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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# 3rd Circ. Ruling May Significantly Expand Antitrust Standing

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Jason C. Murray

The recent Third Circuit decision Hanover 3201 Realty LLC v. Village Supermarkets Inc. applies the "inextricably intertwined" doctrine to reinstate antitrust claims dismissed in the district court.[1] Generally, antitrust standing is limited to consumers and competitors in the market restrained by allegedly anti-competitive conduct. But under the "inextricably intertwined" doctrine, a party who is neither a consumer nor a competitor may potentially sue a defendant if the defendant harmed the plaintiff in order to gain an unfair advantage over actual competitors. The Third Circuit's interpretation of this doctrine in Hanover could significantly expand the number of plaintiffs with antitrust standing.

The case arose after a real estate developer, Hanover, contracted with Wegmans to develop a full-service supermarket. Hanover filed the necessary government permit applications, to which the defendant supermarket chain, ShopRite, filed multiple oppositions. Hanover sued ShopRite for attempted monopolization under the Sherman Act, alleging that ShopRite's objections were sham complaints intended to monopolize the market for full-service supermarkets. The trial court dismissed the claim because Hanover was not a ShopRite competitor.

Hanover appealed, arguing that its antitrust injury was "inextricably intertwined" with ShopRite's attempt to monopolize the market for full-service supermarkets. The "inextricably intertwined" doctrine derives from a U.S. Supreme Court decision, Blue Shield of Va. v. McCready, where a Blue Shield insurance customer challenged the carrier's policy of reimbursing psychiatrist visits and not psychologist visits as an unlawful conspiracy aimed at excluding clinical psychologists from the market for psychotherapy.[2] In McCready, the Supreme Court concluded that "[w]here the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations would be likely to cause."[3]

The Third Circuit agreed with Hanover that McCready applied, because its alleged injury was the "very means" by which ShopRite sought to restrain the market.[4] Even though Hanover was neither a competitor nor a consumer in the restrained market, Hanover suffered antitrust injury as the target of ShopRite's anti-competitive conduct.

With this grant of standing to a party not participating in the restrained market, the Third Circuit may have dramatically expanded the scope of antitrust standing. In particular, the Court's language focuses on the defendant's anti-competitive purpose, rather than the anti-competitive effect of the conduct.[5] Shifting the emphasis away from anti-competitive effect could broaden antitrust standing significantly.

As noted in a dissenting opinion by Circuit Judge Thomas L. Ambro, the Hanover majority's focus on the anti-competitive purpose of ShopRite's conduct means that standing can be applied to a party lacking an injury stemming from the anti-competitive consequences of the defendant's conduct, namely, increased prices or reduced output.[6] By his reasoning, the antitrust standing question should center on the anti-competitive effect of a defendant's conduct, not the purpose. Indeed the Third Circuit majority's apparent focus on intent, rather than effect, is consistent with a general shift away from Chicago School economics prioritizing the assessment of anti-competitive effects over all other considerations.

The main limitation imposed by Hanover appears to be confining its applicability to the "very means" for the anti-competitive conduct.[7] Accordingly, "suppliers and other non-market participants generally do not have antitrust standing unless their injuries were the very means by which the defendants carried out their illegal ends."[8] This "very means" analysis is not necessarily straightforward. For example, in manufacturing industries, a delivery vendor, manufacturing services provider, or design manufacturer might be the "very means" for a price-fixing scheme. And in the health care or financial industries, a third party payor or other financial institution may be the "very means" for a monopolization or boycott.

Consider, for example, a third party payor ("Payor 1") that pays health care providers for care provided to patients. Payor 1 informs a health care provider that it will stop paying it if it continues to contract with another third party payor, "Payor 2." The health care provider continues to work with both third party payors, and Payor 1 stops paying the health care provider. Payor 1's intent is to monopolize the market by excluding Payor 2 from working with the health care provider. However, Payor 2 was not the party harmed by the conduct, because the health care provider ignored Payor 1's warnings and continued to work with Payor 2. The health care provider certainly has a colorable contract claim against Payor 1. But in addition, under Hanover, the provider may also have an antitrust claim against Payor 1. Even though the health care provider is neither a competitor of Payor 1 nor a consumer of health care services, Payor 1 injured the health care provider in an attempt to harm its competitor, Payor 2.

This possibility certainly follows the example discussed by the Supreme Court in McCready, whereby a hypothetical group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists. For that scenario, the court reasoned that "the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions."[9]

Interestingly, despite the seemingly wide swath of plaintiffs that could compare to the bank in the McCready hypothetical, this expanded class of plaintiffs has not substantially materialized in the over 30 years since McCready — basically until Hanover.

The Third Circuit's decision in Hanover might finally cause potential plaintiffs to test the outer limits of antitrust standing with its rekindling of the "inextricably intertwined" doctrine. Federal courts may soon be forced to define the doctrine's breadth. We have thought up a few hypothetical plaintiffs that might have antitrust standing under the "inextricably intertwined" doctrine as it is defined in Hanover, but there certainly are many more. It will be very interesting to see whether these "inextricably intertwined" cases survive.

—By Jason C. Murray, Robert McNary and Dylan Burstein, Crowell & Moring LLP

*Jason Murray is a partner and head of Crowell & Moring's Los Angeles office. Robert McNary is a counsel and Dylan Burstein is an associate in the firm's Los Angeles office.*

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[1] Hanover 3201 Realty, LLC v. Village Supermarkets, Inc., 806 F.3d 162 (3rd Cir. 2015).

[2] 457 U.S. 465, 467-70 (1982).

[3] Id. at 479 (internal quotations and citations omitted).

[4] Hanover, 806 F.3d at 174.

[5] See, e.g. id. at 174 ("Regardless of who bore these costs, Defendants' objective remained the same: to keep Wegmans out of the relevant market.").

[6] Id. at 188.

[7] Id. at 173.

[8] Id.

[9] 457 U.S. at 484 n. 21.