United We Stand: Antitrust Aspects of Collaboration Among Corporate Bondholders

By Ali M. Stoeppelwerth *

Many observers over the years have commented on the various tactics employed by issuers of corporate debt seeking to restructure or repurchase their securities and the potentially coercive effects of these actions on bondholders. In response to issuer actions of this sort, large bondholders of a particular security often band together in groups or committees to try and negotiate collectively with the issuer and obtain more favorable terms. In some circumstances, these collaborations bring together firms that may be considered competitors in some aspects of their businesses and have on occasion been challenged as unlawful price-fixing agreements or group boycotts under section 1 of the Sherman Act. This article reviews the opinions in those cases and discusses the antitrust implications of collective action by bondholders or their representatives in dealings with a common issuer.

Numerous articles have been written over the years about the tactics employed by issuers of corporate debt seeking to restructure or repurchase their securities and the potentially coercive effects of these actions on bondholders. [1] The most common issuer maneuvers include tender offers to exchange the outstanding bonds for compensation (in the form of cash or other securities) well below their face value, consent solicitations aimed at loosening or eliminating covenants and defaults in the indenture in ways favorable to the issuer, and solicitations for bondholder approval of prepackaged plans of reorganization that may dramatically reduce the value of the original investment. [2] Many commentators have observed that these practices can put individual bondholders into a form of Prisoner's Dilemma because the decision whether to tender or consent to an issuer's solicitation usually must be made in a short time frame and without advance

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1. *See, e.g.*, Royce De R. Barondes, *An Economic Analysis of the Potential for Coercion in Consent Solicitations for Bonds*, 63 FORDHAM L. REV. 749 (1994); Victor Brudney, *Corporate Bondholders and Debtor Opportunism: In Bad Times and Good*, 105 HARV. L. REV. 1821 (1992); John C. Coffee, Jr. & William A. Klein, *Bondholder Coercion: The Problem of Constrained Choice in Debt Tender Offers and Recapitalizations*, 58 U. CHI. L. REV. 1207 (1991); John C. Coffee, Jr., *Coercive Debt Tender Offers*, N.Y. L.J., July 19, 1990, at 17.

2. *See* Coffee & Klein, *supra* note 1, at 1209; Ford Lacy & David M. Dolan, *Legal Aspects of Public Debt Restructurings: Exchange Offers, Consent Solicitations and Tender Offers*, 4 DEPAUL BUS. L.J. 49, 49 (1991).

knowledge of what other bondholders intend to do.[3] As with the classic game theory example, in this situation the individual bondholder's best strategy is often to accept the issuer's offer even if all bondholders collectively would have been better off rejecting it.[4]

In response to issuer actions of this sort, large bondholders of a particular security often band together in groups or committees to try and negotiate collectively with the issuer and obtain more favorable terms.[5] In addition, there have been instances (although they are comparatively rare) in which bondholders or indenture trustees of different debentures from the same issuer have collaborated in efforts to protect their investments.[6] Notwithstanding their frequency, such collaborations do bring together firms that may be considered competitors in some aspects of their businesses and have on occasion been challenged as unlawful price-fixing agreements or group boycotts under section 1 of the Sherman Act.[7] This article reviews the opinions in those cases and discusses the antitrust implications of collective action by bondholders or their representatives in dealings with a common issuer. It concludes that the antitrust risks associated with such activity are relatively low and identifies four strong defenses that potentially could be asserted in response to a section 1 challenge: lack of antitrust injury, consent of the issuer, the *Noerr-Pennington* doctrine, and implied immunity. Nevertheless, given the paucity of direct precedents and the significant expense, not to mention reputational risk, that can be incurred getting even frivolous antitrust cases dismissed at an early stage, counsel for individual bondholders may want to consider the likely applicability of each defense to their particular circumstances before combining with other investors in response to a common issuer.

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3. De R. Barondes, *supra* note 1, at 752, 765; Coffee & Klein, *supra* note 1, at 1212 ("by exploiting the threat that bondholders will be made worse off, corporations can achieve favorable recapitalizations through exchange offers that put the bondholders into a kind of prisoner's dilemma, thereby coercing the bondholders to accept an amendment to their indenture that in their unconstrained choice they would reject").

4. *See* De R. Barondes, *supra* note 1, at 765 n.84 (defining a prisoner's dilemma as "a game with the following attributes: 'Each player has two basic choices: he can act "cooperatively" or "uncooperatively." When all the players act cooperatively, each does better than when all of them act uncooperatively. For any fixed strateg(ies) of the other player(s), a player always does better by playing uncooperatively than by playing cooperatively.' " (quoting MORTON D. DAVIS, GAME THEORY: A NONTECHNICAL INTRODUCTION 109 (rev. ed. 1983))); Coffee & Klein, *supra* note 1, at 1227–33 (giving examples of the prisoner's dilemma in the bondholder context).

5. *See* Lacy & Dolan, *supra* note 2, at 71 ("Most indentures do not provide for the establishment of bondholder 'steering' committees to negotiate with the issuer, on behalf of the bondholders, about the terms of a proposed debt restructuring. These arrangements, although informal, have become prevalent in recent years."); De R. Barondes, *supra* note 1, at 752 (observing that "recent empirical evidence indicates that bondholders frequently are able to negotiate [jointly] with issuers and obtain better terms"); Marcel Kahan & Bruce Tuckman, *Do Bondholders Lose from Junk Bond Covenant Changes?*, 66 J. BUS. 499, 512 (1993) (reporting that bondholder groups formed in at least twelve of fifty-eight consent solicitations reviewed and that 42 percent of issuers modified consent solicitations after initially failing to procure a sufficient number of consents); Coffee & Klein, *supra* note 1, at 1222 (noting that because the ownership of bonds is usually more concentrated than ownership of equities, it is easier and more common for debtholders "to engage in collective action").

6. *See, e.g.*, Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1046 (2d Cir. 1982); Falstaff Brewing Corp. v. N.Y. Life Ins. Co., 513 F. Supp. 289, 290 (N.D. Cal. 1978).

7. *See, e.g.*, United Airlines, Inc. v. U.S. Bank N.A., 406 F.3d 918, 921 (7th Cir. 2005); *Sharon Steel*, 691 F.2d at 1047; *Falstaff*, 513 F. Supp. at 292.

I. LACK OF ANTITRUST INJURY

The first, and perhaps easiest to establish, defense for bondholders facing issuer allegations that their coordination constitutes price-fixing or otherwise contravenes the Sherman Act is that such conduct has no anticompetitive effect and thus cannot support a section 1 claim. This argument has been decisive in the four reported cases involving antitrust challenges to collaboration among creditors, with each of the courts agreeing that there is no restriction of competition where the joint action relates to pre-existing debt.[8]

In *Falstaff Brewing Corp. v. New York Life Insurance Co.*, for example, the issuer asserted that collusion among several lenders resulted in it paying a higher interest rate for its total indebtedness and amounted to price-fixing.[9] The district court rejected this argument, observing that the defendants "were not competing . . . to offer or to supply [the plaintiff] with more credit, but were attempting to secure that credit which they had already extended, the terms of which had already been negotiated."[10] This conduct, the court declared, "is in fact the very opposite of price-fixing."[11]

Similarly, in *United Airlines, Inc. v. U.S. Bank N.A.*, the Seventh Circuit characterized United's antitrust claim challenging coordination among indenture trustees with respect to outstanding payments on aircraft leases as "thin to the point of invisibility."[12] Explaining the rationale for its decision, the court noted that "[c]ompetition comes at the time loans are made," and added that "cooperation in an effort to collect as much as possible of the amounts due under competitively determined contracts is not the sort of activity with which the antitrust laws are concerned."[13]

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8. CompuCredit Holdings Corp. v. Akanthos Capital Mgmt., LLC, 661 F.3d 1312 (11th Cir. 2011); *United Airlines*, 406 F.3d 918; *Sharon Steel*, 691 F.2d 1039; *Falstaff*, 513 F. Supp. 289.

9. *Falstaff*, 513 F. Supp. at 293.

10. *Id*.

11. *Id*.; *see also CompuCredit*, 661 F.3d at 1315 (rejecting the plaintiff 's assertion that a collective demand by defendants that it repurchase their notes at par value constituted unlawful price-fi xing: "Here, the par value of the debt was already fixed by agreement of the parties. Negotiations about the repayment of a debt are factually dissimilar from a unilateral conspiracy to fix future prices in a market.").

12. 406 F.3d at 924.

13. *Id*. at 921; *see also id*. at 925 (coordination among lenders with respect to "how much *less* than the contract price [they] are willing to accept" does not implicate section 1 of the Sherman Act); Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 521 F. Supp. 104, 116 (S.D.N.Y. 1981) (concluding as a matter of law that efforts by indenture trustees to "insure that the credit previously extended to [the defendant] would be repaid" did not qualify as price fixing; rather, "the price paid by [the plaintiffs] for credit under the Indentures was fixed at the time the Indentures were issued"); *cf*. Newman v. Universal Pictures, 813 F.2d 1519, 1522 (9th Cir. 1987) (rejecting price-fixing claim where terms of the relevant contract were set prior to advent of alleged conspiracy).

In addition to finding no anticompetitive effect as a result of creditor collaboration relating to existing debt, the courts in these cases also based their rulings on determinations that there are procompetitive justifications for such activity. Borrowing from the public policy arguments supporting joint negotiations by creditors in a bankruptcy context, the opinions recognize that coordination among bondholders facing a common issuer can have some of the same beneficial effects, even if the issuer is not on the verge of insolvency. [14] Those benefits include inducing mutual forbearance on the part of cooperating lenders to prevent a run on the issuer's assets (e.g., by side agreements demanding preferential payments) or a rush to the courthouse by individual bondholders desirous of protecting their investments in the face of uncertainty about what fellow investors will do, and the savings in transaction and litigation costs that can be achieved by a global resolution. [15]

These arguments (i.e., absence of anticompetitive effects and precompetitive justifications) apply equally to coordination within and across debentures from a common issuer. By contrast, as suggested below, the implied-immunity defense is probably stronger with respect to collaboration among investors in a single debenture. It is worth keeping in mind, however, that while the most recent *CompuCredit* case was decided on the pleadings, none of the other three was dismissed at an early stage, imposing a non-trivial measure of burden and expense on the defendants. [16]

II. THE CONSENT DEFENSE

Where an issuer has effectively agreed to collaboration among its bondholders, there should be little scope for a section 1 challenge. Although there are no cases dealing directly with this scenario, authority for the consent defense can be derived from decisions addressing collaboration among competitors in a joint bidding context, which generally is subject to the strictest possible scrutiny under the antitrust laws. [17] Thus in *Love v. Basque Cartel*, [18] the court dismissed a section 1

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14. *See United Airlines*, 406 F.3d at 924; *Sharon Steel*, 691 F.2d at 1052.

15. *See Sharon Steel*, 691 F.2d at 1052–53 ("By allowing the parties to various indentures to seek compromise arrangements avoiding resort to litigation while protecting all concerned, such collective activity reduces the costs of indenture enforcement and the costs of borrowing."); *Falstaff*, 513 F. Supp. at 293–94; *see also* Coffee & Klein, *supra* note 1, at 1224 ("[P]ublic policy justifications for facilitating out-of-bankruptcy consensual renegotiations [between bondholder groups and issuers] expand beyond ensuring fairness to bondholders and involve the overall efficiency of the capital market for debt. Ultimately, any increase in the cost of capital because of the law's inability to deter opportunistic behavior or to facilitate collective action represents a dead-weight social loss.").

16. In *CompuCredit* the Eleventh Circuit affirmed the district court's grant of the defendants' motion for judgment on the pleadings. 661 F.3d at 1315. *United Airlines* was decided on appeal to the Seventh Circuit after the district court entered a temporary restraining order against the defendants. 406 F.3d at 926. In *Sharon Steel* the Second Circuit affirmed the district court's grant of a directed verdict for the defendants after a full trial, 691 F.2d at 1047, and in *Falstaff* the district court granted the defendants' motion for summary judgment, 513 F. Supp. at 296.

17. Federal courts and antitrust agencies consistently treat conspiracies to submit non-competitive rigged bids as a form of price fixing that is per se illegal under section 1 of the Sherman Act. *See, e.g.*, United States v. Misle Bus & Equip. Co., 967 F.2d 1227, 1235 (8th Cir. 1992); United States v. W.F. Brinkley & Son Constr. Co., 783 F.2d 1157, 1160 (4th Cir. 1986); Compact v. Metro. Gov't, 594 F. Supp. 1567, 1577–79 (M.D. Tenn. 1984). By contrast, all the cases discussed in Part I evaluated the antitrust claims under the more forgiving rule of reason.

18. 873 F. Supp. 563 (D. Wyo. 1995).

challenge by unsuccessful bidders for ranch property to collective action by other buyers where it was "undisputed that the sellers purposely structured the auction to . . . [facilitate] combination bidding, and actively encouraged joint bidding as the auction progressed." [19] Similarly, in *International Nutronics, Inc. v. Isomedix, Inc.*, [20] the court rejected a belated challenge by a bankruptcy trustee to coordination between bidders for estate assets where the alleged collusion was known to him at the time of the sale and "apparent from the face of the bid." [21]

The strength of the consent defense will depend on the nature of the evidence available to demonstrate issuer awareness of and/or assent to the collaboration. An issuer's express blessing, encouragement, or facilitation of bondholder group formation (e.g., by directly providing requesting investors with a list of individual bondholders so they can contact each other or agreeing to pay for separate bondholder group counsel) should be sufficient to preclude a finding of anticompetitive conduct. [22] In addition, although it is always possible that an issuer who voluntarily participates in joint negotiations or agrees to modify its proposal after consultation with bondholders could subsequently claim it was unlawfully coerced into doing so, such arguments are likely to be viewed with skepticism by courts and regulators if no contemporaneous objections to the bondholder coordination were made. [23]

III. *NOERR-PENNINGTON* IMMUNITY

The *Noerr-Pennington* doctrine is derived from two Supreme Court cases holding that bona fide efforts by rival firms to petition government entities (including regulatory agencies and federal courts) are immune from Sherman Act scrutiny, even if the outcome of those efforts reduces or eliminates competition. [24] The doctrine has been extended by lower courts to permit parties with common legal

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19. *Id*. at 578.

20. 28 F.3d 965 (9th Cir. 1994).

21. *Id*. at 970; *see also* United States v. Seminole Fertilizer Corp., No. 97-1507-Civ-T-17E, 1997 WL 692953, at *8–10 (M.D. Fla. Sept. 19, 1997) (consent decree enjoining defendant from submitting joint bids unless seller is informed of joint bidding arrangement); *In re* B & J Sch. Bus Serv. Inc., No. C-3425, 116 F.T.C. 308, 313–16 (1993) (consent decree prohibiting joint bids unless requested by potential purchaser); Kathryn M. Fenton, *Antitrust Counseling on Group Buying Issues*, ANTITRUST, Spring 1998, at 23, 26 & n.20 (noting that the risks of a private or governmental challenge to a competitor collaboration "will be minimized, if not totally eliminated, if the joint bid [arrangement] is made transparent to the seller").

22. *See Int'l Nutronics*, 28 F.3d at 970; *Love*, 873 F. Supp. at 578. There may also be a consent argument if the indenture itself contains provisions facilitating bondholder communications.

23. *See* United Airlines, Inc. v. U.S. Bank N.A., 406 F.3d 918, 925 (7th Cir. 2005) (precluding plaintiff from subsequently complaining about joint conduct by its creditors after previously not objecting to and benefiting by such conduct); Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1052 (2d Cir. 1982) (rejecting allegation that concerted action by indenture trustees amounted to a group boycott where issuer had previously dealt with them collectively: "For all of [plaintiff 's] current enthusiasm about dealing with the Trustees individually, it was in its interest . . . [initially] to deal with them jointly.").

24. *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136–37 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965).

rights to engage in joint efforts to enforce those rights, e.g., by collectively threatening to bring a lawsuit challenging the breach of an agreement. [25]

Noerr-Pennington immunity has been successfully invoked in two of the cases challenging coordination among creditors under the Sherman Act. In *Sharon Steel*, for example, the district court held that the concerted issuance of default notices and commencement of lawsuits by indenture trustees faced with misconduct by a single issuer was clearly an "invocation of judicial processes for the resolution of business and economic interests" and therefore immune from antitrust scrutiny. [26] Similarly, in *United Airlines* the Seventh Circuit rejected a claim that the collective decision of several indenture trustees to demand the return of their airplanes unless United cured all defaults in the fi nancing leases and resumed rental payments qualifi ed as a group boycott, emphasizing that "businesses are entitled under the *Noerr-Pennington* doctrine to act jointly when presenting requests to courts and agencies." [27]

However, where the joint action by debtholders or their trustees does not clearly contemplate an invocation of the judicial process, the *Noerr-Pennington* defense is unlikely to be available. Thus, for example, where an issuer makes a tender or exchange offer, or solicits consent for amendments in a manner not prohibited by the terms of the indenture, it may not be plausible to assert that bondholder coordination in resisting or seeking to modify the issuer's proposal is protected under the doctrine, unless there is a realistic threat of ensuing litigation. Moreover, side agreements among lenders designed to share the risk of a debtor's default or to affect the terms of future transactions with an issuer are also likely outside the ambit of *Noerr-Pennington* immunity, although they may be defensible on other grounds. [28]

IV. IMPLIED IMMUNITY

When regulatory statutes are silent about the applicability of federal antitrust laws, courts must determine whether, and in what respects, immunity from the Sherman Act's reach should be implied. [29] The Supreme Court has explained that "[t]hose determinations may vary from statute to statute, depending upon the

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25. *See* Primetime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 99 (2d Cir. 2000) (the Sherman Act "has been read not to prohibit parties with common legal rights—for example, creditors—from engaging in coordinated efforts to enforce those rights" (citation omitted)); Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 161 (3d Cir. 1984) (a good-faith attempt by parties with common interests to enforce their rights does not violate the antitrust laws).

26. Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 521 F. Supp. 104, 117 (S.D.N.Y. 1981), *aff 'd*, 691 F.2d 1039, 1052–53 (2d Cir. 1982).

27. 406 F.3d at 920.

28. *See* Falstaff Brewing Corp. v. N.Y. Life Ins. Co., 513 F. Supp. 289, 293–94 (N.D. Cal. 1978) (no *Noerr-Pennington* defense raised in connection with workout arrangements among lenders, but court nevertheless held they were not unreasonable restraints of trade); *United Airlines*, 406 F.3d at 925 (collusion among lenders concerning future terms of dealing with debtor not protected under *Noerr-Pennington*).

29. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 270–71 (2007).

relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws." [30] As this language from *Billing* suggests, mounting an implied-immunity defense can be a fact-intensive endeavor, and to date the only cases in which it has been successfully invoked involved a handful of securities statutes not relevant to the issue of collaboration among corporate bondholders.[31] Nevertheless, as demonstrated below, a review of the language and legislative history of the primary law regulating corporate debentures suggests that there is a powerful argument for extending the rationale of those cases to immunize collective bondholder action, at least in some circumstances.

> The Supreme Court has indicated that the following factors are "critical" to warrant "an implication of preclusion" in the securities context:
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> (1) the existence of regulatory authority under the securities law to supervise the activities in question;
> (2) evidence that the responsible regulatory entities exercise that authority; . . .
> (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct[; and . . .]
> (4) . . . the possible conflict affect[s] practices that lie squarely within an area of financial market activity that the securities law seeks to regulate. [32]

The principal regulatory statute governing the issuance of corporate debt is the Trust Indenture Act of 1939 ("TIA"). [33] One of the driving forces behind the TIA 's enactment was Congress's recognition that "the national public interest and the interest of investors in notes, bonds, [and] debentures . . . are adversely affected" when investors lack representation of a trustee empowered to protect and enforce their rights and adequate means of identifying and communicating with each other when those rights are imperiled. [34] A review of the Act's legislative his-

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30. *Id*. at 271.

31. *See id*. at 285 (interpreting Securities Exchange Act of 1934); United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975) (Investment Company Act and Maloney Act); Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659 (1975) (Exchange Act); Elec. Trading Grp., LLC v. Banc of Am. Sec. LLC, 588 F.3d 128 (2d Cir. 2009) (Exchange Act); *In re* Stock Exch. Options Trading Antitrust Litig., 317 F.3d 134 (2d Cir. 2003) (Exchange Act); Friedman v. Salomon/Smith Barney, Inc., 313 F.3d 796 (2d Cir. 2002) (Exchange Act); Finnegan v. Campeau Corp., 915 F.2d 824 (2d Cir. 1990) (Williams Act).

32. *Billing*, 551 U.S. at 275–76.

33. Trust Indenture Act, ch. 38, tit. III, 53 Stat. 1149 (1939) (codified as amended at 15 U.S.C. §§ 77aaa–77bbbb (2006 & Supp. IV 2010)). The TIA in form is "an amendment, by addition, to the Securities Act of 1933." Stanley E. Howard, *The Trust Indenture Act of 1939*, 16 J. LAND & PUB. UTIL. ECON. 168, 168 (1940) ("It is a statute which establishes standards and imposes requirements to be met in the drafting of indentures for certain kinds of securities," including notes, bonds, and debentures).

34. 15 U.S.C. § 77bbb(a) (2006); *see also id*. § 77bbb(a)(1) ("concerted action by such investors in their common interest through representatives of their own selection is impeded by reason of the wide dispersion of such investors through many States, and by reason of the fact that information as to the names and addresses of such investors generally is not available to such investors"); 69 AM. JUR. 2D *Securities Regulation—Federal* § 807 (2011) (TIA was "promulgated to insure that indenture security holders would have the services of qualified and disinterested trustees, that they would receive full and continuing disclosure with respect to the securities, and that they would be afforded means by which to communicate with one another for the purpose of the protection of their common interests").

tory makes clear that Congress intended to strengthen the ability of bondholders to safeguard their investments by facilitating communication and coordination among them. Both the Senate and House reports accompanying the TIA indicate that one of its "primary purposes" was "[t]o provide machinery whereby . . . continuing disclosure may be made to the security holders, and whereby they may get together for the protection of their own interests." [35]

The chief means by which Congress sought to achieve this objective is section 312 of the Act, which requires issuers to furnish indenture trustees with the names and addresses of current bondholders at regular intervals. [36] In addition, upon receipt of an application by three or more bondholders stating their "desire to communicate with other indenture security holders with respect to their rights under such indenture," the trustee is required either to provide them with the bondholder list or tell them the approximate number of bondholders on the list and the cost of mailing the applicants' proposed communication to them. [37] If the trustee declines to provide the bondholder list to the applicants, upon their written request and offer to pay the associated expenses, the trustee must either send the applicants' desired communication to the other bondholders or file with the U.S. Securities and Exchange Commission ("SEC" or "Commission") a statement outlining why the trustee believes such a mailing would be "contrary to the best interests of the indenture security holders" or "in violation of applicable law." [38] The SEC then has to decide whether to sustain or reject the trustee's objection and, if it rules against the trustee, the applicants' mailing must be sent out. [39]

It is worth noting that nowhere in the legislative discussions about facilitating concerted action among bondholders is there any suggestion that such collaboration could violate the antitrust laws. Instead, the congressional statements all focus on the urgent need for means to enable bondholders to band together for their mutual protection, given the absence of any investor role in the drafting of debentures and the typically wide dispersion of individual investors across the country. [40] There also is no "antitrust savings clause" in the Act—rather, the

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35. S. REP. No. 76-248, at 1 (1939); H.R. REP. No. 76-1016, at 25 (1939).

36. *See* S. REP. No. 76-248, at 6 (1939) ("Section 312 of the bill meets the problem of restoring to the bondholders control of their own destinies by providing that the indenture shall include a requirement that the issuing company furnish to the trustee at stated intervals or at the request of the trustee, information in its possession or control as to the names and addresses of the bondholders."); Howard, *supra* note 33, at 174 (bondholders list requirement "is designed to facilitate the cooperation of security holders with each other in the protection of their rights").

37. 15 U.S.C. § 77*lll*(b) (2006). In practice, however, this process is rarely utilized. Instead, as previously noted, most bondholder groups are created via more informal means, with large investors becoming aware of and reaching out directly to one another. *See supra* note 5.

38. 15 U.S.C. § 77*lll*(b)(2).

39. *Id.*; *see also* Howard, *supra* note 33, at 174 ("the Commission, after giving opportunity for a hearing, has the authority to decide whether or not the communication must be mailed by the trustee").

40. *See, e.g.*, 84 CONG. REC. 9511 (1939) (statement of Sen. Everett Dirksen) (where investors "are scattered in four or fi ve states, where the house of issue has the only lists[,] . . . my notion is that this bill will not be complete unless you say to a given number of bona fide holders of securities that they can come in . . . and demand as a matter of right that they know who the other security holders

"Effect on Existing Law" section provides that nothing in the statute shall "affect the jurisdiction of any other commission, board, agency, or officer of the United States . . . , insofar as such jurisdiction *does not conflict* with any provision of this subchapter or any rule, regulation, or order thereunder." [41]

Based on these sections of the TIA and the associated legislative history, a strong argument can be made that collaboration among bondholders dealing with a common issuer and debenture is impliedly immune from the antitrust laws. Applying the factors identified in *Billing* and the Supreme Court's other implied-immunity decisions, [42] it seems clear that the SEC has broad authority under the TIA to supervise the issuance of corporate debt and, pursuant to section 312, specifically to permit and encourage collective action by bondholders aimed at preserving or enforcing their rights. In addition, the Commission has plainly exercised its general authority under the TIA, [43] and the protection of investors in debt securities is certainly within the "heartland" of the capital market activity the Act seeks to regulate. [44]

The crux of the implied-immunity analysis is typically the conflict requirement, i.e., a showing that permitting application of the antitrust laws to the challenged

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are . . . , and if they want to get together to save . . . their investments, under the dome of heaven and the law of this country they should not be deprived of what I regard to be that elemental and essential right."); 84 CONG. REC. 5007 (1939) (statement of Sen. Alben Barkley) ("This bill requires . . . that [the trustee] give, upon request, to every bondholder in America a list of other bondholders, so that in case of any difficulty, in case of default, or in case the assets of the corporation are being or have been dissipated the bondholders may communicate one with another in the formation of protective committees looking toward the taking of legal steps which may be available to them in the protection of their interests.").

41. 15 U.S.C. § 77zzz (2006 & Supp. IV 2010) (emphasis added). For an example of an antitrust savings clause, see the Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(b)(1), 110 Stat. 56, 143 (codified at 47 U.S.C. § 152 note (2006)). Where a regulatory statute contains such a clause, the implied-immunity defense is unavailable. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis Trinko, LLP, 540 U.S. 398, 406 (2004) (existence of a savings clause "bars a finding of impliedimmunity").

42. *See supra* note 31.

43. *See, e.g.*, *Trust Indenture Act of 1939*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/divisions/corpfi n/guidance/tiainterp.htm (last updated Mar. 30, 2007) (providing updated guidance on interpretation of the TIA); Arch Wireless Holdings, Inc., SEC No-Action Letter, 2002 WL 1359406 (May 24, 2002) (determining that certain indentures could be qualified under the TIA). While examples of affirmative SEC actions pursuant to the TIA are less common than with some other securities statutes (e.g., the 1933 Act and the Exchange Act), the absence of a strong showing on this prong of the analysis has not been determinative in other implied-immunity cases. *See, e.g.*, United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 724, 734 (1975) (SEC's acceptance of industry practices for more than three decades without additional regulations did not demonstrate laxity in the exercise of its authority); Finnegan v. Campeau Corp., 915 F.2d 824, 831 (2d Cir. 1990) (fact that SEC's exercise of its regulatory authority was via required disclosures rather than prohibitions or enforcement actions was sufficient for purposes of implied-immunity defense); Elec. Trading Grp., LLC v. Banc of Am. Sec. LLC, 588 F.3d 128, 136 (2d Cir. 2009) (fact that recent SEC enforcement activity did not focus on the particular conduct alleged to be anticompetitive was not bar to immunity; for purposes of satisfying this factor of the *Billing* test it wasenough that the SEC was exercising its general authority over short selling).

44. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 277 (2007). It should also be noted that Congress afforded the Commission a fair amount of discretion in administering the TIA—a fact that has tended to support an immunity finding in other cases. *See* Howard, *supra* note 33, at 180 ("to no small extent success or failure of the Act to accomplish its purposes should be credited or debited to the soundness of judgment shown by the Commission in the exercise of its discretionary powers").

conduct is incompatible with operation of the relevant regulatory scheme as Congress intended. [45]

In connection with an antitrust challenge to the formation of bondholder groups who have invested in the same debenture, this requirement could be met by arguing that allowing the case to proceed would directly conflict with a fundamental purpose of the TIA (i.e., fostering bondholder collaboration for the protection of their mutual interests), potentially subject the defendants to conflicting standards, [46] and deter conduct that Congress has concluded is important to the proper functioning of the capital markets. [47] Although in response one could imagine a contention that the TIA only blesses concerted bondholder action mediated through or in conjunction with the indenture trustee, there is no suggestion in either the Act or its legislative history that Congress believed the trustee's involvement was necessary to alleviate antitrust concerns. On the contrary, the record makes clear that section 312's provision for a trustee role in facilitating bondholder communications was added in an attempt to curb past abuses—including issuers withholding bondholder lists or selling them to outsiders, or otherwise attempting to thwart joint bondholder action—not as a result of antitrust considerations. [48] Indeed, the legislative history is replete with expressions of congressio-

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45. *Billing*, 551 U.S. at 275 ("when a court decides whether securities law precludes antitrust law, it is deciding whether, given context and likely consequences . . . the two are 'clearly incompatible' "); Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 691 (1975) (implying immunity where "[i]nterposition of the antitrust laws . . . would preclude and prevent the operation of the Exchange Act as intended by Congress").

46. *See Billing*, 551 U.S. at 275–76 (requisite incompatibility for immunity exists where there is a risk that allowing application of both securities and antitrust laws "would produce conflicting guidance, requirements, . . . or standards of conduct"); *Gordon*, 422 U.S. at 689 (affirming dismissal of Sherman Act complaint because "to deny antitrust immunity with respect to . . . [the challenged conduct] would be to subject the exchanges and their members to conflicting standards").

The conflict here would be between the permissive, even approving, treatment of joint bondholder action under the TIA and the potential condemnation of such conduct under the Sherman Act. It is clear, for example, that the SEC is well aware of the formation of bondholder groups in response to exchange offers and other issuer restructuring efforts and does not appear ever to have suggested that they raise competition issues. *See, e.g.*, Black Box Inc., SEC No-Action Letter, Fed. Sec. L. Rep.¶ 79,510, 1990 WL 286633, at *8 (June 26, 1992) (observing that as a result of an exchange offer, a bondholders' steering committee was formed); Seaman Furniture Co., Fed. Sec. L. Rep. ¶ 79,406, 1989 WL 246436, at *2 (Oct. 10, 1989) (formation of debtholders' committee in response to issuer restructuring proposal). In addition, the fact that section 312 allows the Commission to compel a trustee to mail out communications from investors seeking to form bondholder groups, 15 U.S.C. § 77*lll*(b)(2) (2006), is plainly incompatible with permitting joint efforts by such groups to protect their investments to be challenged as antitrust violations.

47. *See* 15 U.S.C. § 77bbb(b) (2006) (noting that unless certain practices, including hurdles to "concerted action by . . . investors in their common interest" are ameliorated through regulation, "the public offering of notes, bonds, [and] debentures . . . is injurious to the capital markets"); *see also Billing*, 551 U.S. at 283 (concluding that immunity was warranted where the threat of antitrust lawsuits could have a "chilling effect" on lawful joint activities and cause "serious harm to the efficient functioning of the securities markets").

48. *See, e.g.*, *Regulation of Sale of Securities: Hearing on S. 2344 Before the Subcomm. on Sec. & Exch. of the S. Comm. on Banking & Currency*, 75th Cong. 110 (1937) (statement of Louis S. Posner, Member of the Mortgage Commission of the State of New York) ("The provisions concerning maintenance of lists of bondholders I regard as of an importance exceeded only by the higher degree of care which the trustee will be required to exercise. . . . Lists of security holders have long constituted a sort of

nal concern over how to overcome the obstacles to bondholder coordination, and there is no indication that any such coordination achieved without the facilitating mechanisms created in section 312 would contravene the Sherman Act. [49]

Not surprisingly, given the relative rarity of antitrust cases challenging collaboration by bondholders, there are no reported decisions addressing the applicability of the implied-immunity doctrine in this context. The doctrine appears to have been raised somewhat obliquely in *Sharon Steel*, where the defendant trustees attempted to buttress their principal argument (i.e., that their collaboration had no anticompetitive effect) with the assertion that "[c]oncerted action to insure [the issuer's] discharge of . . . common obligations to its Debentureholders, whether by the Debentureholders themselves, or on their behalf, . . . was envisioned by Congress when it enacted the Trust Indenture Act of 1939." [50] In responding to this contention, the plaintiff did not dispute that "[a]ctions taken by each [trustee] *individually* on behalf of the group of debentureholders it represents," or by the bondholders for a single issue "may be consistent with" the TIA, but maintained that "the Act was not intended to protect concerted activity among trustees for *separate and distinct debt issues*." [51] The Second Circuit did not reach this issue in ruling for the trustees, but at least one court has suggested that the TIA's language could be interpreted as promoting coordination among trustees (and bondholder groups) for different loans to a common issuer, as well as among investors in a single debenture. [52]

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battleground between the 'ins' and 'outs,' with the lists as the fortress of the 'ins.' These lists were so valuable for unified and effective action that, as the [SEC's] report shows, occasionally those who possessed such a list would succeed in extracting for its surrender the impudent price of a general release to themselves against any wrongdoing."); 84 CONG. REC. 9511 (1939) (statement of Sen. Everett Dirksen) (explaining the need for section 312 by noting that issuers "did not want the security holders to get together" and therefore either held onto bondholder lists or sold them at auction "for as high as $25,000 a list").

49. *See, e.g.*, *Regulation of Sale of Securities: Hearing on S. 2344 Before the Subcomm. of the S. Comm. on Banking & Currency*, 75th Cong. 96 (1937) (statement of Samuel Untermeyer) ("The result of the present situation is that it is well-nigh impossible for protective committees on defaulted bonds, or other contesting bodies of bondholders to communicate with one another, and their protection against 'the powers that be' in the corporation is impossible."); 84 CONG. REC. 9524 (July 19, 1939) (statement of Sen. Everett Dirksen) ("Unless we make it possible for bona fide holders for value to get together and pool their interests and determine what they should do[,] . . . we will not have gotten at the very root of the problem. The [SEC] realize that fact, as evidenced by the report they made.").

50. Brief of the Indenture Trustees and Intervening Debentureholders at 55 n.67, Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039 (2d Cir. 1982) (Nos. 81-7664, 81-7674, 81- 7682, 81-7692, 81-7694 & 81-7702), 1982 WL 608997, at *88 n.67.

51. Reply Brief of Plaintiff-Appellant-Cross Appellee Sharon Steel Corporation at 31, Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039 (2d Cir. 1982) (Nos. 81-7664, 81-7674, 81- 7682, 81-7692, 81-7694 & 81-7702), 1982 WL 608999 (second emphasis added); *see also id.* (citing the Senate Report on the TIA and emphasizing that the statute was designed to address "the problem of individual investors [i.e., bondholders] not being able to enforce their rights," and "*not* concerted action by trustees themselves").

52. *See* United Airlines, Inc. v. U.S. Bank N.A., 406 F.3d 918, 921 (7th Cir. 2005) (observing in connection with an antitrust challenge to collaboration among banks serving as trustees for multiple aircraft leases that "[o]ne might suppose that coordination is a normal function of indenture trustees, which exist under the Trust Indenture Act of 1939 precisely because individual lenders may be too diffuse to protect their own interests" (citing 15 U.S.C. § 77bbb(a)(1))).

V. CONCLUSION

In the face of issuer attempts to restructure or otherwise modify the terms of outstanding debt at their bondholders' expense, holders of these securities, particularly institutional investors, have often banded together in an effort to protect their interests. The fact that such collaborations have never been questioned by antitrust enforcement agencies and have only rarely been challenged by private litigants should provide a fair measure of comfort to bondholders and their representatives contemplating coordinating with other investors in response to coercive tactics by issuers. In addition, as outlined above, there are a number of well-founded arguments that could be advanced in defense of any such collaboration. The strongest of these are likely *Noerr-Pennington* immunity and lack of antitrust injury, but in some circumstances the consent and implied-immunity defenses may be dispositive as well.

Nevertheless, given the dearth of direct precedents and the cost and uncertainty of any litigation, investors considering participation in or formation of bondholder groups should proceed with some caution. Steps that may help to ward off an antitrust challenge include confining their collective efforts to pre-existing debentures, documenting the basis for a common legal position, and, if possible, obtaining issuer buy-in for a joint negotiation.