



Monopolization and Financial Markets Manipulation: The Evolving Role of Antitrust

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Private plaintiffs allegedly injured by a scheme to manipulate financial markets have asserted not only violations of the securities or commodities laws but also violations of the Sherman Act, including monopolization claims under Section 2. The interplay between the antitrust laws and financial regulatory oversight in the context of alleged manipulation has long been a source of debate. We look at three doctrines where this debate has reemerged over recent years: (a) the extent to which regulatory oversight should displace application of the antitrust laws; (b) whether antitrust injury limits the availability of remedies potentially arising from alleged market manipulation; and (c) application of the antitrust laws to developing theories of alleged “open market” manipulation (i.e., manipulation allegedly achieved through facially legitimate open market transactions). Clear answers to these and other questions that are key to assessing antitrust liability for financial market manipulation remain elusive in this evolving area of the law.

Implied Immunity and Regulatory Oversight

In the not too distant past, there was a split in authority as to whether the antitrust laws should be applied to regulate certain types of alleged market manipulation. In *Smith v. Groover*, for example, the plaintiffs brought claims under both the Sherman Act and the Commodity Exchange Act (“CEA”) for the alleged manipulation of the price of soybean futures contracts.¹ The Northern District of Illinois held that the “specific remedy rule” precluded application of the antitrust laws to conduct more specifically governed by the CEA and dismissed the antitrust claims as “superfluous.” The court explained “that where the law provides a special statutory remedy for specific conduct, as well as a general provision which is comprehensive enough to include that specific conduct and a wide variety of other conduct, the general remedy is inapplicable.”² The court also noted that the remedies available under the two statutes were inconsistent insofar as the Sherman Act provides for treble damages while the CEA does not.³

The Second Circuit subsequently rejected the “specific remedy rule” in *Strobl v. New York Mercantile Exchange*, allowing the plaintiffs in that case to simultaneously pursue both antitrust

and CEA claims.⁴ The Second Circuit reasoned that barring plaintiffs from pursuing both CEA and Sherman Act claims amounted to implied repeal of the antitrust laws. Because the CEA and antitrust laws both prohibit the price manipulation alleged, the court separately held that implied repeal was not warranted because there was no conflict between the regulatory schemes. *Id.* at 27-28.

Strobl seemed to close the door on the availability of the specific remedy rule and the doctrine of implied repeal to bar antitrust claims in the context of commodities market manipulation. Subsequent developments, however, including the evolution of the implied repeal doctrine in *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007) and *Verizon Commc’ns. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), beg the question of whether there could be circumstances under which the antitrust laws are impliedly repealed by more specific financial markets regulation.

Implied immunity under *Credit Suisse* and *Trinko*, for example, could be particularly applicable in circumstances where the allegedly manipulative trading is occurring in an organized and regulated market in which prices and market structure are tightly controlled by a federal agency. In *Simon v. KeySpan Corp.*,⁵ for example, a plaintiff alleged that KeySpan Corporation, a generator of wholesale electricity and generation capacity in New York City, violated the antitrust laws by entering into a financial swap transaction with the Morgan Stanley Capital Group, Inc that was tied to capacity prices set through an auction process governed by tariffs approved by the Federal Energy Regulatory Commission (“FERC”). The complaint alleged that the swap transaction made it profitable for KeySpan, which had market power in an “installed capacity market” established and regulated by FERC, to withhold generation capacity from that market and thereby reap artificially high prices from its capacity sales. FERC, after investigating KeySpan’s conduct and the specific transaction at issue, concluded that the swap transaction had no impact on market outcomes and violated no FERC rule or tariff. Apparently unpersuaded by FERC’s findings, the Antitrust Division of the United States Department of Justice pursued its own investigation and entered into consent decree settlements requiring the swap counterparties to disgorge some of their alleged profits.⁶

Because the DOJ investigation was resolved through settlements, the issue of implied repeal in the government’s cases was never litigated, although every element of the

⁴ 768 F.2d 22, 23 (2d Cir.), cert. denied, 106 S.Ct. 527 (1985).

⁵ 785 F. Supp. 2d 120 (S.D.N.Y. 2011), reconsideration denied 2011 WL 2135075 (S.D.N.Y. May 27, 2011).

⁶ See *United States v. KeySpan Corp.*, Final Judgment, No. 10-cv-1415 (WHP) (S.D.N.Y. Feb. 2, 2011), available at <http://www.justice.gov/atr/cases/f266700/266798.pdf>; and *United States v. Morgan Stanley*, Final Judgment, No. 11-cv-6875 (S.D.N.Y. Aug. 7, 2012), available at <http://www.justice.gov/atr/cases/f285700/285799.pdf>.

¹ 468 F. Supp. 105, 116-17 (N.D. Ill. 1979).

² *Id.* at 116.

³ *Id.*



doctrine arguably applied and could have foreclosed the DOJ from applying the antitrust laws to the allegedly manipulative trading. Specifically, Congress gave FERC specific, exclusive jurisdiction over the wholesale energy market at issue; FERC actively exercised that authority by establishing market structure and price formation rules and enforcing those rules through active oversight of the swap transaction at issue; and FERC had concluded that the transaction at issue was lawful and consistent with its market regulation - a conclusion that was reached through factual and legal findings in direct conflict with the assertions made by the DOJ. Moreover, the subsequent private civil actions brought in both state and federal courts were all dismissed under the filed-rate doctrine, the jurisdictional prerequisites of which closely track the implied repeal doctrine set out in *Credit Suisse*.⁷

Unlike *Strobl*, which presented a fairly straight-forward scenario in which the conduct at issue presented no actual or potential conflict between the antitrust laws and the CEA, *KeySpan*, and similar cases make clear that implied repeal of the antitrust laws may nonetheless apply where a regulatory agency specifically authorized by Congress to police the market at issue has determined (or has the authority to determine) whether the alleged conduct amounts to price manipulation.⁸

Antitrust Injury

Application of the antitrust laws to alleged market manipulation also could be limited by the concept of antitrust standing, as recently seen in the LIBOR cases.⁹ Black letter antitrust law holds that a plaintiff must adequately allege antitrust injury in order to establish standing to assert a Section 2 claim. Antitrust injury is an injury that is “of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429

U.S. 477,489 (1977)). To establish antitrust injury, “a plaintiff must show (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute.” *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489.

In the well-publicized multidistrict LIBOR litigation currently pending in the United States District Court for the Southern District of New York, the plaintiffs asserted both Sherman Act and CEA act claims against banks that allegedly used their market power to manipulate various LIBOR interest rates. In a March 29, 2013 opinion, Judge Buchwald dismissed the antitrust claims on standing grounds but declined to dismiss all of the plaintiffs’ CEA act claims.¹⁰ According to Judge Buchwald, the plaintiffs lacked standing to pursue the antitrust claims because the LIBOR rate-setting process itself was not a competitive one and, therefore, the injury alleged was not actionable under the antitrust laws.¹¹

But antitrust standing is not always an impediment to monopolization claims involving alleged market manipulation. In *In re Crude Oil Commodity Futures Litigation*, 913 F. Supp. 2d 41 (S.D.N.Y. 2012), a group of commodities traders alleged that another trader manipulated prices of West Texas Intermediate (“WTI”) grade crude oil and related derivatives in violation of Section 2 of the Sherman Act and the CEA. The defendants moved to dismiss for lack of standing because the plaintiffs did not trade in the physical market for WTI that the defendants allegedly monopolized. *Id.* at 57. The court, untroubled by the fact that the alleged monopolization and injury occurred in a market separate from that which was allegedly manipulated, found that the plaintiffs’ alleged losses were “caused by artificial market conditions that were spawned by [the defendant’s] dominant share of the physical WTI market.” *Id.* Such injury - alleged “losses from transacting in a market tainted by price manipulation—is of the type the antitrust laws were intended to prevent.” *Id.* (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

Open Market Manipulation

The developing theory of “open market” manipulation may present other challenges to plaintiffs seeking redress under the antitrust laws for alleged financial markets manipulation. Open market manipulation refers to situations where the alleged manipulative scheme is accomplished solely through the use of facially legitimate open market transactions (i.e., with willing buyers and sellers at prevailing market prices) and does not allege wash sales, false reporting of market information, or fictitious trading. In such situations, although each open market trade may, individually, be lawful and legitimate, the allegation is made that the cumulative effect of

⁷ See *Perez v. KeySpan Corp.*, 941 N.Y.S.2d 608, 609-10 (App. Div. 2012) (dismissing complaint under the filed rate doctrine), *leave to appeal denied*, 19 N.Y.3d 809, 951 N.Y.S.2d 109 (Table) (2012); *Simon v. KeySpan Corp.*, 694 F.3d 196 (2d Cir. 2012) (affirming dismissing on filed rate and standing grounds).

⁸ Particularly in the current era of sweeping regulatory reform that has substantially changed and broadened the scope of specific agency regulatory oversight of financial markets, the doctrine of implied repeal will most certainly be revisited with respect to certain types of alleged market manipulation. The CFTC, for example, now has significantly broader powers to regulate particular types of alleged manipulation of commodities markets under the Dodd-Frank regulatory reforms. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 753 (amending of the CEA Section 6(c) to prohibit fraud and manipulation in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity). Such reforms could potentially provide the ballast for an argument that the authority to regulate such manipulation should rest exclusively with the CFTC.

⁹ See *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 11 MD 2262 (NRB) (S.D.N.Y.).

¹⁰ See *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 935 F. Supp. 2d 666, 695 (S.D.N.Y. 2013).

¹¹ *Id.* at 687-89.



multiple such trades in combination is intended to and does distort market outcomes in the affected or related markets.

There could be several impediments to a private plaintiff asserting monopolization claims based on an alleged “open market” manipulation. First is the perennial problem of identifying a relevant market that was allegedly manipulated. One can imagine a situation in which a series of legitimate trades in a physical commodity are alleged to have had an artificial effect in a related derivative market. Which market is the relevant market for antitrust purposes? The physical market where the trades occurred? The derivative market where the impact of the physical market trading was allegedly realized? What if the plaintiff participated in one of the markets but not the other?

A second issue may arise in sufficiently proving that the defendant had market power in the allegedly manipulated market. For any relatively liquid market it might be difficult to show that the alleged manipulator had the ability to control prices or exclude competitors from the market. Do traditional market share thresholds apply in manipulation cases? Would the absence of entry barriers defeat a claim?

Third, and perhaps most disabling to a plaintiff’s monopolization claim, is the requisite proof that the alleged monopoly was obtained or furthered through unlawful means.¹² For example, lawful trading in a derivative market to affect an outcome in the allegedly monopolized market may not meet that essential element of the claim. This is especially true considering that, for any single trade to be possible, there must be a market participant on the other side of the transaction willing to buy or sell at prices established through the competitive forces of supply and demand.

Conclusion

The debate about the interplay between the antitrust laws and financial market regulatory regimes is certainly not one without consequence as private litigants seek to avail themselves of the treble damages and attorneys’ fees provided for under the antitrust laws and that are not available under other statutory rights of action. A private plaintiff claiming that alleged manipulation violated the CEA, for example, is not entitled to the treble damages relief set out under the antitrust laws. Statute of limitations differences between the antitrust laws and the CEA are another example of why the reach of the former can be dispositive in manipulation cases. Perhaps the only observation that can be made with certainty is that the debate will continue to evolve and the interplay of antitrust and regulatory oversight in the context of alleged manipulation of financial markets will be determined by the facts of a particular case, including the markets at issue and the nature of the alleged manipulation.

¹² See *Trinko*, 540 U.S. at 407 (“the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”) (emphasis omitted).