Sixth Circuit Finds Antitrust Appeal Not Up to Snuff

The U.S. Supreme Court recently denied certiorari to an appeal of the Sixth Circuit’s decision affirming a lower court finding that numerous business torts amounted to illegal monopolization or attempted monopolization, and upholding a $350 million jury award, trebled to $1.05 billion. *Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002).

In the spring of 1998, Conwood filed an eight-count complaint against the United States Tobacco Company (USTC) that included antitrust, state law and Lanham Act claims. USTC filed counterclaims for conversion and violations of the Sherman and Lanham Acts. Both parties dismissed their Lanham Act claims and Conwood dismissed its state law claims before the case went to the jury. The jury awarded Conwood $350 million in damages, ruling in its favor on USTC’s state law and Sherman Act claims.

The case related to the moist snuff market in the United States. From 1911 to the late 1970s, USTC was the only manufacturer of moist snuff, and it continues to dominate the market, with a market share of approximately 77 percent at the time of trial. Conwood’s expert at trial testified that USTC used its position as category manager to harm competition by deliberately providing false information to stores to exclude competitors from the market. Conwood also provided testimony that its customers required it to consult with USTC to obtain additional space for Conwood’s products or advertisements. USTC documents also suggested that it used the position to restrict competition, stating “it is imperative that we continue with this Category Management action plan to eliminate competitive products.”

Conwood then showed that USTC routinely removed and discarded Conwood’s racks and POS displays from retail locations. Conwood’s chairman testified that it spent $100,000 per month replacing racks and that its sales representatives spent about 50 percent of their time replacing or repairing racks destroyed by USTC representatives. Evidence showed that USTC paid commissions to its representatives based on the number of Conwood racks the representative removed. Conwood’s economist testified that its growth was slower than it would have been absent USTC’s exclusionary practices. His testimony placed the damage to Conwood between $313 and $488 million.

USTC argued that the evidence presented at trial demonstrated no more than sporadic torts and traditional marketing behavior. The Sixth Circuit, however, held that due to the restrictions on other forms of tobacco advertising, and the critical nature of POS advertising, “efforts by USTC, a conceded monopolist, to exclude Conwood’s racks and POS advertising from retail locations through any means other than legitimate competition could certainly support Conwood’s § 2 Sherman Act claim.”

The court upheld the jury verdict and the mandatory trebling by the district court.

Although this decision imposes antitrust liability for conduct generally deemed business torts, it should not be read expansively. The court recognized that business torts, standing alone, cannot give rise to antitrust liability. It also determined, however, that business torts may be anticompetitive and that a monopolist that uses business torts to maintain its market power can violate the antitrust laws. Simply put, where a company has market power, business personnel should be...
counseled that similar tortious actions could give rise to antitrust liability. On the other hand, it is less likely that companies without market power would be found to have violated the antitrust laws if they engage in similar behavior.

The Seventh Circuit reversed a district court’s grant of summary judgment in defendants’ favor, which was entered after minimal discovery into the question of standing. Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469 (7th Cir. 2002).

The district court found that plaintiffs were indirect purchasers, so their claims were barred by the Illinois Brick doctrine. The Seventh Circuit acknowledged that plaintiffs did not purchase directly from defendants, but found that they were the best-situated plaintiffs and could avoid the Illinois Brick doctrine.

This case arises out of an alleged conspiracy to fix the world price of copper futures on the international exchange market. According to the court, “this market manipulation necessarily and directly inflated the price of the products purchased by the plaintiffs, buyers of copper cathode, copper rod, and scrap copper” and the plaintiffs sued for violations of the Sherman Act, RICO and various state laws. Defendants claimed that plaintiffs were barred from recovery because they were indirect purchasers. The court rejected this argument, noting that “the plaintiffs are not indirect purchasers along a supply chain” in the physical copper market. Instead, “the alleged conspiracy operated in the separate but related futures market.” Because plaintiffs were making claims for harm only in the second market, the fact that there were other, independent damages in the first market was irrelevant.

The court then turned to whether plaintiffs were the proper plaintiffs in the physical copper market. In making this determination, it evaluated the six factors required under Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983):

1. The causal connection between the violation and the harm;
2. The presence of improper motive;
3. The type of injury and whether it was one Congress sought to redress;
4. The directness of the injury;
5. The speculative nature of the damages; and
6. The risk of duplicative recovery or complex damage apportionment.

The court found that plaintiffs bought copper cathode under contracts that relied on prices on the futures exchange. By manipulating the price of copper futures, the defendants had a direct effect on the price plaintiffs paid. This established “a direct relation between the defendants’ illegal scheme and [plaintiffs’] harm.” The court also found that determining damages would be no more complex than in other antitrust price fixing cases.

Finally, the court found that duplicative recovery was not likely because other plaintiffs in the physical copper market would be barred by Illinois Brick if they were not similarly situated to the current plaintiffs.

Because of the relationship between the copper futures market and the copper physical market, and the fact-specific nature of the decision, this case should have limited impact on other cases evaluating Illinois Brick arguments.

The Supreme Court of Vermont added Vermont to the list of states that reject the Illinois Brick rule and allow indirect purchasers to sue for antitrust violations under state antitrust laws. In a case of first impression, the court held that Vermont’s consumer fraud statute does not require plaintiffs to be direct purchasers in order to have standing to maintain an antitrust suit. Elkins v. Microsoft Corp., 2002 Vt. LEXIS 314 (Vt. November 1, 2002).

The court recognized that the documents constituted attorney work-product and plaintiffs did not contest this finding. In addition, the court found that defendants had not waived work-product protection. The court also tentatively concluded, subject to in camera review, that the documents were fact work-product, rather than opinion work-product. Accordingly, the court’s decision focused on whether plaintiffs had a substantial need for the information and whether plaintiffs could obtain that information from other sources without undue hardship.

The court found that plaintiffs made an adequate showing of substantial need for the materials based on three factors.
a significant portion of documents that would have been relevant to the litigation had been destroyed. Second, most of the employees of defendants who had firsthand knowledge of the conspiracy had invoked the Fifth Amendment and refused to testify. Third, and, in the court’s opinion, most importantly, the witness statements contained inconsistencies and equivocations.

The court concluded that the documents should be produced for in camera inspection, and found that, to the extent the documents consisted of fact work-product, they should be produced to plaintiffs. Further, the court concluded that opinion work-product in the documents would be redacted if possible while those documents containing opinion work-product that could not be redacted would be withheld.

While the result in this case requires production of documents most lawyers view as strongly protected, the facts of the case should limit the holding to those cases where key witnesses are indisputably unavailable.


Plaintiffs alleged that defendants (a union local and certain contractors) were conspiring to exclude contractors who employed workers who were members of another union. Before bringing suit, plaintiff U.S. Information Systems (USIS) attempted to persuade the Manhattan District Attorney to take action against the defendants. USIS’s outside counsel drafted a letter to be sent under the signature of a USIS executive to the Manhattan District Attorney describing facts that USIS hoped would cause the District Attorney to act against the defendants. During the subsequent litigation, USIS withheld the letter and several drafts, claiming work-product protection and the common interest privilege.

The court found that the documents were prepared in anticipation of litigation, noting USIS and its counsel “clearly expected USIS to ultimately be involved in a lawsuit and hoped that the . . . letters would either foment parallel litigation by the District Attorney’s office or at least lead to an exchange of information that would be useful in USIS’s own case.” Even though the incident referenced in the letter ultimately was not the basis for the lawsuit, the court held that “[d]ocuments do not lose work product immunity simply because intervening circumstances prevent the originally intended litigation from coming to fruition.”

The court concluded, however, that the documents should be produced. Work-product protection may be waived “when disclosure substantially increases the likelihood that the adversary will obtain the information.” In this case, submission of the documents to the district attorney actually increased the likelihood that the adversary would become privy to the information. As the court stated, “work product immunity is lost when a party simply makes a ‘voluntary submission of material to a government agency to incite it to attack the informant’s adversary.’”

COPPERWELD DEVELOPMENTS

A recent Tenth Circuit decision relates to the effect of pre-merger coordination on antitrust conspiracy claims.

Plaintiffs claim that defendant drove them out of business and asserted a series of contract and promissory estoppel claims, as well as an antitrust conspiracy claim, a monopolization claim, an attempted monopolization claim, and a conspiracy to monopolize claim. Of particular interest is the court’s analysis of the agreement element of the conspiracy to monopolize claim. Lantec, Inc. v. Novell, Inc., 306 F.3d 1003 (10th Cir. 2002).

The case arose out of plaintiffs’ efforts to write software packages that would take advantage of Novell’s software systems. Just as plaintiffs were preparing to go to market, Novell announced its merger with WordPerfect. Plaintiffs claimed that the merger and actions by the companies leading up to the merger gave rise to antitrust liability. As a result of the merger, Novell altered its approach to its software systems in order to integrate them with certain WordPerfect applications, adversely affecting plaintiffs’ business.

The Tenth Circuit upheld the district court’s dismissal of most of the antitrust claims because plaintiffs failed to define a market, finding that plaintiffs failed to produce sufficient evidence to support their market definition. Because, in the Tenth Circuit, a conspiracy to monopolize claim does not require establishment of a relevant market, however, the court reviewed the evidence to determine whether plaintiffs produced sufficient evidence of a conspiracy.

Both the court and the parties recognized that the Copperweld doctrine protected Novell and WordPerfect post-merger, but plaintiffs alleged that Novell and WordPerfect entered into a conspiracy to monopolize through pre-merger coordination. Plaintiffs attempted to use post-merger actions to support the inference that there was pre-merger coordination. The court ultimately rejected this argument, finding no evidence in the record “suggesting Novell and WordPerfect agreed to any of these post-merger changes before the merger was complete.” It concluded that “in this instance, Novell’s post-merger actions are not sufficient to raise an inference of conspiracy to monopolize.”

The court suggests that pre-merger coordination, to the extent supported by the evidence, could, in some situations, lead to antitrust conspiracy liability.
The U.S. District Court for the Eastern District of Pennsylvania suggested that a corporation, Lifeway Foods, and its 20 percent shareholder, Danone Foods, may be eligible for Copperweld protection. Critical to the court’s willingness to consider application of Copperweld to an owner with only a 20 percent interest was that plaintiff alleged that Danone “controls or exercises significant influence over Lifeway’s business activities.” Fresh Made, Inc. v. Lifeway Foods, Inc., 2002 WL 31246922 (E.D. Pa. August 9, 2002).

One of plaintiff’s claims was that Lifeway and Danone conspired to restrain trade in violation of Section 1 of the Sherman Act. In deciding a motion to dismiss, the court considered whether the 20 percent interest standing alone would protect Lifeway and Danone from Section 1 liability, but, consistent with existing case law, concluded that the “20 percent interest in Lifeway does not appear to be enough to invoke the Copperweld rule.” The court suggested, however, that “the allegation that Danone controls or exercises significant and substantial influence over Lifeway arguably makes Danone and Lifeway a single entity with unity of interests, incapable of conspiring under Copperweld.”

This aspect of the decision was not necessary for the court’s ruling on the motion to dismiss, but makes clear that the level of common ownership between the alleged conspirators is not dispositive of the applicability of the Copperweld doctrine.

Under the consent decree, Computer Associates and Platinum must pay jointly and severally a $638,000 civil penalty and refrain from agreeing on prices, exchanging bid information with future merger partners, and approving or rejecting proposed customer contracts.

After reviewing more than 32,000 comments from the public, the U.S District Court for the District of Columbia approved the settlement between the United States and Microsoft with minor modifications. The only change required by the court was a modification to rewrite the jurisdiction provision to ensure that it is clearly articulated and broadly drawn.


The settlement presented to the court did not expressly vest the court with authority to act sua sponte to enforce the decree or to order reports regarding compliance with it. With that caveat, the court gave conditional approval to the consent decree. On November 8, the parties submitted a revised consent decree consistent with the court’s proposed modification and the court entered a final judgment on November 12.

In a related case, New York v. Microsoft Corp., 2002 WL 31439655 (D.D.C. November 1, 2002), the court issued its order regarding remedies for those states that did not settle with Microsoft. The remedies imposed by the court were substantially similar to those agreed to by the United States and Microsoft. The states involved in this portion of the proceedings were California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, West Virginia and the District of Columbia. Massachusetts and West Virginia plan to appeal the remedies, while the remaining states have stated that they will not appeal.

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