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Strategies for Handling Direct and Indirect Purchaser Antitrust Class Actions

Aimée Latimer-Zayets, *Partner*

202 263 3453

alatimer-zayets@mayerbrown.com

Gary A. Winters, *Partner*

202 263 3273

gwinners@mayerbrown.com

Lee H. Rubin, *Partner*

650 331 2037

lrubin@mayerbrown.com

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Speakers



Aimée Latimer-Zayets, *Partner*

202 263 3453

alatimer-zayets@mayerbrown.com



Lee H. Rubin, *Partner*

650 331 2037

lrubin@mayerbrown.com



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202 263 3273

gwinters@mayerbrown.com

Setting the Stage

- *Illinois Brick* rule: Indirect purchasers (downstream purchasers who did not buy from the alleged antitrust violator) cannot bring claims under federal antitrust laws
- Indirect purchasers may bring claims under state law
- Most modern antitrust class actions allege price-fixing conspiracies or monopolization that raises prices to direct and indirect purchasers
 - Cartel cases – *e.g.*, DRAM, SRAM, LCDs, Air Cargo, Rubber Chemicals
 - Monopolization – *e.g.*, Relafen, Flonase, Wellbutrin, Intel, Microsoft

Setting the Stage (con't)

- Class Action Fairness Act of 2005 (CAFA) permits removal of class actions from state to federal court if damages sought are in excess of \$5 million, and any class member is diverse from any defendant
- Therefore, indirect purchasers now bring cases directly in federal court rather than wait for removal
- Cases brought by direct and indirect purchasers around the country consolidated by JPML

What are the Claims?

- Direct purchasers
 - Claims under Sherman Act Sections 1 and 2
- Indirect purchasers
 - Brought under state antitrust and unfair competition statutes, as well as state laws permitting unjust enrichment claims
 - State substantive law, but federal procedural rules – impacts motion to dismiss (Twombly), class certification, summary judgment

Effects of Consolidation – Pretrial

- Coordinated discovery
 - Core liability issues are the same
 - Injury and damages issues, usually addressed through third-party discovery and experts, proceed separately
- No more costly state-by-state litigation of dismissal and class certification motions
 - *E.g.*, Visa cases, Microsoft cases
- More extensive third-party discovery to address pass-through
 - Plaintiffs need to obtain data on intermediate costs and prices for the merits expert to build a model
 - Opportunity for the defense to attack pass-through

Effects of Consolidation – Pretrial (con't)

- Indirect purchasers more active in the litigation
 - Indirect purchasers can't wait for results of direct purchaser case
- Rulings affecting indirect cases have an “all or nothing” impact
- Greater exposure for defendants, but also greater opportunity to win the entire case

Class Certification Issues Affecting Indirect Purchaser Claims

- Conflicts among state consumer protection statutes
- Ascertainability of class members

FTAIA

- Implicated if
 - Claims by foreign plaintiffs
 - Claims by domestic plaintiffs, for purchases by foreign subsidiaries (*e.g.*, *Sun v. Hynix* direct purchaser claims)
 - Claims by domestic purchasers for anticompetitive conduct related to component sold in foreign commerce (*e.g.*, domestic indirect purchasers)
- Defense should consider facial and factual attacks on subject matter jurisdiction

FTAIA (con't)

- Basic principles

- FTAIA issues arise when foreign commerce involved; domestic and import commerce are within U.S. jurisdiction
- Foreign commerce may be brought within U.S. jurisdiction if conduct has a “direct, substantial, and reasonably foreseeable” effect on U.S. commerce, and that effect “gives rise to” a Sherman Act claim

FTAIA (con't)

- Indirect purchaser claims are vulnerable where component sold in foreign commerce
 - *SRAM* decision:
 - component sold domestically and also to foreign purchasers; end products imported into U.S.
 - FTAIA applies to state-law claims
 - sale of finished products in U.S. does not qualify under “import” exception because *defendants* didn’t import – manufacturers of finished products did
 - high hurdle for meeting domestic effects exception – plaintiffs must show defendants specifically designed component for a particular manufacturer, and incorporated into a product specifically designed to be imported into the U.S.
 - if plaintiffs unable to meet domestic effects exception, and unable to segregate damages based on foreign and domestic commerce, all claims fail

FTAIA (con't)

- Discovery of foreign sales data
 - Is it relevant to indirect purchaser damages claims?
 - Not if indirect purchasers use “bottom up” damage calculation
 - But *SRAM* decision may encourage alternative methodology

Remand of Indirect Purchaser Actions

- Not an issue for direct purchaser actions; they are all on behalf of a nationwide class
- Defendant may want to remand indirect purchaser actions
- Plaintiffs probably favor consolidation for trial
- *Lexecon*: Prohibits MDL court from transferring cases to itself for trial; cases must be remanded back to original district for trial
- Parties can waive remand (*Carbon Dioxide, Armstrong*)

Remand of Indirect Purchaser Actions (con't)

- Is remand required if defendant does not waive?
 - District court decisions in *Drosperinone*, *Cessna*, suggest waiver must include all parties
- Can plaintiffs avoid remand by filing an amended complaint in the MDL district?
- No remand of cases on behalf of a state class, where the class originally filed in the MDL district

Remand of Indirect Purchaser Actions – Strategic Considerations

- Remand allows defendant to reduce damages exposure to indirect purchasers in MDL trial
- Remand allows damages to state classes to be challenged separately, because an adverse verdict in the MDL trial is collateral estoppel on liability, but not on damages
- Even if damages claims would not be litigated separately after plaintiff's victory, remand may create leverage for settlement
- Collateral estoppel is a one-way street: if cases remanded and defendant wins the MDL trial, plaintiffs in remanded cases could still litigate liability

Remand of Indirect Purchaser Actions – Strategic Considerations (con't)

- Trial in the MDL district of all indirect purchaser claims has the advantage of giving the defendant a judgment on all cases if it prevails
- If cases remanded, would they be transferred back to the MDL district for trial under 28 U.S.C. § 1404(a)?

Can Direct and Indirect Purchaser Cases be Tried Together?

- A joint trial of all plaintiffs and all defendants is the most efficient approach
- Key pieces of the puzzle: liability standards for state claims, *Hanover Shoe*/pass-on, allocation of damages
- What if there are no common defendants in the direct and indirect purchaser cases?
 - SRAM: separate trials

One Fly in the Ointment – Conflicting Liability Standards for Indirect Purchaser Claims

- Indirect purchasers typically sue under antitrust and consumer protection statutes
- Can conduct that does not violate the antitrust laws violate state consumer protection statutes?
- Can the jury evaluate the same course of conduct under different standards?

One Fly in the Ointment – Conflicting Liability Standards for Indirect Purchaser Claims (con't)

- Example: *SRAM Litigation*
 - price-fixing claim based on evidence of information exchange
 - indirect purchaser plaintiffs' proposed jury instructions would allow liability under state consumer protection standards for “unfair,” “deceptive” or “unconscionable” conduct
 - liability could have been predicated on conduct that fell short of an “agreement” as required under Section 1 and state antitrust analogues

One Fly in the Ointment – Conflicting Liability Standards for Indirect Purchaser Claims (con't)

- State courts have not decided whether traditional antitrust claims recast as consumer protection claims are evaluated under different standards
- Federal courts have addressed this issue in ruling on the FTC's use of Section 5 of the FTC Act, which is the model for many state consumer protection statutes
 - Over the last 30 years, courts have shown a reluctance for Section 5 to become a “catchall” for conduct deemed unfair but not violative of the antitrust laws
 - *Official Airline Guides, Boise Cascade, DuPont*

A Second Fly in the Ointment – Pass-on

- *Hanover Shoe*: Precludes direct purchasers from raising pass-on defense
- Direct plaintiffs fear infringement on *Hanover Shoe* principle if indirect purchasers argue pass-on of damages
- Is *Hanover Shoe* implicated where defendants do not raise a pass-on defense, but indirect purchasers claim overcharges were passed through?

A Second Fly in the Ointment – Pass-on (con't)

- The “cost-plus contract” exception
 - Defense allowed where pass-through could easily and reliably be shown
 - Does this logic allow direct purchasers to be subject to reduction of damages if indirect purchasers can show pass-through?
 - Or do direct purchaser plaintiffs have an absolute federal right to recover full damages?

Allocation of Damages

- The problem: If direct purchasers can recover full overcharge despite pass-on (*Hanover Shoe*), and indirect purchasers can recover damages under state law (*ARC America*), defendant at risk to pay 6 times damages, trebled
- Issue can now be addressed by a single federal judge
- *Hanover Shoe* may permit allocation if pass-through proven by indirect purchasers
 - Accepted in *Western Liquid Asphalt (decided before Illinois Brick)*
 - Direct purchasers retain damages not passed on, and indirect purchasers obtain only what was passed on

Allocation of Damages (con't)

- Alternatively, indirect purchasers' recovery may be reduced by amounts awarded to direct purchasers
 - *Illinois Brick* repealer statutes seek to avoid duplicative recovery, usually through judicial management
 - indirect purchasers could recover only those overcharges that
 - exceed direct purchaser-proven overcharges, and
 - were passed through

Severance of Defendants

- Many cartel cases involve defendants who pled guilty in a related industry
 - *E.g.*, HFCS, EPDM, SRAM, Flash, LCDs
- Can the defendant that pled guilty be tried together with defendants that have no guilty pleas?
 - Key issue is admissibility of guilty plea and evidence of the other conduct
 - Theories of admissibility
 - Rule 404(b)
 - other conduct is “inextricably intertwined” with alleged conspiracy
- If plea and other conduct evidence admitted, uninvolved defendants may seek severance or separate juries
 - In re HFCS Antitrust litigation

Speakers



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