No. 18-3735

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

MARION HEALTHCARE, LLC, ET AL.,

Plaintiffs-Appellants,

v.

BECTON DICKINSON & COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois
(Hon. Nancy J. Rosenstengel, No. 3:18-cv-01059)

BRIEF AND SHORT APPENDIX OF PLAINTIFFS-APPELLANTS

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Counsel for Plaintiffs-Appellants

ORAL ARGUMENT REQUESTED

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-3735

Short Caption: Marion Diagnostic Center, LLC, et al. v. Becton, Dickinson, and Co., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Marion Diagnostic Center, LLC

Marion Healthcare, LLC

Andron Medical Associates

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

MoloLamken LLP

Berry Law PLLC

Goldsmith & Goldsmith, LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a (no parent corporation for any Plaintiff-Appellant)

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a (no publicly held company that owns 10% or more of any Plaintiff-Appellant's stock)

Attorney's Signature: s/ R. Stephen Berry Date: 4/18/2019

Attorney's Printed Name: R. Stephen Berry

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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n/a (no parent corporation for any Plaintiff)

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a (no publicly held company that owns 10% of any Plaintiff's stock)

Attorney's Signature: /s/ Justin M. Ellis Date: 04/18/2019

Attorney's Printed Name: Justin M. Ellis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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None (no parent corporation for any Plaintiff)

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None (no publicly held company that owns 10% or more of any Plaintiff's stock)

Attorney's Signature: s/ Jennifer E. Fischell Date: 04/18/2019

Attorney's Printed Name: Jennifer E. Fischell

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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Goldsmith & Goldsmith, LLP (Inadvertently Omitted on Previous Disclosure)

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Marion Diagnostic Center, LLC: None; Marion Healthcare, LLC: None; Andron Medical Associates: None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Marion Diagnostic Center, LLC: None; Marion Healthcare, LLC: None; Andron Medical Associates: None

---

Attorney's Signature: s/ Allison Mileo Gorsuch Date: 04/18/2019

Attorney's Printed Name: Allison Mileo Gorsuch

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Steven F. Molo Date: 04/18/2019

Attorney's Printed Name: Steven F. Molo

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: s/ Eric Posner Date: 4/18/2019

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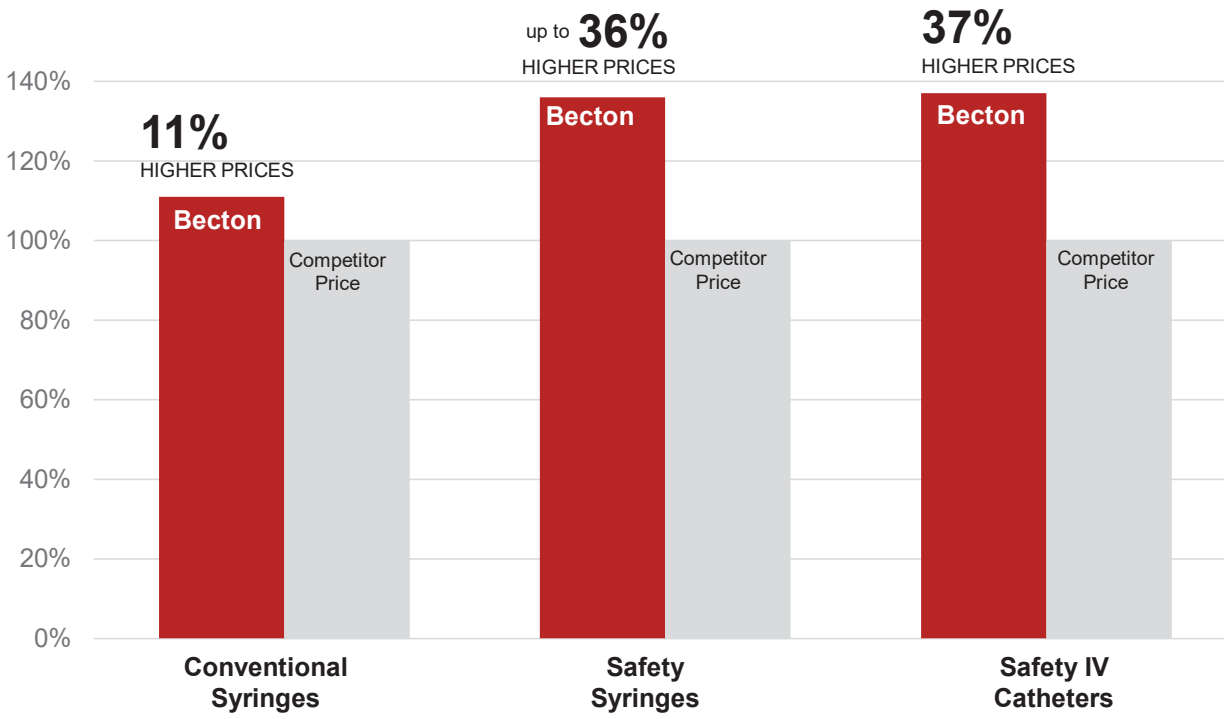
INTRODUCTION

Defendant-Appellee Becton, Dickinson & Company ("Becton") is a monopolist. It possesses substantial market power in the nationwide markets for syringes and catheters, and it charges supracompetitive prices for these commodity products. Becton's prices vis-à-vis its competitors in the three markets at issue – conventional syringes, safety syringes, and safety IV catheters – are jaw-dropping:



Dist. Ct. Dkt. 121 at 6; *see* A.10-A.11, Compl. ¶39.[1]

[1] District court docket entries are cited by internal page (except for Dist. Ct. Dkt. 121, which is cited by docket-stamped page). The amended complaint ("Compl.") is cited by short-appendix page and internal paragraph numbers.

Becton maintains its monopoly through a web of oppressive contracts and by facilitating payments among itself, distributors, and Group Purchasing Organizations ("GPOs") that purportedly act on behalf of medical purchasers but which, in fact, are tools of Becton. The conspirators benefit from supracompetitive prices paid by healthcare providers.

Plaintiffs-Appellants – Marion HealthCare LLC, Marion Diagnostic Center LLC, and Andron Medical Associates – are small healthcare providers that are outside the conspiracy and the first innocent purchasers of Becton's products. They brought this class action to restore competition in the markets for these commodity products.

The district court acknowledged that Plaintiffs pled a conspiracy among the defendants, but it misapplied the antitrust standing rule articulated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and dismissed the action below. We ask that the district court's decision be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§1331 and 1337 because Plaintiffs alleged claims under Section One of the Sherman Act, 15 U.S.C. §1, *et seq.*

This Court has jurisdiction under 28 U.S.C. §1291 because this appeal is from a final judgment that disposes of all parties' claims. The district court granted the defendants' motions to dismiss and judgment was entered on November 30, 2018. A.30-A.38 (opinion); A.39 (judgment). Plaintiffs timely filed their notice of appeal on December 27, 2018. A.40-A.41.

ISSUES PRESENTED

The Clayton Act allows private antitrust damages suits by "any person who shall be injured in his business or property." 15 U.S.C. §15(a). But the Supreme Court has allowed only "direct purchasers" from antitrust violators to sue under that statute. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 747 (1977). This Court has recognized that *Illinois Brick* does not bar suit if the plaintiff directly purchases goods from a distributor that – as alleged here – participated in an anticompetitive conspiracy. *See, e.g.*, *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 631-32 (7th Cir. 2002).

The issues presented are:

1. Whether the district court erred in applying *Illinois Brick* to dismiss a suit by healthcare product purchasers alleging a conspiracy, where the distributors from which they purchased agreed to enforce non-price exclusionary terms and engage in other anticompetitive acts, and were per-

mitted to add their own markup.

2. Whether *Illinois Brick* should be overruled if it is deemed to bar suit here.

STATEMENT OF THE CASE

I. RELEVANT STATUTES AND THEIR APPLICATION

Section One of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. §1.

Section Four of the Clayton Act provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §15(a).

The Supreme Court has limited which parties may sue under these provisions. In *Illinois Brick*, the Court held that only "the overcharged direct purchaser" from the antitrust violator, "and not others in the chain of manufacture or distribution," should be considered "the party 'injured in his business or property'" under the Clayton Act. 431 U.S. at 729. The Supreme Court based its ruling on the purported difficulties caused by apportioning

damages between different levels of the distribution chain. *See id.* at 737; *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605 (7th Cir. 1997).

Illinois Brick, however, does not "stand for the proposition . . . that a defendant cannot be sued under the antitrust laws by any plaintiff to whom it does not [directly] sell." *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 481-82 (7th Cir. 2002). Rather, this Court has held repeatedly that a plaintiff that has purchased directly from an anticompetitive conspiracy may sue *all* conspirators, regardless of their place in the distribution chain. *See Paper Sys.*, 281 F.3d at 631; *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980); *see also Brand Name Prescription Drugs*, 123 F.3d at 604.

Allowing a plaintiff that purchased two or three steps down the distribution chain from a monopolistic manufacturer – from a seller that participated in the manufacturer's conspiracy – follows the basic doctrine of "joint and several liability, under which each member of a conspiracy is liable for all damages caused by the conspiracy's entire output." *Paper Sys.*, 281 F.3d at 632 (citing *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981)). Although some courts describe "[t]he right to sue middlemen that joined the

The balance of this brief has been omitted for this sample.

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Thank you.