5th Circ. Steel Boycott Ruling Likely To Be Controversial

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On Nov. 25, 2015, the Fifth Circuit Court of Appeals in MM Steel LP v. JSW Steel (USA), 2015 U.S. App. LEXIS 20520, affirmed a $156 million antitrust jury verdict against a steel manufacturer in a Sherman Act Section 1 case. The jury in the court below had found that the plaintiff steel distributor was forced out of business when two of its competitors conspired to pressure certain steel manufacturers not to supply it with steel. The Fifth Circuit's opinion accepted a framework for evaluating group boycotts and concerted refusals to deal that sets a low bar for future plaintiffs and calls into question the circumstances in which a manufacturer can pursue its own self-interest in choosing to deal with incumbent customers who threaten not to purchase its products if it sells to their competitors.

Key takeaways from the opinion are:

- Businesses continue to have the right to determine with whom they want to deal and the right to unilaterally refuse to deal with other entities, but those rights must be exercised carefully;

- A manufacturer can listen to distributors' complaints and independently decide what is in its best interests, but must avoid conduct which could lead a jury to infer an agreement with the complaining distributor that would harm the other distributor;

- Businesses can face antitrust liability for knowingly joining an agreement orchestrated by others even if they had no involvement in orchestrating it themselves;

- Prohibited antitrust agreements can be established by circumstantial evidence and inference;

- Refusals to deal with other entities are easier to defend as unilateral if they are consistent with preexisting company policies; and

- Group boycott agreements like the ones in this case are considered per se illegal meaning that companies alleged to have knowingly joined such agreements will be foreclosed from showing that the agreement did not harm competition.

Background Facts

Two steel industry salesmen founded a new steel distributor, plaintiff MM Steel. The salesmen had previously worked at two other steel distributors, American Alloy (AA) and Chapel. Upset that their former salesmen had established a new competitor, AA and Chapel agreed to pressure at least three steel manufacturers JSW, Nucor and SSAB, not to sell to MM. MM sued the distributors and manufacturers alleging an illegal group boycott agreement. SSAB settled before trial, but MM proceeded against the remaining defendants. There was substantial evidence of a group boycott conspiracy at the distributor level between AA and Chapel, but JSW

and Nucor argued at trial that they did not join any conspiracy. The jury disagreed, finding that both companies had joined a distributor-led conspiracy. On appeal, JSW and Nucor argued that there was insufficient evidence to support the jury's finding and that the case should have been analyzed under the rule of reason, not the per se rule.

Joining an Illegal Agreement

The Fifth Circuit found sufficient evidence to support the jury's finding that JSW joined the horizontal distributor conspiracy, but not Nucor.

JSW had initially entered a contract to sell to MM, but breached that contract after AA and Chapel each threatened not to buy from JSW if it sold to MM. According to the Fifth Circuit, that both AA and Chapel "made these threats within several weeks of each other was sufficient evidence for a reasonable juror to conclude that JSW was aware of the horizontal conspiracy to exclude MM from the market" and that "JSW's abrupt decision to no longer deal with MM following these threats … tended to exclude the possibility" that JSW reached its decision not to sell to MM independently. The court found that a reasonable jury could infer that JSW knew that it was joining a group boycott conspiracy between AA and Chapel.

The court reached a different result with respect to Nucor. Immediately after MM told Nucor that it was open for business, Nucor's president wrote Chapel to "pledge his 'fullest support.'" Although there was some evidence that Chapel threatened not to purchase from Nucor if Nucor sold to MM, Nucor declined to sell to MM both before and after those threats were made, in accordance with Nucor's "incumbency practice" where "Nucor remains loyal to established customers, such as Chapel, in order to maintain its original supply chain." Thus, unlike JSW, Nucor had never agreed to sell to MM in the first place, and so was not reversing course, which the court found significant. The Fifth Circuit held that this evidence was consistent with the possibility that Nucor's was acting independently of any conspiracy between AA and Chapel.

The case appears to put a substantial limitation on a manufacturer's long-acknowledged right to choose with whom it will deal, including its right to deal with one distributor over another when that distributor threatens to withhold business if the manufacturer sells to both. Here, JSW appears to be liable because:

- It received threats from two large customers and not just one of them — thereby permitting the jury inference that JSW knew that AA and Chapel were conspiring; and

- It reneged on its promise, made before AA's and Chapel's threats, to sell to MM even though reneging seems equally consistent with the pursuit of its self-interest as with conspiracy under the circumstances of threats by major customers.

Thus, the case stands for the proposition that a manufacturer can listen to the distributors' complaints and independently decide how to proceed in a manner that is in its best interests, but it must avoid any conduct from which a jury could infer an agreement with the complaining distributor to harm the other distributor. And yet, the case does not provide much of a

principled basis to distinguish between behavior that would support such an inference and behavior that would not.

The Per Se Rule

A key issue in the case was whether the steel manufacturers' agreement not to sell steel to the plaintiff should have been judged under the "rule of reason" test, which analyzes the market in detail and asks whether competition has been harmed by the agreement not to sell, or the per se standard, which automatically presumes such harm, thereby precluding a competitive analysis. The plaintiff pursued solely a per se theory of recovery; the district court gave the jury a per se instruction and the Fifth Circuit affirmed. Thus, the plaintiff was able to bypass any inquiry into whether the agreement actually harmed competition, an inquiry which presumably would have led to a defense victory since the market for steel products appears highly competitive.

While certain categories of clearly anti-competitive conduct like price-fixing and bid rigging agreements among competitors remain solidly within the per se category, it is generally recognized that in the last few decades "the per se rule has been in steady retreat."[1] This has left group boycotts in a gray area. Indeed, the U.S. Supreme Court has acknowledged widespread confusion about the application of the per se rule to group boycotts.[2] In the last 20 years, the Supreme Court and many lower courts have refused to apply the per se doctrine to several categories of group boycott cases that stray from the classic boycott fact pattern.

Nonetheless, the Fifth Circuit held that the boycott alleged by MM Steel was the sort of classic boycott that has routinely been judged under the per se doctrine because it involved joint efforts by firms to disadvantage a competitor by coercing suppliers to cut off access to a necessary source of supply.

The Fifth Circuit's imposition of per se liability for what is in essence a series of vertical agreements not to sell steel to MM — although induced through collusively made threats by the distributors — is likely to be controversial. In another case involving pressure put on manufacturers from a reseller, the Ninth Circuit recently suggested that while the horizontal aspect of the case should be analyzed under the per se rule, the vertical part should be analyzed under the rule of reason.[3] The Supreme Court has stepped back from applying the per se doctrine to vertical agreements in other contexts. In Leegin Creative Leather Products Inc. v. PSKS Inc., 551 U.S. 877, 893 (2007), the Supreme Court included a passage in its opinion that suggested that vertical agreements in support of a horizontal conspiracy should be analyzed under the rule of reason, although judges and litigants have disagreed over the meaning of the language.

Given the uncertainty, it is possible that the Supreme Court may want to weigh in. It is unclear whether JSW will petition for certiorari in this case, but the issue was raised recently by another company in a pending petition for certiorari in the e-books antitrust case.[4]

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[1] United States v. Apple, Inc., 791 F.3d 290, 345-46 (2nd Cir. 2015) (Jacobs, J. dissent).

[2] Nw. Wholesale Stationers v. Pacific Stationary & Printing Co., 472 U.S. 284, 294 (1985).

[3] In re Musical Instrument & Equipment Antitrust Litigation, 798 F.3d 1186, 1192 (9th Cir., 2015) ("once the conspiracy is broken into its constituent parts, the respective vertical and horizontal agreements can be analyzed either under the rule of reason or as violations per se").

[4] Brief for Petitioner at 13-18, Apple Inc. v. United States, petition for cert. filed, 84 U.S.L.W. 3258 (U.S. Oct. 28, 2015) (No. 15-565).