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Freeborn's Review of Antitrust Decisions: November 2015 Part A – Appellate Decisions

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

Freeborn's Annual Review of Antitrust Decisions in the Seventh Circuit

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Dear Reader,

As the Firm's Antitrust Litigation Team began to prepare our annual review of antitrust decisions in the Seventh Circuit and the district courts that comprise the Seventh Circuit, we realized that we were looking at a very active circuit in this area of the law. Consequently, we decided to split the review into two parts – a collection of Seventh Circuit antitrust decisions issued over the last year or so and a collection of district court decisions issued during roughly the same. We hope that this division will be helpful.

This release covers antitrust decisions issued by the Seventh Circuit Court of Appeals. Some of the highlights of these decisions summarized in this release include:

In re Dairy Farmers of America, Inc. Cheese Antitrust Litigation
This decision deals with the issue of whether circumstantial evidence of an agreement is sufficient when it cannot exclude the possibility that the defendant was pursuing its independent interests.

In re Text Messaging Antitrust Litigation
This important decision by Judge Posner contrasts the evidence sufficient to uphold the denial of a motion to dismiss and the evidence that is not sufficient to avoid summary judgment, especially when the evidence only establishes a tacit agreement.

Motorola Mobility LLC v. AU Optronics Corp.
In another important decision by Judge Posner, the Seventh Circuit walks a fine line between barring private litigation alleging an overseas price-fixing conspiracy that victimized a U.S. corporation's foreign subsidiaries directly but the U.S. corporation only indirectly and at the same time leaving the door open for enforcement actions by U.S. regulators.

Fisher v. Aurora Health Care, Inc.
This decision re-affirms the Seventh Circuit's view that staffing decisions at a single hospital do not create antitrust concerns.

Pearson v. NBTY, Inc.
In another decision by Judge Posner, the Seventh Circuit sets forth the necessary elements for approval of a class action settlement.

Thermal Design, Inc. v. American Society of Heating, Refrigerating and Air-Conditioning Engineers
This important decision addresses the issue of vicarious liability of a trade association for the conduct of its industry members, contrasting the case before it from the seminal Supreme Court decision in *Hydrolevel*.

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Table of Contents

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In re Dairy Farmers of America, Inc. Cheese Antitrust Litigation, 801 F. 3d 758 (7th Cir. 2015)

by Jill C. Anderson and Dylan Smith

ABOUT THIS CASE STUDY:

On September 1, 2015, the Seventh Circuit affirmed the district court's order granting summary judgment for defendant Schreiber Foods, Inc. This involved a consolidated multidistrict class action suit. It alleged that Schreiber had conspired with settling defendants Dairy Farmers of America, Inc. (DFA) and Keller's Creamery LP to purchase cheddar cheese at inflated prices on the Chicago Mercantile Exchange (CME). Their supposed purpose was to manipulate the price of Class III milk futures. The plaintiffs asserted both antitrust claims (under Section 1 of the Sherman Act and California's Cartwright Act) and a claim under Section 22 of the Commodities Exchange Act.

Schreiber Foods is a cheese manufacturer and distributor. It buys most of its cheese directly from suppliers, but also purchases a small amount on the CME. DFA—a dairy marketing cooperative—was not only a horizontal competitor of Schreiber's, but also one of its largest suppliers and biggest customers.

The claims against Schreiber involved the CME's spot market for two types of cheddar cheese: block and barrel. (In contrast to a futures contract, a "spot" contract requires immediate delivery of the commodity.) Spot block cheese historically sold for about three cents more per pound than spot barrel cheese, with the differential (known as the "spread") subject to fluctuation.

A large spread between block and barrel cheese could negatively affect Schreibers. The company would purchase barrel cheese on the CME in an effort to correct or maintain the three-cent spread. As a milk producer, DFA had an interest in high cheese prices, which increased milk prices. It frequently attempted to prop up the block cheese price on the CME market.

This was the plaintiffs' theory. Between late May and late June 2004, Schreiber conspired with DFA to manipulate the price of Class III milk futures on the CME, in violation of Section 1 of the Sherman Act. Lacking any direct evidence of a conspiracy, the plaintiffs pointed to what they contended was circumstantial evidence of an illegal agreement. This included regular communications between employees at Schreiber and DFA between April and June 2004.

The district court held—and the Seventh Circuit agreed—that the plaintiffs' antitrust claims failed. This happened because the evidence couldn't exclude the possibility that Schreiber was pursuing its independent interests as opposed to carrying out an illegal agreement with DFA.

The communications between the two companies "could be understood as a part of a legitimate business relationship as readily as they could be understood as a part of a conspiracy." Even though the two companies were competitors, "DFA was also one of Schreiber's main suppliers, and Schreiber was one of DFA's largest customers, giving them a number of legitimate reasons to communicate with one another."

In addition, Schreiber pointed to evidence that its CME purchasing activity resulted from its independent interest in restoring a certain spread between barrel and block cheese. The plaintiffs' lack of evidence "tending to exclude the possibility that Schreiber was pursuing independent interests when it purchased cheese on the CME," doomed its antitrust claim.

The panel also affirmed the district court's grant of summary judgment on the plaintiffs' Commodities Exchange Act (CEA) claims. This alleged that Schreiber aided and abetted DFA's and Keller's manipulation of Class III milk futures through spot cheese purchases and, alternatively, that Schreiber was a principal CEA violator.

The district court held—and the panel agreed—that the CEA provided no private right of action for manipulating cheese prices. This was because the commodity underlying the Class III milk futures contract was *milk*, not spot cheese. The record contained no evidence that Schreiber was interested in manipulating the price of milk futures.

The aiding-and-abetting theory failed largely for the same reason as the antitrust claims. There was no evidence to support an inference of an agreement between Schreiber and any other party to manipulate cheese prices, much less milk futures.

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In re Text Messaging Antitrust Litigation, 782 F.3d 867 (7th Cir. 2015)

by Dylan Smith and Jeffery M. Cross

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

ABOUT THIS CASE STUDY:

On April 9, 2015, the Seventh Circuit upheld a grant of summary judgment for the defendants—four major wireless carriers and a wireless trade industry association—in a multidistrict class action suit. The plaintiffs alleged that the carriers conspired to fix the price of pay-per-use (PPU) text messages in violation of Section 1 of the Sherman Act. The case involved evidence of an oligopoly and parallel pricing behavior.

Judge Richard Posner, one of the country's leading antitrust jurists, emphatically reaffirmed a cardinal antitrust principle: "Express collusion violates antitrust law; tacit collusion [often called conscious parallelism] does not."

This opinion is significant because it explains the type and character of the circumstantial evidence needed to defeat a motion to dismiss under the *Twombly/Iqbal* pleading standard in an oligopoly and parallel conduct case, but not sufficient to defeat summary judgment.

The plaintiffs alleged that, from 2005 to 2008, the carrier defendants (AT&T, Sprint, T-Mobile, and Verizon Wireless) agreed on the pricing of PPU text messages. This was reflected in successive price increases culminating in a uniform price of 25 cents per text. The conspiracy was allegedly directed by the carriers' top executives, who used meetings of defendant The Wireless Association to coordinate pricing decisions.

At the pleading stage, the Seventh Circuit had upheld the denial of a motion to dismiss, because five alleged facts plausibly supported the inference of a price-fixing conspiracy: 1) parallel conduct; 2) the small number of industry players and industry structure that would facilitate collusion; 3) "the alleged exchanges of price information, orchestrated by the firms' trade association"; 4) "the seeming anomaly of a price increase in the face of falling costs"; and 5) "the allegation of a sudden simplification of pricing structures followed very quickly by uniform price increases."

At summary judgment, however, the plaintiffs needed direct or circumstantial evidence “that the defendants had colluded expressly—that is, had explicitly agreed to raise prices—rather than tacitly.” Judge Posner confirmed that express collusion *could* be proved by wholly circumstantial evidence. However, after conducting full pretrial discovery, the plaintiffs failed to find enough evidence of express collusion—circumstantial or otherwise—to make out a *prima facie* case of express collusion.

The plaintiffs’ appeal addressed what they regarded as direct evidence of conspiratorial agreement in the form of two “smoking gun” emails. One of those, exchanged between lower level T-Mobile executives, included the criticism that a recent price increase was “colusive [sic] and opportunistic.” In the Seventh Circuit’s view, by leaning so heavily on the word “collusive,” “the plaintiffs’ counsel demonstrate[d] a failure to understand the fundamental distinction between express and tacit collusion.” The surrounding context, in fact, tended to show that the term referred to collusion of the *tacit* variety, which was not an antitrust violation.

Judge Posner’s opinion also addressed a number of important factors in the court’s first opinion. This had affirmed the trial court’s denial of the defendant’s motion to dismiss, but which the appellate court found weren’t sufficient to establish a prima facie case of express collusion. For example, Judge Posner addressed industry structure. He noted that, if a small number of firms dominate a market, it’s easier to collude and detect cheating. Furthermore, the leading firms don’t have to worry about fringe players being able to expand output sufficiently to drive prices down to competitive levels. On the other hand, the fewer the firms, the easier it is to engage in “follow the leader” pricing, which is tacit collusion or conscious parallelism.

Judge Posner’s opinion focused on the reasons why parallel pricing behavior when increasing prices is *lawful*—unless express collusion is involved. He noted that the Sherman Act doesn’t impose an obligation on firms to compete vigorously, or even at all, on price. He stated that it is not an antitrust violation for a firm to raise its price, counting on competitors to do likewise. He added that, if one among four competitors raises its price and the others follow suit, they might do so because they think the price leader has insights into market demand that they don’t. Or they may be afraid that if they don’t raise prices, the leader will reduce its price—which may increase the leader’s sales. Or they might fear that the price leader raised its fees to finance improvements to keep its existing customers or win over new ones.

Judge Posner also noted that the anomaly of competitors raising prices in the face of falling costs—one of the factors considered in the court’s denial of the motion to dismiss—is evidence that the parties aren’t competing by trying to take sales from each other. However, he concluded that this evidence is not necessarily because of an express agreement. The parties may have determined independently that they may be better off with a higher price. That price increase may generate greater profits if prices are falling.

Judge Posner addressed the evidence of company executives attending trade association meetings, which also was considered at the motion to dismiss stage. He noted this gave the senior leaders an *opportunity* to collude, but the evidence was not sufficient to avoid summary judgment in favor of the defendants. He said the presence of non-conspirators at the meetings reduced the probability of express collusion. In addition, Judge Posner addressed the evidence that one of the defendant's executives admitted telling the association's president that "we all try not to surprise each other" and "if any of us are about to do something major, we all tend to give the group a head's up." Judge Posner found that evidence would be more compelling if prices changed uniformly *immediately* after one of these meetings, instead of the substantial lags in time that actually occurred. He also stated there was no evidence of what information was exchanged at meetings that would create an inference of express collusion.

The plaintiffs argued that, absent unanimous price increases, the carriers that raised prices could expect to lose customers to their lower cost competitors (called "churn" in the wireless industry). This led the plaintiffs to reason that all four carriers being willing to raise prices could be explained only by assuming the existence of an agreement to do so. The court identified six flaws in this theory:

- It wrongly assumed that a rational profit-maximizing seller cared about its *number of customers* rather than its *total profits*
- Tacit collusion occurs notwithstanding the ever-present risk of "churn," because tacit colluders "will see the advantages of hanging together rather than hanging separately"
- The defendants' respective price increases did not occur simultaneously, which would have been required to prevent "churn"
- Given the general movement of customers away from PPU service and into volume-discount "bundle" plans offered by their existing carriers, it could not be inferred that PPU pricing was a "major determinant of consumers' choice of carrier"
- Given the lower cost to carriers of providing plans with unlimited text messaging, the carriers wanted their customers to switch from PPU pricing into unlimited plans
- If the carriers were going to conspire to fix prices, they wouldn't have limited themselves to the shrinking PPU market, because the potential gains wouldn't be worth the risk

Moreover, contrary to the plaintiffs' factual contention that PPU price increases were forced on middle managers by senior executives, there was abundant evidence that middle management proposed the price increases.

The court acknowledged it was "difficult to prove illegal collusion without witnesses to an agreement." The court also allowed that the plaintiffs had "presented circumstantial evidence consistent with an inference of collusion." The problem, however, was that the same evidence was "equally consistent with independent parallel behavior."

The court concluded by expressing the hope that "this opinion will help lawyers understand the risks of invoking 'collusion' without being precise about what they mean. Tacit collusion, also known as conscious parallelism, does not violate Section 1 of the Sherman Act. Collusion is illegal only when based on agreement."

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Motorola Mobility LLC v. AU Optronics Corp., et al., 775 F.3d 816 (7th Cir. 2015)

by Dylan Smith and Jeffery M. Cross

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

ABOUT THIS CASE STUDY:

In *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015), the Seventh Circuit closed the door a second time on a Sherman Act suit alleging an overseas price-fixing conspiracy that victimized a U.S. corporation's foreign subsidiaries directly but the U.S. corporation only indirectly. At the same time, the appeals court left the door open to enforcement actions by U.S. regulators targeting the same extraterritorial conduct.

The case involved liquid-crystal display ("LCD") panels used by Motorola and its ten foreign subsidiaries in the manufacture of cellphones. Motorola alleged that the foreign manufacturers of the LCD panels violated section 1 of the Sherman Act by conspiring to fix the prices of the panels. (The lead defendant, AU Optronics, had already been convicted of participating in just such a conspiracy.) Only about one percent of the LCD panels were bought directly by Motorola in the U.S. The remaining 99 percent of the panels were purchased by Motorola's foreign subsidiaries: 42 percent for cellphones that the subsidiaries manufactured overseas and then sold to Motorola for resale in the U.S.; and 57 percent for cellphones both manufactured and sold abroad.

The district court granted summary judgment in favor of the defendants with regard to the 99 percent of LCD panels purchased by Motorola's foreign subsidiaries. The lower court ruled that claims predicated on sales to the subsidiaries were barred by the Foreign Trade Antitrust Improvements Act ("FTAIA"), which limits the extraterritorial reach of U.S. antitrust law. The court originally affirmed the district court in March, 2014. However, it subsequently granted a motion for rehearing, vacated its original decision, directed further briefing, and granted several requests for amicus briefs. In a second opinion by Judge Richard Posner, the Seventh Circuit again affirmed. The Supreme Court denied Motorola's petition for certiorari on June 15, 2015.

The appeals court stressed that the FTAIA imposed two prerequisites to a Sherman Act claim based on non-import trade or commerce with foreign nationals: first, "[t]here must be a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce"; and, second, "the effect [on U.S. commerce] must give rise to a federal antitrust claim."

The 57 percent of LCD Panels installed in cellphones sold abroad could satisfy neither requirement. As to the 42 percent installed in cellphones that were destined for the U.S., the court was willing to assume that the effect of the price-fixing conspiracy on U.S. commerce might be direct, foreseeable and substantial, thus satisfying the FTAIA's first requirement. But Motorola's claim foundered on the second requirement—that the effect give rise to a federal antitrust claim.

The immediate victims of the price-fixing conspiracy, the court explained, were Motorola's foreign subsidiaries; Motorola was harmed at most indirectly. In other words, "the cartel-engendered price increase in the components and in the price of cellphones that incorporated them occurred entirely in foreign commerce." Because the antitrust laws did not encompass injuries to foreign customers, Motorola itself did not have a Sherman Act claim.

Notably, the court rejected Motorola's attempt to treat itself and its foreign subsidiaries as a "single integrated enterprise." Judge Posner noted that American law does not collapse parents and subsidiaries in the way that Motorola wanted. Having elected to operate through subsidiaries governed by foreign law, Motorola could not use their separate legal existence for some purposes yet disregard that separate existence for antitrust purposes. To the extent that the foreign subsidiaries had suffered antitrust injury, they must seek recourse in the countries where they were domiciled. If those remedies were lacking, then to Judge Posner, that was the price that it paid for setting up foreign subsidiaries. Judge Posner described Motorola's attempt to invoke the U.S. antitrust laws as "forum shopping."

Motorola claimed that it had told its subsidiaries how much they could pay the cartel-sellers for LCD panels. Therefore, Motorola argued that it was the real buyer of the panels. Judge Posner rejected this argument. He characterized Motorola's position as pretending that the subsidiaries were really divisions. He stated that Motorola could not just ignore its corporate structure whenever its interest benefited it to do so. He stated that Motorolas could not pick and choose from the benefits and burdens of U.S. corporate citizenship. For example, he noted that Motorola was not claiming that its foreign subsidiaries owed taxes to the United States or that its foreign subsidiaries were bound by the workplace safety and labor laws of the United States. He held that, having chosen to conduct its LCD purchases through legally distinct entities organized under foreign law, Motorola could not impute to itself the harm suffered by the subsidiaries.

However, Judge Posner concluded that, even if the court was wrong and Motorola was correct that it and its subsidiaries "are one," the result under the FTAIA would be the same. He found that, even if the price fixers sold components to "the one," which assembled them into cell phones, and then "the one" sold the cell phones to U.S. consumers, the first sale in the

United States was to the U.S. consumers. “The one” would have been injured abroad when “it”purchased the price-fixed components there. In this regard, Motorola could still not overcome the second prong of the FTAIA.

For related reasons, the court opined that Motorola’s suit collided with the U.S. Supreme Court’s seminal decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). That case generally prohibits federal antitrust claims by indirect purchasers, even when they have absorbed supracompetitive prices passed on by direct purchasers. Judge Posner noted that Illinois Brick rested on the proposition that it was difficult to assess the impact of a price increase at one level of distribution on the prices and profits at a subsequent level, and thus to apportion damages between direct and indirect purchasers. He found these principles clearly applied to the facts surrounding Motorola and its subsidiaries. He rejected Motorola’s assertion that Illinois Brick did not apply to the FTAIA.

Further, because Motorola’s damages expert focused exclusively on the foreign subsidiaries’ injuries, and because Motorola in discovery disclaimed any intent to rely on prices it paid for finished cellphones incorporating the LCD panels, the court held that Motorola had waived any claim of injury based on those prices.

Finally, responding to concerns raised in an amicus brief submitted by U.S. regulators, the court affirmed that nothing in the FTAIA prevented the Justice Department from seeking criminal or injunctive remedies against the LCD manufacturers, provided that their cartel activity had the requisite effect on domestic U.S. commerce. To permit Motorola to sue on its foreign subsidiaries’ behalf under the U.S. antitrust laws “would be an unjustified interference with the right of foreign nations to regulate their own economies.” But the U.S. government, unlike private parties, was sensitive to such concerns, and U.S. enforcement agencies collaborate with their foreign counterparts in major antitrust cases. Accordingly, the court endorsed an approach that was “skeptical of Motorola’s suit but emphatic in asserting the government’s power to obtain relief through criminal and injunctive actions without ruffling our allies’ feathers.” Furthermore, the court of appeals noted that the *Illinois Brick* indirect purchaser doctrine is only applicable to suits for damages.

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Fisher v. Aurora Health Care, Inc., 2014-1 Trade Cases 78,707, 558 Fed. Appx. 653 (7th Cir. 2014)

by Deborah H. Bornstein and Jeffery M. Cross

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

ABOUT THIS CASE STUDY:

Staffing decisions at a single hospital don't create antitrust concerns that violate Section 1 of the Sherman Act. This was the finding of the Seventh Circuit Court of Appeals, in an unpublished opinion issued under Seventh Circuit Rule 32.1. The court also upheld the lower court's view that consumers or insurers—rather than individual physicians—are in a better position to bring antitrust claims on staffing decisions.

The plaintiff, Dr. Albert Fisher, was an independent physician who had been on the medical staff at the defendant's hospital. Fisher arranged for other physicians to attend his hospitalized patients when he was not on call. In 2010, the hospital changed its policy. It now required all medical staff members—including independent physicians—to be on call 24 hours a day, seven days a week. Fisher found this requirement nearly impossible to meet. The hospital informed Fisher that his staff privileges wouldn't be renewed unless he agreed to the rule, or arranged coverage by another physician on the hospital's staff.

Fisher sued the hospital after his privileges were terminated. He alleged an anticompetitive conspiracy in violation of Section 1 of the Sherman Act. He claimed the hospital wished to exclude independent physicians by preventing them from arranging backup coverage for their patients. Fisher also alleged that the hospital's new rules excluded him from an "essential facility," in violation of Section 2 of the Sherman Act.

The district court dismissed Fisher's original complaint for two reasons. First, it failed to allege antitrust injury. Second, the court found Fisher lacked standing to bring an antitrust complaint. The district court denied Fisher's motion to amend the complaint, because it would be impossible for him to file one that would pass muster.

The court of appeals affirmed the district court's dismissal and denial to amend the complaint. The court also pointed out that in *BCB Anesthesia Care, Ltd. v. Passsavant Memorial Area Hospital Ass'n*, 36 F.3d 664 (7th Cir. 1994), it "rejected the notion that hospital staffing decisions could give rise to antitrust concerns."

It also found Fisher lacked standing to bring an antitrust claim and could not allege antitrust injury. The court of appeals considered Fisher's case foreclosed by its prior decision: *Kochert v. Greater Lafayette Health Services, Inc.*, 463 F.3d 710 (7th Cir. 2006). That case found an anesthesiologist lacked standing to bring an antitrust complaint. This happened when she was excluded from the market when hospitals merged and signed a contract with another anesthesiologist group.

In *Kochert*, the court of appeals also determined that patients, insurers, or even physician groups—rather than individual physicians—would suffer more direct injury. As a result, they would be more appropriate plaintiffs for a private antitrust suit on hospital privilege decisions.

The court concluded Fisher lacked standing to sue Aurora Health Care, because "Fisher is not the plaintiff that can most efficiently vindicate an alleged antitrust violation." Any injury he suffered was not the kind that antitrust laws were designed to redress. Any causal connection between his alleged injury and the claimed antitrust violation was "tenuous at best." The court found it unnecessary to address the merits of Fisher's claims because he couldn't show antitrust standing or injury.

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Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014)

by Verona M. Sandberg and Jeffery M. Cross

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

ABOUT THIS CASE STUDY:

On November 19, 2014, Judge Richard Posner of the Seventh Circuit Court of Appeals issued an opinion discussing what class action settlements must include for a court to approve them. This was based on his finding that the district court had abused its discretion in approving a settlement in a nationwide consumer protection class action.

The lawsuits at issue were filed against manufacturers (NBTY, Inc. and the Rexall Sundown Defendants) and a retailer (Target) of the dietary supplement glucosamine. The class counsel for each of the cases came to a settlement agreement with NBTY and Rexall. They then submitted the nationwide settlement to one of the district courts for approval. The judge approved the settlement, but made significant changes. Appeals followed from both the members of the class, as well as from class counsel.

The settlement approved by the district court required Rexall to pay $1.93 million to class counsel in attorneys' fees and $865,284 (among other payments) to the class members. The settlement also required Rexall to pay $1.13 million to the Orthopedic Research and Education Foundation (the *cy pres* award).

The original settlement agreement had provided for attorneys' fees of $4.5 million. Any amount of the $4.5 million that the court held to be excessive was to revert to Rexall rather than being paid to the class. The district court valued the approved settlement at $20.2 million. Because the $1.93 million in attorneys' fees amounted to less than 10% of this amount, the district court judge found the $1.93 million in fees reasonable.

In rejecting this analysis, the appellate court stated that the district court should have looked at this ratio: the attorney's fees divided by the attorneys' fees plus what the class members received. After concluding the injunction relief should be valued at zero benefit to the class, the court found that the class members only received $865,284. So attorneys' fees were 69% of the settlement value, which the appellate court found "outlandish." Instead, Justice Posner stated that the presumption should be that attorneys' fees in a class action should *not* exceed one-third to one-half the total amount of money going to class members and their attorneys.

The appellate court also admonished the class counsel and Rexall for structuring the claims process to discourage class members from using it. This would minimize the total cost of the settlement to the Rexall defendants.

The court found that the average claimant would get a "modest monetary award." The process to receive this would deter people from filing. It required receipts of payment, the review of five documents accessible on the claims website, and the threat of criminal prosecution for filing a false claim. The court pointed out that the fewer the claims filed, the more funds Rexall would be willing to provide to the class counsel to settle the cases. Judge Posner pointed out that "an economically rational defendant will be indifferent to the allocation of dollars between class members and class counsel."

In addition, the appellate court found problems with the *cy pres* award: the $1.13 million awarded to the Orthopedic Research and Education Foundation. The Foundation would receive the difference between $2 million and what the class members actually received (if they received less than that amount, which they did). A *cy pres* award, however, is meant to be limited to money that can't be awarded to the class members, because it couldn't be shown that it wasn't feasible to award the additional funds to the class members, the *cy pres* award was improper.

Judge Posner was also critical of the reversion or "kicker" clause in the settlement. Under this, if the judge reduced the fees awarded to class counsel, the savings would go not to the *class* but to the *defendants*. Judge Posner described this as a "gimmick" designed to defeat those who objected to the settlement. If the class can't benefit from a reduction in the fee award, then objectors who are members of the class would not have standing to contest this.

The judge noted the simple and obvious way for the trial court to correct an excessive fee award was to increase the share of the settlement received by the class at the expense of class counsel. Judge Posner found no justification for the kicker clause and, at the very least, there should be a strong presumption of its validity.

The judge was also critical of claims by class counsel that they negotiate for the benefits to the class before any consideration of their own fee award. He described these claims as "not realistic." He stated that an economically rational defendant cares only about the *total* liability—not about the division of dollars between class members and their counsel.

There *is* a conflict of interest between class counsel (who seek to maximize their own fee recovery), defendants (who seek to minimize the total cost of settlement and aren't interested in the division of costs between class members and class counsel), and class members (who have little control over class counsel). Judge Posner remarked that the district court plays a critical role in approving a settlement. He described this settlement as "a selfish deal between class counsel and the defendant," and the class members' interests were not protected even by the modified version. The judgment was reversed and the case remanded for further proceedings.

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Thermal Design, Inc. v. American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc., 755 F.3d 832 (7th Cir. 2014)

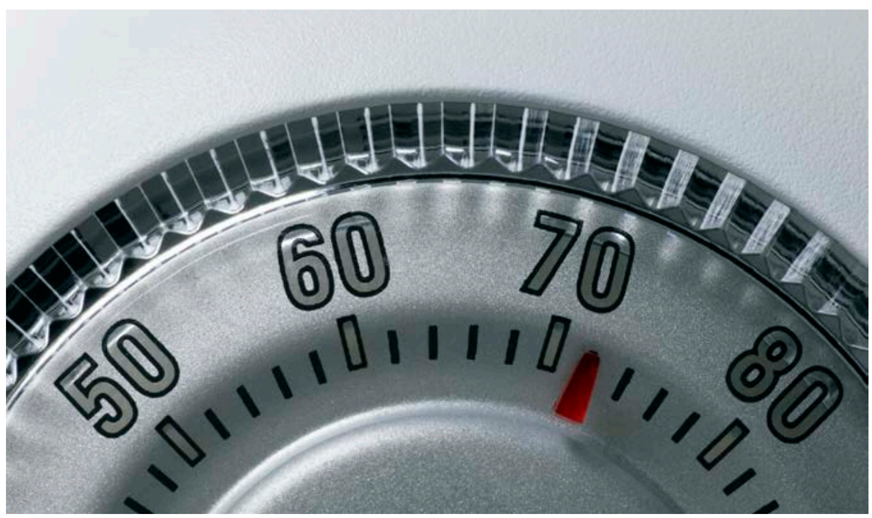
by Deborah H. Bornstein and Jeffery M. Cross

A FREEBORN & PETERS LLP ANTITRUST DECISION REVIEW

ABOUT THIS CASE STUDY:

The Seventh Circuit affirmed the district court's rejection of the plaintiff's challenge to the activities of an industry standard-setting organization. The plaintiff did not appeal the dismissal of its federal and state antitrust claims (or of its Lanham Act claims). Instead, the court of appeals reviewed the plaintiff's claims under the Wisconsin Deceptive Trade Practices Act and common law unfair competition theories.

The Seventh Circuit's opinion did not directly address the merits of plaintiff's antitrust claims. However, the opinion indirectly touched on collusion and competition issues that frequently arise from industry standard-setting efforts in the antitrust context. Most significantly, the appellate court made important distinctions between this case and the principles of apparent authority established by the seminal Supreme Court decision of *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982).



The plaintiff, Thermal Design, manufactured insulation—known as "liner systems"—for non-residential metal buildings. The plaintiff's liner systems competed primarily with "over-the-purlin systems." The defendant, the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), developed and published standards for the building heating and air-conditioning industry.

The plaintiff claimed that—through a committee of representatives from competing producers of metal building installation systems—ASHRAE promoted a misleading industry thermal performance standard based on inaccurate data. The performance standard was called U-factors. The plaintiff alleged that competing members of the standards committee submitted inaccurate data, which was used to calculate the U-factors.

Thermal Design said it engaged a respected national lab to test the U-factors. This lab discovered the factors were incorrect. The plaintiff alleged it reported the national lab's findings to ASHRAE, but the organization disagreed and published its original standard. The plaintiff argued that the deceptive standard: 1) discouraged consumers from buying its insulation products; and 2) favored the products of the competitors who dominated the committee.

On the unfair competition claim, Thermal Design alleged that the competing members of the standard-setting organization acted as agents of the association through principles of apparent authority. The company invoked the Supreme Court's *Hydrolevel* opinion.

The Seventh Circuit disagreed, finding *Hydrolevel* markedly different from this case.

Hydrolevel involved a standard-setting organization establishing a standard for low-water fuel cutoff valves as part of a Boiler and Pressure Vessel Code. A company named M&M had dominated the market for fuel cutoff valves. *Hydrolevel* entered the market offering a new device with a time-delay.

One of M&M's executives was vice-chairman of a subcommittee writing a segment of the code. This executive met with the chairman of the committee to devise a scheme to stifle *Hydrolevel's* threat.

The vice-chairman wrote a letter to the committee that was carefully crafted to elicit a negative response on the time-delay features of a fuel cutoff valve. The letter was addressed to the committee secretary, a full-time employee of the standard-setting organization. The association's procedures required the letter be passed to the chairman of the committee to prepare an answer. The chairman gave the letter to the M&M executive/vice-chairman. Both men kept control of the response by asserting it was "unofficial."

Predictably, the response was negative. It was sent out over the name of the committee secretary on the standard-setting organization's stationary. M&M used the organization's response to convince *Hydrolevel's* customers not to do business with it.

The trial court in *Hydrolevel* rejected the plaintiff's request for this jury instruction: the association could be liable for the acts of its agents if they acted within the scope of their apparent authority. Instead, the court instructed the jury that the association could be liable only if it *ratified* the agent's actions, or if the agent had acted according to the association's interests. Despite the more favorable instruction, however, the jury convicted.

The Supreme Court rejected the trial court's instruction to the jury. The court held that corporate liability under a theory of apparent authority was consistent with the law's intent to deter antitrust violations. It held that a ratification rule would encourage corporate defendants to be ignorant of conduct within the corporation. This made it contrary to the intent of the antitrust laws to deter violations. Similarly, it rejected a rule requiring a plaintiff to prove that the agent acted without intending to benefit the corporation. The court believed that rule was irrelevant to the purposes of antitrust laws.

Contrary to the position of the Supreme Court in *Hydrolevel*, the Seventh Circuit affirmed the dismissal of the complaint for unfair competition against the standard-setting organization. The Seventh Circuit attached two requirements onto the apparent authority standard: 1) the standard-setting body had to exercise *control* over the committee members; and 2) committee members had to undertake their allegedly anticompetitive acts with the consent or knowledge of the standard-setting body. The appellate court reached this conclusion, despite the plaintiff bringing to the association's attention that the U-factors were inaccurate and the standard-setting body had published them anyway.

In addition, the Seventh Circuit held that the organization had *not* delegated any degree of authority to the committee members. This means a reasonable person would believe that an agency relationship existed. To the Seventh Circuit, the representatives of the competition were simply voting members of the standard-setting organizations subcommittee that help develop the U-factors.

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