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SECOND CIRCUIT REVIEW

Expert Analysis

Significance of Proximate Causation in 'Efficient Enforcement' Analysis

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At the end of last year, the U.S. Court of Appeals for the Second Circuit considered two appeals concerning standing of plaintiffs to seek recovery under the Clayton Act for antitrust violations: *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127 (2d Cir. 2021) (*Amex*) and *Schwab Short-Term Bond Market Fund v. Lloyds Banking Group PLC*, —F.4th—, 2021 WL 6143556 (2d Cir. Dec. 30, 2021) (*Schwab*).

In *Amex*, Circuit Judges Denny Chin, Joseph Bianco, and Steven Menashi unanimously held that merchants who did not accept payment via American Express (Amex) and therefore had no contractual agreement with Amex did not have standing to sue Amex for harm caused by Amex's contractual anti-steering provisions.

In *Schwab*, Chief Judge Debra Ann Livingston and Circuit Judges Gerard Lynch and Richard Sullivan unanimously held that a group of plaintiffs who purchased LIBOR-related bonds sold by third parties did not have standing to sue approximately forty defendants for harm caused by those defendants' fixing of LIBOR rates.

In both cases, the Second Circuit held that the plaintiffs did not have antitrust standing because they were not "efficient enforcers" of the Clayton Act. These two decisions illustrate the hurdles plaintiffs face in establishing that they are "efficient enforcers," and in particular, how important it is that plaintiffs are able to prove that specific defendants proximately caused their harm.

Antitrust Standing

Section 4 of the Clayton Act provides a private right of action to those "injured in [their] business or property by reason of anything forbidden in the antitrust laws" and gives them the ability to pursue treble damages. 15 U.S.C. §15. The Supreme Court has explained that litigants seeking to avail themselves of this provision must demonstrate antitrust standing. See *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983) (*AGC*).

To prove they have antitrust standing, a plaintiff must show that: (1) they suffered an antitrust injury—an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," and (2) they are a proper plaintiff because they would be an "efficient enforcer" of the antitrust laws. *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009).

Courts determine whether a plaintiff is an "efficient enforcer" based on their assessment of four factors: (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest

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would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries. Id. Efficient enforcement is important for antitrust standing because, as the Second Circuit has explained, the plaintiff essentially will "perform the office of a private attorney general and thereby vindicate the public interest in antitrust enforcement." *Gelboim v. Bank of America*, 823 F.3d 759, 780 (2d Cir. 2016).

'Amex'

In *In re. Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127 (2d Cir. 2021), the Second Circuit addressed whether a group of merchants who did not accept payment by Amex had standing to seek recovery under Section 4 of the Clayton Act for harm caused by Amex's "anti-steering" provisions—contractual provisions that credit card industry participants often include in contracts with merchants to deter merchants from encouraging or discouraging consumers to use certain credit cards.

The District for the Eastern District of New York had dismissed the claims of the non-Amex merchants on the basis that all four of the "efficient enforcer" factors weighed against a finding of standing. The Second Circuit affirmed the dismissal, also finding that the non-Amex merchants had not proven antitrust standing.

As to the first factor concerning whether "the violation was a direct or remote cause of the injury[,]" the Second Circuit noted that the factor "turns on familiar principles of proximate causation" and that, in "the context of antitrust standing, proximate cause generally follows the first-step rule." 19 F.4th at 139. The "first-step rule requires some direct relation between the injury asserted and the injurious conduct alleged." Id. (internal quotation marks omitted).

> These two decisions illustrate the hurdles plaintiffs face in establishing that they are "efficient enforcers," and in particular, how important it is that plaintiffs are able to prove that specific defendants proximately caused their harm.

The non-Amex merchants alleged that they suffered harm because most large merchants accept Amex—proliferating Amex's presence in the market and reducing any incentive for the network to tailor terms to smaller merchants—and Amex's anti-steering provisions allow for it to charge higher fees, which in turn results in its competitor networks also charging higher fees.

The Second Circuit, however, noted that Amex raised fees for Amex-accepting merchants, not the non-Amex merchants, and therefore the "alleged antitrust violation was instead a 'remote' cause of the injuries" allegedly suffered by the appellants. Id. at 141. The Second Circuit held that the second factor—considering the existence of a class that would be motivated through self-interest to vindicate the public interest—also weighed against antitrust standing because the non-Amex merchants did not suffer direct harm. Id.

As to the third factor—how speculative the damages might be—the Second Circuit noted that it was a "close question" because the appellants' damages could be a foreseeable consequence of the anti-steering provisions, but ultimately concluded that this factor was not sufficient to confer antitrust standing. Id. at 143. And, while the Second Circuit found that any potential recovery would not be duplicative or complex, satisfying the fourth factor, the Second Circuit held that the non-Amex merchants were not efficient enforcers because the "key principle underlying the [efficient-enforcer] test is proximate cause, and here the appellants fail to show the required direct connection between the harm and the alleged antitrust violation." Id.

'Schwab'

In *Schwab-Short-Term Bond Market Fund v. Lloyds Banking Group PLC*, 2021 WL 6143556, the Second Circuit addressed whether certain bondholders who had purchased LIBOR-related bonds from third parties had standing to sue defendants for the harm caused by their fixing of LIBOR rates. The District

Court for the Southern District of New York had dismissed the bondholders claims on the basis that they lacked antitrust standing because they did not suffer an antitrust injury that was proximately caused by defendants' alleged antitrust violations. The Second Circuit agreed.

Addressing whether the bondholders had suffered an antitrust injury, the court explained that "there can be no doubt … that all plaintiffs here … have 'plausibly alleged antitrust injury' flowing from the Banks' horizontal price-fixing conspiracy." 2021 WL 6143556, at *6. The court noted, however, that the bondholders still needed to show that they were "efficient enforcers" to establish standing. Id.

As to the first "efficient enforcer" factor, the court determined that "the district court correctly drew a line" between plaintiffs who transacted directly with defendants and those who did not, finding that only those who transacted directly suffered a direct antitrust injury. Id. It held that the defendants did not "proximately cause[]" the alleged antitrust injury because the harm that "befell [the bondholders was] far removed" from the defendants' conduct. Id. at *7.

The court noted that its conclusion on the "first factor alone furnishe[d] ample justification" for affirming the District Court's decision, but it nevertheless considered the three other "efficient enforcer" factors. Id. at *9. It held that the second factor also weighed against the bondholders since there were numerous other parties better positioned to vindicate the public interest—those other parties had purchased LIBOR-indexed instruments directly from the defendants rather than from third parties. Id.

The third factor also tipped in favor of dismissal since any determination of the damages would be "highly speculative" requiring "multiple layers of speculation" as to what the LIBOR rate would have otherwise been, although the court gave this factor "only limited weight" in part because of the Supreme Court's warning that the complicated nature of damages calculations should not provide a "get-out-of-court-free" card. Id. at *9. Although the fourth factor favored the bondholders in that the court held there was only a minimal risk of duplicative recoveries, it was not enough to overcome the weight of the other three factors.

While prior precedent does suggest that the "efficient enforcer" factors may be given different weight in different factual situations, these two cases illustrate that the Second Circuit views proximate cause as a significant factor, if not the primary factor, in determining whether a plaintiff is an "efficient enforcer" of the Clayton Act.

As a result, the court held that the bondholders who had purchased LIBOR-related bonds from third parties failed to establish antitrust standing.

Conclusion

In both *Amex* and *Schwab*, the plaintiffs sought vindication under the Clayton Act for harm they claimed was caused by the antitrust violations of the defendants. In both cases, the Second Circuit found plaintiffs did not have standing primarily because of the attenuated nature of their injuries. While prior precedent does suggest that the "efficient enforcer" factors may be given different weight in different factual situations, these two cases illustrate that the Second Circuit views proximate cause as a significant factor, if not the primary factor, in determining whether a plaintiff is an "efficient enforcer" of the Clayton Act.

These cases serve as exemplary examples of how courts assess whether a plaintiff's claimed injury is too attenuated for that plaintiff to be an "efficient enforcer" of the Clayton Act.