Nos. 00-3979, 01-1148

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LOEB INDUSTRIES, INC., LOS ANGELES SCRAP IRON & METAL CORP.,
and METAL PREP COMPANY, INC.,
Plaintiffs-Appellants,

v.

SUMITOMO CORPORATION and GLOBAL MINERALS AND METALS CORPORATION,
Defendants-Appellees.

LOEB INDUSTRIES, INC., LOS ANGELES SCRAP IRON & METAL CORP.,
and METAL PREP COMPANY, INC.,
Plaintiffs-Appellants,

v.

J.P. MORGAN & CO., INC. and MORGAN GUARANTY TRUST COMPANY
OF NEW YORK,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin
Nos. 99 C 377, 99 C 468, 00 C 274

BRIEF OF AMICUS CURIAE, THE AMERICAN ANTITRUST INSTITUTE (SUPPORTING APPELLANTS AND REVERSAL)

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The American Antitrust Institute ("AAI") is an independent, non-profit education, research and advocacy organization.[1] Founded in 1998, its mission is to increase the role of competition, assure that competition is fair, and challenge unduly concentrated power in the American and world economy. The AAI is dedicated to the vigorous use of antitrust as a vital component of national competition policy.[2]

ARGUMENT

I. THE IMPORTANCE OF DETERRENCE IN ANTITRUST

The law of antitrust has served this nation so well in the one hundred eleven years since the Sherman Act was passed that over eighty countries have now followed our lead. Antitrust, characterized by the Supreme Court as the Magna Carta of our market economy,[3] provides the framework for fair competition, contributing not only to the celebrated efficiency and productivity of our companies, but to the entrepreneurial spirit that generates innovation, to the diversity of opportunity that enlivens both consumers

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[1] For additional background, see http://www.antitrustinstitute.org.

[2] The AAI is assisted by its Advisory Board, currently consisting of forty-nine lawyers and law professors, economists, and business leaders. The authors of this amicus brief are Albert A. Foer, President of the AAI and three members of the Advisory Board, Professors Joseph P. Bauer, Warren S. Grimes and Lawrence A. Sullivan. Two attorneys, Arthur Kaplan and Joseph Goldberg, who represent clients in this litigation, are also members of the Advisory Board. No member of the AAI's governing Board of Directors represents clients in this litigation. Professor Bauer is the co-author and co-editor of Kintner's Federal Antitrust Law (1998). Professors Sullivan and Grimes are co-authors of The Law of Antitrust, An Integrated Handbook (2000).

[3] United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972): "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete--to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."

and producers alike, and to the general sense that the marketplace operates so that consumers will have competitively-established prices and a range of options.

Antitrust is necessary because companies left to their own devices will naturally seek ways to avoid the relentless impact of competition. As Adam Smith famously wrote, “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[4] One of the most universal strategies for avoiding competition has been for competitors to conspire to manipulate prices, as is alleged in the instant case. Collusion will probably never be stamped out entirely, because the economic payoff can be so huge, but it can be reduced (like other forms of social pathology) if the risk of being caught and punished is high enough.

To create a system that will control collusion and other forms of anticompetitive conduct, Congress has legislated competition laws with strong disincentives for violations: for certain types of violations, there are imprisonment, fines and penalties; for civil violations, there are not only a wide range of injunctive remedies, but a vigorous private enforcement regime, lubricated by the availability of statutory treble damage awards. Private enforcement has been part of the scheme since the original Sherman Act in 1890. In accordance with this system, private actions to enforce the antitrust laws and obtain remediation for persons who have been injured by antitrust violations outnumber federal actions by approximately ten-to-one.[5] We believe it honors the Congressional

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[4] Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1776), vol. 1, bk. 1, ch. 10, pt. 2.

[5] The traditional reasons cited for the emphasis on private enforcement are: (1) the threat of civil penalties increases deterrence; (2) it is important to provide compensation and other remedies for victims of violations; (3) private enforcement preserves scarce government resources, i.e. the

intent and serves public policy that antitrust actions generally not be subjected to procedural impediments that change the risk-reward ratio of violating antitrust laws.

Our specific concerns in the instant cases are two: (1) the factual development of antitrust cases must not be terminated prematurely; and (2) the Illinois Brick precedent should not be expanded beyond its narrow purpose.

II. THE FACTUAL DEVELOPMENT OF ANTITRUST CASES MUST NOT BE TERMINATED PREMATURELY

The facts of an antitrust case are typically complicated. Often, they are hidden or obscure and only become understood through prolonged investigation, including pre-trial discovery. They can only be evaluated, finally, in a context that unfolds as information is developed. The back-and-forth dynamic as facts and theory are interactively developed usually takes substantial time. Courts can and ought to move the process along efficiently, but antitrust can only do its work if the moving parties are given sufficient time and opportunity to develop the facts and theory of their claims.

The process followed by the District Court warps the fact-and-theory process by premature dismissal, without having provided the plaintiffs with a sufficient opportunity to develop their case. The Court imported facts from outside of the pleadings, while denying the plaintiffs the opportunity to demonstrate that genuine conflicts of fact exist. As a precedent, this would dramatically affect the risks and benefits of violating the antitrust laws. Plaintiffs would have to produce their factual case earlier, without the benefit of complete pre-trial discovery, and therefore with less opportunity to learn what the facts are or exactly how they fit together. Defendants would understand that their

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Department of Justice can focus on other problem areas; and (4) private parties often have greater knowledge of violations than the government.

odds of going to trial would be substantially reduced. This would upset the existing calculations in a way that favors defendants and would be contrary to an ordered system of antitrust that values decisions based on substantial factual development.

Two additional points must be made in regard to the premature dismissal of this case. The District Court, in determining whether the case should go to trial, considered that the potential damages that could be found would be "ruinous" for the defendants. This is not a relevant consideration under the Clayton Act.[6] At the summary judgment stage of a case, or even at the dismissal stage, the focus must be on whether the elements of a violation are present and whether the plaintiff has suffered injury for which compensation is fair and appropriate, not on the magnitude of one of a number of possible remedies.

At this stage, no evidence regarding remedy is before the Court. Indeed, it is extremely difficult to even think about a remedy until the facts of the case have been determined on the merits. Whether a particular remedy would be "ruinous" depends not only on the wrongs that are found to have been perpetrated, but on the ability of the defendants who have been found liable, to absorb various remedies.

Even beyond these procedural points is the question of whether the enormity of the injury caused should ever be deemed an antitrust *defense*. Under the District Court's reasoning, the lesson for antitrust deterrence would seem to be: "Do not do just a little harm." We submit that companies will be properly deterred from antitrust violations only if they know that they may be held liable for making their victims whole, no matter how

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[6] Section 4 of the Clayton Act provides, "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States…and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 12 et seq.

large a proportion of their assets may be at stake. Courts don't dismiss tort cases prior to trial on the consideration that if the defendant were to be found liable, the damages would be "ruinous," and there is no reason for a different standard to be applied in antitrust.

Finally, the District Court was apparently impressed that calculation of damages might be complicated, and considered this a reason for precluding trial. But this argument proves too much and it is inconsistent with long-standing precedent in this area. Virtually all antitrust cases are complicated in one way or another, as are many other types of cases that come before the judiciary. It is up to the parties and their expert witnesses to clarify and simplify that which is complicated and to convince the Court that certain conclusions follow from the evidence. It is not appropriate for the judge to conclude before the evidence is presented that the parties will be incapable of presenting clear arguments. This is particularly true in antitrust, where the Supreme Court has repeatedly held it sufficient to "show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."[7] Once the plaintiff proves the *fact* of damages, the burden of proof on *amount* of damages is relaxed.

If potential complexity were viewed as a practical defense tool, companies intent on violating the antitrust laws would strategize to increase the apparent complexity of cases in which they are named as defendants. The District Court's approach would skew the risk-benefit calculus and would further reduce the deterrent impact of antitrust.

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[7] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931). See Lawrence A. Sullivan and Warren S. Grimes, The Law of Antitrust, 957 (2000). As as this Court noted in Sanner v. Board of Trade of Chicago, 62 F.3d 918, 930 (7th Cir. 1995), the damages in a physical commodity market flowing from manipulations of a futures market are "hardly beyond the ken of the federal courts."

III. THE ILLINOIS BRICK CASE SHOULD NOT BE EXPANDED BEYOND ITS LIMITED PURPOSES

The District Court apparently believed that the Supreme Court's decision in Illinois Brick[8] is relevant, notwithstanding this Court's decision in Sanner.[9] But Illinois Brick deals with a vertical chain of distribution in which an antitrust violator imposes damages in the form of monopoly rents on a direct purchaser of its products, and where the direct purchaser passes on some or all of the overcharge to an indirect purchaser. Illinois Brick was an attempt to harmonize rather than overrule Hanover Shoe[10]. There, the Court held that if direct purchasers had to prove that they did not pass on their damages, this would undermine their ability to prevail, and hence would reduce their motivation to use their own resources to enforce the antitrust laws. The purpose of the Illinois Brick opinion was to assure full recovery of all of the overcharges caused by the conspiracy as well as to avoid complexity and duplicate recovery. The Supreme Court determined that in "pass-on" situations, it would be too complicated to trace what was passed through from direct to indirect purchasers. The Supreme Court believed that direct purchasers, being closest to the violation, would generally be the parties with the most at stake and would be most likely to provide the deterrence that the antitrust system needs. Therefore, it made a choice in favor of one class of possible victim, trading off the rights of indirect purchasers.

The Illinois Brick decision was explicitly motivated by the Supreme Court's conclusion that Congress' desire to deter antitrust violations would best be fulfilled if

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[8] Illinois Brick Co. v. State of Illinois, 431 U.S. 720 (1977).

[9] Sanner v. Board of Trade of Chicago, 62 F.3d at 929.

[10] Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

there existed a plaintiff or a set of plaintiffs who could recover the entire antitrust overcharge.[11] In this case, however, the District Court's decision defeats that purpose by preventing any recovery of the plaintiffs' damages proximately caused by effect of the defendant's conduct on physical copper's prices.

Unlike Illinois Brick, but like this Court's decision in Sanner, the instant case does not involve vertical relationships in which costs are passed downward within a channel of distribution from producer to retailer to consumer. Rather, according to the allegations, there is an index price set on the LME or COMEX for anyone who purchases copper. Plaintiffs have demonstrated, through eminent economic experts, that passing on does not occur in this industry. Because there is only a single commodity price for copper at any given time, everyone who buys copper pays the same commodity price. The direct purchaser cannot turn around and sell for more than the "market" price because the indirect purchaser has the option of itself purchasing at the same "market" price.

Indeed, the market price is constantly changing, presenting several scenarios. Let us suppose there is a Purchaser of copper ("P") who resells it to a Manufacturer ("M"). P does not purchase copper from an antitrust violator. P may purchase at Time 1 when the market is operating competitively, or at Time 2, when the market is manipulated and the copper price is inflated, or at Time 3, when the market is again operating competitively. If P buys at Time 1 or 3, there is no basis for an antitrust claim by P. However, if P buys at Time 2, P is injured by the conspirators' antitrust violation and should have a right to be made whole by recovering the anticompetitive overcharge for the particular purchase.

Meanwhile, P can re-sell to M the copper purchased at Time 1, 2 or 3. According to the allegations, the price of that purchase by M will be established by the index price at

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[11] Illinois Brick, 431 U.S. at 746.

the time of the resale, without regard to the cost of the original purchase. Whether M has an injury will depend not on whether P was injured, but on whether the market price is artificially inflated at the time M makes its purchase. In other words, P is not in a position to pass-on its injury; here, the question of pass-on is irrelevant. Indeed, if P resells at Time 3 (the competitive market price) the copper that it had purchased at Time 2 (the artificially inflated price), P will not recover any of what it was overcharged. M's injury, if any, will be unrelated to whether P was injured or not. Both P and M are injured only if and when the index price is being manipulated at the moment of their respective purchases. Thus, M's damages are independent of P's damages, and *vice versa*, rather than being derivative.

Unlike the Illinois Brick situation, P and M are not confronted with producer collusion. Rather than producers raising their prices through a horizontal agreement, the defendants here have allegedly manipulated a commodity index price that is the same for all buyers of copper, at whatever level of business. A further implication of this analysis is that, contrary to the Illinois Brick situation, neither P nor M can be considered closer to the perpetrators of the antitrust violation as a result of a vertical relationship. Consequently, neither has a greater incentive than the other to seek recovery against the violator.

In this situation, unlike Illinois Brick, it is relatively simple to determine the aggregate class-wide damage, by establishing how much copper was sold at any time the market was subject to manipulation. The damages are the total of the amount of copper times the amount of price inflation. There is no risk of the violators having to pay twice as a result of pass-throughs.

Finally, much has changed since Illinois Brick was handed down. Economic and accounting sophistication have increased, and economic measurement is more easily accomplished today, through use of the computer, through econometrics, and through improvements in record-keeping at the corporate level.[12] There have also been significant improvements in managing complex litigation, including revised discovery rules, greater judicial overview and intervention, and greater use of magistrates and masters. At least nineteen states with well over half of the nation's citizens have in effect legislated the repeal of Illinois Brick with respect to their own antitrust laws, and indirect purchaser class actions have proven to be judiciable.[13] Although Illinois Brick is still the law at the federal level, it would be poor policy to extend its reach beyond its limited purpose.

CONCLUSION

The District Court's holding would have the effect of undermining the private enforcement of the antitrust laws, by making it more difficult for a plaintiff to bring a case to trial. This would be contrary to a statutory system, common law development, and a public policy that has worked well for more than a century.

[12] E.g., regression analysis to determine the relative effect of conspiratorial and extraneous factors is now commonplace.

[13] See California v. ARC America Corp., 490 U.S. 93 (1989).

Respectfully submitted,

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