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
gwinters@mayerbrown.com

Lee H. Rubin, Partner
650 331 2037
lrubin@mayerbrown.com

April 21, 2011
Speakers

Aimée Latimer-Zayets, Partner
202 263 3453
alatimer-zayets@mayerbrown.com

Lee H. Rubin, Partner
650 331 2037
lrubin@mayerbrown.com

Gary A. Winters, Partner
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
• Ascertaintiability 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 *Drosperrinone, 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

Aimée Latimer-Zayets, Partner
202 263 3453
alatimer-zayets@mayerbrown.com

Lee H. Rubin, Partner
650 331 2037
lrubin@mayerbrown.com

Gary A. Winters, Partner
202 263 3273
gwinters@mayerbrown.com