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## Feature

BY JUSTIN M. ELLIS AND LAUREN F. DAYTON



**Justin M. Ellis**  
MoloLamken LLP  
New York



**Lauren F. Dayton**  
MoloLamken LLP  
New York

## Antitrust Challenges to Cooperation Agreements

In the ongoing struggle for leverage between borrowers and creditors, an increasingly popular tool is a cooperation agreement (or “co-op”), under which creditors agree to work together in dealing with the debtor. Issuers and excluded creditors are now fighting back by arguing that co-ops violate antitrust laws.

Two lawsuits pressing this theory have been brought recently: one by the dissenting creditors excluded from the co-op, and the other by the borrower who claims that its attempts to find new capital have been stymied by a co-op. The outcome of these cases may shape the future of co-ops and liability-management exercises (LMEs).

### LMEs and Co-Ops

LMEs are a common method for a borrower to realign its capital structure within the limits of its existing financing documents. These transactions typically involve a borrower working with a select creditor group to amend these documents so it can circumvent restrictions on taking on new debt. In many cases, LMEs are executed over the objection of dissenting creditors that chose not to support the transaction or were not invited to participate in the LME at all. These dissenting creditors can find themselves left with lower-priority debt, less collateral or both. The use — or even threat — of an LME can create powerful leverage over dissenting creditors, and each individual creditor faces the risk that it will be left out in the cold.

“Co-ops” are agreements among creditors designed to avoid that collective-action problem. Co-ops are contracts restraining their members’ ability to take certain actions (*e.g.*, requiring members to withhold consent from any proposal not endorsed by the group, or to vote in favor of any future group-approved restructuring proposal). Typically, co-ops

also include limits on how creditors can sell their holdings. They might also include the creation of a steering committee of lead creditors that will take the lead in negotiations with the debtor.

### Antitrust Challenges to Co-Ops

Recent litigation has put a spotlight on whether, by teaming together, creditors that enter into cooperation agreements are violating antitrust laws. The Sherman Act broadly prohibits every “contract, combination ... or conspiracy” in restraint of trade.<sup>1</sup> Some types of competitor coordination, such as price-fixing, are considered *per se* violations of antitrust laws and are always illegal.<sup>2</sup> However, courts hesitate to declare *per se* violations, especially for new fact patterns with which they have less experience.<sup>3</sup> Conduct that is not *per se* illegal is generally assessed under the “rule of reason,” a burden-shifting analysis that examines whether the challenged conduct harms competition, and if it does, whether any pro-competitive benefits outweigh that harm.<sup>4</sup>

Antitrust claims offer plaintiffs strategic advantages. If successful, a Sherman Act claim can impose treble damages on the defendant.<sup>5</sup> In addition, alleging a federal antitrust claim creates federal subject-matter jurisdiction that provides plaintiffs standing in federal court.<sup>6</sup> The latter is significant, because federal cases (generally) move faster than state cases and, unlike some states (such as New York), do not permit interlocutory appeals.

However, antitrust claims also present unique challenges. To bring a claim, it is not enough for a plaintiff to allege that a given practice is anticom-

Justin Ellis is a partner with MoloLamken LLP in New York and has experience in bankruptcy, distressed debt and structured finance litigation. Lauren Dayton is a partner in the same office and litigates bankruptcy and distressed-debt matters, as well as contract disputes and business torts under New York law.

1 15 U.S.C. § 1.  
2 See *Leegin Creative Leather Prods. Inc. v. PSKS Inc.*, 551 U.S. 877, 886-87 (2007).  
3 *Id.*  
4 *Ohio v. Am. Express Co.*, 585 U.S. 529, 541-42 (2018).  
5 15 U.S.C. § 15(a).

petitive. In addition, a plaintiff must prove it has “antitrust standing,” which has two requirements. First, a plaintiff must show “antitrust injury,” meaning that its “injury [is] of the type the antitrust laws were intended to prevent and ... flows from that which makes defendants’ acts unlawful.”<sup>7</sup> Second, a plaintiff must prove that it is the right person to sue, which includes considerations such as the directness of its injury and whether its damages are speculative.<sup>8</sup>

Separately, an antitrust plaintiff must allege a relevant market that is harmed by the defendant’s anticompetitive acts. The boundaries of a market generally depend on whether there is cross-elasticity of demand between a given product and its substitutes.<sup>9</sup> Although courts hesitate to decide the relevant market on the pleadings, courts will dismiss claims if the allegations are implausible, or the proposed market clearly does not encompass interchangeable substitutes.<sup>10</sup>

## The *Selecta* Case

In *Selecta*, the plaintiffs were dissenting lenders suing the preferred creditors and the borrower for using a co-op to execute an LME. *Selecta*, a Swiss-based vending machine company, began preparing in 2024 to deal with upcoming debt maturities.<sup>11</sup> *Selecta* allegedly approached certain creditors, which entered into a co-op,<sup>12</sup> then announced a restructuring, which was approved by a Dutch court.<sup>13</sup> As part of this restructuring, *Selecta* conducted a non-*pro rata* exchange in which the dissenting creditors first received discounted junior-priority notes in lieu of their original notes.<sup>14</sup> These creditors then were given the option to exchange them for higher-priority notes, but only if they gave up their “sacred rights” to payment.<sup>15</sup>

Faced with these unattractive options, the dissenting creditors sued. The *Selecta* plaintiffs asserted a mix of antitrust, contract and business-tort claims. The plaintiffs alleged that the restructuring violates their indenture and that the security agent/trustee made misrepresentations to the Dutch court.<sup>16</sup> They also asserted *per se* and rule-of-reason antitrust claims, arguing that the favored creditors’ conduct amounted to price-fixing and a group boycott.<sup>17</sup> The plaintiffs claimed that the relevant markets are the secondary market for *Selecta*’s first-lien debt, and the leveraged finance market generally.<sup>18</sup>

A motion to dismiss will be briefed in the first and second quarters of 2026. One key issue might be whether the dissenting creditors suffered an antitrust injury, as opposed to a contractual or tort injury. The only harm that the plaintiffs allege is that the favored creditors increased the value of their own holdings at the excluded creditors’ expense.<sup>19</sup> The plaintiffs emphasize that LMEs “risk broad

anticompetitive harm to the leveraged finance market.”<sup>20</sup> However, the factual allegations supporting this assertion are very general: The plaintiffs claim that LMEs like this one will deter smaller investors from participating in the initial purchase of bonds, which will then drive up interest rates for borrowers.<sup>21</sup> A skeptical court might conclude that borrowers can assuage investors by offering tighter covenants or more attractive economic terms.

Market definition is another potential issue. The plaintiffs’ allegations about the relevant market rely on their very general allegations about *Selecta*’s debt having “unique features” and investors being unwilling to purchase other debt because they “likely already have as much weight in their portfolio on these alternatives as they desire.”<sup>22</sup> The plaintiffs’ allegations about why the leveraged finance market as a whole is a relevant market similarly rely on non-specific allegations about what companies’ debt requirements are generally.<sup>23</sup>

The *Selecta* plaintiffs also face challenges because the Dutch court approved the restructuring that allowed the borrower to conduct the non-*pro rata* exchange.<sup>24</sup> Although the plaintiffs allege on information and belief that *Selecta* misrepresented certain facts to the court,<sup>25</sup> this approval could arguably break any causal chain between the co-op and the plaintiffs’ alleged harm.

## The *Optimum* Case

By contrast, the issuer in *Optimum* alleged that a cooperative group violated the Sherman Act by *preventing* an LME. *Optimum* alleged that in April 2024, it began receiving “overtures” for LMEs that could improve its liquidity and financial position,<sup>26</sup> but a cooperative group then formed allegedly holding up to 99 percent of *Optimum*’s outstanding debt.<sup>27</sup> The co-op reportedly had strict limits, including a supermajority consent requirement across debt classes, a term barring individual creditors from negotiating with the issuer, and indemnification obligations for any breach.<sup>28</sup> *Optimum* alleged that these restrictive terms prevented it from doing an LME with individual members.<sup>29</sup> The issuer asserted a variety of antitrust theories, including *per se* theories that the co-op is price-fixing or instituting a group boycott, as well as a claim under the rule of reason.<sup>30</sup>

The *Optimum* complaint relied on two themes that might set it apart from other antitrust claims. First, the complaint placed weight on the size of the co-op group — in an unnamed financial advisor’s alleged words, the “[l]argest co-op ever,” holding nearly all of *Optimum*’s outstanding debt and comprising a large share of the leveraged-loan market.<sup>31</sup> The complaint also asserted that the leveraged-loan market was highly concentrated and dominated by large institutional inves-

6 28 U.S.C. § 1337.

7 *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477, 489 (1977); see *DiracTV LLC v. Nexstar Media Grp. Inc.*, 162 F.4th 295, 309 (2d Cir. 2025).

8 *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 778 (2d Cir. 2016).

9 *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

10 *Regeneron Pharms. Inc. v. Novartis Pharma AG*, 96 F.4th 327, 339 (2d Cir. 2024).

11 Second Am. Compl. at ¶ 87.

12 *Id.* at ¶¶ 88-89.

13 *Id.* at ¶¶ 104-08, 115.

14 *Id.* at ¶¶ 118-21.

15 *Id.* at ¶¶ 124-31.

16 *Id.* at ¶¶ 113, 116-17.

17 *Id.* at ¶¶ 167-68.

18 *Id.* at ¶ 154.

19 See, e.g., *id.* at ¶ 172.

20 See, e.g., *id.* (cleaned up).

21 See, e.g., *id.* at ¶ 160.

22 *Id.* at ¶ 155; see also *id.* at ¶¶ 156-58.

23 *Id.* at ¶ 159.

24 *Id.* at ¶¶ 109, 114-15.

25 *Id.* at ¶ 116.

26 Compl. at ¶ 99.

27 *Id.* at ¶ 100.

28 *Id.* at ¶ 104.

29 *Id.* at ¶¶ 185-99.

30 *Id.* at ¶¶ 186-88, 221-22.

31 *Id.* at ¶¶ 100, 111.

tors.<sup>32</sup> These allegations were central to the plaintiff's theory that the co-op group holds power in the leveraged-loan market.<sup>33</sup> Second, the complaint offered a full-throated defense of LMEs as "play[ing] a key role in th[e] free-market process" of efficiently pricing debt.<sup>34</sup> To prevail on its rule-of-reason theory, the issuer sought to prove that LMEs are pro-competitive and benefit borrowers and lenders alike.<sup>35</sup>

The defendants' motion to dismiss is pending as of the time of this article.<sup>36</sup> Similar to the *Selecta* LME, a key issue will be whether the issuer has alleged an antitrust injury and is not simply seeking to dress up a business tort in Sherman Act clothing. In fact, the defendants argue that, citing cases in the Second and Seventh Circuits, creditor coordination to enforce pre-existing debt never implicates antitrust laws.<sup>37</sup> These cases reason that the real competition is for the initial debt contract, that creditors should be encouraged to coordinate, and that impairing creditor coordination to enforce rights could raise First Amendment problems. However, the defendants also acknowledge U.S. Supreme Court precedent that might permit antitrust claims in at least some circumstances if creditors prevent a debtor from accessing *new* credit.<sup>38</sup>

Another thorny issue will be proper market definition. At some stage, the court might have to assess how readily "consumers" of debt (*i.e.*, investors) can substitute between particular tranches of *Optimum's* debt and other leveraged loans. A related problem that the plaintiffs have anticipated is whether other funding sources, such as asset-backed lending, private credit and equity financing, are reasonable substitutes for leveraged loans.<sup>39</sup> It is also possible that, similar to the cases the defendants cite, courts will deem each indenture a type of "aftermarket," where the original competition is for the indenture itself, which then shapes borrowers' and lenders' post-issuance rights.<sup>40</sup> In this scenario, the question will be whether information asymmetries or unequal bargaining power "lock in" participants and allow for the exercise of market power.<sup>41</sup>

That being said, a decision in *Optimum* might have limited impact on other antitrust claims against co-ops. On one hand, a broad ruling denying antitrust standing might foreclose future challenges of this sort. On the other hand, the large size of the co-op group and the terms of the agreement might result in a decision that does not carry over to other situations.

## Future Directions for Antitrust Claims

Plaintiffs may also bring new theories beyond those alleged in *Selecta* and *Optimum*. For example, dissenting lenders might allege "aftermarket" claims if they can show that majority lenders or the issuer exploited information asymmetries or other inequalities of bargaining power to

execute an LME to their detriment. Alternatively, an issuer might argue that a co-op is a kind of exclusive dealing that forecloses a substantial share of competition in the market for its debt.<sup>42</sup> A dissenting lender also might analogize co-ops to "pay-for-delay settlements" in the patent context, where a settlement can be used to buy off generic competitors to a brand-name drug.<sup>43</sup> Under this analogy, the co-op could allegedly be used to "buy off" lenders that might otherwise participate in an LME. Whether these theories, or others, are viable will depend on both the specific facts and the general concerns described in this article.

If these cases (or others) proceed, courts will have to wrestle with the underlying policy question of whether co-ops harm competition. Minority lenders could argue that co-ops can abuse their rights. Debt documents are incomplete contracts that do not fully specify the parties' rights and obligations, not least because how and when a debtor might fall into distress is uncertain. Issuers and creditors also are engaged in an arms race to either find or close off loopholes in contractual language. In this environment, dissenting lenders could argue that co-ops permit exploitation by either blocking or perpetrating LMEs. At the same time, the participants involved are sophisticated investors, and their awareness of both LMEs and co-ops means that they cannot claim surprise if one forms to their disadvantage.

Weighing the pro-competitive benefits of co-ops will depend, at least in part, on whether courts take a *caveat emptor* approach or are more concerned with unequal bargaining power. As previously described, both sides can cite authority from other contexts about when and how creditors might cooperate relative to debtors.

Ultimately, these theories might create conflicts between antitrust and bankruptcy law. At its roots, antitrust claims seek to regulate when and how creditors can coordinate to increase their bargaining power relative to a debtor. However, bankruptcy law does much the same thing through such rules as committee formation, absolute priority, and voting and confirmation procedures. Moreover, bankruptcy courts might well decide many of the issues raised by these challenges as a practical matter. Commentators have noted how many companies that execute LMEs end up in chapter 11 anyway.

Once filing becomes necessary, issuers can often select a friendly forum in which they can treat antitrust causes of action as one more unsecured obligation that can be settled, released or contracted around. While antitrust claims may — or may not — become another weapon creditors and issuers might wield, they are at most one tool in a much larger arsenal. **abi**

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32 *Id.* at ¶¶ 175-77.

33 *See id.* at ¶¶ 166-78.

34 *Id.* at ¶ 188.

35 *Id.*; *see also id.* at ¶ 67.

36 The defendants moved to dismiss before plaintiffs filed an amended complaint; further motion to dismiss briefing is expected.

37 *See United Airlines Inc. v. U.S. Bank NA*, 406 F.3d 918 (7th Cir. 2005); *Sharon Steel Corp. v. Chase Manhattan Bank NA*, 691 F.2d 1039 (2d Cir. 1982).

38 *See Catalano Inc. v. Target Sales Inc.*, 446 U.S. 643 (1980).

39 *Compl.* at ¶¶ 135-38.

40 *See Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 476-77 (1992).

41 *Id.*

42 *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

43 *See F.T.C. v. Actavis Inc.*, 570 U.S. 136, 154 (2013).