

The Judicial Legacy of Louis C. Bechtle

By Carl Hittinger

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I had the honor of clerking for former Chief Judge Emeritus Louis C. Bechtle of the U.S. District Court for the Eastern District of Pennsylvania from 1979 until 1981. It was perhaps the best professional experience of my life. My clerkship was filled with rarefied cases of historical note, intellectual challenges and conflicting human dimensions. Bechtle passed away at age 97 a few weeks ago. See [Judge Louis C. Bechtle: An American Jurist Who Relied on Common Sense, Sound Judgment and Fairness](#). He is deeply missed by his judicial family but will always be our guiding light and inspiration.

My clerkship included working with Bechtle on seminal antitrust cases. Particularly, the infamous Continental Group cases. Often referred to as the Consumer Bag cases, which had civil and criminal elements. It was a true clash of the antitrust titans of the Philadelphia Bar of the day that resulted in lengthy jury trials and precedential damage awards and criminal sentences. At its core was proof of causation. Namely, that the actions of the defendants caused injury and how to best prove and challenge it was a favorite subject of Bechtle. A few years ago, he called me and asked if I would be interested in writing an article with him on that subject in the context of antitrust cases. That lengthy article is below and is still valid and applicable to antitrust cases in this circuit. I thought it might be a nice tribute to re-publish the article and share Judge Bechtle's views on an ever-present issue challenging antitrust litigants.

Reviewing Two 3rd Circuit Rulings: Use of Fed. R. Evid. 803(3) to Prove Causation, Damages in Antitrust Cases

By the late Louis C. Bechtle and Carl W. Hittinger, published Dec. 7, 2009

The Supreme Court's rulings in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal* have made it more difficult for plaintiffs to show causation and damages in antitrust cases. However, two still-applicable U.S. Court of Appeals for the Third Circuit cases demonstrate that plaintiffs can prove both elements by using their own testimony, including Federal Rule of Evidence 803(3) hearsay testimony to prove causation. Buttredding that testimony with nonspeculative expert evidence further strengthens the likelihood of a plaintiff's success, particularly before a jury.

Twombly and *Iqbal* require that in all civil pleadings the plaintiff must plead sufficient facts to establish a facially plausible claim from which the court can infer defendant misconduct that "plausibly give[s] rise to an entitlement to relief." However, the holdings by the Third Circuit in *Callahan v. AEV* and *Stelwagon Manufacturing v. Tarmac Roofing Systems*, continue to allow plaintiffs to meet that burden more readily but also provide opportunities for defendants to successfully challenge plaintiffs' evidence.

A successful plaintiff's case contains two basic elements: proof of

causation in the form of plaintiffs' testimony concerning out of court statements by their customers explaining why those customers stopped buying a product from plaintiffs, admissible under Rule 803(3) hearsay exception to show customer motive and proof of loss in the form of plaintiffs' own nonhearsay testimony that those customers stopped buying from them supported by expert evidence of causation and loss.

In *Callahan*, owners of 16 beer retail stores in the Pittsburgh area brought antitrust and RICO actions alleging the defendants made false statements and submitted false affidavits to the Pennsylvania Liquor Control Board and lied to a grand jury to cover up those statements in order to circumvent LCB regulations. A defendant allegedly used his deception to open five "Beer World" stores in the Pittsburgh area between 1986 and 1988 in violation of LCB regulations, which limit the number of stores a single entrepreneur can own to one. A defendant then used the collective bargaining power of his five stores to negotiate lower wholesale prices than his competitors could obtain.

U.S. District Court Judge Donetta Ambrose granted the defendants' motion for summary judgment as to the antitrust claims and RICO claims. On appeal in 1999, Chief Judge Edward Becker, writing for the majority of the court joined by Circuit Judge Timothy Lewis, reversed that ruling and held plaintiffs' testimony that customers

told them they stopped buying beer from the plaintiffs because the defendants offered cheaper prices was admissible under Rule 803(3) “as evidence of the customers’ states of mind, i.e., their reasons for no longer shopping at the plaintiffs’ stores.”

The Third Circuit further held this was sufficient disputed proof of causation for plaintiffs to defeat a summary judgment motion. The plaintiffs’ own deposition testimony as to actual loss was that those customers were “in fact no longer shopping at their stores.” The Third Circuit held that this sufficed to demonstrate actual loss at the summary stage.

The Third Circuit also found in *Callahan* that the plaintiffs’ expert’s report considered some alternative explanations and were sufficiently grounded in fact to constitute adequate proof of injury and causation in combination with the “customer evidence.” The plaintiffs’ expert showed loss by comparing average gross profits for the 16 plaintiffs for the periods before and during the alleged antitrust conspiracy, and then calculating damages based on the difference between average gross profits during the two periods.

The expert showed causation with a four-part analysis that addressed at least some possible alternative explanations. First, he concluded the lost profits were caused by the defendants’ lower wholesale costs achieved through their alleged antitrust conspiracy. Second, he demonstrated that there had been no downturn in market demand by showing that distributor profits had increased during the relevant period. Third, the expert showed that when a grand jury investigation into the defendants’ activities caused defendants’ volume of business to decline, the plaintiffs’ gross profits rose. Finally, the expert looked at two other beer retailers that employed a “supermarket” marketing strategy similar to the defendants’, but found that neither “had any effect on the plaintiffs.” One store failed a few months after it opened, and the other was open for two decades without noticeably affecting plaintiffs’ profits.

The Third Circuit in *Callahan* accepted the expert opinion for a number of reasons:

It rested on assumptions based on past performance rather than “guesses as to the future” and did not rely on an “assumption of perfect knowledge of future demand, future prices, and future costs” of the sort the Third Circuit had condemned in *Rossi v. Standard Roofing*. The plaintiffs’ expert looked at distributor sales to buttress his conclusion that economic conditions were “at least as good during this period.”

The expert considered factors other than the defendants’ acts that might have “affected the plaintiffs’ business success,” including declining profits for Beer World stores and increasing profits for plaintiffs following criminal indictment of a defendant in 1991. The Third Circuit found these factors created factual disputes for resolution at trial that could not be resolved through summary judgment

Callahan’s summary judgment decision contrasts with an earlier Third Circuit case, *Stelwagon*, overturning a jury verdict for plaintiffs where the plaintiffs relied solely on customer statements admitted under Rule 803(3) to prove the fact of their antitrust loss. In addition

to different procedural postures and standards of proof, Chief Judge Becker in *Callahan* later noted that the main distinction between the two cases was that plaintiffs in the 1995 *Stelwagon* case relied on customers’ hearsay statements to prove both causation and the fact of their loss of business to defendants without any admissible expert testimony, whereas plaintiffs in *Callahan* relied on direct evidence — their own nonhearsay statements that they had lost customers — to prove loss.

Circuit Judge Lewis, in *Stelwagon*, writing for the majority with Judges Robert Cowen and Leonard Garth concurring, found essentially that plaintiff’s hearsay evidence at trial (before district Judge Eduardo Robreno) was not enough to carry the day because of the absence of requisite evidence in respect to antitrust injury — meaning damages or loss of business.

In *Rossi*, the Third Circuit had previously held that evidence sufficient to defeat a motion for summary judgment does not require the opponent to match item for item each piece of evidence proffered by the movant, but requiring only a “mere scintilla” standard. Further, in *Stelwagon*, unlike *Callahan*, the plaintiff’s expert evidence was conclusory and failed to account for evidence of alternative explanations for the plaintiff’s losses that the defendants had presented at trial, including evidence that the plaintiff had higher overhead costs and had terminated a number of managers and other key employees during the relevant period for embezzlement.

The higher standard of proof required for trial also helped account for some of the difference in the two cases. The *Callahan* plaintiffs’ expert evidence was sufficient to defeat a summary judgment motion as it raised a genuine issue of material fact in part because all the alternative explanations of loss offered by the defendants were merely speculative. The Third Circuit found the plaintiffs met their summary judgment burden even though the defendants’ alternative hypothetical explanations for the plaintiffs’ losses may ultimately prove correct at trial.

The various standards of proof that apply for a motion to dismiss, summary judgment or trial dictate what evidence courts will accept as sufficient. On a motion to dismiss, plaintiffs must now plead under *Iqbal* sufficient facts of antitrust injury and causation to allow the court to “infer more than the mere possibility of defendant misconduct” and to determine whether the “well-pleaded factual allegations plausibly give rise to an entitlement to relief.”

At summary judgment, plaintiffs must create genuine issues of material fact on loss and causation to prevail, as noted in *Callahan*. While proof of the fact of loss is sufficient to defeat a defendant’s summary judgment motion, at trial, plaintiffs have to prove by a preponderance of the evidence the amount of damages as well.

The plaintiffs’ own testimony on loss and causation, including 803(3) customers statements as detailed above, could be sufficient to defeat a motion to dismiss and a summary judgment motion, as was shown in *Callahan*, where combined evidence of hearsay customer statements and plaintiffs’ testimony that those customers were “no longer shopping at their stores” was sufficient to meet the plaintiffs’ burden on loss and causation “to overcome a motion for summary judgment.”

However, at trial, such testimony coupled with expert evidence is necessary to succeed, given that plaintiffs must also prove the specific amount of damages at trial, and that defendants can bring in alternative explanations for their own behavior and for plaintiffs' losses, both of which expert evidence would need to address. Also, where defendants introduce evidence of alternative plausible explanations for plaintiffs' losses or for their own behavior on a motion to dismiss or at summary judgment, the belt and suspenders of also using expert evidence may be necessary for plaintiffs to prevail. *Stelwagon* is an example of where expert evidence was found lacking, thereby effectively undermining the chance of admitting 803(3) hearsay testimony to prove causation.

While the courts require plaintiffs to offer customer statements to prove loss and causation at summary judgment to produce the customers themselves to testify at trial, hearsay testimony is admissible at the summary judgment stage to prove loss and causation only if it is capable of proof at trial. In *Stelwagon*, the court noted the plaintiff "presumably" would have produced the customers for trial and stating that "the rule in this circuit is that hearsay statements can be considered on a motion for summary judgment if they are capable of being admissible at trial." Otherwise, plaintiffs must offer separate proof of actual loss to defeat a summary judgment motion.

On the other hand, plaintiffs do not need to prove the specific amount of loss for purposes of summary judgment. The Third Circuit in *Callahan* dismissed as irrelevant, for summary judgment purposes, the defendants' objections to the plaintiffs' reliance on incomplete data when calculating the amount of damages, noting that the focus at summary judgment is on the fact of damage, not on the sufficiency of evidence of a specific amount of damages. By contrast, at trial, the plaintiff would need sufficient evidence to justify the actual amount of damages awarded based on a reasonable estimate that is not the product of guesswork or speculation. Plaintiffs also do not need to show at trial that defendants actually benefited from the plaintiffs' economic loss when the plaintiffs are trying to establish antitrust liability and damages, as seen in *Callahan*. To show loss, plaintiffs only have to show customers did not purchase from them because of the defendants' antitrust violations, not that the customers actually bought from the defendants.

To strengthen the plausibility of their claim, plaintiffs should identify their lost customers by name well in advance of trial, although the *Callahan* court found this is not necessary for 803(3) admissibility because identity is not a critical element of admissibility of the hearsay statement.

For *Twombly* purposes, such customer statements should also be included in the initial complaint. Such name recognition (in advance of trial) not only adds to the credibility of the testimony but would further aid in defeating a hearsay objection because such identified witnesses could have been deposed and cross-examined during discovery. The only important factor is that the declarant be the person whose state of mind the statement concerns. In addition, plaintiffs could obtain affidavits from customers concerning their reasons for ceasing to purchase from the plaintiffs to further reinforce their evidence for purposes of defeating summary judgment.

Notably, although the plaintiffs' statements about what customers told them are not admissible themselves to prove loss, experts could inject such statements into their final reports as information relied upon so long as there is other factual supporting evidence. At trial, the expert could then testify about such customer statements upon which his opinion is based, but not for their truth. However, as a practical matter, the jury still hears it. (See *Stelwagon*, noting lack of corroborating evidence of loss).

On the other hand, defendants can weaken plaintiffs' evidence by bringing in factually based alternative explanations (through lay witnesses or experts) for the plaintiff's loss and their own allegedly antitrust behavior. In *Twombly*, the Supreme Court found "an obvious alternative explanation" was sufficient to defeat plaintiffs' claims on a motion to dismiss. By contrast, the *Callahan* court granted summary judgment to plaintiffs where the defendants merely speculated about possible alternative explanations for plaintiffs' losses, as opposed to the actual evidence of embezzlement and higher overhead defendants introduced at trial in *Stelwagon*. In addition to showing other economic factors at work affecting plaintiffs' profits, defendants can show that they would have suffered a loss if they had acted in a different manner. For example, in *Twombly* the Supreme Court determined plaintiffs failed to state a plausible claim for relief in part because they alleged defendants should have acted in a manner that was arguably economically unsustainable.

Proving loss and causation using the plaintiffs' own testimony, including 803(3) statements about customers' reasons for no longer doing business with the plaintiffs, makes life a bit easier for antitrust plaintiffs. However, this evidence should also be supported by nonspeculative expert reports to avoid what happened in *Stelwagon*. Nevertheless, at trial, despite the holding in *Callahan*, plaintiffs must still prove the amount of damages and defeat evidence of plausible alternative explanations of loss or of the defendants' behavior in order to survive reversal, as *Stelwagon* illustrates. The Third Circuit has not revisited *Callahan* and *Stelwagon*. Stay tuned.

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