

Trial Issues In Consolidated Direct And Indirect Purchaser Cases: Lessons From the *SRAM* Litigation

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Introduction

Following passage of the Class Action Fairness Act of 2005 (CAFA), it has become commonplace for antitrust class actions in which direct and indirect purchasers raise claims concerning the same conduct to be litigated in one federal court. This results from the fact that indirect purchaser class actions now are often filed in federal court in the first instance. Indirect purchasers, of course, must bring their claims under state law, because the well-known *Illinois Brick* decision strips them of standing to sue under federal law.¹ Before CAFA, indirect purchaser class actions typically were brought in multiple state courts because the requirements for diversity jurisdiction could not be satisfied.² This often led to a fragmented and inefficient process in which issues of standing and class certification were separately litigated in multiple jurisdictions around the country, sometimes with a parallel direct purchaser action proceeding in federal court.³

Strategic and practical considerations now drive plaintiffs to file most post-CAFA indirect purchaser class actions in federal court. In most cases, defendants can easily remove class action claims based on state antitrust, consumer protection and unjust enrichment laws — the usual triad of claims brought by indirect purchasers — from state to federal court.⁴ Because defendants in class actions typically prefer litigating in a federal forum — indeed, that preference contributed to the passage of CAFA — indirect purchaser plaintiffs, knowing they have little chance of keeping a class action in state court, skip the removal proceedings and go straight to federal court. Experience in the six years since CAFA's passage suggests, however, that indirect purchaser plaintiffs also may perceive some advantage in bringing their claims in federal court rather than state court. In a single proceeding in federal court, for example, they need only litigate class certification once before a single judge rather than slog through a long, costly state-by-state marathon of separate certification motions. If certification can be obtained and summary judgment overcome, the defendant may face the prospect of an all-or-nothing decision to settle or risk a single trial with far

greater damages exposure.⁵ And, as discussed in more detail below, there is the prospect that the court will consolidate the trial of the direct and indirect purchaser claims in some fashion, thereby reducing the cost to the indirect purchasers of trying the case.

The bottom line is that, whatever strategic considerations are driving plaintiffs' filing decisions, since 2005 indirect purchaser litigation has largely migrated to federal court. In the typical scenario, the Judicial Panel on Multidistrict Litigation consolidates all the indirect and direct purchaser class actions alleging the same claims in a single district and assigns them to one judge for coordinated pretrial proceedings.⁶ This allows for the efficient conduct of discovery, as the core issue of liability is common to both the direct and indirect purchaser classes even though there are pass-through issues unique to indirect purchasers. But what about trial? Can Sherman Act claims brought by direct purchasers and state-law claims brought by indirect purchasers be consolidated under Federal Rule of Civil Procedure 42(a) and tried together before a single jury? Or is it advisable to split the direct and indirect purchaser cases and try them separately? Should the trial be sliced more finely, with the common issue of liability for an antitrust violation tried jointly and damages issues tried separately? Moreover, whatever the trial structure, does the fact that both the direct and indirect purchaser cases will be tried in federal court have implications for the eternal bogeyman of indirect purchaser litigation — the specter of multiple liability for the same offense?

Because CAFA was passed relatively recently, and because so few indirect purchaser actions go to trial, there is no clear precedent in this area. However, the recent experience in *In re SRAM Antitrust Litigation* offers a useful jumping off point for discussion, as the plaintiffs and two defendants (Cypress Semiconductor and Samsung Semiconductor) litigated numerous issues concerning the structure of the impending trial before ultimately reaching settlements with direct and indirect plaintiffs. This article considers, from the defense perspective, several of the key issues involved in the trial of related direct and indirect purchaser cases.

Remand of transferred actions

If claims on behalf of either direct or indirect purchaser classes have been filed in district courts around the

country and then consolidated with direct purchaser claims, there is a threshold question whether the transferred cases can be tried in the transferee, or MDL, district. The Supreme Court in *Lexecon Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*⁷ interpreted the transfer statute, 28 U.S.C. §1407, to require a transferee court to remand actions to the transferor district when pretrial proceedings have run their course. Subsequent decisions have held that the plaintiff may waive the right to request remand⁸ and that both parties may consent to trial in the transferee district.⁹ Remand under *Lexecon* is rarely, if ever, an issue with regard to the direct purchaser cases: each original action will have been brought on behalf of the same nationwide class, and since at least one original action also will have been brought in the MDL district¹⁰ — which, of course, will be the district ready to try the case — there is little value for either side in seeking to remand any of the other actions to their original districts.¹¹

Remand is potentially relevant to the indirect purchaser actions, as each action typically will have been brought only on behalf of a class of a particular state's residents under that state's law.¹² Whether a defendant may seek remand of those cases originally filed outside the MDL district is a trickier question. In the first instance, counsel should determine if, for any of the state classes where an original action was filed outside the MDL district, an original action on behalf of that same class also was filed within the MDL district. In such a situation, remand of the transferred action is unnecessary. For example, assume the MDL district is the Southern District of New York, and an action on behalf of a California indirect purchaser class was originally filed in the Northern District of California. If an action on behalf of the same California class was also originally filed in the Southern District of New York, remand of the transferred action back to the Northern District of California is unnecessary because that class' claims could also be tried in New York.

With regard to indirect purchaser classes on whose behalf all original cases were filed *outside* the MDL district, however, a defendant may have a right to seek remand of each case back to its original district. Several decisions hold or imply that consent to trial in the transferee district must be obtained from *all parties*, not just the plaintiff.¹³ Moreover, while the

argument is sometimes made that the post-transfer filing of an amended or consolidated complaint in the MDL district effectively “wipes out” the original cases and obviates the need for remand, a consolidated complaint arguably is merely an administrative tool to achieve judicial efficiency.¹⁴

Whether it is in a defendant’s strategic interest to seek remand of indirect purchaser actions depends on several considerations. On one hand, if indirect purchaser actions representing all or a significant fraction of the total indirect purchaser damages claim can be remanded to separate districts, a defendant may be able to reduce the risk associated with trying the case in the MDL district. In a trial of all the indirect purchaser actions, an adverse verdict against a defendant probably would result in a damage award to each state class; but if some of the actions have been remanded, the damages award necessarily would be lower. While collateral estoppel would prevent the defendant from re-litigating in the remanded actions the question whether it conspired, monopolized, or otherwise violated substantive antitrust law,¹⁵ the same would not be true on the question of damages. Because each state class’ damages claim would be based on unique evidence of class members’ purchases and, perhaps, pass-through economics specific to indirect sales into that state, a defendant still could challenge the damages claims of each class whose actions were remanded. Of course, as a practical matter, the likelihood of holding separate trials on damages of remanded cases is between slim and none, as the result in the MDL trial almost certainly would foster settlement of the remaining cases. Nonetheless, a defendant may wish to leverage the prospect of separate damages trials before the main MDL trial as part of its overall strategy.

Another consideration in favor of seeking remand is the possibility that the MDL court will hold a single trial on direct and indirect purchasers’ substantive antitrust claims, yet will instruct the jury on state-law consumer protection claims in a way that undermines the basic antitrust instructions and potentially prejudices the defendants. As explained *infra*, there are unsettled questions about whether a jury should be permitted to evaluate conduct that is traditionally understood to be within the province of antitrust law under the standards applicable to state consumer

protection claims. If a defendant knows or anticipates that the court intends for one jury to evaluate the indirect purchasers’ consumer protection claims under standards that depart from traditional anti-trust law requirements, this may militate in favor of seeking remand of indirect purchaser actions rather than consenting to trial in the MDL district.

On the other hand, if some actions are remanded and the defendant prevails in the MDL district, collateral estoppel would not protect the defendant from having to try the entire case — both liability and damages — in each of the districts to which actions had been remanded. That is because a defendant cannot make use of collateral estoppel to foreclose new plaintiffs from having their day in court. By trying all indirect purchaser cases together in a single district, a prevailing defendant obtains a single judgment on the claims of all indirect purchasers.

In short, the decision whether to pursue remand should be driven by whether a defendant believes it will be better off taking an “all or nothing” shot at winning the whole indirect purchaser case, or hedging the risk of a loss. One fly in the ointment is the possibility that a remanded action could be transferred back to the MDL district under 28 U.S.C. §1404(a), which provides for transfer for convenience to any district in which a case might have been brought. If the remanded action could have been brought in the first instance in the MDL district, the plaintiff may seek to have it transferred back and consolidated with any actions still pending in the MDL district. The decision whether to transfer back rests in the discretion of the judge in the transferor district, and therefore this possibility should not necessarily dissuade a defendant from seeking remand if it is otherwise in its interest.

In short, the interplay of *Lexecon* and its progeny, the rules of collateral estoppel, and the substantive law to be applied all combine to make the question of remand an important threshold consideration in the trial of direct and indirect purchaser cases.¹⁶

Trial Structure

Assuming claims by direct purchasers and at least some indirect purchasers remain to be tried in the MDL district against common defendants, the

question becomes how to structure the trial to meet the twin goals of maximizing efficiency and ensuring a fair trial for all parties.¹⁷ From the standpoint of time, cost, and judicial resources, the most efficient structure would seem to be a single trial of all direct and indirect class claims, including liability and damages.¹⁸ Witnesses (particularly experts) whose testimony goes to issues of both liability and damages would have to testify only once, and the jury would obtain a complete picture of the alleged antitrust violation and its effect on all plaintiffs in the distribution chain. This approach, however, potentially presents problems on at least two dimensions: (1) indirect purchasers' need to show pass-on of damages arguably conflicts with direct purchasers' right to recover full damages notwithstanding proof of pass-on; and (2) the standards governing indirect purchasers' consumer protection claims may be in tension with the standards governing the antitrust claims, making a joint trial problematic even on the core liability issue.

THE IMPACT OF HANOVER SHOE

It is easy to see why direct purchasers would oppose a joint trial of direct and indirect claims that addresses both liability and damages. Under *Hanover Shoe*, a defendant may not raise a “pass-on” defense to federal antitrust claims brought by direct purchasers.¹⁹ In a joint trial, however, indirect purchasers as part of their affirmative case would effectively be making the very same pass-on argument that defendants are forbidden to raise, contending that the overcharge was absorbed not by direct purchasers but by persons further down the distribution chain. Even though this is not strictly a violation of *Hanover Shoe*, direct purchasers understandably would be concerned about a jury — despite instructions to the contrary — deciding that the only injured parties are those to whom the overcharge was passed on, namely, the indirect purchasers. Direct purchasers can be expected to take the position that they are entitled to their full damages (trebled) even if the indirect purchasers prove 100% pass-through.

In *SRAM*, the plaintiffs, invoking this very concern, urged the court to try only the issue of conspiracy jointly. If there was a verdict in their favor, they suggested, the direct purchasers' damages could be

tried separately to the same jury, with the indirect purchasers' damages tried to a separate jury.²⁰ In the alternative, the plaintiffs suggested that the entire direct purchaser case could be tried first, with the indirect purchaser case to follow. A verdict in favor of the plaintiffs would be collateral estoppel as to liability, leaving only the indirect purchasers' damages for the second trial. The reverse would not be true, however, making this a less attractive option from the defense standpoint; but in reality, indirect purchasers would be unlikely to re-try a case after a loss by direct purchasers.

Although *Hanover Shoe* is often thought of as insulating direct purchasers from any reduction in their damages due to pass-on, the decision should not necessarily preclude trying direct and indirect purchasers' liability and damages in one proceeding. *Hanover Shoe* was grounded in concerns about deterrence and litigation complexity. The Court was concerned that if a pass-on defense were allowed, “ultimate consumers” (*i.e.*, indirect purchasers) would have little incentive to sue, leaving no party with the incentive to deter antitrust violations. It also believed that determining pass-on would embroil courts in “virtually unascertainable” inquiries into other parties' pricing decisions, the effect of higher prices on sales volumes, and the effect of output changes on marginal cost.²¹ Importantly, though, the Court recognized that in circumstances where it is “easy to prove” that the direct purchaser passed on an overcharge — “for instance, preexisting cost-plus contracts” that automatically require passing on of any cost increase to purchasers farther down the chain — the concerns about complexity and deterrence are less pronounced, and the defense could be raised.²² The non-exclusive wording of *Hanover Shoe*'s cost-plus exception makes it clear that a cost-plus contract was not the *only* circumstance in which a passing on defense was allowed; it was just an illustrative example. While the Court no doubt saw little room for a pass-on defense at the time, the prohibition was based on prudential and practical considerations and was not absolute.

The intervening decades have shown that both the Court's skepticism about consumers' incentives to sue and the ability to prove pass-on were misplaced. Indirect purchasers began to sue more regularly in federal court in the 10 years between *Hanover Shoe*

and *Illinois Brick*, and today litigation by indirect purchasers is commonplace as well-financed attorneys mount parallel actions to virtually every direct purchaser action. More to the point for present purposes, modern economic regression methods, coupled with almost limitless computing power, now permit accurate calculation of the amount of passed-through overcharges — at least according to the plaintiffs and their experts who routinely perform these analyses in indirect purchaser litigation. In fact, one of the foundational articles routinely cited by indirect purchasers’ experts to show that pass-on calculations are both theoretically and practically possible is now more than 30 years old, suggesting that there is nothing especially new (from plaintiffs’ perspective) about the ability to prove pass-on.²³

Thus, the basis for invoking an exception to the *Hanover Shoe* rule now exists quite apart from the “cost-plus” scenario discussed in the decision itself. If calculating pass-on to indirect purchasers is as straightforward as their economic experts claim, there no longer is any reason why direct purchasers should be insulated from the implications of pass-on proof. After all, it is *other allegedly injured parties*, not defendants attempting an end-run around *Hanover Shoe*, who claim that the direct purchasers passed through the overcharge. Properly understood, *Hanover Shoe* should not serve as a bar to a joint trial on liability and damages. If indirect purchasers are able to prove pass-on of some or all of an overcharge, it should be permissible for the jury to reduce the passed-on amount from any damages award to the direct purchasers. Although the combination of *Hanover Shoe* and the availability of state indirect purchaser remedies makes it possible for a defendant to be exposed to multiple liability for the same overcharge, nothing in either *Hanover Shoe* or *ARC America*²⁴ requires that to occur. If the optimal arrangement is to try all aspects of the direct and indirect cases together, a court should be able to proceed in this fashion without running afoul of *Hanover Shoe*.²⁵

In *SRAM*, only one of the two defendants — Samsung — requested a joint trial on liability and damages.²⁶ The court ultimately sided with the plaintiffs in part due to *Hanover Shoe* concerns, ruling that trial on the direct and indirect purchasers’ conspiracy claims

would be held first, and, in the event of a verdict for the plaintiffs, trial on the direct purchasers’ damages would proceed before the same jury and trial on the indirect purchasers’ damages would proceed before a different jury.²⁷

THE POSSIBLE CONFLICT BETWEEN ANTITRUST AND CONSUMER PROTECTION CLAIMS

Although for the reasons discussed above the defense may prefer a joint trial, there certainly are countervailing considerations. An important one is how the court will instruct the jury on the standard of liability for the state-law consumer protection claims, and whether those standards will differ materially from the ones applicable to the federal and state antitrust claims.

Indirect purchasers typically allege that the defendants’ conduct violates state antitrust, consumer protection, and unjust enrichment laws.²⁸ The standard of liability under the federal antitrust laws and their state counterparts at issue in most indirect purchaser litigation is virtually identical, as state statutes often are worded similarly to Sections 1 and 2 of the Sherman Act and many state statutes contain a harmonization provision requiring that the statute be interpreted in accordance with applicable federal precedents.²⁹ Thus, for example, to show a horizontal conspiracy under state antitrust law, just as under federal law, a plaintiff must show an “agreement” to achieve an unlawful objective, such as fixing prices or allocating markets.³⁰ Given this similarity, there should be no problem trying direct purchaser claims and indirect purchaser antitrust claims together.

But state consumer protection statutes are different: they predicate liability variously on “unfair methods of competition,” “deceptive,” and “unconscionable” conduct.³¹ When an indirect purchaser’s theory fundamentally sounds in antitrust (such as price-fixing), but the claim is brought under a consumer protection statute, what liability standards govern those claims? More importantly from a trial perspective, how will the court instruct the jury? To give a concrete example drawn from the *SRAM* case, where the challenged conduct involves an exchange of information that allegedly constituted price-fixing, can the plaintiffs ask the jury to find the defendants liable under consumer protection statutes if they find

the acts of exchanging information “unfair,” “deceptive,” or “unconscionable,” even if the jury would otherwise find that the conduct as a whole does not amount to the “agreement” required for liability under Sherman Act Section 1 and parallel state antitrust statutes? Or must the instructions make clear that unfairness, deception and unconscionability can only be evaluated with reference to antitrust concepts?

Fundamentally, the question is whether state consumer protection statutes proscribe a broader swath of conduct that would be considered lawful under the antitrust laws, and therefore provide plaintiffs with more than just an alternative basis for pursuing their antitrust claims.

This question has not been explored in state case law, or even in the extensive recent federal case law addressing indirect purchaser claims, most likely because so few indirect purchaser actions proceed to trial. But its resolution — most likely through jury instructions — has important strategic implications for both parties. If the jury is permitted to find the defendants liable to the indirect purchasers under more open-ended (some might say less rigorous) consumer protection standards, there is a risk of the jury confusing the two sets of standards and perhaps resolving the federal and state antitrust claims under the consumer protection standards. Even if the jury follows its instructions to the letter, it could find that conduct that would not violate the Sherman Act is nevertheless sufficient to violate various state consumer protection statutes. In a price-fixing case, for example, plaintiffs would stress to the jury that the defendants’ conduct, viewed as a whole, may be deemed an unfair method of competition, “deceptive,” or “unconscionable” even if the evidence falls short of showing an actual agreement. Thus, defendants faced with the prospect of the jury evaluating a single course of conduct under both antitrust and consumer protection standards may contend that the risk of jury confusion and prejudice warrants separate trials of the direct purchaser and indirect purchasers’ claims.³²

After CAFA, it is unlikely that state courts will have an opportunity to address this issue, so federal courts will have to make predictions about state law. Nonetheless, there is some guidance in the federal courts’ interpretation of Section 5 of the FTC Act, which provides that “[u]nfair methods of competition

in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” Section 5 is relevant not only because its language served as the model for many state unfair competition provisions, but also because several states have harmonization provisions that direct state courts to interpret the consumer protection statute in accordance with federal interpretations of the FTC Act.³³

Federal courts on several occasions have considered whether a practice can violate Section 5 of the FTC Act even if it does not violate the antitrust laws. The FTC certainly has the power to proscribe unfair and deceptive competitive practices that do not run afoul of antitrust laws,³⁴ but only in a few older cases have the courts upheld FTC challenges to such practices. These cases mainly involved vertical arrangements where the conduct resembled tying arrangements, but were decided well before more recent decisions recognizing that tying can have anticompetitive effects only in limited circumstances.³⁵

Decisions over the last 30 years have reversed course and demonstrate that the courts are reluctant to allow Section 5 to become a “catchall” provision for conduct that does not otherwise violate the antitrust laws. In *Official Airline Guides v. FTC*,³⁶ the Second Circuit declined to endorse an FTC interpretation of Section 5 that would have penalized a monopolist for conduct that had an effect outside the market in which the monopolist competed. And in *Boise Cascade Corp. v. FTC*³⁷, the Ninth Circuit rejected the FTC’s decision that Section 5 had been violated by a plywood manufacturer’s use of a delivered pricing system under which customers were charged a “West Coast” freight factor regardless of the shipping location, where there was no evidence that prices were set by collusion. The Commission had condemned the delivered pricing practice based only on parallel action by competitors, each of whom had a business justification for adopting the delivered pricing system in the first place. The Ninth Circuit, however, held that in the absence of overt agreement to avoid price competition, the Commission had to show anticompetitive effect, which it had not. Another FTC challenge to parallel, but unilateral, conduct by competitors was rejected in *E.I. DuPont de Nemours & Co. v. FTC*,³⁸ where the Second Circuit characterized

the FTC's challenge to the respondents' conduct as opening the door to "arbitrary and capricious administration of §5."³⁹

Taken together, the federal case law suggests that Section 5 does not sweep in a broad range of conduct that the agency might condemn as "unfair," but that would fall outside the prohibitions of the federal antitrust statutes. There is no reason to believe that states, in adopting their own versions of Section 5, intended anything different. This conclusion should be unaffected by the fact that state consumer protection statutes contain a private remedy, whereas Section 5 can only be enforced by the FTC. The question is what conduct the statute condemns, and that should not vary by the identity of the enforcer. Viewed in this fashion, in cases such as *SRAM* that involve garden-variety antitrust claims, it would be improper to instruct a jury that it could find liability merely if it decides that the defendants' conduct is judged to be unfair, deceptive, or unconscionable. Even though state law in some instances defines those terms more precisely, without a clear requirement that the conduct also be found to violate the antitrust laws, a jury would have an open-ended invitation to condemn conduct traditionally thought to fall within the exclusive province of antitrust. What decision a court makes about the proper scope of the state consumer protection claims therefore may inform both parties' decisions about the most appropriate trial structure.

Allocation of Damages

Ever since the *ARC America* decision confirming that states may confer standing on indirect purchasers, one of the most significant concerns associated with indirect purchaser litigation has been the possibility that defendants would be exposed to multiple liability for the same offense. Equally troubling is that if both direct and indirect purchasers can prove damages, defendants will have fully compensated direct purchasers even though they suffered no (or only a partial) loss. Debate over whether indirect purchaser suits are a good thing has continued unabated in the more than 30 years since *Illinois Brick* was decided, and while there have been proposals for wholesale structural reform,⁴⁰ none has been adopted. The only significant change in the law that could affect the multiple liability problem is, ironically, not contained

in an antitrust statute, but in a procedural statute of general application — CAFA. Specifically, by making it possible for direct and indirect purchaser actions to be consolidated for trial in one federal court, CAFA throws the issue into sharp relief and makes it possible for a judge to ensure that remedies are consistent with antitrust law's goals of compensation and deterrence.

From the plaintiffs' perspective, of course, there is no multiple liability "problem" and no basis for allocating damages. Plaintiffs can be expected to invoke the twin pillars of *Hanover Shoe* and *ARC America* to argue that, regardless of what academics and lawyers believe the optimal policy may be, the black-letter law as it stands now allows direct and indirect purchasers to recover the full overcharge. Indeed, the plaintiffs in *SRAM* took that very position.⁴¹ The court, however, was not so sure. Although it recognized that the defendants could not affirmatively assert a pass-on defense, it recoiled from the notion of the defendants paying twice:

Let's say there's a big verdict for the [direct purchasers] and then a verdict for the [indirect purchasers]. We have a double recovery. It seems to me that wouldn't be allowed. There has to be some sort of method of allocating. I know the jury wouldn't hear about it, and the jury would be told for the [direct purchasers] to award all the damages and that there's no pass-on defense. . . . But in the end, when we come down to actually writing checks, you don't get it twice, I don't think, or the defendants don't have to pay it twice. So somehow that would have to be allocated, and I don't quite know how one would do that. But you're going to have to come up with something.⁴²

The court did not issue any further ruling on allocation and the settlements ultimately mooted the issue. But the court's acknowledgement of the problem and search for a solution — something that probably would not have happened under the fragmented pre-CAFA regime — indicates that this issue will have to be grappled with in future litigation.

Despite the seemingly insurmountable barriers of *Hanover Shoe* and *ARC America*, there are several arguments for precluding multiple liability. First, as noted earlier in connection with the discussion of trial

structure, the *Hanover Shoe* rule is not absolute. Even though it is generally acknowledged that establishing the cost-plus contract exception is extremely difficult after *UtiliCorp*⁴³ (and irrelevant in most modern indirect purchaser cases, where the plaintiffs are end consumers who lack contractual relationships with direct purchasers), other methods for easily showing pass-on now exist and in fact would be offered to the jury by the indirect purchasers themselves. For the same reasons that a joint trial of direct and indirect purchaser damage claims would not unfairly trench on any rights of direct purchasers to keep the jury in the dark about pass-on, it should be permissible as a matter of substantive law for damages to be allocated as between direct and indirect purchasers in accordance with the jury's finding on pass-on rates.⁴⁴ Indeed, it is difficult to imagine a more illogical legal regime than one in which indirect purchasers are able to *prove* pass-on to a jury as a matter of fact, yet the parties doing the passing-on still recover their full damages arising from the same conduct. The Court in *Hanover Shoe* surely never contemplated such a situation, and to the extent direct purchasers believe their damages should not be taken away, their remedy is to offer evidence that they absorbed the overcharge.

In the years between *Hanover Shoe* and *Illinois Brick*, when indirect purchaser actions could be brought in some federal courts, at least one court addressed the question whether a direct purchaser's damages could be reduced when an indirect purchaser proves pass-on. In *In re Western Liquid Asphalt Cases*,⁴⁵ the Ninth Circuit held on an interlocutory appeal that indirect purchasers had standing to bring suit. Because the case involved claims by both direct and indirect purchasers, the court commented on how the problem of double recovery might be addressed on remand. The court was steeped in the *Hanover Shoe* rule, having considered it in depth in deciding that indirect purchasers have standing, but it saw no conflict between that rule and the imperative to avoid duplicate liability through allocation: "[T]he intermediary [*i.e.*, a direct purchaser] should recover the amount of the overcharge *that was not passed on*, if the proof shows that the ultimate consumers did not pay it at all, and any lost profits resulting from increased costs. The ultimate purchasers should obtain the remainder of the overcharge, and any other

damages proximately caused."⁴⁶ The overcharge "is not subject to double payment, because [defendants'] liability in that regard is to be apportioned after the amount of the overcharge is fixed. Further, each plaintiff . . . , be he [direct purchaser] or ultimate consumer, will be awarded only such further damages, including lost profits, as he may reasonably prove allocable to him."⁴⁷ Without explicitly saying so, the Ninth Circuit recognized that asserting a pass-on defense is materially different than having proof of pass-on by indirect purchasers.

Second, the Court in *ARC America* indicated that *Hanover Shoe* did not confer on direct purchasers an absolute right to recover the full amount of an overcharge even when indirect purchasers established entitlement to relief for the same overcharge in the same litigation. In that case, states acting *in parens patriae* brought indirect purchaser claims that were pendent to their claims as direct purchasers. Other direct purchaser plaintiffs sought to exclude the indirect purchasers from access to a single settlement fund, claiming the federal antitrust laws entitled the direct purchasers to all recoveries for the overcharge and preempted any contrary state remedies. The Court made clear that the direct purchasers did not have an exclusive right to all damages from an overcharge, explaining that "*Illinois Brick* was not concerned with the risk that a plaintiff might not be able to recover its entire damages award." Rather, the Court recognized that in some circumstances indirect purchasers' recovery may "reduce the amount that can be paid . . . to direct purchasers."⁴⁸ Thus, the Court approved allocation of the single settlement even though "direct purchasers may have to share with indirect purchasers."⁴⁹

Third, even if a court were to hold that, notwithstanding pass-on evidence, *Hanover Shoe* requires direct purchasers to keep the full amount of any overcharges, state law might prevent many or perhaps all indirect purchasers from recovering damages. In some states, statutes and judicial decisions require courts to take steps to avoid duplicate liability when claims are brought by direct and indirect purchasers.⁵⁰ To be sure, these rules and decisions are usually premised on the assumption that direct and indirect purchasers are proceeding in state court in actions filed under

state law. But when a federal court sitting in diversity adjudicates indirect purchaser claims, the substantive rule of decision is supplied by state law. As such, a federal court is obligated to give effect to state law principles rejecting the possibility of duplicate liability. No state authorizes the award of duplicate damages to separate classes of antitrust plaintiffs for the same alleged overcharge, and the statutes and decisions cited above illustrate that state policy is to encourage courts to take affirmative steps to *avoid* such an outcome.

Few state statutes expressly set forth procedures for apportionment; instead, the matter typically has been placed within the discretion of state courts. The states that have implemented an allocation procedure reduce the damages available to a plaintiff on its state antitrust claim by the amount of any recoveries previously obtained for the same violation or injury. The Utah Code provides the clearest and most relevant model: “In an action by indirect purchasers, any *damages or settlement amounts* paid to direct purchasers *for the same alleged antitrust violations* shall constitute a defense in the amount paid on a claim by indirect purchasers under this chapter so as to avoid duplication of recovery of damages.”⁵¹ The statute is clear that this limitation applies when “a defendant has been sued in one or more actions by both direct and indirect purchasers, whether in state court or federal court.”⁵² If applied to indirect purchasers’ claims, this method of allocation would require a court to reduce any damages awarded by the jury to indirect purchasers by the amount of damages awarded to direct purchasers.⁵³

SRAM produced a vigorous and illuminating debate on the issue of allocation. Although the court did not have the opportunity to finally resolve it, future cases in which direct and indirect purchaser claims head toward trial before a single federal court are certain to result in fresh guidance for courts, practitioners, and parties.

Conclusion

CAFA has wrought significant changes in the way class actions are litigated in many areas of the law. But it has had a particularly important impact on antitrust litigation, largely putting to rest the era of fragmented federal and state adjudication of direct

and indirect purchaser claims. Whether the new regime provides greater advantages for plaintiffs or defendants, it plainly raises new strategic considerations as cases head to trial. ♦

Endnotes

- ¹ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).
- ² Before CAFA, federal district courts could, and sometimes did, exercise supplemental jurisdiction over indirect purchasers’ state-law claims for damages, where those purchasers also brought claims under federal antitrust law for injunctive relief. *See, e.g., In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 265 (D. Mass. 2004). Nonetheless, most indirect purchaser litigation before 2005 took place in state court. *See generally* Daniel Karon, “Your Honor, Tear Down That Illinois Brick Wall!” *The National Movement Toward Indirect Purchaser Standing and Consumer Justice*, 30 WM. MITCHELL L. REV. 1351 (2004).
- ³ The indirect purchaser litigation against Microsoft is a good example. After the United States prevailed on its claims under Sections 1 and 2 in 1999, indirect purchasers of Microsoft software brought suit in state courts around the country. *See Karon, supra*, at 1362 n.73, for a sampling of cases.
- ⁴ All that is required is for the plaintiff class to seek damages in excess of \$5 million, and for any member of the putative class to be diverse from any defendant. *See* 28 U.S.C. §1711(a)(2).
- ⁵ *Cf.* Kevin J. O’Connor, *Is the Illinois Brick Wall Crumbling?*, ANTITRUST 34, 36 (2001) (pre-CAFA, identifying reasons why state attorneys general might wish to consolidate indirect purchaser claims in a single federal court).
- ⁶ If direct and/or indirect actions are filed in different districts around the country, they will be consolidated by the JPML. If all cases are filed in a single district, they will be consolidated under local district court rules or case assignment procedures.
- ⁷ 523 U.S. 26 (1998).
- ⁸ *Armstrong v. Lasalle Bank Nat’l Ass’n*, 552 F.3d 613, 616-17 (7th Cir. 2009).
- ⁹ *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321, 1326 (11th Cir. 2000); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 235 F.R.D. 127, 146 n.73 (D. Me. 2005) (“Without that consent these various classes would be sent back to their respective districts for trial, pursuant to *Lexecon . . .*”).
- ¹⁰ The MDL Panel ordinarily does not transfer cases to a district in which no action has been filed.
- ¹¹ If opt-out direct purchaser actions have been consolidated with the other direct and indirect purchaser actions for pretrial proceedings, opt-out plaintiffs may have unique reasons to seek remand of their cases.
- ¹² Plaintiffs have on occasion attempted to bring actions under one state’s law on behalf of a class of indirect purchasers who reside in multiple states.
- ¹³ *See, e.g., In re Yasmin & Yaz (Drospirenone) Marketing, Sales Practices & Prods. Liab. Litig.*, 2010 WL 4024778, at

*1 (S.D. Ill. Oct. 13, 2010) (a “completely voluntary waiver” by all parties of “all objections to venue, including the issues involved in Lexecon” is a prerequisite to trial of transferred actions in the MDL court); *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 2009 WL 424744, at *1 (D. Kan. Feb. 19, 2009) (“Absent consent of the parties, this Court *must* remand the cases which plaintiffs filed in other district courts.” (emphasis added)). In a ruling from the bench, the court in SRAM rejected this view, but did not explain its reasoning.

14 See *In re Guidant Corp. Implantable Defibrillators Product Liab. Litig.*, 489 F. Supp. 2d 932, 936 (D. Minn. 2007).

15 See *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979) (approving use of offensive, non-mutual collateral estoppel, *i.e.*, a plaintiff may prevent a defendant from re-litigating an issue that was fully litigated and lost in a prior proceeding to which the plaintiff was not a party).

16 In *SRAM*, Cypress was the only non-settling defendant remaining in the indirect purchaser case as trial approached. Cypress sought remand of certain indirect purchaser actions under *Lexecon*, which the court denied in an oral ruling from the bench. See Tr. of Motions Hearing, *In re SRAM Litigation*, MDL No. 1819, Dec. 14, 2010, at 6-7.

17 As the *SRAM* case came closer to trial, Cypress settled with the direct purchasers and Samsung settled with the indirect purchasers. This still left direct and indirect purchaser claims in the same court, but *against different defendants*. Once that occurred, there were two distinct cases, and Cypress moved for separate trials. The court granted that motion. The discussion in this article is focused on the situation in which direct and indirect purchasers are pursuing claims against one or more common defendants.

18 “Liability” here refers only to the question whether there has been a violation of antitrust law, as distinct from the proof of injury and damages.

19 *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

20 Joint Pretrial Conference Statement in *In re SRAM Antitrust Litig.*, MDL No. 1819, Dkt. 1170 (Nov. 30, 2010), at 16-18.

21 *Hanover Shoe*, 392 U.S. at 493-94.

22 *Id.* at 494.

23 See Robert G. Harris and Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979).

24 *California v. ARC America, Inc.*, 490 U.S. 93 (1989). This decision held that indirect purchaser actions under state law are not preempted by federal antitrust law.

25 Although the foregoing discussion considers only whether Hanover Shoe categorically bars a joint trial of direct and indirect purchasers’ damages claims due to the risk of a jury reducing direct purchasers’ award, there may be independent reasons why apportionment of damages between direct and indirect purchasers is required.

26 Joint Pretrial Conference Statement in *In re SRAM Antitrust Litig.*, MDL No. 1819, Dkt. 1170 (Nov. 30, 2010), at 23-28. Cypress was differently situated and contended that issues bearing on a possible severance of Cypress from *Samsung* had to be resolved before the court could address

how to structure a trial of the direct and indirect purchaser claims. In brief, Cypress contended that evidence of Samsung’s involvement in the DRAM conspiracy was inadmissible against both Samsung and Cypress under Rule 404(b). It further contended that the issue of admissibility had to be decided first, because if the evidence was admitted, Cypress would seek a severance from Samsung under Rule 21. See *id.* at 28-31.

27 Tr. of Motions Hearing, *In re SRAM Antitrust Litig.*, MDL 1819, Dec. 14, 2010, at 5-6.

28 Courts in a few states have held that indirect purchasers can sue only under consumer protection statutes, *e.g.*, *Ciardi v. F. Hoffman-LaRoche, Ltd.*, 762 N.E.2d 303 (Mass. 2002), whereas in a number of other states, plaintiffs may bring claims under both antitrust and consumer protection statutes. An ever-evolving patchwork of federal and state decisions addresses the contours of antitrust claims brought under state consumer protection statutes. Discussion of that extensive body of law is beyond the scope of this article.

29 See ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (SIXTH), at 623 (2007) (noting that most state statutory provisions are comparable to Sections 1 and 2 of the Sherman Act). See also, *e.g.*, *Relafen*, 221 F.R.D. at 278 (noting that the state antitrust statutes under which indirect purchasers brought conspiracy claims “uniformly parallel their federal counterparts”). For a few examples of harmonization provisions, see ABA Section of Antitrust Law, INDIRECT PURCHASER LITIGATION HANDBOOK, at 34 n.106 (2007)

30 See, *e.g.*, *Pacific Gas & Elec. Co. v. County of Stanislaus*, 947 P.2d 291, 294 (Cal. 1997); *Romero v. Philip Morris, Inc.*, 203 P.3d 873, 880 (N.M. Ct. App. 2008).

31 See, *e.g.*, New York Gen. Bus. Law §349 (“Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”); N.C. Gen. Stat. §75-1.1(a) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.”).

32 Of course, this problem would also be present in a trial that consisted solely of indirect purchasers’ claims under state antitrust and consumer protection statutes. That is probably unavoidable, as a court would not be likely to split the trial of state antitrust and consumer protection claims. But it still may make sense for a defendant to attempt to separate the federal antitrust claims from the statute consumer protection claims.

33 *E.g.*, Fla. Stat. §501.204(2); Maine Rev. Stat. §207(1); N.M. Stat. §57-12-4; R.I. General Laws §6-13.1-3.

34 *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

35 See *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

36 630 F.2d 920 (2d Cir. 1980).

37 637 F.2d 573 (9th Cir. 1980).

38 729 F.2d 128 (2d Cir. 1984).

39 *Id.* at 139.

40 The Antitrust Modernization Commission, for example, proposed a straightforward process in which direct and indirect purchaser claims are litigated in federal court,

with damages allocated as between claimants who can prove injury and the defendant subject only to pay the overcharge to the direct purchasers (trebled). *See* AMC Recommendations at 267.

⁴¹ *See* Plaintiffs' Joint Brief on Damages Issues in *In re SRAM Litigation*, MDL No. 1819, Dkt. 1219 (filed Dec. 28, 2010). Professor Hovenkamp similarly asserts that "the existence of a state statute in no way limits or controls damage measurements under federal law. That is, the state statute cannot mandate that the damages be 'allocated,' for that would reduce the direct purchaser's federal right." Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (West 1994), § 16.6d.

⁴² Tr. of Motions Hearing, *In re SRAM Litigation*, MDL No. 1819, Dec. 14, 2010, at 8.

⁴³ *Kansas v. UtiliCorp. United, Inc.*, 497 U.S. 199 (1990).

⁴⁴ If a jury found 100% pass-on throughout the entire class period, as the indirect purchasers contended was the case in *SRAM*, damages would not be "allocated" but would flow entirely to indirect purchasers. But a jury could find less than 100% pass-on. In that circumstance, the amount of the initial overcharge to direct purchasers would be divided according to the parties found to have absorbed them.

⁴⁵ 487 F.2d 191 (9th Cir. 1973).

⁴⁶ *Id.* at 201 (emphasis added).

⁴⁷ *Id.*

⁴⁸ *ARC America*, 490 U.S. at 104.

⁴⁹ *Id.* at 105. Although *ARC America* held that state indirect purchaser statutes were not pre-empted even though they may lead to multiple liability, *id.* at 105, the Court did not preclude district courts from taking steps to mitigate this problem.

⁵⁰ *See, e.g., Bunker's Glass Co. v. Pilkington PLC*, 75 P.3d 99, 108 (Ariz. 2003) ("trial courts are capable of ensuring that antitrust defendants do not pay more than the total amount of damages to which all the parties are entitled"); *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 449-50 (Iowa 2002) (same); *Freeman Indus., LLC v. Eastman Chem. Co.*, 172

S.W.3d 512, 520 (Tenn. 2005) (same); N.M. Stat. Ann. § 57-1-3(C) (permitting use of pass-on evidence "to avoid duplicative liability"); N.Y. Gen. Bus. Law § 3409(6) (same); N.D. Cent. Code § 51-08.1-08(4) (same); D.C. Code Ann. § 28-4509(b) (permitting use of pass-on evidence "to avoid duplication of recovery of damages."); Haw. Rev. Stat. § 480-13(c)(2) (same); Minn. Stat. § 325D.57 (a court "may take any steps necessary to avoid duplicative recovery against a defendant"); S.D. Codified Laws Ann. § 37-1-33 (same); Cal. Bus. & Prof. Code § 16760(a)(1) (in a *parens patriae* suit on behalf of IPs, "court shall exclude ... monetary relief ... which duplicates amounts ... awarded for the same injury"); R.I. Gen. Laws § 6-36-12(g) (same).

⁵¹ Utah Code § 76-10-919(6) (emphasis added).

⁵² *Id.*

⁵³ Utah's allocation procedure has parallels in other state antitrust statutes, which apply the same method to *parens patriae* suits brought by their attorneys general on behalf of indirect purchasers. *See* Cal. Bus. & Prof. Code § 16760(a)(1)(A) (in a *parens patriae* suit on behalf of indirect purchasers, the "court shall exclude ... monetary relief ... which duplicates amounts ... awarded for the same injury"); Fla. Stat. Ann. § 542.22(2)(a) (same); Okla. Stat. Ann. tit. 79, § 205A.1.a (same); R.I. Gen. Laws § 6-36-12(g) (same); S.D. Codified Laws §§ 37-1-23 to -25 (same); W. Va. Code Ann. § 47-18-17(f)(1) (same); Wash. Rev. Code Ann. § 19.86.080(3) (in a *parens patriae* suit on behalf of IPs, "[t]he court shall exclude ... monetary relief ... that duplicates amounts ... awarded for the same violation"). The ABA's Indirect Purchaser Task Force took the same approach when it recommended amending the federal Clayton Act to permit indirect purchaser suits, but only in the form of *parens patriae* suits by state attorneys general. *See* Report of the Indirect Purchaser Task Force, 63 Antitrust L.J. 993, 995 (1995). Specifically, it proposed that in any such suit "[t]he amount awarded to a plaintiff for a claim based on direct or indirect purchases (i) shall not duplicate amounts previously awarded to a direct or indirect purchaser for the same overcharge based on proof in fact of such injury" *Id.* at 999-1000 (language of proposed Section 4i(b)(1)(C) of amended Clayton Act) (emphasis added).

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