

The Seventh Circuit Shows Steely Resolve in Scrapping a Putative Class of Indirect Purchasers

by Mark Weiss

Mark Weiss is an associate at Shearman & Sterling where his practice focuses on antitrust issues.



On September 6, 2018, Chief Judge Diane Wood, writing for a three-judge panel of the Seventh Circuit Court of Appeals (the “Court”), affirmed the dismissal of a putative class action by indirect purchaser plaintiffs (“IPPs”) alleging that seven US steel producers conspired to fix prices on the sale of steel products in the United States.¹ The Seventh Circuit found the district court was correct in dismissing the complaint on two independent grounds (1) it was barred by the statute of limitations; and (2) the plaintiffs failed to demonstrate a proximate causal link between the alleged conspiracy and the alleged damages suffered by indirect purchasers of a wide variety of products containing steel.

The MDL initially involved two putative classes: a direct purchaser class and an indirect purchaser class. The district court deferred considering class certification of the IPP class pending its decision on certification of the direct purchaser class. The direct purchasers defined their proposed class as purchasers of the following steel products:

[A]ll products derived from raw steel ... including, but not limited to, steel sheet and coil products; galvanized sheet and other galvanized and/or coated steel products; tin mill products; steel slabs and plates; steel beams, blooms, rails, and other structural shapes; steel billets, bars, and rods; steel pipe and other tubular products; and all other products derived from raw steel.²

The district court certified this class “for the sole purpose of determining whether defendants engaged in a conspiracy in violation of federal antitrust laws” but denied class certification with regards to impact and damages.³ The direct purchaser class reached a settlement shortly thereafter.

In its original complaint, the sole IPP plaintiff sought to define the following class – similar to the direct purchaser class – of “consumer steel products” including:

[A]ny consumer steel product including but not limited to produced flat steel sheets and coils; galvanized steel products; tin mill products; steel plates; steel beams, rails and other structural shapes; steel bars and rods; steel wire and wire rod; steel pipes and other tubular products; and a variety of other products derived from raw steel.⁴

Shortly after certification of the direct purchaser class, defendants moved to dismiss the IPPs’ complaint. Instead of responding, the IPPs filed an amended complaint, which significantly transformed their claim and added new plaintiffs. The amended complaint also dropped the federal antitrust claims and instead relied on 21 state antitrust statutes, as well as state consumer protection and unjust enrichment laws. Importantly, the IPPs broadened their product definition to include a number of manufactured products containing steel, including:

[A]ny consumer steel product for end use and not for resale, including clothes washers, clothes

¹ See *Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc.*, 902 F.3d 735 (7th Cir. 2018).

² *Id.* at 739.

³ *Id.*

⁴ *Id.* at 740.

dryers, refrigerators, freezers, dishwashers, microwave ovens[,] regular ovens, automobiles, semi-tractor trailers, farm and construction equipment, room air conditioner units, hot water heaters, snow blowers, barbeque grills, lawn mowers, and reinforcing bars used in patios, driveways, swimming pools and sidewalks.⁵

Defendants again moved to dismiss, claiming the plaintiffs' injuries were too remote from the alleged offense and that plaintiffs had alleged a new set of injuries that were now barred by the statute of limitations. A district court in the Northern District of Illinois agreed, granting the motion to dismiss and setting up this appeal.

Addressing the statute of limitations, the Seventh Circuit noted that plaintiffs did not contest that their claims were now outside of the relevant limitations period. The original claim was filed in 2008 and the longest period from any state antitrust statute – six years – barred any claim filed after 2014. Accordingly, the IPPs relied on tolling or relation back arguments. To relate back, plaintiffs needed to show that their claim, under Federal Rule of Civil Procedure 15, “arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.”⁶ Where the IPPs' original complaint focused on purchases of steel pipes, tubing, and sheet from distributors and resellers, their new complaint included dozens of household and commercial products making virtually every American consumer and business a putative class member. Plaintiffs argued that their original product definition included “any consumer steel product” but the Court found that the IPPs' original complaint was limited to products manufactured at steel mills, rather than a host of downstream consumer and industrial products where steel was merely an input. Thus, the Court determined the original definition was insufficient to put defendants on notice of this wider claim. That the IPPs had issued third-party subpoenas to consumer product sellers Whirlpool and John Deere was similarly insufficient to put defendants on notice that the IPP claims encompassed all these manufactured end products. While defendants complained

about this overbroad discovery in their original motion to dismiss, the Court was not persuaded that defendants had ever been properly notified or – as IPPs suggested – were aware of this broader claim “*all along*.”⁷ Thus, relation back was unavailable under Rule 15.

The Court also quickly dispensed with tolling arguments once it concluded that the new named plaintiffs were not in fact members of the class proposed in the original complaint. Accordingly, under the Supreme Court's *American Pipe* and *China Agritech* decisions, there was no suspension of the statute of limitations.⁸

Although its statute of limitations ruling was dispositive, the Seventh Circuit decided to also address the district court's alternative ruling that the IPPs failed to establish proximate causation because they did not prove a direct relation between the plaintiff's alleged injury and the defendant's behavior. The IPPs' theory of recovery relied on tracing an overcharge allegedly implemented by steel manufacturers through to end-use consumers for a wide variety of “complex products, all of which have gone through numerous manufacturing alterations and lines of distribution.” “In many of these products,” the Court found, “steel is not even a primary or necessary ingredient.”⁹ With a twinge of irony, the Court noted that the IPPs' original complaint based on steel rods and similar items purchased indirectly would satisfy proximate causation requirements under “many if not all *Illinois Brick* repealer” statutes but that the connection between the alleged overcharge and the complex, manufactured end-products in the amended complaint was simply too remote. In sum, the IPPs needed to show that “the alleged injury is still fairly traceable to the defendant steel manufacturers” but, the Seventh Circuit found, the IPPs had no reasonable means of tracing the injury through “complex supply and production chains.”¹⁰

The facts of the case read like a law school issue-spotter, implicating numerous civil procedure concepts, including: proximate causation, statutes of limitations, relation back, tolling, standing, the distinction between federal and state

⁵ *Id.*

⁶ *Id.* at 741.

⁷ *Id.* at 742.

⁸ *Id.*

⁹ *Id.* at 744.

¹⁰ *Id.*

statutes adjudicated in federal court, as well as the merits of a good old-fashioned price-fixing antitrust case.

The takeaways from this decision are that courts will continue to give appropriate scrutiny both to amended pleadings and new parties after the statute of limitations has run. Amendments will not automatically relate back, particularly when the nature of the underlying claim has changed. Further, at least in the Seventh Circuit, indirect purchaser claims will face skepticism when they do not draw a clear line of traceable causation between their alleged injury and the underlying violation. More generally, the decision shows the difficulty in expanding claims – especially a full decade after an original complaint is filed. Courts will often view this expansion with skepticism, often finding that it appears strategic or unfair.

Defense counsel can use this decision as a blueprint for vigorously defending against amended complaints, especially when those amendments change the nature of

the injury and expand the class of plaintiffs. Furthermore, claims are susceptible to proximate causation defenses when the underlying violation is too far removed from the injury – certainly in antitrust cases – by more than one directly traceable level of commerce or by other intervening factors. This decision also has important implications beyond the motion to dismiss stage, most notably in determining whether class certification is appropriate in indirect purchaser cases where the allegedly price-fixed products are transformed at various points and in different ways in the stream of commerce. While federal courts have adopted a fairly liberal standard for allowing amended pleadings to relate back, adding new claims that expand cases from a limited set of purchasers to virtually every American and American business is a (steel) bridge too far.