7th Circ. Ruling Solidifies Circuit Split On Antitrust Standing

By **William Reiss and Noelle Feigenbaum** (April 22, 2020)

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In the seminal case of Illinois Brick Co. v. Illinois, the U.S. Supreme Court held that indirect purchasers lack antitrust standing to recover damages under the federal antitrust laws.[1] But what if a consumer who purchased from a distributor seeks to hold the manufacturer liable for overcharges resulting from a conspiracy between the manufacturer and the distributor?

Most of the lower courts that have confronted the issue have held that the first nonconspiratorial purchaser has standing to sue all parties to a vertical price-fixing conspiracy, irrespective of whether it purchased directly from each of those parties. Several courts have dubbed this the "co-conspirator exception" to Illinois Brick. Other courts contend that the so-called co-conspirator exception is not an exception at all, but rather refers to a set of facts in which Illinois Brick does not apply.[2]

In light of the debate among courts and commentators concerning whether the co-conspirator exception is really an exception to Illinois Brick, we will refer to this term as the "co-conspirator rule" throughout this article.

In addition to their disagreement on the proper nomenclature, lower courts disagree as to whether the co-conspirator rule is limited to vertical price-fixing cases or whether it applies more broadly to any vertical antitrust violation.

On March 5, in Marion Healthcare LLC v. Becton Dickinson & Co., the U.S. Court of Appeals for the Seventh Circuit held that the co-conspirator rule applies beyond vertical price-fixing conspiracies.[3] The Seventh Circuit's decision solidifies an existing circuit split on the scope of the co-conspirator rule.[4]

This circuit split may soon be addressed by the Supreme Court in the case of National Football League v. Ninth Inning Inc., where defendants requested that the court grant certiorari to determine this very issue.[5] The resolution of this circuit split will likely have a profound impact on consumers' ability to seek redress under the federal antitrust laws.

The Seventh Circuit Extends the Co-Conspirator Rule

In Becton Dickinson, a group of health care providers that purchased medical devices alleged that the manufacturer of the devices conspired with its distributors and group purchasing organizations, or GPOs, to unlawfully perpetuate its monopoly in the market for those medical devices and charge supracompetitive prices.

The distribution chain at issue in Becton Dickinson is unconventional. Health care providers join GPOs, which, in turn, negotiate prices with manufacturers on the providers' behalf. Once the prices and terms are agreed, the providers purchase Becton-manufactured medical devices through a distributor authorized to sell the products according to the contract terms negotiated by the GPO. The providers pay the distributor the agreed contract price and, often, a markup.

According to the providers, the defendants conspired to incorporate anti-competitive exclusive dealing and penalty provisions into a network of contracts between the GPOs, manufacturers and providers. The plaintiffs contended that these actions, among others, resulted in the plaintiffs paying unlawfully inflated prices for the medical devices they purchased.

The district court dismissed the plaintiffs' claims,[6] finding that the health care providers lacked standing to sue under Illinois Brick because they did not purchase the medical devices directly from the manufacturer, but instead purchased them through distributors. The district court concluded that the co-conspirator rule could not save the providers' claims since they did not allege a vertical conspiracy to fix prices.

The Seventh Circuit vacated, concluding that under the co-conspirator rule the plaintiffs had standing to seek antitrust damages under federal law for "whatever form of anticompetitive conduct" they could plausibly allege took place within the vertical conspiracy.[7] In so holding, the Seventh Circuit firmly aligned itself on the side of those courts concluding that Illinois Brick is inapplicable to the first nonconspiratorial purchaser, irrespective of the anti-competitive conduct alleged.

Courts Set Forth Competing Rationales for Limiting and Extending the Co-Conspirator Rule

Courts have articulated a number of competing rationales for why the co-conspirator rule should be limited to or extended beyond vertical price-fixing conspiracies. Their analyses turn largely on how they interpret Illinois Brick.

Those courts in favor of limiting the co-conspirator rule to vertical price-fixing conspiracies emphasize Illinois Brick's concern that courts should not suffer the burden of undertaking the highly complex process of tracing the alleged overcharge through multiple levels of the chain of distribution. Unlike other anti-competitive conduct, vertical price-fixing conspiracies do not implicate such pass-on issues because by definition the manufacturer and its distributor conspire to inflate the price actually paid by the plaintiff.

Put another way, in a vertical price-fixing conspiracy, there is no danger that a court will be required to conduct a complex pass-on analysis of damages because the plaintiff is the first party to pay the overcharge. Illinois Brick is therefore inapplicable.

This rationale may not apply where the anti-competitive vertical agreement does not involve naked price-fixing. Several courts explained that in the context of non-price-fixing cases, permitting indirect purchasers to sue upstream sellers from whom they did not purchase would inappropriately impose liability on these upstream sellers for inflated prices that were set by an intermediary. Other courts noted that a broad co-conspirator rule would allow indirect purchasers to circumvent Illinois Brick by simply alleging that the upstream defendant conspired with its distributor.

By contrast, courts applying the co-conspirator rule more broadly view the primary goal of Illinois Brick as allocating the right to sue to one group. These courts recognize that in the context of a vertical conspiracy, distributors will in most instances lack the incentive or ability to sue their upstream co-conspirators. Accordingly, the relevant inquiry under Illinois Brick is who is the first party outside the conspiracy to make the purchase, not what type of anti-competitive conspiracy is afoot.

These courts also reason that because all members of a conspiracy are jointly and severally

liable, it makes sense to identify the conspiracy's victim by looking to the first purchaser outside the conspiracy. Finally, some courts recognize that focusing on the structure of the conspiracy rather than on the conspiracy's victim creates a risk that antitrust violators could avoid antitrust liability altogether simply by conspiring with a middleman.

Becton Dickinson's Ultimate Influence is Uncertain, But May Well Reach Beyond the Seventh Circuit

Critically, the circuit split solidified by Becton Dickinson may soon be addressed by the Supreme Court in National Football League v. Ninth Inning. There, defendants filed a petition for certiorari asking the court to upend a decision by the Ninth Circuit applying the co-conspirator rule to an alleged vertical output restriction conspiracy.[8]

In their petition, the defendants present the question: "whether, notwithstanding this Court's decision in Illinois Brick, antitrust damages claims may be brought by indirect purchasers who do not allege that they paid a price fixed by the alleged conspirators?"

It remains to be seen whether the Supreme Court will grant certiorari in NFL. Should the court see fit to do so, Becton Dickinson's application of recent Supreme Court precedent may well resonate with the court and influence its decision. Indeed, Becton Dickinson relied heavily on the court's most recent guidance in Apple Inc. v. Pepper.[9]

In Pepper, like Becton Dickinson, the Supreme Court analyzed the applicability of Illinois Brick in the context of a nontraditional supply chain. The court concluded that since iPhone users purchased apps from Apple, they had standing to sue Apple for overcharges resulting from Apple's alleged anti-competitive conduct even though app developers (not Apple) set app prices.

According to the Seventh Circuit, Pepper established "a bright-line rule allocating the right to sue to direct purchasers alone ... The relationship between the buyer and the seller, rather than the nature of the alleged anticompetitive conduct governs."[10] Applying its understanding of the rule set forth in Pepper, the Seventh Circuit concluded that since the plaintiff providers in Becton Dickinson purchased from the conspirators, they had standing to sue no matter which defendant set the price and regardless of the anti-competitive conduct alleged.

In the wake of its decision in Pepper, determining the scope of the co-conspirator rule may be a logical next step for the Supreme Court in providing guidance on how Illinois Brick should apply in our rapidly modernizing economy. And, if the court were to grant certiorari, Becton Dickinson sets forth a framework that the Supreme Court could use in determining whether to apply Illinois Brick. This framework would arguably be consistent with the court's recent decision in Pepper.

Should the Supreme Court follow Becton Dickinson, and extend the co-conspirator rule beyond the vertical price-fixing context, consumers who do not purchase directly from the primary antitrust violator will be afforded opportunities to recover for injuries under federal antitrust laws that previously did not exist. Conversely, should the court limit the co-conspirator rule to vertical price-fixing cases, a number of antitrust violations may go unprosecuted.

Worse yet, the Supreme Court could deny the petition, in which case consumers and businesses are likely to face inconsistent results and uncertain outcomes across lower courts in different jurisdictions. In any event, the resolution of this question is certain to have a

profound impact on the enforcement of the antitrust laws and the behavior of businesses across the country.

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[1] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[2] See, e.g., Marion Healthcare, LLC v. Becton Dickinson & Co., No. 18-3735, 2020 U.S. App. LEXIS 6938, at *12 (7th Cir. Mar. 5, 2020) (hereinafter, "Becton Dickinson") ("it is better to think of the right to sue co-conspirators not as an exception to Illinois Brick, but instead as a rule inhering in Illinois Brick that allocates the right to collect 100% of the damages to the first non-conspirator in the supply chain."); Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136, 1157 (9th Cir. Aug. 13, 2013) ("the 'co-conspirator' exception is not really an exception at all, but rather describes a situation in which Illinois Brick is simply not applicable.") (internal citations and quotations omitted).

[3] Becton Dickinson, 2020 U.S. App. LEXIS 6938, at *17.

[4] The Third, Eighth, and Ninth Circuits hold that the "co-conspirator rule" applies to vertical conspiracies beyond price-fixing agreements. See Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 424 F.3d 363, 378-79 (3d Cir. 2005) (co-conspirator exception applies to any vertical conspiracy "where the middlemen would be barred from bringing a claim against their former co-conspirator [] because their involvement in the conspiracy was 'truly complete'"); Insulate SB, Inc. v. Advanced Finishing Systems, Inc., 797 F.3d 538, 542 (8th Cir. 2015) ("indirect purchasers may bring an antitrust claim if they allege the direct purchasers are 'party to the antitrust violation' and join the direct purchasers as defendants"); DirecTV, 933 F.3d at 1158 (plaintiffs that purchased from distributors have standing to sue manufacturer where plaintiffs alleged that manufacturer and its distributors participated in a conspiracy to restrict the output of NFL broadcasts).

The Fourth and Eleventh Circuits have arguably interpreted the Co-Conspirator Rule more narrowly. See Dickson v. Microsoft Corp., 309 F.3d 193, 215 (4th Cir. 2002 (interpreting the "co-conspirator rule" "as standing for the more narrow proposition that Illinois Brick is inapplicable to a particular type of conspiracy—price-fixing conspiracies."); Lowell v. Am. Cyanamid Co., 177 F.3d 1228, 1232 (11th Cir. 1999) ("[n]ot every vertical conspiracy allegation will get around the Illinois Brick doctrine. An alleged vertical conspiracy on top of a horizontal conspiracy" will not "'save' the overall conspiracy claims.").

[5] Petition for a Writ of Certiorari, National Football League v. Ninth Inning, Inc., No. 19-1098 (Feb. 7, 2020) ("Cert. Petition").

[6] Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co., No. 18-cv-01059, 2018 U.S. Dist. LEXIS 203407, at *12-13 (S.D. Ill. Nov. 30, 2018).

[7] Becton Dickinson at *17-18, 22, 23-24. The court explained that plaintiffs' allegations regarding the distributors' participation in the conspiracy were limited to facts reflecting that

distributors buy and sell according to contract terms. According to the court, such allegations did not amount to either parallel or conspiratorial conduct and the complaint therefore warranted dismissal. However, given the district court's error in applying Illinois Brick, the court permitted plaintiffs' to amend their complaint to adequately plead a conspiracy.

[8] Cert. Petition at ii.

[9] Apple Inc. v. Pepper, 139 S.Ct. 1514 (2019).

[10] Becton Dickinson, 2020 U.S. App. LEXIS 6938, at *15.