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Emerging Trends In Indirect-Purchaser Antitrust Cases

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Since the enactment of the Class Action Fairness Act ("CAFA"), 28 U.S.C. §1332(d), federal district courts handling indirect purchaser price fixing and market allocation cases have been confronted with arguments by defendants that indirect purchaser plaintiffs asserting antitrust claims under federal and state law lack antitrust standing. These arguments rely on the Supreme Court's decision in *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters* ("*AGC*")[1], and assert, for example, that indirect purchasers' antitrust injuries are too remote from the defendants' unlawful conduct or are not the type of injury the antitrust laws were intended to prevent. This article provides a general overview of the application of *AGC* in such cases, and describes trends in indirect purchaser cases that may be of interest to antitrust practitioners handling such matters.

AGC directed federal courts to apply a five-factor test to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them to determine whether a plaintiff is a proper party to bring an antitrust claim."[2] These factors are: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages."[3] *AGC* was decided several years after *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which held that, by and large, indirect purchasers should not be permitted to maintain a claim for damages under federal antitrust law. In response to *Illinois Brick*, many states created *Illinois Brick* "repealer" provisions that permitted, by statute or case law, indirect purchasers to maintain damages claims under state-law antitrust statutes. The Supreme Court later rejected a preemption challenge to these "repealer" provisions, and affirmed the right of the states to provide indirect purchasers with redress for their antitrust injuries.[4]

AGC Does Not Automatically Apply In Federal Court

Notwithstanding that *AGC* is the product of federal antitrust jurisprudence in which indirect purchaser damages claims are largely absent, defendants continue to challenge indirect purchaser claims in federal court on *AGC* grounds. Invariably, the first question courts face is whether federal antitrust standing principles under *AGC* should be applied, or whether antitrust standing principles under the applicable state law should be applied. The vast majority of courts addressing this issue have questioned the broad application of *AGC* to indirect purchaser claims under state law, have instead held that

the relevant state's rules of antitrust standing should be applied, and that, *AGC* should not be applied in the absence of a clear directive from those states' legislatures or highest courts.[5] A decision early in the post-CAFA history of the application of *AGC* to indirect purchaser claims under state antitrust law broadly applied the *AGC* standing test to bar indirect purchaser claims under state antitrust law.[6] Also, one or more other courts since then have imposed the *AGC* standing test based on a superficial determination that harmonization provisions or state case law indicate that the relevant state statutes "are construed in accordance with federal antitrust principles."[7] But the early decision has since been rejected by other courts,[8] and the occasional holding that *AGC* automatically applies if state statutory or case authority indicates that the state's antitrust law is in any way guided by federal antitrust law are anomalous and the clear minority.

AGC As Applied In Federal Court

Post-CAFA, a number of federal courts have applied *AGC* as a result of their analyses of state law antitrust standing principles. Often, however, weary federal judges have applied the *AGC* standing test rather than engage in the "back-breaking labor involved in deciphering the state of antitrust standing"[9] in each of the numerous "repealer" states usually at issue in post-CAFA indirect purchaser multidistrict litigation. A brief overview of these cases discloses several trends related to product and market characteristics of the allegedly price-fixed product that may impact antitrust standing.

Stand-Alone Products

Where an allegedly price-fixed stand-alone product travels essentially unchanged through the chain of distribution to indirect purchaser plaintiffs, and is sold either by itself or as part of a service, arguments by defendants that the indirect purchasers are participating in a separate market, requiring a finding of no standing or more detailed application of the *AGC* standing test, have been unavailing. In *In re Aftermarket Filters Antitrust Litigation*,[10] for example, the court analyzed whether indirect purchasers of aftermarket oil filters, who purchased the filters as part of a service package, had antitrust standing. The court held that they did, reasoning that purchase of an oil filter as part of service package did not constitute "a market separate from the physical filter market," that the product installed "is separately itemized and taxed," and that the case "is precisely the kind of case the repealer states envisioned when they enacted the state antitrust laws."[11] Similar arguments have failed to defeat standing under *AGC* or state law in cases involving allegedly price-fixed components.[12]

Component Products

Where the indirect purchase plaintiffs purchase allegedly price-fixed component products subsumed within another product along or at the final stage of the chain of

distribution, antitrust standing under *AGC* is generally found when any one or more of a number of key product or market characteristics is alleged or shown. Allegations of product or market characteristics that courts have found support antitrust standing under *AGC* include the following:

- The markets for the components and end-products are "inextricably linked and intertwined" and the component products "have no independent utility and have value only as components for other products."[13]
- The market for the components and the market for the products in which the components are used are linked such that the demand for the components directly derives from the demand for the end products.[14]
- The component parts can be physically traced through the supply chain.[15]
- Component part prices can be traced to show that changes in the prices paid by direct purchasers of the component affect prices paid by indirect purchasers of products containing the components.[16]
- The component parts, while used in different end-product markets, provide essentially the same functionality in those different markets.[17]
- Transformation of product in the distribution chain does not defeat standing under *AGC* where "primary use" of component product is to make the end products at issue.[18]
- The price of the component product purchased by a direct purchaser is negotiated by the indirect purchaser plaintiff.[19]

The importance of alleging facts sufficient to establish one or more of the above product or market characteristics in component cases is demonstrated by a recent case dismissal. In *In re Magnesium Oxide Antitrust* Litigation, the court dismissed the indirect purchasers' claims on the grounds that the plaintiffs failed to specify which products containing the relevant magnesium oxide ("MgO") products they purchased.[20] The court noted that "without knowing which specific products IP Plaintiffs purchased, it is impossible to determine whether an increase in their price is the type of injury that furthers the object of the alleged conspiracy to fix prices in and allocate shares of the domestic [MgO products] markets."[21] The court "granted [plaintiffs] leave to amend in order to allege (1) the specific purchased products containing [MgO Products] and (2) the nexus between an increase in the price of those products and the alleged conspiracy to fix prices in and allocate shares of the domestic [MgO Products] markets."[22]

Different Products

Finally, in cases where the indirect purchasers' price-fixing conspiracy allegations center around certain products, but the indirect purchaser plaintiff class includes those who purchased different, but related allegedly price-inflated products, plaintiffs and

defendants should be particularly attuned to potential arguments that may defeat antitrust standing under *AGC*. In such cases, plaintiffs should endeavor to allege pricing, product and market linkages between the products at issue, and defendants should seek to capitalize on any failure to connect them. A recent example is *In re Digital Music Antitrust Litigation*, in which the court held that plaintiff indirect purchasers of music on compact disks (CDs) lacked antitrust standing because they failed to allege sufficient linkages between their CD-related injuries, and the defendants' alleged unlawful conduct focused in the Internet Music market.[23] The plaintiffs alleged an overall digital music market comprised of Internet Music and CDs; and that defendants' conspiracy to restrain the availability and distribution of, and fix prices of, Internet Music, enabled them also to maintain or inflate CD prices. Applying *AGC*, the court found no standing because, among other reasons, plaintiffs made no "nonconclusory allegations about how the pricing of Internet Music affected CD pricing, how the CD market operated generally, what considerations affected CD pricing, or any kind of tie—contractual, historical, or correlative, for example—between CD pricing and Internet Music pricing."[24]

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So long as CAFA continues to drive indirect purchaser claims into federal court, defendants will continue to raise antitrust standing and *AGC* in an effort to defeat those claims. As the above discussion shows, indirect purchaser plaintiffs should carefully consider the applicable state antitrust standing principles, and the characteristics of the products and markets at issue in their case, so as to prepare for and respond to these inevitable challenges.

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[1] 459 U.S. 519, 539, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983).
[2] *Am. Ad Mgmt. Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1054 (9th Cir. 1999) (internal quotation marks and citation omitted) (citing *AGC*).
[3] *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1997) (*citing AGC*, 459 U.S. at 535).
[4] *California v. Arc America Corp.*, 490 U.S. 93 (1989).
[5] *See, e.g.*, *D.R. Ward Constr. Co. v. Rohm and Haas Co*., 470 F.Supp.2d 485, 494-96 (E.D. Pa. 2006) (the court "finds that it need not use the AGC factors as the framework for analyzing whether federal prudential considerations permit standing under [state] antitrust statutes, unless relevant state adopts

these factors"); *Graphics Processing Units Antitrust Litig*. ("*GPU I*"), 527 F.Supp.2d 1011, 1026 (N.D. Cal. 2007) ("Standing under each state's antitrust statute is a matter of that state's law. It would be wrong for a district judge, in *ipse dixit* style, to bypass all state legislatures and all state appellate courts and to pronounce a blanket and nationwide revision of all state antitrust laws"); *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, 586 F.Supp.2d 1109, 1123 (N.D. Cal. 2008) ("it is inappropriate to broadly apply the AGC test to plaintiffs' claims under the repealer states' laws in the absence of a clear directive from those states' legislatures or highest courts"); In re Flash Memory Antitrust Litigation ("Flash"), 643 F.Supp.2d 1133, 1151-53 (N.D. Cal. 2009) (holding that the applicability of *AGC* is a question of state law and questioning whether "a state's harmonization provision, whether created by statute or common law, is an appropriate means of predicting how a state's highest court would rule regarding the applicability of *AGC*"); *In re Aftermarket Filters Antitrust Litigation*, No. 08 C 4883, 2009 WL 3754041, at *7 (N.D. Ill. Nov. 5, 2009) ("any decision on whether a state has adopted the use of federal precedent in general, and the *AGC* factors in particular, to determine antitrust standing must be made on a state by state basis"); *In re Cathode Ray Tube (CRT) Antitrust Litigation* ("*CRTs*"), 738 F.Supp.2d 1011, 1024 (N.D.Cal. 2010) (application of *AGC* is a question of state law); *Stanislaus Food Products Co. v. USS–Posco Industries*, 782 F.Supp.2d 1059, 1070-72 (E.D. Cal. 2011) (applying principles of antitrust standing under California's Cartwright Act to indirect purchaser claims).

[6] *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation* ("*DRAM I*"), 516 F.Supp.2d 1072 (N.D. Cal. 2007) and *DRAM II*, 536 F.Supp.2d 1129 (N.D. Cal. 2008).

[7] *In re Magnesium Oxide Antitrust Litigation*, Civ. No. 10-5943 (DRD) ("*Magnesium Oxide*"), 2011 WL 5008090, at *7 n.9 (D. N.J. Oct. 20, 2011) (holding that indirect purchaser plaintiffs lacked standing to assert federal injunctive relief claims under federal law and dismissing state antitrust claims "because those claims are construed in accordance with federal antitrust principles").

[8] *See, e.g.*, *In re Optical Disk Drive Antitrust Litigation*, No. 3:10-md-2143 RS, 2011 WL 3894376, at *12 (N.D. Cal. Aug. 3, 2011).

[9] *See, e.g.*, *Flash Memory*, 643 F.Supp.2d at 1153.

[10] No. 08 C4883, 2009 WL 3754041, at **7-8 (Nov. 5, 2009 N.D. Ill.).

[11] Id. at *8.

[12] *See Flash Memory*, 643 F.Supp.2d at 1154-55 (relying, in part, on plaintiffs' allegation "that the NAND flash memory, whether in the form of a product or as a component of a finished product, remains discrete and traceable to its manufacturer" in denying a motion to dismiss under *AGC*).

[13] *TFT–LCD (Flat Panel)*, 586 F.Supp.2d at 1123 (LCD panels incorporated into laptops, televisions and other products); *Stanislaus Food Products*, 782 F.Supp. at 1070-72 ("rolled steel sheets that are coated with a thin protective layer of tin or chrome" incorporated or formed into tin-plate cans).

[14] *TFT–LCD (Flat Panel)*, 586 F.Supp.2d at 1123.

[15] *TFT–LCD (Flat Panel)*, 586 F.Supp.2d at 1123; *In re Graphics Processing Units Antitrust Litig*. ("*GPU II*"), 540 F.Supp.2d 1085, 1092–1093 (N.D. Cal. 2007); In re Cathode Ray Tube (CRT) Antitrust Litigation, 738 F.Supp.2d 1011, 1024 (N.D. Cal. 2010).

[16] *TFT–LCD (Flat Panel)*, 586 F.Supp.2d at 1123; *GPU II*, 540 F.Supp.2d at 1092–1093; *CRTs*, 738 F.Supp.2d at 1024.

[17] *TFT–LCD (Flat Panel)*, 586 F.Supp.2d at 1123; *Flash Memory*, 643 F.Supp.2d at 1154.

[18] *Stanislaus Food Products*, 782 F.Supp.2d at 1072.

[19] *Oracle America, Inc. v. Micron Technology, Inc.*, No. C 10-4340 PJH, 2011 WL 999583, at **4-5 (N.D. Cal. March 21, 2011).

[20] *Magnesium Oxide*, 2011 WL 5008090, at *7.

[21] *Id*.

[22] *Id*.

[23] No. 06 MD 1780(LAP), 2011 WL 2848195, at *8 (S.D. N.Y. July 18, 2011).

[24] *Id*. at *6.