁸ Clayton Act, § 4A, 15 U.S.C. § 15a. Professor Hovenkamp argues that *Trial Lawyers* would not have come out any differently if the restraint had not occurred until the government acted. He sees the case as an example of the government as purchaser, and suggests that if a group of sellers to the government agreed to fix prices or engage in predatory pricing against competitors, *Noerr* immunity would not attach despite the fact that no private injury precedes the government decision. See Hovenkamp, *supra* note 136, § 18.2b, at 634-35.

⁷¹⁹ In *Trial Lawyers*, the lawyers were seeking to amend the District of Columbia Criminal Justice Act, D.C. Code Ann. § 11-2601 et seq. (1981), which, *inter alia*, set the fees for court-appointed lawyers representing indigent criminal defendants. *Trial Lawyers*, 493 U.S. at 414-17.

⁷²⁰ See *infra* note 730.

⁷²¹ The lack of state action rationale also provides an alternative justification for Professor Hovenkamp's hypothetical discussed *supra* note 715. In his hypothetical, "government abdication" could be interpreted as "lack of active supervision," which means that the state action doctrine would not apply. In fact, *Allied Tube* itself could be viewed as a "lack of active supervision" case.

the difference between *Allied Tube* and *Trial Lawyers* and the class action context means anything, it cuts in favor of denying *Noerr* immunity in the class action context, not against it.

It is true that the Court has never explicitly decided whether *Noerr* immunity applies when private conduct separate from the use of governmental processes is the source of the restraint, and when the government approval of that conduct does not result in state action or federal regulatory immunity.⁷²² There can be little doubt, however, that *Noerr* immunity does not and should not apply in such cases. If it did, most of the cases denying state action or federal regulatory immunity would essentially mean nothing. In most of those cases,⁷²³ the defendants “petitioned” an agency to take some action. The cases implicitly assume that once the governmental immunity claim was defeated, no further immunity related to the government action could bar the antitrust claim.⁷²⁴ Moreover, the statements the

⁷²² It is important to note that we are not talking about cases in which the only private anticompetitive conduct alleged is the petitioning activity itself. In such cases, courts have held that the mere fact that the governmental action is not protected under the state action doctrine does not deprive the petitioning conduct of *Noerr* immunity, unless the sham exception applies. Using the antitrust laws to punish such conduct would threaten the type of petitioning activity *Noerr* sought to protect. See Hovenkamp, *supra* note 136, § 18.3e, at 644-45.

⁷²³ See, e.g., *Federal Trade Comm’n v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992) (no state action immunity protection for private price-fixing arrangement where title insurance rates become effective only in not rejected by the agency within a set time); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (denying state-action immunity claim that state regulation of public utilities authorizes monopolization in the market for electric light bulbs); *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963) (no federal regulatory immunity where proposed merger requiring approval was approved by Comptroller of the Currency); *California v. Federal Power Comm’n*, 369 U.S. 482 (1962) (no federal regulatory immunity for merger approved by Federal Power Commission where statutory grant of authority did not allow commission to enforce antitrust laws); *United States v. Radio Corp. of Am.*, 358 U.S. 334 (1959) (no federal regulatory immunity for exchange of television stations approved by Federal Communications Commission where legislative history revealed that Commission approval was not intended to prevent enforcement of antitrust laws); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945) (denying federal regulatory immunity claim that authority to fix joint through-rates with other carriers allows conspiracy and coercion in the fixing of those rates).

⁷²⁴ In the words of one court of appeals, “[i]f extensive substantive regulation does not warrant an antitrust exemption, then surely an essentially procedural aspect of regulation—tariff filing—cannot.” *Litton Systems v. American Tel. & Tel. Co.*, 700 F.2d 785, 807 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984). The court went on to state that “AT&T cannot cloak its actions in *Noerr-Pennington* immunity simply

Court has made are consistent with the notion that no *Noerr* immunity attaches when agency approval of private conduct does not create state action or federal regulatory immunity. With respect to state action immunity, a portion of *Cantor v. Detroit Edison Company*⁷²⁵ joined only by a plurality of justices explicitly states that

nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct.⁷²⁶

Nothing in the opinions of the concurring justices disagreed with the plurality's interpretation of *Noerr*. With respect to federal regulatory immunity, the Court in *Allied Tube* cited *Georgia v. Pennsylvania R.R. Company*⁷²⁷ as an example of a case in which

because it is required, as a regulated monopoly, to disclose publicly its rates and operating procedures." *Id.*

⁷²⁵ 428 U.S. 579 (1976).

⁷²⁶ *Id.* at 601-02. Several courts of appeals have relied on this language to conclude that the mere filing of a tariff by a regulated firm does not confer *Noerr* immunity on private restraints. See, e.g., *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1181 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) (claim that utility created a "price squeeze" through its rates submitted to and approved by state and federal agencies not barred by *Noerr*); *Litton Systems*, 700 F.2d at 806-09 (claim that AT&T monopolized the market by filing tariffs requiring customers to connect equipment made by rival companies to the telephone system only through an "interface device" made by AT&T not barred by *Noerr*).

Although two courts of appeals have implicitly suggested that tariff filings might enjoy *Noerr* immunity, these cases involved allegations that the act of filing and the ensuing delay were themselves the antitrust violations, in contrast to the allegations that could be made against lawyers in class actions. See *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1153-58 (7th Cir.), cert. denied, 464 U.S. 891 (1983); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1251-54 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983). Moreover, in both cases, the courts actually rejected the *Noerr* claim because they found the petitioning to be sham. Thus, the cases could actually be read to leave open the question of whether filing tariffs should ever enjoy *Noerr* protection. See *MCI*, 708 F.2d at 1155 n.114 (noting that "*Noerr-Pennington* might not apply if a tariff filing is only a *pro forma* publication perhaps required by law and not an exercise of the right to *petition* the government," and stating that "[w]e do not reach this issue").

⁷²⁷ 324 U.S. 439 (1945).

Noerr immunity does not apply despite the fact that there was no “sham” activity.⁷²⁸

It is also true that the Court has never definitively decided whether the standards for immunity are different depending on which political body is being petitioned. *Allied Tube* does state that the scope of petitioning immunity depends on the “source, context, and nature of the anticompetitive restraint at issue.”⁷²⁹ In addition, the Court has strongly suggested that petitioning immunity is broader in the legislative sphere than in the judicial or administrative spheres. For example, the Court has referred to the fact that in the legislative sphere “unethical and deceptive methods” are more tolerated than in the judicial and administrative sphere, where such methods may constitute abuse of process “that may result in antitrust violations.”⁷³⁰ But if *Noerr* has its roots in state action and federal regulatory immunity, the scope of immunity in the legislative sphere must be broader. Only the legislature can “restrain trade” in ways that would otherwise violate the antitrust laws. In general, the power of courts and agencies to restrain trade is entirely dependent on their authority from the legislature to do so, as is their ability to stop private restraints.

Another difference between the class action context and the *Allied Tube* and *Trial Lawyers* cases also suggests the case for denying *Noerr* immunity is stronger in the class action context. The steel conduit makers in *Allied Tube* did not violate association rules by stacking the meeting and did not do any harm to the association that the association could not itself remedy. The lawyers in *Trial Lawyers* were probably in the best position to petition on behalf of protecting their clients’ Sixth Amendment

⁷²⁸ *Allied Tube*, 486 U.S. at 503.

⁷²⁹ *Id.* at 499.

⁷³⁰ *Id.* at 499-500 (noting that although antitrust immunity applies to “unethical and deceptive” conduct used to influence legislature, “in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations”). See also *California Motor Transport*, 404 U.S. at 512-13 (noting that “unethical conduct in the setting of the adjudicatory process often results in sanctions” and that “[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process”). But cf. *Professional Real Estate*, 508 U.S. at 62 n.6 (“We 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.”).

rights, and no one denied that the higher wages the lawyers sought would do just that. In the class action context, by contrast, if the anticompetitive allegations are correct, the lawyers are acting at the expense of their clients and, in particular, their clients' own right of petition under the First Amendment. One would think that if ever there were a case in which a court would hesitate to apply *Noerr* immunity, it would be when applying such immunity could harm the First Amendment rights of other petitioners to whom the defendants owed fiduciary obligations.

The one case that has considered the applicability of *Noerr* immunity in the context of settlement, though not an antitrust case, supports the interpretation we advocate here. That case is *Wright v. DeArmond*,⁷³¹ a successor case to the *Derrickson*⁷³² case discussed above in connection with collateral estoppel.⁷³³ In *Wright*, a habeas corpus action, the Court of Appeals for the Seventh Circuit held that *Noerr* did not bar the state of Illinois from prosecuting city commissioners and the city's lawyer for violating state conflict of interest laws in negotiating a settlement on behalf of the city in a federal Voting Rights Act suit.⁷³⁴ The officials had argued that because they submitted the settlement, which kept them on the city payroll as "administrators," to a federal district court for approval, they were engaging in protected "petitioning" activity analogous to the type of activity protected by *Noerr*.⁷³⁵

The court started from the proposition that the officials "were prosecuted because they participated in the negotiation of a settlement agreement which involved . . . their private employment interests."⁷³⁶ It then held *Noerr* inapplicable for two reasons. First, the court found that the petitioning by the officials was analogous to sham petitioning. The officials had used their bargaining leverage "to obtain personal benefits" and because

⁷³¹ 977 F.2d 339 (7th Cir. 1992), cert. denied, 507 U.S. 1051 (1993).

⁷³² *Derrickson v. City of Danville*, 845 F.2d 715 (7th Cir. 1988)].

⁷³³ See *supra* text accompanying notes 296-305 (claim preclusion), 347-351 (issue preclusion), 358-359 (issue preclusion), 373-380 (equitable estoppel), 392-398 (equitable estoppel), 404-408 (equitable estoppel).

⁷³⁴ *Wright*, 977 F.2d at 345-49.

⁷³⁵ *Id.* at 344-45.

⁷³⁶ *Id.* at 345.

their "petition to the court was a petition for approval of this illegal and fraudulent act . . . [it amounted to] 'unethical conduct in the setting of the adjudicatory process,' analytically analogous to the sort of conduct held to be unprotected by the First Amendment in *California Motor Transport*."⁷³⁷ Second, the court noted that the officials retained their rights to petition the government for jobs with the city, but could "not do so while simultaneously representing the interest of the government."⁷³⁸

Although the court's first argument misconstrues and misapplies the sham exception,⁷³⁹ the reasoning and result of the case are consistent with Supreme Court precedent and the argument presented here. Like the defendants in *Allied Tube* and *Trial Lawyers*, the city officials in *Wright* engaged in unlawful, self-interested conduct that was separable from any petitioning activity. Nothing prevented the city officials from petitioning the government to further their own interests. The fact that the unlawful conduct did not cause harm that preceded or was independent from court approval of the settlement did not make *Noerr* applicable. Because the Voting Rights Act did not preempt or otherwise displace state conflict of interest rules (as the court implicitly held),⁷⁴⁰ the mere fact that the officials asked a court to approve a settlement in a Voting Rights Act case did not create *Noerr* immunity. The *Wright* court also recognized the greater scope for condemning "unethical" methods in the judicial context that *Allied Tube* suggests. Finally, the officials

⁷³⁷ *Id.* at 348 (quoting *California Motor Transport*, 404 U.S. at 512).

⁷³⁸ *Id.* at 348-49.

⁷³⁹ As noted above, the Court has limited the sham exception to cases in which the petitioner is not seeking the result of the governmental action. See *supra* notes 690-695 and accompanying text. *Allied Tube*, which first articulated this notion of sham, had already been decided when *Wright* was litigated. The *Wright* court did try to shoehorn its holding into this notion of sham by focusing on the fact that the city officials "had no hope of successfully defending against" the Voting Rights Act suit. *Wright*, 977 F.2d at 348. But this fact had absolutely nothing to do with the "leverage" the court spoke of. In fact, as the dissenting judge correctly recognized, the settlement if anything avoided sham litigation. *Id.* at 349 (Bauer, C.J., dissenting). Nor was the assertion of sham relevant to the court's argument that the officials retained the petitioning rights *Noerr* sought to protect.

⁷⁴⁰ The dissenting judge concluded that "[i]f the Illinois statutes are in conflict with the settlement, and I conclude they are not, then the state statutes should give way to the policy of the federal law." *Wright*, 977 F.2d at 349 (Bauer, C.J., dissenting). The majority did not respond directly to Judge Bauer's contention.

by writing a settlement that feathered their own nests might very well have acted at the expense of the interests of the city to which they owed fiduciary obligations. In all these respects, the conduct in *Wright* is analogous to the anticompetitive conduct we have identified in connection with class action settlements, and supports our argument that *Noerr* immunity should not apply to lawyer anticompetitive conduct in class actions.

Although the antitrust immunity doctrines we have discussed are varied and somewhat complex, our argument that they do not apply to lawyer conduct in class actions is straightforward and simple. The market in which lawyers compete is separate from any market the courts seek to regulate through the class action device. And there is no intention on the part of any authoritative government body, either at the state or the federal level, to restrict competition in those separate lawyer markets. This argument complements the argument in Part III concerning collateral estoppel. Just as lawyers are incidental to and separate from the litigational features of the class action for collateral estoppel purposes, so they are incidental to and separate from the regulatory features of the class action for antitrust purposes. Although lawyers may instigate, orchestrate, and dominate class actions, in the final analysis they are just lawyers—lawyers who may not cloak their unlawful conduct in judicial approval of a settlement in which they participate.

CONCLUSION

In the Preface to *Bleak House*,⁷⁴¹ Dickens reported a Chancery Judge's defense of his court: "though the shining subject of much popular prejudice [the court and its processes were] almost immaculate." Any "trivial blemish . . . was exaggerated and had been entirely owing to 'the parsimony of the public.'"⁷⁴² Dickens found this "too profound a joke to be inserted in the body of [the novel]."⁷⁴³ But had he chosen to insert it in the

⁷⁴¹ Charles Dickens, *Bleak House* (Signet Classic ed. 1980) (1853).

⁷⁴² *Id.* at vii.

⁷⁴³ *Id.* Dickens explained that "everything set forth in [the novel] concerning the Court of Chancery [in which the Jarndyce case is set] is substantially true, and within the truth." *Id.* To back up his statement he described several cases pending in that court as of 1853 in which the money absorbed by the lawyers was exorbitant. One

mouth of some appropriately odious character, he said he might have coupled it with the following lines from Shakespeare:

My nature is subdued

To what it works in, like the dyer's hand:

Pity me, then, and wish I were renewed!⁷⁴⁴

We believe that those who claim that only trivial blemishes mar our system for settling class actions are as deluded, or as eager to delude, as was Dickens' Chancery Judge. We write to show the dyer his hand and to offer a scrub brush with which he might clean it.

EPILOGUE

Much has happened as this Article was proceeding through the editing process. With so much breaking news, we decided to append this Epilogue, which allowed us to include several last minute developments.

In the fall of 1995, Dexter Kamilewicz of Maine, his wife, Gretchen, and Martha Preston of Wisconsin (the *Kamilewicz* plaintiffs) filed a class action suit against Bank of Boston, its lawyers and class counsel, who had purported to represent them in the *Hoffman v. BancBoston Mortgage Corporation*⁷⁴⁵ class action suit filed and settled in an Alabama state court. These plaintiffs, on behalf of themselves and the other class members in *Hoffman*, sued the bank, its lawyers and class counsel for negotiating a class settlement that allegedly cost many class members more money than they recovered from the settlement and allegedly resulted in all class members being charged in attorney's fees more than one-third of the economic benefit conferred on them by the suit.⁷⁴⁶

The *Kamilewicz* plaintiffs brought suit in federal district court in Chicago because that is where the two law firms that served

case involved 30 or 40 lawyers and costs of 70,000 (1853) pounds had been thus far incurred; in the other, "more than double [that amount] has been swallowed up in costs." *Id.* at viii.

⁷⁴⁴ *Id.* at vii (quoting, with slight alterations, William Shakespeare, Sonnet cxi).

⁷⁴⁵ No. CV-91-1880 (Ala. Cir. Ct. Jan. 24, 1994).

⁷⁴⁶ *Kamilewicz v. Bank of Boston Corp.*, No. 95-C6341, 1995 U.S. Dist. LEXIS 18973, at *1-*9 (N.D. Ill. Dec. 15, 1995).

as lead counsel in *Hoffman* were located.⁷⁴⁷ The suit alleged violations of RICO, a conspiracy to deprive the plaintiffs of their constitutional rights to due process and property, fraud, breach of fiduciary duty, and malpractice.⁷⁴⁸ The defendants promptly filed a motion to dismiss the federal suit, but the *Hoffman* class counsel went further—all the way to Alabama. The *Hoffman* class counsel asked the Alabama court to order the *Kamilewicz* plaintiffs to show cause in Alabama state court as to why they were not bound by that court's approval of the class settlement and thus, inferentially, estopped from proceeding in federal court. The Alabama court scheduled a hearing on this order for December 18, 1995, while the motion to dismiss the federal suit was pending. The *Kamilewicz* plaintiffs responded by asking the federal district court in Chicago to enjoin the Alabama court from proceeding.⁷⁴⁹

The federal district court in Chicago scheduled a hearing for Friday, December 15, before the Alabama court's Monday morning show-cause hearing was to be held, and dismissed the plaintiffs' complaint. The district court held that it lacked subject matter jurisdiction over the complaint because the complaint was in the nature of an appeal from the state court approval of the settlement, and, under the *Rooker-Feldman* doctrine,⁷⁵⁰ federal district courts lack jurisdiction over matters that are in essence appeals of state court rulings.⁷⁵¹ He thus refused to enjoin the Monday morning Alabama hearing. That hearing was held, although the *Kamilewicz* plaintiffs did not show up, refusing to submit to the jurisdiction of the Alabama court, which they claimed had no right to have ordered money withdrawn from their escrow accounts in *Hoffman* and now had no right to order them to forego their federal suit. The Alabama court proceeded without them.

⁷⁴⁷ Id. at *2-*3.

⁷⁴⁸ Id. at *9-*10.

⁷⁴⁹ Id. at *10-*11.

⁷⁵⁰ The *Rooker-Feldman* doctrine, derived from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), holds that the only federal court authorized to exercise appellate review over a state court's civil litigation judgment is the Supreme Court of the United States.

⁷⁵¹ *Kamilewicz*, No. 95-C6341, 1995 U.S. Dist. LEXIS 18973, at *17.

The same Alabama state court judge who had approved the *Hoffman* settlement held the hearing and issued an opinion that stated he had two matters before him: the motion from Edelman to show cause, and the allegations in the federal complaint, which he decided to treat as if they had been made by the *Kamilewicz* plaintiffs in a motion for relief from a judgment under Alabama's Rule 60(b).⁷⁵² The Alabama judge decided that the allegations in the federal complaint were baseless; reaffirmed his prior ruling that the settlement was fair and the attorney's fees awarded were proper; and ended by ordering the *Kamilewicz* plaintiffs not to "reassert[] the claims dismissed in the Federal Class Action in *any* forum."⁷⁵³

The *Kamilewicz* plaintiffs, nonetheless, appealed the federal district court order to the Seventh Circuit. This time they were joined by nine state Attorneys General, who filed an amicus brief urging the court to reverse the district court's dismissal. The *Kamilewicz* plaintiffs and the Attorneys General argued that the *Kamilewicz* plaintiffs' allegations were not in the nature of an appeal, but were independent actions not subject to the *Rooker-Feldman* bar and that, in any event, *Rooker-Feldman* was inapplicable to any state court judgment entered without proper personal jurisdiction over the parties who now sought to challenge that ruling. The *Kamilewicz* plaintiffs claimed the jurisdiction of the Alabama court was defective under *Phillips Petroleum Company v. Shutts*⁷⁵⁴ because the Notice they received did not tell them that they might lose money or that attorney's fees might be well in excess of one-third of the economic benefit, and that they were consequently denied their constitutional right to opt out. Moreover, they claimed they could not be considered parties to the Alabama proceeding because they were absent class members denied adequate representation by their lawyers' self-dealing, and *Hansberry v. Lee*⁷⁵⁵ says that without adequate representation absent class members are not to be considered parties to the class action.⁷⁵⁶ Put an-

⁷⁵² Ala. R. Civ. P. 60(b).

⁷⁵³ *Hoffman v. BancBoston Mortgage Corp.*, No. CV-91-1880, at 7, 10 (Ala. Cir. Ct. Jan. 30, 1996) (emphasis added) (on file with the Virginia Law Review Association).

⁷⁵⁴ 472 U.S. 797 (1985).

⁷⁵⁵ 311 U.S. 32 (1940).

⁷⁵⁶ See Brief of Plaintiffs-Appellants at 14-32, *Kamilewicz v. Bank of Boston Corp.*,

other way, the *Kamilewicz* plaintiffs were saying that the Alabama state court judgment could not be given any effect through the doctrine of *Rooker-Feldman* or any other doctrine because out-of-state residents who are denied their rights under *Shutts* (and any absent class member denied adequate representation under *Hansberry*) must be treated as any out-of-state residents who lack minimum contacts with the forum state court; they are free to ignore the judgment of the state court because it is null and void as to them. An incontrovertible proposition, or so one would have thought.

The Seventh Circuit did not, however, think, or so it appears to us. In a unanimous opinion, the Seventh Circuit affirmed the dismissal, holding that *Rooker-Feldman* barred the action in federal court.⁷⁵⁷ The opinion by Judge Evans, joined by Judges Cummings and Ripple, is remarkable for its failure to justify its conclusions. For example, the Attorneys General argued (as did the *Kamilewicz* plaintiffs) that the *Kamilewicz* plaintiffs were free to attack the Alabama judgment in any way they chose, just as a party is free to attack a default judgment entered against him without personal jurisdiction. The response by the court: "We see significant differences between default judgments and the judgment under attack here."⁷⁵⁸ That's it. The panel chose to give no explanation of what those differences might be. The court did explain that Alabama had a procedure by which "a litigant can assert an independent action for fraud upon the court Alabama Rule 60(b)."⁷⁵⁹ Of course, that assumes that these absent, out-of-state class members had been "litigants," a proposition that seems to assume the jurisdictional point at issue and to run counter to the teachings of *Shutts* and *Hansberry*.

Before the Seventh Circuit issued its opinion—indeed before the briefs were filed in the appeal—the *Hoffman* class counsel was back in Alabama, this time to file suit against the *Kamilewicz* plaintiffs for malicious prosecution and abuse of process for

92 F.3d 506 (7th Cir. 1996) (No. 96-1019); Brief of Amici Curiae at 6-19, *Kamilewicz* (No. 96-1019).

⁷⁵⁷ *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 512 (7th Cir. 1996).

⁷⁵⁸ *Id.* at 510.

⁷⁵⁹ *Id.* at 511.

their actions in connection with the federal suit. They also sued the lawyers for the *Kamilewicz* plaintiffs in the federal suit. The suit sought damages of \$25 million or thereabouts.⁷⁶⁰ Now the *Kamilewicz* plaintiffs needed another set of lawyers and their lawyers in the federal action needed lawyers too; by now it seemed clear to at least the authors of this Article that Alabama had its own notion of “justice” and so the Alabama suit needed to be taken quite seriously. This new set of lawyers for the *Kamilewicz* plaintiffs—the third since the beginning of this ordeal—asked the Alabama court to dismiss the malicious prosecution suit, hoping that even in Alabama a suit in federal court backed by nine Attorneys General and pending on appeal would be seen as a ridiculous candidate for a malicious prosecution suit. And then everyone waited.

The very day that the Seventh Circuit affirmed the district court’s dismissal, the Alabama trial court ruled that the Alabama malicious prosecution case could proceed. Discovery was ordered and legal bills began to pile up in earnest. The *Kamilewicz* plaintiffs petitioned the Seventh Circuit for rehearing by the panel or en banc. With no dissent from the panel opinion, this appeared a long shot, but they decided to try. The day after the rehearing petition was filed, the Seventh Circuit ordered the federal defendants to reply. Someone up there was paying attention. Weeks passed: three, six, nine, twelve.

In the meantime, without knowing about the *Kamilewicz* case, another absent class member had filed suit against the Bank of Boston for the Bank’s involvement in the *Hoffman* settlement. Ted Benn, a corporate lawyer from Dallas, Texas, filed suit in state court in Texas, alleging that the bank deducted about \$144

⁷⁶⁰ See Complaint, *Edelman v. Wildman, Harrold, Allen & Dixon*, No. CV-96-91 (Ala. Cir. Ct.) (copy on file with the Virginia Law Review Association).

from his escrow account in connection with the settlement in Alabama and deposited zero dollars in recovery. He alleged that he had read the Notice, just as our fictional law professor had, had understood that he was in the subclass entitled to zero recovery and had figured that he would owe no attorney's fees because one-third of zero is zero. He had thus not opted out. Then, he alleged that he had over \$100 deducted from his escrow account, as a miscellaneous disbursement, which turned out to be money paid to the class lawyers as attorney's fees. He tried to get the Bank to return this money to him and when the Bank refused, he sued.⁷⁶¹

The Bank, fresh off its victory before the district court in Chicago, removed Benn's case to federal court and then—pay attention here—sought to have the federal district court in Dallas dismiss the suit *with prejudice*, on the grounds that under the *Rooker-Feldman* doctrine the suit could not be brought in federal court!⁷⁶² Moreover, while this motion was pending, the Bank, taking a page from the *Hoffman* class counsel's book, petitioned the Alabama state court for relief, arguing that Benn, like the *Kamilewicz* plaintiffs, was bound not to challenge the Alabama judgment in any other court. Once again, the Alabama court obliged,⁷⁶³ although Benn, like the *Kamilewicz* plaintiffs, refused to recognize the Alabama court's right to order him to do anything and did not show up for the hearing in Alabama on the Bank's motion—a motion in effect for Alabama to enjoin a Texas citizen from proceeding against the Bank in any federal court *or* in Texas state court, which motion the Alabama court granted, a fact we repeat because it may be difficult to believe.

When Benn asked the federal district court in Texas to enjoin the Bank from proceeding against him in Alabama, the district court judge apparently became as eager to rid herself of this case as the district judge in Chicago had been when the *Kamilewicz* plaintiffs made a similar request of him. She

⁷⁶¹ Benn v. BancBoston, No. 3:96-CV-0974-J, at 2-4 (N.D. Tex. Oct. 4, 1996) (Order Denying In Part Defendant's Motion to Dismiss) (on file with the Virginia Law Review Association).

⁷⁶² Id. at 4-5.

⁷⁶³ Hoffman v. BancBoston Mortgage Corp., No. CV-91-1880 (Ala. Cir. Ct. Oct. 17, 1996) (on file with the Virginia Law Review Association).

promptly issued an opinion, tracking that of the panel in the Seventh Circuit, but refused the request to dismiss with prejudice and remanded the fraud and breach of fiduciary claims filed by Benn back to Texas state court.⁷⁶⁴ Back in state court, Benn decided to join Fannie Mae as a defendant, alleging, inter alia, that Fannie Mae, the owner and holder of Benn's mortgage, was responsible for the actions of the bank, its agent—the servicer of the mortgage. That addition landed Benn back in federal court. Fannie Mae removed the case again, the district court's recent opinion that it lacked subject matter jurisdiction notwithstanding. Moreover, according to Benn, the bank consented to this removal in writing. Fannie Mae apparently removed to federal court with the further plan to have the case transferred to Chicago, where cases involving escrow practices across the nation have been transferred for consolidation by the panel on Multi-District Litigation.

Benn intends to argue that his case is essentially about fraud in the course of a settlement, not escrow practices, and to fight transfer to Chicago. He also intends to argue that the law of the case is that the federal court lacks subject matter jurisdiction over this dispute under the misguided application of *Rooker-Feldman*. Just as Benn was ordered back to federal court for the second time, the Seventh Circuit finally decided the rehearing petition in *Kamilewicz*.

The petition was denied.⁷⁶⁵ The *Kamilewicz* plaintiffs learned of that order on November 22, 1996, the day it was issued. But there was a dissent. Finally, some support, and formidable support it was. Judge Easterbrook, joined by Chief Judge Posner and Judges Manion, Rovner and Wood, filed a forceful and detailed dissent, which took serious issue with the panel's failure to see the *Kamilewicz* plaintiffs as analogous to those against whom a default judgment had been entered. Judge Easterbrook first considered the federal plaintiffs claims against the bank, which he apparently considered to be in the nature of a collateral attack on the state judgment:

⁷⁶⁴ Benn v. BancBoston, No. 3:96-CV-0974-J, at 12.

⁷⁶⁵ Kamilewicz v. Bank of Boston Corp., No. 96-1019, at 2 (7th Cir. Nov. 22, 1996) (Order denying Petition for Rehearing En Banc) (on file with the Virginia Law Review Association).

Collateral attacks based on lack of personal or subject-matter jurisdiction are proper, no less in class actions than in other cases—indeed, they are especially appropriate where class members are stunned to find that, although aligned as plaintiffs, they are net losers, just as if the original defendants had filed and prevailed on a counterclaim of which they received no notice and over which the state court had no jurisdiction. In effect, though not in name, this was a defendant class, attempting (unbeknownst to its members) to fend off predatory lawyers' claims to the balances in the escrow accounts.⁷⁶⁶

We agree, although we have also argued that, questions of personal and subject matter jurisdiction aside, the claim against the bank should not be collaterally estopped. Because Judge Easterbrook was analyzing this case under *Rooker-Feldman*, which the Seventh Circuit has held is not coextensive with the doctrines of claim and issue preclusion,⁷⁶⁷ his analysis does not conflict with our argument on estoppel. On the other hand, we did not consider whether *Rooker-Feldman* barred challenges in federal court to state court settlements because frankly that issue did not even occur to us until the defendants raised it in the district court. Once it was raised, we decided not only that *Rooker-Feldman* properly applied should not bar federal courts from taking jurisdiction (as Judge Easterbrook and his four colleagues said), but that the issue was not worth separate discussion because even if federal courts lacked jurisdiction over state court settlements, state courts would not. Thus, some court could entertain the later suits we were discussing as long as we showed that issue and claim preclusion did not bar such suits.

And Judge Easterbrook's dissent supports our preclusion argument as to malpractice actions against class counsel as we would have predicted from his opinion in *Derrickson v. City of Danville*.⁷⁶⁸ In his *Kamilewicz* dissent from the denial of rehearing, he wrote:

Next consider plaintiffs' claim against the *Hoffman* class counsel, which is not a collateral attack on a judgment. It takes

⁷⁶⁶ Id. at 5 (Easterbrook, J., dissenting).

⁷⁶⁷ See, e.g., *GASH Associates v. Village of Rosemont*, 995 F.2d 726, 728-29 (7th Cir. 1993), and cases cited therein.

⁷⁶⁸ 845 F.2d 715 (7th Cir. 1988).

the judgment as a given—indeed, it is only so long as the judgment stands that the litigant has a compensable loss. Neither state nor federal law requires a malpractice suit to be filed in the same court that handled the initial litigation. The *Rooker-Feldman* doctrine therefore does not apply to malpractice suits, which may be litigated in federal courts without regard to the location of the initial case. If the panel is right, no malpractice suit growing out of state litigation in which the judge awarded attorneys' fees—maybe no malpractice suit, period—may be brought in federal court, even if all requirements of the diversity jurisdiction have been satisfied. This holding is sufficiently troubling and affects so many other cases that it is worth the time of our court to consider the subject en banc.

....

... The attorneys representing the *Hoffman* class were not parties to the Alabama case. Neither were the class members. Absent class members are represented by the named plaintiffs and their lawyers, but they aren't parties, a point reflected in federal litigation by disregarding their citizenship. They are ignored in negotiating settlements as well. A real party's lack of assent means that there is no settlement; but the missing class members don't sign the settlement, and their objection is not dispositive. It is crammed down the throats of objectors, which cannot be done to real parties. . . . For some purposes missing class members are treated *like* parties, but only if the named plaintiffs adequately represent the interests of the class, and only if the unnamed members of the class receive adequate notice and elect not to opt out—which in this case is the very thing in dispute! It gets the cart before the horse to reject, as barred by a judgment, an effort by the absent class members to show that they were not properly brought into the state case and therefore are not affected by the judgment.

From all of this it follows that a malpractice action is not affected by the *Rooker-Feldman* doctrine. Does the fairness hearing required to approve the settlement of a class action make a difference? I think not. For the reasons just explained, absent class members (*especially* those who deny the state court's jurisdiction over them) are not parties and cannot be treated as bound by the findings implicit in the approval of the settlement and the award of fees to attorneys. . . .

All jurisdictional doubts to one side, a settlement followed by a fairness hearing remains more like a contract than like litigation. Accordingly there is even less reason to apply the *Rooker-Feldman* doctrine than in a normal malpractice case, where the loss ensues from a genuine contest. Representative plaintiffs and their lawyers may be imperfect agents of the other class members—may even put one over on the court, in a staged performance. The lawyers support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means that it lacks essential information. . . .

The Kamilewicz class asserts that it suffered harm from the *Hoffman* class lawyers' breach of their duties of care and loyalty in negotiating the settlement, which was concealed from the Alabama judge (and the class) by a further breach of the duty of loyalty in drafting the notice about the settlement. The notice not only didn't alert the absent class members to the impending loss but also pulled the wool over the state judge's eyes. Suing faithless agents is far from the core of the *Rooker-Feldman* doctrine, which should not be extended to block suits like this. . . .

. . . If the *Rooker-Feldman* doctrine applies to suits by the absent class members because a malpractice action is a collateral attack on the order approving the settlement and awarding attorneys' fees, then the law of preclusion (*res judicata*) should bar malpractice actions in any court, state or federal, and without regard to which judicial system handled the first case. Yet no one thinks that. A malpractice suit is an independent action. A (potential) defense of issue preclusion is defeated by the very theory of the claim: that the first judgment is unreliable because of the attorney's bungling. The bungler cannot point to the adverse judgment produced by his own incompetence to ward off the client's demand. The Kamilewicz class may fail in its proof, or it may encounter other obstacles, but the *Rooker-Feldman* doctrine does not close the door of the federal courthouse.⁷⁶⁹

The *Kamilewicz* plaintiffs must now decide whether to risk further repercussions in Alabama by seeking certiorari from the Supreme Court. Mr. Benn has to fight transfer and decide what

⁷⁶⁹ *Kamilewicz*, No. 96-1019, at 6-11 (Easterbrook, J., dissenting) (citations omitted).

position to take on *Rooker-Feldman* in this second round for him in federal court. That is the stage of play as we go to press.

And what do we make all of this? A significant number of judges, as we feared, prefer to twist the law out of all recognizable shape and subject ordinary citizens to outrageous treatment at the hands of foreign courts and unwanted “champions” rather than face the reality of class action abuse and improperly approved class settlements. We have in mind particularly the majority of judges on the Seventh Circuit who, despite a powerful dissent, were willing to leave Dexter and Gretchen Kamilewicz, Martha Preston, and the lawyers who tried to help them by bringing suit in federal court to the not-so-tender mercies of the Alabama court system, which had already harmed the Kamilewicz’s and Preston—at least in their eyes. On the other hand, five judges did dissent. We can only hope that the publication of this Article will help more judges see what needs to be done and will help tear down the facade of estoppel law that some would use as an excuse not to do it.