

It May Be Steel, but Its Supply is Elastic: Eleventh Circuit Rejects Market Definition That Fails to Account for Ease of Entry

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In a decision undergirded by fundamental principles of economics, burden of proof and common sense, the Eleventh Circuit affirmed the entry of summary judgment dismissing attempted monopolization claims against a producer of untreated hot rolled steel in *Gulf States Reorganization Group, Inc. v. Nucor Corp.*,^[1] on the ground that manufacturers of another product easily could – and likely would – enter the market in response to a significant price hike by a potential monopolist. What the *GSRG* opinion lacks as gripping drama based on the facts, it makes up for as a lesson on what is often the most crucial element of a Sherman Act Section 2 case: product market definition.

Commonly litigated are issues of cross-elasticity of demand and the potential exclusion of substitute products resulting in a too-narrow market definition – or, in the familiar words of Justice Fortas, the “strange, red-haired, bearded, one-eyed man with a limp” market criteria.^[2] Perhaps less often the focus of judicial opinion, but no less important to the viability of a monopolization-related offense, are issues of cross-elasticity of supply – *i.e.*, the ease with which other manufacturers could enter the market. The failure of plaintiff *GSRG* to account for that cross-elasticity doomed its attempted monopolization claim.

“Like a swallow returning to Capistrano,”^[3] *GSRG*’s case – which arose out of the bankruptcy of Gulf Coast Steel in 1999 – had returned to the Eleventh Circuit, following a reversal of the dismissal of its initial complaint, after an extended post-remand sojourn in the Northern District of Alabama. *GSRG* was an entity that wished to enter the market for black hot rolled coil steel by purchasing the assets of Gulf Coast Steel out of bankruptcy. Nucor is a leading manufacturer of black hot rolled coil steel that *GSRG* alleged had conspired with other entities to purchase the steel-producing assets of Gulf Coast in order to block competition in and monopolize the black hot rolled coil steel market. *GSRG* further alleged that Nucor had attempted to monopolize the same market. The district court granted summary judgment, accepting the reports and recommendations of the special master.^[4] The Eleventh Circuit affirmed based on those reports and the district court’s order, but wrote specifically to address cross-elasticity of supply as it related to the attempted monopolization claim against Nucor.^[5]

As the Eleventh Circuit panel^[6] underscored, a necessary element of an attempted monopolization

offense is the “dangerous probability of success [that] arises when the defendant comes close to achieving monopoly power in the relevant market,” which a plaintiff can show “only if it can properly define the relevant market.”^[7] Of particular note with respect to GSRG’s assertion of a black hot rolled coil steel product market is the fact that, with the additional process of an acid bath and oil coating, new black hot rolled coil steel can be made into “pickled and oiled” steel – and conversely, *merely by skipping that step*, manufacturers of pickled and oiled steel could produce black hot rolled coil steel.^[8] Citing the Ninth Circuit’s *Rebel Oil* decision,^[9] the Eleventh Circuit panel observed that GSRG’s assertion that “pickled and oiled steel is not the equivalent of black hot rolled coil steel from the perspective of purchasers ... misses the point.”^[10] In addition to demand considerations, market definition must also take into account cross-elasticity of supply, which is another way in which producers can take business away from a monopolist. The panel concluded, “the black hot rolled coil steel market ... has a high cross-elasticity of supply.”^[11]

Thus, had Nucor obtained a monopoly in black hot rolled coil steel and inflated prices, the court reasoned, it would be likely that pickled and oiled steel manufacturers would skip the “pickling” process (and save the attendant costs) and sell black hot rolled coil steel, thus introducing price discipline. Indeed, and unfortunately for GSRG, one of its own experts conceded that manufacturers of pickled and oiled steel would produce black hot rolled coil steel if the latter were selling at a higher price^[12] - leaving GSRG in a pickle of its own: unable to establish a likelihood that Nucor could succeed in an attempted monopolization.

^[1] No. 11-14983, ___ F.3d ___ (11th Cir. July 15, 2013) (GSRG).

^[2] See *United States v. Grinnell Corp.*, 384 U.S. 563, 591 (1966) (Fortas, J., dissenting). The author’s first antitrust trial – coincidentally, also affirmed in the Eleventh Circuit – turned (to the client’s advantage) on this very element. See *United States v. Engelhard Corp.*, 126 F.3d 1302 (11th Cir. 1997).

^[3] GSRG, Slip Op. at 1.

^[4] See *Gulf States Reorganization Group v. Nucor Corp.*, 822 F. Supp. 2d 1201 (N.D. Ala. 2011).

^[5] GSRG, Slip. Op. at 2-3.

^[6] The unanimous opinion was authored by Judge Jordan, joined by Judges Carnes and Tjoflat (the court’s resident antitrust scholar).

^[7] GSRG, Slip. Op. at 7 (citations omitted).

^[8] *Id.* at 8.

^[9] *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995).

^[10] GSRG, Slip Op. at 8.

^[11] *Id.* at 9.

^[12] *Id.* at 11.

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