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COLUMBIA IRON AND METAL SEEKS CERTIORARI ON AMBIGUOUS VERDICT

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Can an ambiguous jury verdict support a potentially erroneous jury instruction? That is the essence of the question posed by counsel for Columbia Iron and Metal Company in its Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, filed on January 15, 2009. Columbia's petition arises from a verdict in the long-running scrap metal antitrust litigation in the Northern District of Ohio. On February 9, 2006, a jury returned a verdict in favor of a plaintiff class led by Lincoln Electric Company and Profile Grinding, Inc. and against Columbia in the amount of $11.5 million in damages for violation of Section 1 of the Sherman Antitrust Act.[2] Columbia challenged this verdict via Motion for Judgment as a Matter of Law and Motion for New Trial and on appeal to the Sixth Circuit on a number of grounds, but the most intriguing concerns two instructions given to the jury on different bases for tolling the statute of limitations.

Plaintiffs filed suit on August 15, 2002. Columbia contended, therefore, that August 15, 1998 was the date on or after which plaintiffs had to establish Columbia's participation in the alleged antitrust conspiracy, based upon the usual four-year statute of limitations in antitrust cases. 15 U.S.C. § 15(b). It argued that no statutory or other tolling of the statute of limitations was appropriate. The District Court, however, instructed the jury that "as a matter of law" the critical date on or after which Columbia must have participated in the conspiracy was March of 1996. It based this instruction on 15 U.S.C. § 16(i) which states, in pertinent part:

> *Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect to every private or state right of action arising under said law and based in whole or in part on any matter complained of in the said proceeding, shall be suspended during the pendency thereof and for one year thereafter…*

The factual premise for the court's instruction was the government's initiation of formal proceedings against another former defendant, Bay Metals, in March of 2000, as well as other proceedings instituted against various other scrap dealers in the years that followed. It found that these proceedings tolled the statute of limitation against Columbia, even though Columbia was never named as a defendant in those proceedings (*In Re Scrap Metal*, 2006 WL 2850453 at *21-*22 (*citing Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1966))), and it held that the allegations in the government proceedings need not be identical to those in a subsequent civil case for Section 16(i) to apply, so long as they are substantially

similar. Id. Finally, relying on *Marine Fireman's Union v. Owens-Corning Fiberglass Corp.*, 503 F.2d 246, 250 (9th Cir. 1974) and *State of New Jersey v. Morton Salt Co.*, 387 F.2d 94, 98-99 (3d Cir. 1967), and pointing out that *Bay Metals* was merely the first of a series of government actions in the scrap metal industry, the court held that the statute of limitations, once tolled, remains tolled until the last in the series of government actions against all defendants is resolved. Id. At *22.

In addition, the court gave the jury a fraudulent concealment instruction, which also could have pushed back the date on or after which plaintiffs had to establish conspiracy, and it concluded that instruction with the following: "If you find that the plaintiffs have failed to prove any one of these elements, then you are limited to the post March 1996 time period outlined in the previous "affirmative defense" instruction." *In Re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 537-38 (6th Cir. 2008). The court denied Columbia's request for special interrogatories and a detailed verdict form. The verdict form that was used apparently did not request a finding on or otherwise reveal the time period on which damages were based.

Columbia contended on appeal that both of these instructions were erroneous. In particular, Columbia pointed out that the *Bay Metals* case, on which the court premised its statutory tolling instruction, was charged on March 28, 2000 but concluded by June 21, 2000. There was, thus, a twenty-two month gap between the conclusion of the *Bay Metals* case and the filing of the case by the plaintiff class, rather than one year or less. According to Columbia, this means that "any action to enforce a private cause of action shall be forever barred." See 15 U.S.C. § 16(i).

The Sixth Circuit did not deal with this issue. Rather, it stated "because we concluded the jury could have reached the verdict based on the fraudulent concealment theory, we do not reach Columbia's objection to the statutory tolling instruction." *Scrap Metal*, 527 F.3d at 537. It is this holding that Columbia puts front and center in its Writ Petition, because, it contends, that it is a rule of long standing that a judgment must be reversed when it cannot be determined whether the jury's verdict was based on an erroneous instruction or on an alternative correct instruction. *See* Columbia's Petition for Writ of Certiorari, dated 1/15/09, available at 2009 WL 180871. In making this assertion, Columbia relies on a series of venerable Supreme Court cases[3] and circuit court decisions, including cases from the 6th Circuit.[4]

In this respect, Columbia raises an important issue. The authority it relies on in its petition does indeed seem to suggest that a potentially ambiguous jury verdict that might or might not have been based on an erroneous instruction should be reversed. *See, e.g.*, *Morrissey*, 544 F.2d at 26-27 ("The general rule is that when one of the two claims that have been submitted to the jury should not have been submitted, a general verdict…cannot stand."); *Sunkist*, 370 U.S. at 29-30. To find that a general verdict could be upheld, because the jury *could* have reached a verdict on a proper instruction as opposed to an improper instruction seems to stand this principle on its head. There may be some question about whether or not the verdict form in the matter was truly a "general" verdict, in that it seems to have required some findings from the jury, but some ambiguity on the relevant factual issue does seem to be present.

On the other hand, whether the statutory tolling instruction was truly in error may also be "ambiguous." In Leh, the Court did indeed hold that "[t]he private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants" for that plaintiff to take advantage of statutory tolling. 382 U.S. at 59. Moreover, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, the Court found that a plaintiff that sued a defendant who was not named either as a party or as a co-conspirator on the prior government suit was still entitled to tolling. 401 U.S. 321, 337-38 (1971). And, both *Marine Fireman's Union* and *Morton Salt* conclude that the statute of limitations, once tolled by a government action, remains tolled until "one year from and after the date of the entry of the judgment of conviction against the last remaining defendant in the related criminal proceeding" *Marine Fireman's Union*, 503 F.2d at 249-50; *Morton Salt*, 387 F.2d at 99. But, as Columbia pointed out, none of these cases involved a multiplicity of government proceedings or an assertion that

tolling continues from the filing of the first case until one year after the completion of the last case. Rather, all measured the deadline from the conclusion in the same government case. Whether the government's decision to file multiple government proceedings should make a difference in this analysis, and Plaintiffs contended it should not, is the crux of the issue the Supreme Court will have to consider in ruling on Columbia's Petition.

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[2] *The total amount of judgment entered against Columbia was $23,036,000. The court trebled the jury's initial award to $34.5 million, but then offset that amount by the monies received from other settling defendants. See In Re Scrap Metal Trust Antitrust Litigation, No. 1:02-CV-0844, 2006 WL 2850453 at *3 n.5 (N.D. Ohio, Sept. 30, 2006).*
[3] *E.g., United New York and New Jersey Sandy Hook Pilots Assn. v. Halecki*, 358 U.S. 613,619 (1959); *Sunkist Growers, Inc. v. Winkler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962).
[4] *Morrissey v. National Maritime Union of America*, 544 F.2d 19, 26-27 (2d Cir. 1976); *Avins v. White*, 627 F.2d 637, 646 (3d Cir. 1980); *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1192-3 (4th Cir. 1991), *cert. denied*, 503 U.S. 907 (1992); *Woods v. Sammisa Co.*, 873 F.2d 842, 853-54 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990); *Webber v. Sobba*, 322 F.3d 1032, 1038 (8th Cir. 2003); *McMurray v. Deere and Co.*, 858 F.2d 1436, 1444 (10th Cir. 1988); *Dillard & Sons Const. Inc. v. Burnup & Sims*, 51 F.3d 910, 916 (10th Cir. 1995); , 51 F.3d 910, 916 (10th Cir. 1995); *Allen v. Wal-Mart Stores, Inc.*, 241 F.3d 1293, 1298-99 (10th Cir. 2001).; *Kosters v. The Seven-Up Co.*, 595 F.2d 347, 355 (6th Cir. 1979); *West Knoxville Assocs. Ltd P'Ship v. Ticor Title*