

PROFESSIONAL LIABILITY UPDATE

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DISCOVERY SANCTIONS

Federal Law

By Ann L. Strayer and Jennifer A. Becker

Freeman v. Lasky Haas & Cohler (2005) 410 F.3d 1180

Ruling that discovery is not a petition, the Ninth Circuit applies first amendment immunity and affirms dismissal of a complaint against attorneys alleging anti-trust act violations based on discovery abuse in prior litigation.

Real estate agent Arleen Freeman subscribed to a regional real estate multiple listing service (MLS) run by Sandicor. Believing that Sandicor’s subscriber fees were artificially inflated, Freeman sued Sandicor, the various local realtors’ associations which owned and operated Sandicor, and some of the officers and directors of the associations under the Sherman Anti-trust Act. The defendants engaged in discovery abuses by wrongfully withholding information. Ultimately, the misconduct was discovered and sanctions awarded. Nevertheless, the District Court granted the defendants’ motion for summary judgment.

Freeman then brought a new Sherman Act action against some of the executives, lawyers, and law firms of the associations involved in the previous litigation for their involvement in the discovery misconduct. The District Court dismissed Freeman’s complaint with prejudice for failure to state a claim based, in part, on the *Noerr-Pennington* doctrine which precludes the Sherman

Antitrust Act from covering political lobbying on First Amendment grounds.

The Court of Appeals noted that while *Noerr-Pennington* immunity is broad it nonetheless does not cover all litigation: “sham” petitions don’t fall within the protection of the doctrine. There are several circumstances when litigation conduct might be considered an unprotected “sham” petition. This includes making intentional misrepresentations to the court that deprives the litigation of its legitimacy. *Noerr-Pennington* immunity, and the sham exception, also applies to defensive pleadings, because asking a court to deny one’s opponent’s petition is also a form of petition. Thus there exists “sham defenses” as well as “sham lawsuits.”

However, discovery is not a petition, but merely a communication between parties as an aid to litigation. Thus the court could not consider the discovery abuses in determining whether or not the sham exception to the *Noerr-Pennington*

immunity was applicable. There was enough objective merit and subjective good faith in the defense of the original antitrust lawsuit cover it with the *Noerr-Pennington* cloak.

Comment: In general discovery abuses need to be addressed during the course of litigation itself; there are few post-judgment collateral proceedings available to sanction either attorneys or parties for discovery abuse.