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Purported "Direct Purchaser" Claims Dismissed for Lack of Antitrust Injury in *Aluminum Warehousing Antitrust Litigation*

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On August 9, 2016, the Second Circuit affirmed a district court's dismissal of claims asserted by two groups of self-proclaimed "indirect purchasers" of aluminum products who alleged that three aluminum futures traders, which had acquired operators of warehouses for aluminum, manipulated a price component for aluminum (warehouse storage costs). The Second Circuit concluded that these "indirect purchasers" did not suffer antitrust injury because they were not participants in the aluminum warehousing market. ***In re Aluminum Warehousing Antitrust Litig.*, Nos. 14-3574, 14-3581(2d Cir. Aug. 9, 2016)** (http://www.ca2.uscourts.gov/decisions/isysquery/e82307a9-ca06-47f9-bfd0-e38c1adf56da/1/doc/14-3574_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/e82307a9-ca06-47f9-bfd0-e38c1adf56da/1/hilite/). In the district court, Judge Katherine Forrest recently applied the Second Circuit's analysis to dismiss similar claims brought by the purported "direct purchasers" of the aluminum because they, too, were not participants in the aluminum warehousing market. ***In re Aluminum Warehousing Antitrust Litig.*, No. 13-2481 (S.D.N.Y. Oct. 5, 2016)** (https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0ahUKEwjhrOWyxeTPAhWLq1QKHQY6DskQFgg5MAQ&url=http%3A%2F%2Fwww.sdnyblog.com%2Ffiles%2F2016%2F10%2F13-MD-02481-Opinion-10.5.16.pdf&usg=AFQjCNHSTlXHXQVuEaWDrsVVSR3oP4pk6g&sig2=t3HIGFjkq90S9BHr7wYxWA&cad=rja). These two decisions (assuming the district court's decision is affirmed) should help defendants attack plaintiffs' efforts to establish antitrust standing in other cases by trying to thread the "inextricably intertwined" needle for market participants that the Supreme Court established in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982).

The underlying case involves multidistrict litigation brought by three groups of plaintiffs who claim that the aluminum traders manipulated aluminum warehousing services, which caused a supply restraint that led to higher prices for Midwest Premium, a pricing benchmark incorporated into the price of aluminum that the plaintiffs eventually paid through their downstream purchases of aluminum or aluminum products. Class action claims were asserted for three putative groups: (1) First Level Purchasers ("FLPs"), who bought aluminum directly from aluminum producers; (2) Commercials, who bought semi-fabricated aluminum to manufacture products made of aluminum; and (3) Consumers, who bought finished products made of aluminum. The FLPs asserted Sherman Act claims as "direct purchasers" of the aluminum allegedly affected by the artificially inflated price for Midwest Premium; the Commercials and Consumers asserted damages claims under state law as "indirect purchasers" of the aluminum or aluminum products that then were manufactured and injunctive relief under federal law. Under the law of certain states, indirect purchasers—such as the Commercials and Consumers—may sue for damages; indirect purchasers may not sue for damages under federal law. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

In its August 2016 decision, the Second Circuit affirmed the district court's dismissal of the claims asserted by the Commercial and Consumers, concluding that those purchasers suffered no antitrust injury and therefore lacked antitrust standing. The Second Circuit held that the Commercials and Consumers did not participate in the market where the alleged anticompetitive conduct occurred—the aluminum warehousing market—nor did they even attempt to argue that they did. Instead, they sought to fall within the Supreme Court's holding in *McCready*, in which the Court "carved a narrow exception to the market participant requirement for parties whose injuries are 'inextricably intertwined' with the injuries of market participants." Slip. Op. at 18 (citation omitted).

In *McCready*, a patient asserted antitrust claims against her insurance company and a group of psychiatrists, alleging they had colluded to exclude psychologists from receiving compensation under the health insurance plan. Although the patient was a participant in the market for psychology services, she was not a participant in the market for psychiatry services. Nonetheless, the Supreme Court concluded that she sufficiently alleged antitrust injury because there was no risk of duplicative recovery, and her injury was clearly foreseeable and not so remote that it was not proximately caused by the offending conduct. The Second Circuit—after pointing out that in *Associated General Contractors* the Supreme Court characterized the market in *McCready* as "psychotherapeutic services"—boiled down *McCready* and subsequent developments in the law as follows: "The upshot is that to suffer antitrust injury, the putative plaintiff must be a participant in the very market that is directly restrained." *Id.* at 27.

Having so described the "market participant" test, the Second Circuit rejected the Commercials' and Consumers' reliance on *McCready*, explaining that their injuries were "suffered down the distribution chain of a separate market, and was a purely incidental byproduct of the alleged scheme." *Id.* at 30. The plaintiffs' argument that the *McCready* exception applied because of "their role in creating demand for physical aluminum" was too attenuated. *Id.* at 28. The Second Circuit viewed

the plaintiffs' argument as an attempt to replace the "inextricably intertwined" exception with a "but-for" causation test, which would eviscerate *McCready*'s requirement of a proximate cause connection between the conduct complained of and the injury allegedly suffered.

Given the Second Circuit's analysis, the defendants moved in the district court to dismiss the "direct purchaser" claims asserted by the FLPs. The FLPs hoped that they might persuade the district court they were market participants as described in *McCready* because they were not downstream purchasers but, rather, "direct purchasers"—at least as they described themselves. The district court rejected their argument.

Judge Forrest found that the FLP claims (which were not at issue in the Second Circuit's decision), were essentially the same as the Commercial and Consumer claims: "defendants' alleged shenanigans in connection with aluminum warehousing services caused a supply restraint that led to a higher Midwest Premium." Slip. Op. at 2. Although the FLPs tried to recast their claims, Judge Forrest recounted several examples where they had "identified the locus of defendants' anticompetitive conduct as the aluminum warehousing services market." *Id.* at 4. Accordingly, the Second Circuit's analysis of the Commercial and Consumer "indirect purchaser" claims applied with equal force to the FLP "direct purchaser" claims—the FLPs were not participants in the aluminum warehousing services market, so they did not suffer antitrust injury sufficient to give them antitrust standing. Judge Forrest paraphrased the Second Circuit's analysis as not permitting antitrust standing under *McCready* "unless the defendant conspirators intend to corrupt some market in which they do not participate." *Id.* at 12. Notably, and unlike the more typical claims involving the purchase of price-fixed goods or components, the court did not need to resolve whether the FLPs had antitrust standing for purposes of bringing a damages claim because the court determined that the FLPs were not market participants.

Recognizing their uphill standing argument in light of the Second Circuit's decision, the FLPs also argued that the evidence demonstrated that both the FLPs and the defendants were participants in the physical aluminum market so they no longer had to rely on *McGready*'s "inextricably intertwined" exception. The court rejected this argument first on procedural grounds, explaining that it was far too late for the FLPs to change their basic theory of the case, which centered on anticompetitive conduct directed to the warehousing services market. More substantively, however, the court reasoned that "the fact that the parties may compete in a market into which competitive effects trickle down is not equivalent to competing in the market in which the anticompetitive conduct occurred (warehouse services) or the market(s) intended to be most directly affected (also warehouse services)." *Id.* at 3. It so ruled even while acknowledging allegations that the defendants engaged in the conduct in order to affect the price of physical aluminum. *Id.* at 19.

Assuming the district court's decision is upheld if appealed, these two decisions provide both plaintiffs and defendants with important guidance regarding the antitrust injury requirement for antitrust standing. Plaintiffs often test the limits of the antitrust laws by trying to extend their applicability to situations where the conduct at issue has effects in markets other than the market that was the subject of the alleged anticompetitive conduct. The courts have developed a number of tools to ensure that the antitrust laws—and the treble damages they provide—are not used in situations where they weren't intended to apply. The antitrust injury requirement, and antitrust standing under *Associated General Contractors*, are gateway hurdles that every plaintiff must plan on satisfying; conversely, they are arguments every antitrust defense attorney has in his or her toolbox. As the *Aluminum Warehousing* cases demonstrate, drawing the line between what does and doesn't constitute antitrust injury often is not as apparent or straightforward as one might like. The Second Circuit's recent analysis provides a new guidepost regarding the limits of the *McCready* exception and the need for antitrust plaintiffs to demonstrate that they participated in the market or suffered an injury "inextricably intertwined" with the injuries of market participants.

It is unclear what the next steps will be, but this decision, like its predecessor, may make its way to the Second Circuit, which will need to wrestle with whether the FLPs claims are the same or different in character from the Commercial and Consumer claims. In any event, the court's decision is already having a visible impact. In *In re North Sea Brent Crude Oil Futures Litigation*, two defendant oil companies recently submitted Judge Forrest's order to argue that derivatives traders lack antitrust standing to bring claims based on the alleged manipulation of the price of North Sea Brent crude oil and Brent crude oil futures. ***In re North Sea Brent Crude Oil Futures Litig.*, No. 13-MD-02475, Dkt. 412 (S.D.N.Y. Oct. 12, 2016)** (http://s3.amazonaws.com/cdn.orrick.com/files/LetterInreNorthSeaBrentCrudeOilFuturesLitig.pdf).