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ANTITRUST TRADE AND PRACTICE

Differing Views on the Co-Conspirator Exception to the Indirect Purchaser Rule

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A consumer who buys from a distributor and then seeks to hold the manufacturer liable for overcharges resulting from a conspiracy is an indirect purchaser that lacks standing to recover damages under federal antitrust law. The Supreme Court created this indirect purchaser rule in *Illinois Brick* to avoid requiring courts to conduct complex pass-on damages analysis, to prevent duplicative recovery, and to allocate the right to sue to one group of buyers.

Illinois Brick did not address whether a consumer who buys from a distributor can hold a manufacturer liable for overcharges stemming from a conspiracy *between* the manufacturer and the distributor. Under a standard *Illinois Brick* analysis, these consumers would be indirect purchasers and could not recover damages, because only the distributor is a direct purchaser with standing to sue the manufacturer. But courts have carved out an exception to *Illinois Brick*, labeled the co-conspirator exception, which applies when a downstream consumer alleges a vertical conspiracy between a manufacturer and distributor. Under these circumstances, courts have held that *Illinois Brick* does not prevent the *first* non-conspiratorial purchaser in the chain of distribution from bringing suit against the manufacturer. There is disagreement, however, among the circuits regarding whether the co-conspirator exception to *Illinois Brick* is limited to just *vertical* price-fixing cases (the "narrow interpretation"), or whether the exception applies to *any* kind of vertical anticompetitive conduct (the "broad interpretation"), and the Supreme Court just last week declined to review a case that could have resolved the issue.

Rationales for the Narrow Interpretation

Proponents of the narrow interpretation of the co-conspirator exception emphasize that *Illinois Brick* is based on the concern that courts should not face the heavy burden of determining the alleged overcharge when there are multiple levels of a supply chain. Unlike other vertical anticompetitive conduct, vertical price fixing does not force a court to conduct complex overcharge/pass-on damages analysis because the first nonconspiratorial purchaser is paying a specific (allegedly inflated) price. In other words, where there is a vertical price-fixing conspiracy, courts need not engage in a complex damages calculation because the overcharge was not passed on to consumers through any other level in the chain of distribution. Accordingly, courts applying the

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narrow interpretation hold that *Illinois Brick* is inapplicable in the vertical price-fixing context.

These courts also stress that the Supreme Court has issued a clear directive that federal district courts should exercise caution before creating exceptions to *Illinois Brick*. See *Kansas v. UtiliCorp United*, 497 U.S. 199, 216 (1990) ("We nonetheless believe that ample justification exists for our stated decision not to carve out exceptions to the [indirect purchaser] rule for particular types of markets."). Thus, advocates of the narrow interpretation view their interpretation as being in line with the Supreme Court's guidance.

In addition, these courts note that a broad co-conspirator exception permits indirect purchasers to easily circumvent *Illinois Brick* by alleging that the upstream manufacturer conspired with its distributor—that is, "solely based upon artful pleading." *Dickson v. Microsoft*, 309 F.3d 193, 215 (4th Cir. 2002). These courts also highlight the unfair nature of allowing indirect purchasers to sue manufactures for the allegedly inflated prices that were set by the distributor rather than the manufacturer. This concern is not present with other types of anticompetitive vertical conduct.

Rationales for the Broad Interpretation

Advocates of the broad interpretation of the co-conspirator exception predominantly argue that the structure of the conspiracy was not why the Supreme Court created the *Illinois Brick* rule. Rather, *Illinois Brick* was simply about incentives and allocating claims to one group of plaintiffs against one group of defendants. See, e.g., *Marion Healthcare v. Becton Dickinson & Co.*, 952 F.3d 832, 839 (7th Cir. 2020) (the co-conspirator exception "is not so much a real exception as it is a way of determining which firm, or group of firms collectively, should be considered to be the relevant seller (and from that, identifying which one is the direct purchaser) for purposes of the rule"). To these courts, what matters is which party was the first party to make a purchase and be harmed by the alleged upstream conspiracy, not what type of upstream conspiracy is allegedly occurring.

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These courts also reason that focusing on the structure of the vertical conspiracy rather than on those harmed by it makes it too easy for members of a vertical conspiracy to avoid antitrust liability simply by involving a distributor. According to these courts, following the narrow interpretation "would render upstream antitrust violators effectively immune from suit" for a vast array of anticompetitive vertical conduct—i.e., any vertical conduct that is not price fixing—"through the simple expedient of conspiring with a middleman or distributor." *Marion Healthcare*, 952 F.3d at 839. Were indirect purchasers only able to sue the upstream manufacturer for price fixing, these courts posit that the manufacturer likely would never be held liable for many kinds of vertical anticompetitive conduct because its co-conspirator distributor lacks the incentive to sue the manufacturer. Moreover, the courts state that limiting the co-conspirator exception to only vertical price-fixing cases would be inappropriate, "because the Supreme Court has concluded that price-fixing conspiracies are functionally indistinguishable from output-restricting conspiracies." *In re Nat'l Football League's Sunday Ticket Antitrust Litigation.*, 933 F.3d 1136, 1158 (9th Cir. 2019) (NFL Sunday Ticket), cert. denied mem., No. 19-1098, 2020 WL6385695 (U.S. Nov. 2, 2020) (to be reported at 592 U.S. ___).

Finally, proponents of the broad application of the co-conspirator exception emphasize that antitrust liability is joint and several, and "[n]othing in *Illinois Brick* displaces the rule of joint and several liability, under which each member of a conspiracy is liable for all damages caused by the conspiracy's entire

output." *Paper Sys. v. Nippon Paper Indus. Co*., 281 F.3d 629, 632 (7th Cir. 2002).

The Seventh Circuit Tackles The Issue Head-On

Earlier this year, the Seventh Circuit came out strongly in favor of the broad interpretation of the co-conspirator exception. See *Marion Healthcare v. Becton Dickinson & Co.*, 952 F.3d 832 (7th Cir. 2020). In *Marion Healthcare*, three plaintiff health care providers (plaintiffs) claimed that the defendants—a manufacturer, distributors, and group purchasing organizations (GPO) (collectively, defendants)—took part in a conspiracy to charge inflated prices for medical supplies led by the manufacturer, Becton Dickinson. In this industry, when a health care provider wants to purchase medical supplies, it becomes a member of a GPO, which negotiates on its behalf. Once the GPO and the manufacturer agree on the terms of a sale, the GPO notifies the health care provider of the proposed contract, called a net dealer contract. When the health care provider agrees to the net dealer contract, it enters into a distributor agreement with a medical supply distributor in which the distributor agrees to purchase the medical supplies from the manufacturer and resell them to the health care provider according to the terms of the net dealer contract. In this case, plaintiffs alleged that they were overcharged for catheters and syringes because defendants collectively negotiated and enforced net dealer contracts that employed penalty pricing, rebate provisions, and sole or dual source provisions, a form of exclusive dealing.

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The district court dismissed plaintiffs' claims for lack of standing under *Illinois Brick*, finding that the co-conspirator exception did not apply because plaintiffs failed to allege a vertical price-fixing conspiracy. Rather, plaintiffs alleged that the "defendants use[d] exclusive-dealing provisions, penalty provisions, and other anticompetitive behavior to inflate prices." *Marion Diagnostic Ctr. v. Becton, Dickinson, & Co*., No. 18-CV-01059-NJR-RJD, 2018 WL 6266751, at *4 (S.D. Ill. Nov. 30, 2018). Plaintiffs appealed to the Seventh Circuit. While the appeal was pending, the Department of Justice (DOJ) filed an amicus brief on behalf of plaintiffs, arguing that the ruling would make the manufacturer and its co-conspirators "effectively immune from private antitrust damages actions concerning the alleged conduct." *Brief for the United States of America as Amicus Curiae in Support of Appellants and Vacatur* at 8, *Marion Healthcare v. Becton Dickinson & Co.*, No 3:18-cv-01059-NJR-RJD (7th Cir. Apr. 25, 2019), ECF No. 39. The DOJ asserted that "the *Illinois Brick* court certainly did not intend to immunize antitrust co-conspirators based solely on evidentiary complexity." Id. at 20. The DOJ also appeared at oral argument to advocate for this position.

The Seventh Circuit reversed and adopted the broad interpretation of the co-conspirator exception, holding that it applies to any kind of vertical conspiracy. The Seventh Circuit relied heavily on the Supreme Court's recent ruling in *Apple v. Pepper*, 139 S. Ct. 1514 (2019), in which the Court held that iPhone consumers who bought apps from Apple's app store were direct purchasers under *Illinois Brick* and could sue Apple for alleged anticompetitive conduct, even though the price of the apps was set by the app's developer rather than Apple. The Seventh Circuit reasoned that, as in *Pepper*, the "relationship between the buyer and the seller, rather than the nature of the alleged anticompetitive conduct, governs whether the buyer may sue under the antitrust laws."

Marion Healthcare, 952 F.3d at 840. Moreover, the Seventh Circuit ruled that *Pepper* stands for the proposition that "[t]he relevant inquiry in determining the applicability of *Illinois Brick* focuses on the relationship between the seller and the purchaser, not the difficulty of assessing the overcharge." Id. Therefore, the Seventh Circuit held that plaintiffs had antitrust standing to sue Apple despite not alleging a vertical price-fixing conspiracy, because plaintiffs were the first buyers to purchase from an alleged vertical conspiracy.

The Circuits Are Split On This Issue

Other Circuits that have grappled with whether to apply the narrow or broad interpretation of the co-conspirator exception are split, though there is a recent trend favoring the broad interpretation. The Fourth and Eleventh Circuits apply the narrow interpretation. See, e.g., *Dickson*, 309 F.3d at 215 (holding 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) (stating that "[n]ot every vertical conspiracy allegation will get around the *Illinois Brick* doctrine"). Of note, these decisions are from 2002 and 1999, respectively, and these Circuits have not recently addressed the co-conspirator exception.

In addition to the Seventh Circuit, the Third, Eighth, and Ninth Circuits apply the broader interpretation. See, e.g., *Howard Hess Dental Labs. v. Dentsply Int'l*, 424 F.3d 363, 378-79 (3d Cir. 2005) (holding that the co-conspirator exception applies to non-resale price maintenance vertical conspiracies "where the middlemen would be barred from bringing a claim against their former co-conspirator"); *Insulate SB v. Advanced Finishing Sys.*, 797 F.3d 538, 542 (8th Cir. 2015) (holding that "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"); *NFL Sunday Ticket*, 933 F.3d at 1158 (ruling that "*Illinois Brick* is not applicable … because the complaint adequately alleges that" defendants conspired and injured plaintiffs via a vertical conspiracy to "limit output."). Though the Third and Eighth Circuits have not addressed the issue recently, the Seventh and Ninth Circuit each adopted the broad interpretation recently, in 2020 and 2019, respectively.

Implications and Conclusion

The Seventh Circuit was the second Circuit to address the co-conspirator exception to *Illinois Brick* since the Supreme Court's ruling in *Pepper*, following the Ninth Circuit in *NFL Sunday Ticket*. Although these two Circuits, relying on the Supreme Court's decision in *Pepper*, favored a broad approach, it is unclear whether the Supreme Court ultimately will agree with this analysis. Just last week, the Supreme Court declined to review *NFL Sunday Ticket*, where one of the two questions on appeal was "whether, notwithstanding the Supreme Court's decision in *Illinois Brick Co. v. Illinois,* antitrust damages claims may be brought by indirect purchasers who do not allege that they paid a price fixed by the alleged conspirators." But in the opinion denying the petition for certiorari, Justice Kavanaugh cautioned that the denial of certiorari should "not necessarily be viewed as agreement with the legal analysis of the Court of Appeals." *NFL v. Ninth Inning*, No. 19-1098, 2020 WL 6385695, at *1 (U.S. Nov. 2, 2020) (petition for cert. denied) (Kavanaugh J.) (to be reported at 592 U.S. ___). He stated that the plaintiffs may not have antitrust standing to sue the NFL and the individual teams, and invited defendants to seek review if they do not prevail at summary judgment or at trial. Id. Time will tell whether other Circuits will follow the Seventh Circuit's lead and rely on *Pepper* to adopt the broad interpretation or whether the co-conspirator exception to *Illinois Brick* will continue to be applied inconsistently across Circuits until the Supreme Court resolves the issue.