The Journal of the
Antitrust and Unfair Competition Law Section
of the State Bar of California

Chair's Column
Kenneth R. O'Rourke

Editor's Column
Thomas N. Dahdouh

Recent Developments in Competition and Antitrust Law

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Recent Developments in Competition and Antitrust Law

competition

The Journal of the Antitrust and Unfair Competition
Law Section of the State Bar of California

CHAIR'S COLUMN

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With thanks to the authors, editors and other contributors, our Section is pleased to present you with another edition of *Competition*. A variety of articles and viewpoints are provided on important antitrust and unfair competition law topics. Our editor-in-chief, Tom Dahdouh, for whom special thanks is due, provides an overview of this edition in his Editor's Column below.

In addition to publications, our Section promotes education and professionalism with our programs. Our flagship program is the **Golden State Institute (GSI)**, a daylong conference followed by an evening event honoring the Antitrust Lawyer of the Year. **This year's GSI will be held on Thursday, October 16, 2014, at the historic Julia Morgan Ballroom in San Francisco, California.**

Expect a top-notch program featuring leading plaintiff and defense practitioners, government enforcers, and state and federal judges, serving as speakers and panelists. The topics are varied and range from trials of recent **high-profile mergers challenged including *FTC v. St Luke's Health System* and *United States v. Bazaarvoice***, to the battle over a **Major League Baseball** team with intentions of moving to San Jose, to an insightful conversation with an **Associate Justice of the California Supreme Court, Kathryn M. Werdegar**, to issues surrounding **privacy, big data and the Internet,** to a discussion of complex business and antitrust trials by a panel of **distinguished judges**. There will be much more.

Following the panels, we will honor **Phillip H. Warren** as our **2014 Antitrust Lawyer of the Year.** Phil is the longtime leader of the **U.S. Department of Justice Antitrust Division Field Office in San Francisco.** He could be a multi-year winner based on his stellar career investigating and criminally prosecuting a host of international industry cartels. And his antitrust career continues. This year Phil joined **The Covington Firm** as a partner in the firm's San Francisco office. We congratulate Phil.

Please join us for GSI 2014 and the award dinner honoring Phil on October 16th. It will be a special event, from start to finish. More information will be available in Section email updates and on the Section's website, antitrust.calbar.ca.gov/Education/GoldenStateInstitute.aspx

For those who will be attending the **State Bar's Annual Meeting in San Diego on September 11-14**, please consider attending our Section's presentations. We will have two, back-to-back scheduled on Saturday morning, **September 13, 2014.** One panel will provide an overview of antitrust and unfair competition law while the other panel will address cultural challenges that arise when handling international investigations and litigation.

The State Bar's Annual Meeting in September marks the end of my term as Chair of the Section. It has been a privilege to serve the Section and the profession in this role during the 2013-14 year and as a member of the Executive Committee for several years

before that. Some say the two best days of a leadership appointment are the day your term begins and the day your term ends. This observation is right but not for the reason implied.

My job as chair could not be done without the outstanding contributions of many. They initiate new ways to achieve excellent results for the Section and for the antitrust profession at large. Indeed, we are fortunate to enjoy a true profession, not just a job, because of the camaraderie and collegiality shared among so many members of the Section. Yes, the first day of an antitrust leadership appointment is welcomed—and so is the last. By then one has witnessed over and over the quality and dedication of those who are next (and next after that) in the Section's leadership lines.

I congratulate one of those upcoming leaders, the new Chair of the Section for the 2014-15 term, **Tom Dahdouh**. Tom is the Director of the Federal Trade Commission's Western Region. He splits time in the FTC offices in San Francisco and Los Angles. Tom has served admirably in several roles during his five years on the Section's Executive Committee, most recently serving as our Vice Chair and Editor-in-Chief of Competition.

Tom's term as Chair begins in September. He will be joined by a terrific group of current and future leaders including new and returning vice chairs, deputy vice chairs, and other officers and members of the Section's Executive Committee. I congratulate them all. The Section's future is bright. And so will be the last day of my term. I will step down knowing the Section is in excellent hands for years to come.

EDITOR'S NOTE

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Mind the Gap:

A Symposium on Federal/State Antitrust Differences

This issue offers a Symposium answering five key questions in the evolving relationship – dare I say the growing gap? -- between federal and California state antitrust laws:

- *Do State Antitrust Statutes Reach Foreign Conduct?* In the first set, two articles explore the reach of both federal and state antitrust laws to foreign conduct. First, **Craig C. Corbitt and Aaron M. Sheanin** discuss substantial questions about the reach of federal antitrust statutes. Their article addresses the most recent appellate court machinations concerning interpretation of the Foreign Trade Antitrust Improvements Act ("FTAIA"), a statute whose tortured language has spawned conflicting interpretations of the reach of federal antitrust statutes beyond our shores. Then, **Marc Pilotin** takes the plaintiff perspective in arguing that California's state antitrust laws should apply to foreign conduct. **Dominique-Chantale Alepin and Jonathan Guss** argue for the defense that state antitrust laws should reach no farther than the FTAIA.

- *How Should a Potential Opt-Out Plaintiff Proceed?* Authors **Paula Blizzard, Justina Sessions, and Daniel Gordon** offer purchasers a primer on what to do when faced with price-fixing allegations against their suppliers. They offer helpful strategic advice on what direct puchasers should do in such situations, and include advice on options when the allegedly unlawful conduct occurred abroad.

- *Should Federal and State Class Antitrust Actions Be Tried Together?* Here, **Michael Mallow** begins tackling this issue by giving helpful background information on the Class Action Fairness Act ("CAFA"), along with insights into recent developments about it. For the plaintiff side, **Steve Williams** asserts that federal and state antitrust claims should not be tried in a single trial, while **Robert E. Freitas, Jason S. Angell, and Jessica N. Leal** brief the defense perspective for why a single trial in fact makes the most sense.

- *Should Damages be Apportioned for Federal and State Antitrust Violations?* For this issue, **Steve Williams and Elizabeth Tran** take the plaintiff perspective in arguing against apportionment, while **Kyle Mach and Bradley Markano** give the defense perspective against doing so.

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1 The views expressed here are my own and do not necessarily represent the views of the Federal Trade Commission or any Commissioner.

- *Should Federal Antitrust Standing Rules Apply to State Antitrust Indirect Purchaser Claims?* **Jodie M. Williams and Kristen M. Anderson** offer a plaintiff perspective that federal standing rules – particularly *Associated General Contractors*' multi-factor test for standing – should not apply to indirect claims brought under California's Cartwright Act. **Anna M. Fabish** pleads the defense perspective, pointing out the upside of continuing to use this test.

This issue concludes with three articles taking a look at the burgeoning Unfair Competition Law litigation surrounding deceptive food claims as well as unreasonable data security practices. In the first set, **Jill Manning** for the plaintiff's side and **Rhonda R. Trotter and Oscar Ramallo** for the defense argue about the strength of claims that certain "all natural" claims for foods are deceptive. The last article by Kathryn Russo explores the issues underlying the FTC's recent win against Wyndham in its federal court challenge to alleged unreasonable data security practices and the implications that decision may have on whether privacy violation are actionable under California's Unfair Competition Law.

With this issue, I bid farewell as the editor of *Competition*. I have greatly enjoyed "free-riding" on the wonderful written work of so many great California antitrust and unfair competition lawyers. We in California are lucky that we have a vibrant antitrust and unfair competition bar, and it has been my pleasure to bring you the past two year's worth of issues for this journal. I now pass the torch on to **Heather Tewksbury**, who was formerly a trial attorney in the world-renowned **DOJ Antitrust Division Field Office**, and is now a partner at Wilmer Cutler Pickering Hale and Dorr LLP in Palo Alto. Please keep sending her all your great work!

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APPELLATE COURTS GRAPPLE WITH THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT—PLAINTIFFS' PERSPECTIVE

By Craig C. Corbitt[1] and Aaron M. Sheanin[2]

I. INTRODUCTION

Today's consumer products – from cutting-edge electronic devices to automobiles, and the components in them – are manufactured largely outside the United States. "Nothing is more common nowadays than for products imported to the United States to include components that the producers had bought from foreign manufacturers."[3] But the rise of these globalized supply chains comes with an unexpected cost for American consumers: "As a result, the prices of many products exported to the United States are elevated to some extent by price fixing or other anticompetitive acts that would be forbidden by the Sherman Act if committed in the United States."[4]

In industries as diverse as computer chips, display technologies (both flat-panel and tube varieties), and auto parts (from ball bearings to wire harnesses), long-running, foreign-based cartels have taken hold in recent years and reaped billions of dollars from American consumers who bought finished products containing price-fixed components.[5] As these cartels have been uncovered, often as a result of a cartel member voluntarily confessing to the Antitrust Division of the U.S. Department of Justice under its leniency program, the consequences for foreign-based firms have been severe. The Antitrust Division has obtained, through plea agreements and convictions, record-breaking fines from foreign companies and has secured lengthy prison sentences for foreign nationals. In addition, civil plaintiffs (through class actions, "direct" actions by large intermediate purchasers, and state attorneys general acting pursuant to statutory and common law authority) have sued cartel

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1 Mr. Corbitt is a senior partner at Zelle Hofmann Voelbel & Mason LLP, and represented the Indirect-Purchaser Class in the *In re TFT-LCD Antitrust Litig.*, discussed in this article. He is a former Chair of the Executive Committee of the California State Bar Antitrust and Unfair Competition Law Section. He gratefully acknowledges the assistance of his colleagues, senior associate Patrick B. Clayton and summer associate, Christina S. Tabacco.

2 Mr. Sheanin is of counsel at Pearson, Simon & Warshaw, LLP, and represented the Direct-Purchaser Class in the *In re TFT-LCD Antitrust Litig.* He is a member of the Executive Committee of the Antitrust and Unfair Competition Law Section.

3 *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842, 846 (7th Cir. 2014), *vacated, reh'g granted,* No. 14-8003 (7th Cir. July 1, 2014) (citations omitted) (internal quotation marks omitted).

4 *Ibid.*

5 *See e.g.,* Press Release, The U.S. Dep't of Justice, Antitrust Div., Elpida Memory Executive Agrees to Plead Guilty for Participating in DRAM Price-Fixing Conspiracy (Nov. 16, 2006), *available at* http://www.justice.gov/atr/public/press_releases/2006/219732.htm; Press Release, The U.S. Dep't of Justice, Antitrust Div., Taiwan-Based AU Optronics Corporation, its Houston-Based Subsidiary and Former Top Executives Convicted for Role in LCD Price-Fixing Conspiracy (Mar. 13, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/281032.htm; Press Release, The U.S. Dep't of Justice, Antitrust Div., Denso Corp. Executive Agrees to Plead Guilty to Price Fixing On Automobile Parts Installed in U.S. Cars (June 30, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/306795.htm.

members for the overcharges caused by the price-fixed component, and in many instances have obtained significant recoveries from the cartel participants.

Recent government and private litigation has raised the issue of whether price-fixing agreements made by foreign companies in foreign countries, particularly those agreements to fix the prices of component parts rather than the end-products that are eventually sold to American consumers, are subject to federal and state antitrust laws. The statute enacted to address this question under the Sherman Act, the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"),[6] has proven so inscrutable that it has caused several Courts of Appeals recently to revise (and sometimes reverse) previous pronouncements regarding the application of U.S. antitrust law to foreign conduct. Most colorfully, the Seventh Circuit, after issuing and withdrawing a series of unusual orders, agreed to have a panel including Judge Posner re-hear a recent FTAIA case involving Motorola Mobility LLC, ("Motorola"). With all this upheaval and some inconsistent results, a trip to the Supreme Court – which has not parsed the FTAIA in a decade[7] – looks likely in the near future. This article discusses some of these recent and anticipated developments. The authors typically represent plaintiffs, and this article and opinions expressed reflect that point of view.

II. THE FTAIA AND EARLIER CASELAW

Congress enacted the FTAIA in 1982 in "respon[se] to concerns regarding the scope of the broad jurisdictional language in the Sherman Act."[8] The FTAIA "initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.* it has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that the antitrust law considers harmful, *i.e.,* the 'effect' must give rise to a [Sherman Act] claim.'"[9] As the Supreme Court explained, "the FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets."[10]

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6 15 U.S.C. § 6(a).

7 *F. Hoffmann-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155, 159 (2004) [hereinafter *Empagran*], involved "vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries…." The Supreme Court held that, "in this scenario, a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in [a foreign country] could not bring a Sherman Act claim based on foreign harm." The Court noted, however, that "our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Id.* at 165 (citations omitted).

8 *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 985 (9th Cir. 2008).

9 *Empagran,* at 162 (emphasis and brackets in original).

10 *Id.* at 161.

III. THE LCD CARTEL LITIGATION

The TFT-LCD litigation, including criminal cases brought by the U.S. Department of Justice and civil cases brought by various private plaintiffs at all levels of the distribution chain, has generated the most opinions and turmoil so far. This massive, multidistrict litigation, first initiated in late 2006 and still ongoing, concerns a cartel among Thin-Film-Transistor Liquid Crystal Display ("TFT-LCD") panel manufacturers located in South Korea, Japan, and Taiwan. Some of the defendants, e.g., Samsung, LG, and Sharp, are vertically integrated, so that some of the panels affected by the cartel were incorporated into televisions, computer monitors, laptops, cell phones and other products sold by their subsidiaries or by third party resellers in the United States and elsewhere in the world. Other defendants, who are located in Taiwan, only made panels and did not incorporate them into their own subsidiaries' products. Some of those panels were bought by the vertically-integrated defendants, while others were sold to third parties in Asia who assembled the consumer products but were not part of the conspiracy. Some of those products were eventually sold in the United States, while others were sold throughout the world. The distribution channels were multi-layered, non-uniform, and complex, such that the price-fixed panels may have passed through many different levels before reaching the ultimate consumers who bought the finished products.

Complaints for damages and injunctive relief were filed by classes of direct purchasers under federal antitrust law and by indirect purchasers (invoking Class Action Fairness Act diversity jurisdiction)[11] under state *Illinois Brick* repealer laws, including the California Cartwright Act and Unfair Competition Law. Judge Susan Illston, Northern District of California, denied defendants' FTAIA dispositive motions in the class actions, at both the pleading and summary judgment stages. Especially in the indirect purchaser case, defendants stressed the complex nature of the distribution chain, and argued that the effect therefore was not "direct" as required by the statute. The indirect purchasers emphasized the evidence that the defendants knew that their agreements on LCD panel prices would cause higher prices for products sold in the U.S., and that they tracked those increases to make sure that their agreement was working as intended. The indirect purchasers also pointed to evidence that most defendants had U.S. subsidiaries and employees who facilitated the agreements in some manner, that the defendants dealt directly with original equipment manufacturers (OEMs) in the U.S. who sold products to class members, and that the companies which pleaded guilty to participating in unlawful cartel activity admitted as part of their guilty pleas that commerce in the United States was affected. Finally, the indirect purchasers argued that whatever the FTAIA's effect on a Sherman Act claim, the FTAIA should not be applied to the Cartwright Act and the other state law claims alleged in the

11 28 U.S.C. § 1332(d).

case.[12] The court concluded that conduct had a direct effect on U.S. commerce, and on that basis denied the motion. The court did not address the merits of the issue of whether the FTAIA applies to state law claims.[13]

A. The *Motorola* Case in the LCD Multi-District Litigation

A number of companies opted out of one or both of the LCD class actions and filed as direct action plaintiffs. Some direct action plaintiffs, including Motorola, also alleged a conspiracy by the same defendants to fix prices for smaller panels used in cellphones. Motorola's complaint was originally filed in 2009 in the Northern District of Illinois, where it is headquartered, and its case was transferred by the Judicial Panel on Multi-District Litigation to Judge Illston for pretrial proceedings.

Motorola's foreign subsidiaries assigned their claims to the parent company. Although these subsidiaries directly purchased and received delivery of the panels from the defendants, the parent Motorola alleged that it directed and approved the prices and quantities of panels purchased by those subsidiaries. Motorola alleged injury for three categories of panel purchases: "(1) LCD Panels delivered by the Defendants to Motorola in the United States; (2) LCD Panels delivered to Motorola manufacturing facilities abroad for inclusion in Motorola devices imported into the U.S. by Motorola and later sold by Motorola to customers in the United States; and (3) LCD Panels delivered to Motorola manufacturing facilities abroad for inclusion in Motorola devices sold to Motorola customers abroad."[14] The second and third categories were the so-called "foreign injury claims" at issue in the various FTAIA motions.

Defendants moved to dismiss Motorola's foreign injury claims. In *In re TFT-LCD (Flat Panel) Antitrust Litig.,* 2010 WL 2610641 (N.D. Cal. 2010) [hereinafter *Motorola I*], Judge Illston granted the defendants' motion to dismiss to the extent it was based on foreign injury caused by foreign purchases of LCD panels and products (Categories 2 and 3 above). The court first rejected Motorola's contention that the products that were ultimately imported were not covered by the FTAIA. The court reasoned that the conduct of the defendants at issue for sales to the foreign subsidiaries did not involve importing. The court also agreed with the defendants that "the amended complaint does not allege any facts showing how Motorola's foreign injuries were proximately caused by any domestic effects of defendants conduct…Motorola's complaint generally alleges that defendants engaged in a 'global

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12 Defendants argued that state laws were preempted by the FTAIA. Plaintiffs responded that the standard for preemption was not met, and that generally California and other states are free to enact antitrust laws that go beyond federal law. This issue was addressed by the San Francisco Superior Court in *Rambus v. Micron Technology,* where Judge Richard Kramer held that the FTAIA by its terms amends the Sherman Act and says nothing about state laws, and that the standard for preemption was not met. Order Denying Defendants' Motion for Summary Adjudication of, Or in the Alternative, Motion to Dismiss, Plaintiff's Claims Based on Foreign Commerce for Lack of Subject Matter Jurisdiction, No. 04-0431105, 2009 WL 6761912 (May 29, 2009). A petition for writ of mandamus or prohibition was denied by the Court of Appeal on August 13, 2009, No. A125267. There has not been a definitive opinion by California appellate courts or by federal courts on this issue.

13 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953 (N.D. Cal. 2011).

14 *In re TFT-LCD (Flat Panel) Antitrust Litig.,* 2012 WL 3276932 at n. 1 (N.D. Cal. 2012) [hereinafter *Motorola III*].

conspiracy' that impacted 'global prices' and that Motorola's foreign affiliates 'suffered injury as a result of defendants' antitrust violations'…[T]hese allegations fall far short of alleging that the domestic effect of defendants' conduct gave rise to Motorola's foreign injuries."[15] Two of the cartel participants, Sharp and Epson, not only admitted to unlawful conduct in the Northern District of California (as did every cartel participant except AU Optronics), but specifically identified Motorola in their guilty pleas as one of the customers overcharged for LCD panels. However, this was not enough in the court's view to show a domestic effect that caused injury to the foreign subsidiaries.[16]

Motorola was granted leave to amend and filed a Second Amended Complaint, adding new allegations concerning defendant's conduct in the United States, how Motorola was specifically targeted, its control over its subsidiaries, and "the method by which global prices were negotiated and set by Motorola's procurement team in Illinois and the connection to Motorola's foreign injury."[17] These new allegations were sufficient in the court's view "to establish a concrete link between defendants' price-setting conduct (the collusion between the defendants to establish an artificially high price for LCD Panels), its domestic effect (the negotiations between Motorola and defendants that resulted in the setting of a global, anticompetitive price for all LCD Panels sold to Motorola) and the foreign injury suffered by Motorola and its affiliates (payment of higher prices abroad)."[18]

After the close of discovery, Judge Illston denied the defendants' summary judgment motion directed at the sufficiency of the evidence to support Motorola's FTAIA foreign injury claims, holding that it was a matter for the jury to decide.[19]

B. The *Motorola* Case on Remand to the Northern District of Illinois

Motorola's case was remanded back to the Northern District of Illinois for trial, and assigned to Judge Joan Gottschall. The defendants moved for reconsideration of Judge Illston's summary judgment decision, again arguing that the domestic effects requirement was not satisfied. Motorola opposed on the merits and also on the basis that the standards for reconsideration were not met, because the defendants raised no new argument that had not already been considered by the MDL court. Judge Gottschall granted the motion for reconsideration and granted the motion for summary judgment.[20] She reasoned that:

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15 *Motorola I*, at *7.

16 *Id.*

17 *In re TFT-LCD (Flat Panel) Antitrust Litig.,* 785 F.Supp.2d 835, 844 (N.D. Cal. 2011) [hereinafter *Motorola II*].

18 *Id.* at 842-43.

19 *See Motorola III.*

20 *Motorola Mobility LLC v. AU Optronics Corp.,* 2014 WL 258154 (N.D. Ill. 2014) [hereinafter *Motorola Mobility*].

> The…fundamental problem with the MDL court's analysis is that it did not address how the domestic conduct that Motorola argues it can prove constituted a domestic effect that gives rise to a Sherman Act claim. Although this was the only issue raised by Defendants in their motion for reconsideration, Motorola has offered no authority to support the MDL court's conclusion that because the jury could infer that final decisions regarding pricing of LCD panels took place in the United States, Motorola could prove that this domestic effect gave rise to its Sherman Act claim.[21]

Judge Gottschall did not address Judge Illston's view that domestic effects could be established by "the negotiations between Motorola and defendants that resulted in the setting of a global, anticompetitive price for all LCD Panels sold to Motorola"--negotiations which took place in the United States.[22] Motorola did not just make "final decisions" in the United States to approve prices negotiated by foreign subsidiaries, implying some rubber stamp; it negotiated those prices directly, and its subsidiaries were bound by them. Simply by carrying out the parent's instructions, the subsidiaries were not breaking the chain of proximate causation that set in motion the activities that caused their injury. In Motorola's view, it suffered injury when it was unknowingly induced to agree to buy panels at artificially high prices by the defendants through negotiations in the United States. In contrast, Judge Gottschall stated that, "for Sherman Act purposes, the injury arose when Motorola's foreign affiliates purchased LCD panels at inflated prices, not when Motorola decided at what price those purchases would be made."[23] This seemingly elevates form over substance. The injury that gave rise to Motorola's antitrust claim occurred when it agreed to pay anticompetitive prices. Simply by carrying out the parent's instructions to comply with those agreements, the subsidiaries did not break the chain of proximate causation, or incur new and independent injury.

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21 *Id.* at *8.

22 *Motorola II*, at 842.

23 2014 WL 258154 at *9.

Judge Gottschall went on to hold that even if there was a sufficient domestic effect, there was not a "substantial" effect on American domestic or import commerce, as required by the FTAIA. She acknowledged that "an increase in domestic prices, or a reduction in domestic supply, can constitute a substantial domestic effect that give[s] rise to a Sherman Act claim," citing the Seventh Circuit's decision in *Minn-Chem*,[24] but believed that "the economic consequences of Motorola's domestic approval of LCD prices were not felt in the U.S. economy…"[25] That is a difficult rationale in light of the tens of billions of dollars of LCDs that were included in products sold in the United States during the course of the conspiracy. At the very least, it is difficult to understand why that was not an issue that a jury should be allowed to decide as Judge Illston had found.[26]

C. The *Motorola Mobility* Case in the Seventh Circuit

Judge Gottschall certified her FTAIA opinion, issued on January 23, 2014, for interlocutory appeal, which was uncontested and accepted by the Seventh Circuit on March 13, 2014. Two weeks later, on March 27, 2014, without receiving any briefing and without oral argument, the Seventh Circuit issued a brief, unanimous opinion affirming the lower court. The opinion was written by Judge Posner, and joined by Judge Kanne and Judge Rovner.[27] Although this original panel decision was vacated by a subsequent order, its reasoning and the controversy that it generated warrant discussion.

The Court of Appeals held that all of Motorola's foreign purchases (99% of the total purchases at issue) were barred by the FTAIA. First, it held that there was no direct effect on U.S. commerce:

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24 *Minn-Chem, Inc. v. Agrium, Inc.,* 683 F.3d at 845, 856-58 (7th Cir. 2012) (*en banc*) (interpreting a "direct … effect" as having a "reasonably proximate causal nexus" between the foreign conduct and the harm suffered in the United States).

25 *Id.* (citing *Minn-Chem,* 683 F.3d at 858-59).

26 Judge Gottschall relied on the Ninth Circuit's decision in *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.,* 546 F.3d 981 (9th Cir. 2008). In that case, Centerprise, a foreign computer manufacturer, filed a complaint in U.S. district court alleging injury due to overcharges on DRAM that it purchased outside the U.S. Centerprise contended that the requisite domestic effect was that maintaining higher U.S. prices was necessary for the cartel to maintain higher prices globally. The Ninth Circuit held that this arbitrage or "but for" theory was not sufficient to satisfy the domestic effects requirement, and that "Centerprise has not shown that the higher U.S. prices proximately caused its foreign injury of having to pay higher prices abroad. Other actors or forces may have affected the foreign prices." *Id.* at 988. Similar claims were rejected by the D.C. Circuit, on remand from the Supreme Court, in *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.,* 417 F.3d 1267 (D.C. Cir. 2005), and the Eighth Circuit in *In re Monosodium Glutamate Antitrust Litig.,* 477 F.3d 535 (8th Cir. 2007). Judge Illston distinguished all these cases on the basis that Motorola was not a foreign purchaser, and that it allegedly negotiated prices and quantities in the United States as to which its foreign affiliates were bound, thereby "setting forth with specificity a direct causal relationship between the anticompetitive conduct, the domestic negotiations and Motorola's foreign injury." *Motorola II,* 783 F.Supp.2d at 843. Judge Gottschall seemingly ignored this distinction.

27 *See Motorola Mobility,* 746 F.3d 842 (7th Cir. 2014).

> The alleged price fixers are not selling the panels in the United States. They are selling them abroad to foreign companies (the Motorola subsidiaries) that incorporate them into products that are then exported to the United States for resale by the parent. The effect of component price fixing on the price of the product of which it is a component is indirect, compared to the situation in *Minn-Chem,* where "foreign sellers allegedly created a cartel, took steps outside the United States to drive up the price of a product that is wanted in the United States, and then (after succeeding in doing so) *sold that product to U.S. customers*."[28]

Second, the panel held that any effect on domestic commerce did not give rise to Motorola's antitrust claim:

> The effect of the alleged price fixing on [domestic] commerce must 'give [ ] rise to' an antitrust claim. The effect of the alleged price fixing on that commerce is mediated by Motorola's decision on what price to charge U.S. consumers for the cellphones manufactured abroad that are alleged to have contained a price-fixed component.…So the effect in the United States of the price fixing could not give rise to an antitrust claim.[29]

> If Motorola's foreign subsidiaries have been injured by violations of the antitrust laws in the countries in which they do business, they have remedies; if the remedies are inadequate, or if the countries don't have or won't enforce antitrust laws, these were risks that the subsidiaries (and hence Motorola) assumed by deciding to do business in those countries. What they didn't have if they overpaid was a claim under the Sherman Act; no more does their parent.[30]

Finally, the panel stated that "[t]he position for which Motorola contends would if adopted enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and 'resent[ment] at the apparent effort of the United States to act as the world's competition police officer,' a primary concern motivating the foreign trade act. It is a concern to which Motorola is oblivious."[31]

The first basis for the panel decision, that a conspiracy to fix the price of a component cannot have a direct effect on domestic commerce in products incorporating that product, was not even raised by the defendants before Judge Gottschall. In construing "direct" in the FTAIA as functionally equivalent to "direct purchaser" standing under *Illinois Brick*, the panel's decision cannot be reconciled with the Seventh Circuit's *en banc* decision in *Minn-Chem,* which expressly adopted the DOJ Antitrust Division's view that "direct" means only a "reasonably proximate causal nexus," and observed that requiring that the effect be "immediate" (as the panel decision essentially required) "comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA."[32]

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28 *Id.* at 844 (quoting *Minn-Chem*, at 680) (internal quotations omitted).

29 *Id.* at 845 (quoting 15 U.S.C. §6(a)(1)(A)).

30 *Id.*

31 *Id.* at 846.

32 *Minn-Chem*, at 857.

Likewise, the second basis for panel's decision, that any effect on domestic commerce did not give rise to Motorola's antitrust claim, failed to acknowledge the specific evidence offered by Motorola of its direct negotiations with the defendants in the U.S. concerning the prices its foreign subsidiaries paid for price-fixed LCD panels delivered outside the U.S. This is inconsistent with *Empagran's* holding that the "gives rise to" requirement simply means that the plaintiff suffered "an effect of the kind that antitrust law considers harmful."[33]

Finally, the foreign policy concerns expressed by the panel were quite the opposite of those expressed by the *en banc* court in *Minn-Chem,* which observed that "[t]he host country for the cartel will often have no incentive to prosecute" the cartel, and would be "pleased to reap economic rents from other countries."[34]

Motorola petitioned for rehearing or rehearing *en banc*, arguing that the panel's decision conflicted with *Minn-Chem* and *Empagran*, and would eviscerate antitrust enforcement by the government and private plaintiffs. Motorola also argued that it was essentially a single entity with its foreign subsidiaries, had been assigned their claims, and that its corporate structure should have no bearing on the FTAIA analysis. Motorola also criticized the panel for reaching a decision without briefing or oral argument, and without the benefit of the government's views.[35]

The American Antitrust Institute (AAI), "an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws," submitted an *amicus* brief in support of Motorola. It echoed the policy concerns expressed by Motorola, argued that "the panels' crabbed reading of the FTAIA domestic effects exception undermines deterrence of foreign cartels that harm U.S. businesses and consumers,"[36] and criticized the panel decision for adopting a "super *Illinois Brick* rule" that would preclude indirect purchasers in the United States from recovering for injury caused by foreign cartels.[37]

A number of prominent economists submitted an amicus brief in support of Motorola. They argued that as a matter of economic policy, purchases by foreign affiliates of U.S. companies "should be permitted to seek treble damages in U.S. courts to deter the formation of cartels that harm U.S. consumers and businesses."[38]

The United States Department of Justice and the Federal Trade Commission submitted a joint brief, with the authorization of the Solicitor General, in support of Motorola's petition for rehearing or rehearing *en banc*. The government's brief argued that the panel decision conflicted with *Minn-Chem* and other precedent, that "injuries to indirect purchasers are not too remote, even when they are several steps removed from the antitrust

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33 *Empagran,* at 162.

34 *Minn-Chem*, at 860.

35 Petition for Rehearing *en banc*, *Motorola Mobility*, No. 14-8003 (7th Cir. Apr. 24, 2014) ECF No. 20.

36 Brief for American Antitrust Institute, as Amici Curiae Supporting Petitioners, at 2, *Motorola Mobility*, No. 14-8003 (7th Cir. Apr. 29, 2014) ECF No. 31.

37 *Id.* at 5.

38 Brief for Economists and Professors, as Amici Curiae Supporting Respondents, at 1, *Motorola Mobility*, No. 14-8003 (7th Cir. Apr. 29, 2014) ECF No. 32.

defendant in the chain of distribution," and that "a natural and probable consequence of increasing the price of a critical and substantial component like LCD panels is an increase in the price of cellphones."[39] Thus, "the panel's narrow view of the statutory term 'direct' is likely to constrain the government's ability to effectively prosecute cartels that substantially and intentionally harm U.S. commerce and consumers, as well as prevent those injured in the United States from redressing that harm."[40] The government brief stated that enforcement of U.S. antitrust laws against foreign cartels that harm U.S. consumers was fully consistent with the Congressional purpose in enacting the FTAIA, and consistent with longstanding precedent.

Apparently not convinced that the DOJ/FTC brief reflected the unified position of the federal government, on May 1, 2014, the Seventh Circuit panel issued an unusual order inviting the State Department and the Commerce Department to submit their own amicus briefs, expressing a "special interest" in their "views on the potential effects on foreign relations resulting from the issues presented by this case."[41] The Solicitor General, Donald Verrilli, responded by letter on May 19, thanking the Court for the invitation, but stating that he had authorized the *amicus* brief "on behalf of the United States after appropriate consultation with interested components of the federal government, and it reflects the views of the United States…."[42] The Solicitor General added that the government did not plan to submit any additional briefs. Finally he observed, "Motorola alleges substantially the same unlawful conduct as gave rise to" criminal prosecutions by the DOJ, and that the government was "not aware of any instance in which a foreign government has expressed disapproval of those prosecutions to any official of the United States."[43]

Refusing to accept at face value the Solicitor General's representation that he had done "appropriate consultation with interested components of the federal government," on May 22 the panel ordered the Solicitor General to identify by name "the officials that he consulted with, the nature of the consultation," and the meaning of the representation that the Solicitor General's amicus brief "reflects the views of the United States."[44] Apparently cooler heads prevailed at the court before the Solicitor General could respond to this, because the next day the order was withdrawn without explanation, but with a warning that the court still might seek more information.[45]

The defendants argued against *en banc* review as not warranted because the decision was fully consistent with *Minn-Chem, Empagran,* and other precedent. Motorola had contended that its injury stemmed from higher panel prices and had waived the argument that its

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39 Brief for United States Department of Justice, Antitrust Division, as Amici Curiae Supporting Petitioners, at 10, *Motorola Mobility*, No. 14-8003 (7th Cir. Apr. 29, 2014) ECF No. 30.

40 *Id.*

41 Order, *Motorola Mobility*, No. 14-8003 (7th Cir. May 1, 2014) ECF No. 33.

42 Response by Amicus Curiae USA to Court order of 05/01/14, at 1, *Motorola Mobility*, No. 14-8003 (7th Cir. May 19, 2014) ECF No. 34.

43 *Id.* at 2.

44 Order Directed to the U.S. Solicitor General, *Motorola Mobility*, No. 14-8003 (7th Cir. May 22, 2014) ECF No. 35.

45 Order Withdrawing Order of May 22 Directed to the U.S. Solicitor General, *Motorola Mobility*, No. 14-8003 (7th Cir. May 23, 2014) ECF No. 38.

claims arose from higher cellphone prices, and "higher U.S. cellphone prices at most would give rise to claims by U.S. cellphone purchasers or the U.S. government—not Motorola."[46] Thus, the defendants downplayed the potential wider ramifications of the panel decision.

The defendant's opposition to the petition for rehearing was supported by *amici* briefs from the Korea Fair Trade Commission and Japan's Ministry of Economy, Trade, and Industry; and by a letter from The Republic of China, Taiwan's Ministry of Economic Affairs. (These are the three countries where the LCD cartel members are headquartered.) These countries expressed opposition to "expansive application of U.S. law" that would conflict with sovereignty of other nations and could interfere with enforcement of their own antitrust laws. The Japanese brief in particular referenced a similar submission in a prior case in which the governments of the U.K., Germany, Switzerland and the Netherlands criticized "overly aggressive" extraterritorial enforcement of U.S. antitrust laws.[47]

Motorola moved for permission to file a reply brief in support of its petition for rehearing *en banc,* arguing that it had not been able to fully explain its position to the panel.[48] This motion was opposed by the defendants, and denied by an order issued by Judge Posner on May 29.[49] Later the same day, Motorola filed a request that its motion to file a reply be distributed to the *en banc* court.[50] That motion was construed by Judge Posner as a motion for reconsideration, which, apparently reconsidering his hastiness, he granted the same day, ordering that Motorola's reply and the defendants' opposition to the motion for leave to file the reply be distributed to the full court.[51]

On June 2, 2014, the panel asked the Solicitor General to submit another brief or letter "concerning the potential impact on U.S. foreign commercial relations, and on U.S. foreign relations more generally" regarding the concerns expressed by the foreign governments in their amici oppositions to the petition for rehearing. The government responded to this more polite request with a supplemental brief filed on June 27. The government reiterated arguments it had previously made, stated that the concerns expressed by the foreign governments were unwarranted, and observed that those countries themselves had asserted the right to enforce and had enforced their own competition laws against foreign conduct that impacted their own commerce, including the imposition of substantial fines.

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46 Brief for Respondents, at 5, *Motorola Mobility*, No. 14-8003 (7th Cir. May 30, 2014) ECF No. 49.

47 Brief for Korean Fair Trade Commission, as Amici Curiae Supporting Respondents, at 2, *Motorola Mobility*, No. 14-8003 (7th Cir. May 27, 2014) ECF No. 42; *see also*, Brief for The Ministry of Economy, Trade and Industry of Japan, as Amici Curiae Supporting Respondents, *Motorola Mobility*, No. 14-8003 (7th Cir. May 27, 2014) ECF No. 42; Letter from The Ministry of Economic Affairs for the Republic of China, Taiwan, as Amici Curiae Supporting Respondents, *Motorola Mobility*, No. 14-8003 (7th Cir. May 29, 2014) ECF No. 47.

48 Motion Filed by Petitioner to File Reply Brief in Support of Petition for Rehearing *en banc*, *Motorola Mobility*, No. 14-8003 (7th Cir. May 28, 2014) ECF No. 41.

49 Response in Opposition by Respondents to Petitioner's Motion to Leave to File Reply Brief in Support of Petition for Rehearing *en banc, Motorola Mobility*, No. 14-8003 (7th Cir. May 28, 2014) ECF No. 43; Order re: Motion to File Reply Brief in Support of Petition for Rehearing *en banc, Motorola Mobility*, No. 14-8003 (7th Cir. May 29, 2014) ECF No. 44.

50 Petitioner's Motion for Referral of Motion to *en banc* Court, *Motorola Mobility*, No. 14-8003 (7th Cir. May 29, 2014) ECF No. 48.

51 Order re: Appellant's Request for Referral to en banc Court, *Motorola Mobility*, No. 14-8003 (7th Cir. May 30, 2014) ECF No. 49.

Such enforcement is also consistent with the practice of the European Union and other foreign jurisdictions. However, the government drew a distinction between Motorola's Category 3 claims, based on purchases of LCD panels that never entered the United States and thus "closely resemble the foreign purchasers' claims in *Empagran,*" and Category 2 claims, based on panels incorporated into cellphones sold in the United States, which "are quite different." The government thus seemed to invite the Seventh Circuit to narrow its ruling and reject only Motorola's Category 3 claims for finished products ultimately sold outside of the U.S.

On July 1, 2014, the Seventh Circuit issued an order stating that "the panel has decided to rehear this appeal" and vacating its March 27 opinion discussed above.[52] A separate order the same day set a very quick briefing and hearing schedule—July 9 for Motorola, July 16 for the defendants, and oral argument on July 21.[53] By subsequent orders issued July 3 and July 11, the panel stated that it would allow motions to participate by *amicus curiae* under this schedule, and granted the government's motion to be allowed ten minutes of oral argument separate from the time allotted to the parties.[54]

Motorola filed two briefs on July 9, a supplemental brief to the panel and a petition for hearing *en banc*.[55] Since the original panel opinion had been vacated, the case was still in the procedural posture of Motorola's petition for an interlocutory appeal. The supplemental brief to the panel argued the reasons why the panel should grant the petition for leave to appeal under the standard of 28 U.S.C. §1292(b), which is "a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[56] Motorola went on to argue that "the panel should stop with that determination. There is no federal rule, local rule, operating procedure, published guidance, or other provision that allows a motions panel considering a request for permission to appeal under [28 U.S.C.] Section 1292(b) to proceed directly to the merits."[57]

Motorola's July 9 petition for hearing *en banc* was an attempt to prevent the motions panel from considering the merits of the appeal. It argued that the full court should determine "when may a motions panel of this Court considering only a request for permission to appeal pursuant to 28 U.S.C. § 1292(b) decide the merits of the appeal?"[58] Motorola critically recounted the unusual series of orders before the panel and argued why

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52 Order: The Panel has Decided to Rehear this Appeal, *Motorola Mobility*, No. 14-8003 (7th Cir. July 1, 2014) ECF No. 58.

53 Order: Supplemental Briefing, *Motorola Mobility*, No. 14-8003 (7th Cir. July 1, 2014) ECF No. 59.

54 Order re: Appellant's Motion for Clarification, *Motorola Mobility*, No. 14-8003 (7th Cir. July 3, 2014) ECF No. 63; Order: The Motion [for the United States] to participate in argument, *Motorola Mobility*, No. 14-8003 (7th Cir. July 11, 2014) ECF No. 70.

55 Supplemental Brief of Petitioner, *Motorola Mobility*, No. 14-8003 (7th Cir. July 9, 2014) ECF No. 66; Motorola's Petition for Hearing *en banc*, *Motorola Mobility*, No. 14-8003 (7th Cir. July 9, 2014) ECF No. 76.

56 Supplemental Brief of Petitioner, at 9.

57 *Id.* at 7.

58 Appellant's Petition for Hearing *en banc*, at 1.

the panel's consideration of the merits was improper.[59] Although sharply attacking the panel's handling of the case to date, Motorola stated that "it is not seeking to disqualify the panel or to prevent its members from being eligible for random assignment to the case in the ordinary course. The problem is process, not personnel."[60]

On July 15, without waiting for a determination by the *en banc* court, the panel issued another order, granting the petition for interlocutory appeal, and vacating the expedited briefing schedule and the oral argument set for July 21.[61] The court ordered that the opening brief by filed on August 14, the opposition by September 15, and the reply by September 29.[62] The date for oral argument and the time allotments to the parties and the United States were to be set forth in a separate order. The next day, July 16, Motorola withdrew its petition for rehearing *en banc*.[63] Given the speed with which the Seventh Circuit and Judge Posner in particular normally operate, it is likely that oral argument and a new decision will be issued before the end of 2014. Whichever side wins, a petition for rehearing or rehearing *en banc* and an eventual petition for writ of certiorari seem inevitable.

IV. THE *LOTES V. HON HAI* LITIGATION

After the Seventh Circuit issued its *Motorola Mobility* decision, but before the panel vacated its order, the Second Circuit weighed in on the FTAIA in *Lotes Co., Ltd. v. Hon Hai Precision Industry Co*.[64] Like *Motorola Mobility*, *Lotes* involved allegations of anticompetitive practices by Asian manufacturers of electronics components that were incorporated in finished products sold in the United States. The *Lotes* decision adopted the interpretation of the FTAIA's "direct, substantial, and reasonably foreseeable effect" requirement that the Seventh Circuit set forth in *Minn-Chem*, but undertook a different analysis than the panel in *Motorola Mobility*.

A. Allegations and Decision in *Lotes*

Lotes is a Taiwanese corporation that designs and manufactures electronics components for notebook computers, including Universal Serial Bus ("USB") connectors, which are used to connect peripheral devices (e.g., printers, keyboards, and the like) to those computers.[65] Lotes sued several Taiwanese and Chinese manufacturers for violations of Sections 1 and 2 of the Sherman Act (and state law) by conspiring to monopolize the market for USB 3.0 connectors, the latest industry standard for those components.[66] According to the complaint, the defendants refused to issue licenses to allow Lotes to manufacture USB 3.0 connectors

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59 *Id.* at 4-7.

60 *Id.* at 15.

61 Order re: Petition for Interlocutory Appeal, *Motorola Mobility*, No. 14-8003 (7th Cir. July 15, 2014) ECF No. 74.

62 *Id.*

63 Withdrawal of Motorola's Petition for Rehearing *en banc*, *Motorola Mobility*, No. 14-8003 (7th Cir. July 16, 2014) ECF No. 75.

64 2014 WL 2487188, ___ F.3d ___ (2d Cir. June 4, 2014).

65 *Lotes,* 2014 WL 2487188, at *2.

66 *See id.* at *1,*4.

in violation of their obligations under an industry standard-setting organization.[67] Lotes also alleged that certain defendants had sued its subsidiaries in China for patent infringement, in actions that sought to enjoin two of Lotes's factories from manufacturing and selling USB 3.0 connectors and to compel the destruction of Lotes's existing inventory and specialized manufacturing equipment.[68] Lotes further claimed that the defendants threatened patent infringement litigation against other firms that manufactured USB 3.0 connectors.[69]

In effect, Lotes alleged that the defendants sought to shut it out as a competitor and chill competition from other manufacturers of USB 3.0 connectors. Of particular importance for the FTAIA, Lotes claimed that the defendants' anticompetitive scheme would have downstream effects globally and in the United States, as price increases resulting from these monopolistic practices would "inevitably" be passed on throughout the production process to consumers of notebook computers.[70] The defendants' conduct fell within the exception to the FTAIA, according to Lotes, because "[a]nything that affects the price, quantity, or competitive nature of the production market for USB 3.0 connectors will … have a direct, substantial, and reasonably foreseeable effect on U.S. commerce."[71]

The district court dismissed Lotes's complaint, concluding that Lotes had failed to satisfy an exception to the FTAIA by plausibly alleging a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce or import commerce.[72]

On appeal, the Second Circuit affirmed dismissal on alternative grounds. In doing so, the Second Circuit reached two significant conclusions about the FTAIA.[73] First, the court interpreted the term "direct … effect" under that statute (15 U.S.C. § 6(a)(1)) as meaning

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67 *See id.* at *4.

68 *Id.* at *5.

69 *See id.* at *4-5.

70 *See id.* at *6.

71 *Id.*

72 *See id.*

73 The Second Circuit also held that the FTAIA's requirements are not jurisdictional, but rather an element of a Sherman Act claim. *See id.* at *7-10. Numerous appellate courts, including the Second, Third, Seventh, and Ninth Circuits, had long held that the FTAIA's requirements were jurisdictional, such that they were necessary to invoke a federal court's adjudicative power. *See, e.g., Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998); *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 952 (7th Cir. 2003), overruled by *Minn-Chem*, 683 F.3d at 852; *United States v. LSL Biotechnologies*, 379 F.3d 672, 683 (9th Cir. 2004); *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 300-02 (3d Cir. 2002), overruled by *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467-68 (3d Cir. 2011). The Third and Seventh Circuits had overruled those precedents in *Animal Science Product* and *Minn-Chem*, respectively, determining that the those decisions had been undermined by a line of U.S. Supreme Court cases beginning with *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). In *Lotes*, the Second Circuit followed suit, overruling its own precedent. The Ninth Circuit reached the same conclusion in *United States v. Hsiung*, ___ F.3d ___, 2014 WL 3361084, at *10 (9th Cir. July 10, 2014) ("We hold that the FTAIA is not a subject matter jurisdiction limitation on the power of the federal courts but a component of the merits of a Sherman Act claim involving nonimport trade or commerce with foreign nations."). The conclusion that the FTAIA is a statutory element led the Ninth Circuit later to hold that the FTAIA does not operate as an affirmative defense to the Sherman Act. *See id.* at *16.

a "reasonably proximate causal nexus."[74] This is consistent with the Seventh Circuit's decision in *Minn-Chem*, but at odds with the Ninth Circuit's view that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity."[75] Second, the court explained, in apparent conflict with the Seventh Circuit's now-vacated order in *Motorola Mobility*, that foreign anticompetitive practices concerning components which create harmful downstream effects on U.S. domestic commerce are not necessarily "impermissibly remote and indirect" to require dismissal under the FTAIA.[76] Nonetheless, the Second Circuit held that the conduct of which Lotes complained failed to "give rise to a claim" under the FTAIA (15 U.S.C. § 6(a)(2)).[77] These conclusions are discussed below.

B. The "Direct Effect" Requirement Under the FTAIA is Satisfied Where There is a Reasonably Proximate Causal Nexus Between the Defendants' Conduct and the Effect on U.S. Domestic or Import Commerce

The Second Circuit addressed the meaning of the FTAIA's requirement that the defendants' conduct must have a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce to be actionable. The district court in the *Lotes* case had followed the Ninth Circuit's ruling in *LSL Biotechnologies*, which concluded that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity."[78] In adopting the "immediate consequence" standard, the Ninth Circuit had looked to the Supreme Court's interpretation of the term "direct" under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611 in *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). The Second Circuit disagreed with the court below and the Ninth Circuit's approach in *LSL Biotechnologies*, instead adopting the Seventh Circuit's formulation of the FTAIA: "the term 'direct' means only 'a reasonably proximate causal nexus.'"[79] As the court explained, the "reasonably proximate causal nexus" approach, which had been advocated by the United States and the Federal Trade Commission, was "less stringent" than the "immediate consequence" standard.[80]

The Second Circuit found multiple reasons for not interpreting the FTAIA and the FSIA consistently. First, the purposes of the statutes differ greatly. Because the FSIA codifies the general rule that foreign nations enjoy sovereign immunity, while creating limited statutory exceptions to allow suit in the United States, the court explained that "the 'direct effect' exception construed in *Weltover*[] must be carefully patrolled to preserve

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74 *See id.* at *12-15.

75 *LSL Biotechnologies,* 379 F.3d at 680. *See also United States v. Hsiung*, ___ F.3d ___, 2014 WL 3361084, at *18 & n.8 (9th Cir. July 10, 2014) (recognizing that the Ninth Circuit's view differs from the Second Circuit's view in *Lotes*, but finding it unnecessary to resolve the conflict because it affirmed the convictions on a different basis).

76 *Lotes,* 2014 WL 2487188, at *15.

77 *Id.* at *16-18.

78 379 F.3d at 680.

79 *Lotes*, 2014 WL 2487188, at *13 (quoting *Minn-Chem*, 683 F.3d at 857 (quoting Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. Ann. Surv. Am. L. 41, 430 (2005))).

80 *See id.*

the FSIA's 'general rule of immunity.'"[81] In contrast, the FTAIA "is a substantive antitrust statute designed 'to clarify … the Sherman Act's scope as applied to foreign commerce.'"[82] Accordingly, the text of the FTAIA need not be interpreted as restrictively as the FSIA.

Second, the two statutes differ textually. The FSIA refers to a "direct effect," while the FTAIA contains the phrase "direct, substantial, and reasonably foreseeable effect."[83] As the Second Circuit noted, in equating a "direct effect" under the FSIA to an "immediate consequence," the Supreme Court rejected the notion that the FSIA contains a requirement of substantiality or foreseeability.[84] In contrast, the FTAIA contains those requirements explicitly. "Reading 'direct' as 'immediate' would rob the separate 'reasonabl[e] foreseeab[ility]' requirement of any meaningful function, since we are hard pressed to imagine any domestic effect that would be both 'immediate' and 'substantial' but not 'reasonably foreseeable.'"[85] The Second Circuit continued: "To demand that any domestic effect must follow as an immediate consequence of a defendant's foreign anticompetitive conduct would all but collapse the FTAIA's domestic effects exception into its separate import exclusion."[86]

Instead, the Second Circuit adopted the "reasonably proximate causal nexus" standard, which tethers the term "direct" to the concept of proximate causation.[87] Under a proximate cause analysis, the Second Circuit explained, courts can determine whether alleged anticompetitive conduct is of a type that should be redressed under the Sherman Act by looking at "whether the injury that resulted was within the scope of the risk created by the defendant's [wrongful] act; whether the injury was a natural or probable consequence of the [conduct]; whether there was a superseding or intervening cause; whether the [conduct] was anything more than an antecedent event without which the harm would not have occurred."[88] The Ninth Circuit's "immediate consequence" standard in *LSL Biotechnologies* ignored these concerns in favor of a single factor, "the spatial and temporal separation between the defendant's conduct and the relevant effect."[89] Thus, the Second Circuit's articulation of the standard for interpreting a "direct … effect" under the FTAIA is consistent with the Seventh Circuit's holding in *Minn-Chem*, but opens up a divide from the Ninth Circuit's view in *LSL Biotechnologies*.

C. The FTAIA Does Not Exclude Foreign Anticompetitive Practices Concerning Components That Create Harmful Downstream Effects on U.S. Domestic Commerce from the Reach of U.S. Antitrust Law

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81 *Id.* (quoting *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 109, 114 (2d Cir. 2013)).

82 *Id.* (quoting *Empagran*, 542 U.S. at 169).

83 *See id.* at *14.

84 *See id.* (citing *Weltover*, 504 U.S. at 617).

85 *Id.*

86 *Id.*

87 *See id.*

88 *Id.* at *15 (quoting *CSX Transp. Inc. v. McBride*, ___ U.S. ___, ___, 131 S. Ct. 2630, 2652 (2013) (Roberts, C.J., dissenting).

89 *Id.*

The next major conclusion of the Second Circuit is that the FTAIA does not draw a bright line excluding from the reach of the Sherman Act foreign anticompetitive conduct affecting the market for a component, which is later sold in the United States as part of a finished product. To draw such a bright line in effect would be to apply the "immediate consequence" standard that the court had just rejected. Instead, the "reasonably proximate causal nexus" standard requires a case-by-case analysis of the market structures and relationships throughout the chain of commerce to determine whether the effect of foreign anticompetitive conduct on domestic or import commerce is sufficiently direct.[90]

The Second Circuit determined that the district court in *Lotes* erred by drawing a bright line. The district court had concluded that the effect on the U.S. market for finished products containing USB 3.0 connectors (e.g., notebooks, desktop computers, and severs) of the defendants' alleged anticompetitive conduct in attempting to monopolize the market for those components in Asia was simply too attenuated to satisfy a "direct … effect" under the FTAIA.[91] But the Second Circuit found that the district court was wrong to place "near dispositive weight on the fact that USB 3.0 connectors are manufactured and assembled into finished computer product '*in China*' before being sold in the United States."[92] To hold that such foreign conduct could not have a direct effect on U.S. domestic or import commerce would be to ignore globalization:

> This kind of complex manufacturing process is increasingly common in our modern global economy, and antitrust law has long recognized that anticompetitive injuries can be transmitted through multi-layered supply chains. Indeed the Supreme Court held that claims by indirect purchasers are 'consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct.'[93]

The Second Circuit continued:

> There is nothing inherent in the nature of outsourcing or international supply chains that necessarily prevents the transmission of anticompetitive harms or renders any and all domestic effects impermissibly remote and indirect. Indeed, given the important role that American firms and consumers play in the global economy, we expect that some perpetrators will design foreign anticompetitive schemes for the very purpose of causing harmful downstream effects in the United States. Whether the causal nexus between foreign conduct and a domestic effect is sufficiently "direct" under the FTAIA in a particular case will depend on many factors, including the structure of the market and the nature of the commercial relationships at each link in the causal chain. Courts confronting claims under the FTAIA will have to consider all of the relevant facts, using all of the traditional tools courts have used to analyze questions of proximate causation.[94]

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90 *See id.* at *15.

91 *See id.* at *12.

92 *Id.* at *15.

93 *Id.* (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989)).

94 *Id.* at *15.

This passage of the opinion demonstrates that, while the Second Circuit adopted the same standard of the Seventh Circuit for interpreting the term "direct, substantial, and reasonably foreseeable effect," it is in the application of that standard that the appellate courts diverge. The Second Circuit's view that courts must analyze the downstream effect on U.S. commerce of foreign anticompetitive practices based on the factors present in each particular case is markedly different than the Seventh Circuit's conclusion in the now-vacated order in *Motorola Mobility* that "[t]he effect of [foreign] component price fixing on the price of the product of which it is a component is indirect," as a matter of law.[95] It is perhaps this distinction between the appellate courts that prompted the Seventh Circuit to withdraw its prior order and rehear the *Motorola Mobility* appeal.

D. The Alleged Anticompetitive Conduct Failed to "Give Rise To" Lotes's Claim Under the Sherman Act and the FTAIA

Despite having identified individual factors for analysis in a foreign antitrust case, the Second Circuit did not analyze those factors in *Lotes* or remand with directions for the district court to do so, because it determined that the alleged anticompetitive conduct did not "give[] rise to [the plaintiff's] claim" under the Sherman Act.[96] Whether foreign anticompetitive conduct gives rise to the plaintiff's claim under 15 U.S.C. § 6(a)(2) entails a separate causation analysis from whether the foreign conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic or import commerce under 15 U.S.C. § 6(a)(1).[97] The Second Circuit agreed with several other appellate courts that to satisfy the "gives rise to" prong of the FTAIA, "the domestic effect must proximately cause the plaintiff's injury."[98]

The court then determined that the defendants' anticompetitive conduct did not proximately cause Lotes's injury.[99] Lotes had alleged that the defendants' foreign conduct had the effect of increasing prices of consumer electronics containing USB 3.0 connectors in the United States. The court held that those higher prices—the domestic effect—did not cause Lotes's injury of being excluded from the USB 3.0 market in Asia; instead, "that injury flowed directly from the defendant's [sic] exclusionary foreign conduct."[100] Because Lotes's injury preceded any domestic effect in the causal chain, under the FTAIA it was outside the reach of the Sherman Act.[101] The Second Circuit also rejected the argument that the defendants' failure to license their U.S. patents proximately caused Lotes's injury, because the defendants' foreign conduct, namely their independent patent infringement

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95 746 F.3d at 844.

96 *See id.* at *16 (citing *Empagran*, 542 U.S. at 173).

97 *See id.*

98 *Id.* (citing *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 987 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538 (8th Cir. 2007); *Empagran S.A. v. F. Hoffmann–LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005)). The Ninth Circuit recently agreed with *Lotes* and affirmed its prior holding in *In re DRAM* that a proximate cause standard applies to the "gives rise to" prong of the FTAIA. *See Hsiung*, 2014 WL 3361084, at *18.

99 *See id.* at *17.

100 *Id.*

101 *See id.*

lawsuits in China, still would have harmed Lotes, even if it had had access to the defendants' U.S. patents.[102] As a result, the Second Circuit affirmed dismissal of Lotes's complaint on alternative grounds of failure to satisfy 15 U.S.C. § 6(a)(2).

E. The Implications of *Lotes*

The Second Circuit's interpretation of the FTAIA strikes a balance in complex antitrust cases taking place in the global economy. In adopting the "reasonably proximate causal nexus" standard for determining a "direct … effect," *Lotes* avoids the overly-formalistic approach of the Ninth Circuit in *LSL Biotechnologies* of requiring causation to turn on the immediacy of the "spatial and temporal separation between the defendant's conduct and the relevant effect."[103] In doing so, *Lotes* recognizes that anticompetitive behavior halfway around the world often does have real world effects on U.S. commerce. Simply because components are incorporated into finished products abroad before they are sold to U.S. consumers does not make the effect of the anticompetitive conduct indirect for purposes of the FTAIA. Instead, that merits inquiry can only be determined through a full proximate causation analysis. Should the effect of a defendant's foreign monopolistic or cartel conduct on domestic or import commerce also be substantial and reasonably foreseeable, there is no reason why it should not be subject to antitrust laws in the United States.

Equally important is the Second Circuit's holding that component cases like *Lotes* must be analyzed on a case-by-case basis to determine whether the alleged foreign anticompetitive conduct has a sufficiently direct effect on U.S. domestic or import commerce. The bright line drawn in the Seventh Circuit's original *Motorola Mobility* decision would eliminate large swaths of direct purchaser claims under that Sherman Act and indirect purchaser claims under state law (to the extent the FTAIA applies to state law claims), because the Seventh Circuit concluded as a matter of law that the sale of price-fixed components abroad would only "filter[] through many layers and finally cause[] a few ripples in the United States."[104] But such a limited view fails to take into account the evidence in many cases that has shown foreign actors engaging in anticompetitive behavior with intent to injure U.S. consumers. Again, if a proximate cause analysis shows, for example, that the injury suffered by U.S. consumers from price-fixing electronics components in Asia was within the scope of risk created by a cartel or was a natural or probable consequence of foreign anticompetitive conduct—as occurred in *TFT-LCD* for example–the Second Circuit's approach would bring such conduct within the scope of the Sherman Act.

The *Motorola Mobility* court now has the opportunity to undertake a proximate cause analysis rather than adopt a bright-line rule. If so, then the court may conclude that the evidence showed there was a disputed issue of material fact as to the existence of a reasonably proximate causal nexus between the cartel's conduct and Motorola's category 2 (foreign components incorporated into finished products imported into the U.S.) and possibly category 3 claims (foreign components incorporated into finished products sold

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102 *See id.* at *18.

103 *Lotes,* 2014 WL 2487188, at *15. As discussed below, in *Hsiung* the Ninth Circuit recognized that *Lotes* disagreed with the definition of "direct" articulated by the *LSL Biotechnologies* court, but declined to address the disagreement, having resolved the appeal on grounds other than the domestic effects exception to the FTAIA. *See* 2014 WL 3361084, at *18 n.8.

104 *Motorola Mobility*, 746 F.3d at 844.

outside the U.S.). Such a result would be more in line with Judge Illston's "pre-remand" decision in *Motorola III*, which denied summary judgment in favor of allowing the issue to go to a jury.

V. THE AUO CRIMINAL APPEAL IN THE NINTH CIRCUIT

Five weeks after the Second Circuit issued the *Lotes* decision, the Ninth Circuit had the opportunity to address the "direct, substantial, and reasonably foreseeable effect" exception to the FTAIA in the context of the TFT-LCD cartel. The court largely sidestepped those issues, choosing instead to decide the case on the basis of the "import trade or import commerce" exception to the FTAIA.

United States v. Hsiung, ___ F.3d ___, 2014 WL 3361084 (9th Cir. July 10, 2014), involved appeals from the criminal convictions of Taiwanese TFT-LCD manufacturer AU Optronics ("AUO"), its U.S.-based retailer and wholly-owned subsidiary AU Optronics Corporation of America ("AUOA"), and two of AUO's executives for violating Section 1 of the Sherman Act. Representatives of AUO and five other major TFT-LCD manufacturers met in Taiwan between October 2001 and January 2006 to set target pricing and stabilize the price of TFT-LCD panels. A "substantial volume of goods" were sold to OEMs in the United States for use in consumer electronics. AUOA used reports generated from those meetings to negotiate prices for the sale of TFT-LCD panels to the OEMs. At trial, the government presented evidence that the defendants targeted OEMs in the United States, and that the defendants reaped hundreds of millions of dollars in profits from sales of price-fixed panels in the United States. The defendants were found guilty and appealed their convictions, and AUO also appealed its $500 million fine.[105] The Ninth Circuit explained that the appeal raised "complicated issues of first impression regarding the reach of the Sherman Act in a globalized economy," including questions about the scope and applicability of the "import commerce" exclusion and the "domestic effects" exception to the FTAIA.[106]

With respect to the FTAIA, the trial court instructed the jury that the government was required to prove beyond a reasonable doubt that "the members of the conspiracy engaged in one or both of the following activities:

> (A) fixing the price of TFT-LCD panels targeted by the participants to be sold in the United States or for delivery to the United States; or
>
> (B) fixing the price of TFT-LCD panels that were incorporated into finished products such as notebook computers, desktop computer monitors, and televisions, and that this conduct had a direct, substantial, and reasonably foreseeable effect on trade or commerce in those finished products sold in the United States or for delivery to the United States…."[107]

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105 *Hsiung*, 2014 WL 3361084, at *1-4.

106 *Id.* at *1.

107 *Id.* at *12.

The jury convicted. On appeal, the defendants challenged the sufficiency of the indictment and proof as to both import trade and domestic effects.[108] The Ninth Circuit rejected these arguments, holding that "the indictment contained the factual allegations necessary to establish that the FTAIA either did not apply or that its requirements were satisfied."[109] The court also held that the government had sufficiently proved that the conspirators engaged in import commerce.[110] Separately, the court clarified that foreign price fixing is subject to the *per se* prohibition of the Sherman Act, distinguishing the application of the rule of reason in the Ninth Circuit's decision in *Metro Industries*.[111]

A. Import Trade Analysis

According to the *Hsiung* court, the FTAIA does not apply to import trade at all. The court examined the statute which provides that "the Sherman Act 'shall not apply to conduct involving trade or commerce (other than import trade or import commerce).'"[112] From this, the court held that "import trade, as referenced in the parenthetical statement, does not fall within the FTAIA at all. It falls within the Sherman Act without further clarification or pleading."[113] That view was supported by the legislative history.[114] As to what constitutes "import trade" under the FTAIA, the court determined that "the phrase means precisely what it says."[115] Thus, direct transactions between foreign cartel members and U.S. purchasers constitute import trade or import commerce.[116] As a result, the government did not need to identify the FTAIA in the indictment. Rather, it only needed to plead and prove that "the conspirators engaged in import commerce with the United States and that the price-fixing conspiracy violated § 1 of the Sherman Act."[117]

The government did exactly that. The court cited several allegations in the indictment supporting the government's view that the defendants engaged in import trade with respect to TFT-LCDs. These allegations included that: the defendants "'engaged in the business of producing and selling TFT-LCDs to customer in the United States'"; their representatives and competitors reached agreements on prices for TFT-LCDs "'sold to certain customers, including customers located in the United States'"; and they regularly instructed AUOA employees in the United States to discuss TFT-LCD pricing to U.S. customers with their

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108 *Id.*

109 *Id.*

110 *See id.* at *15.

111 *See id.* at *7-9 (citing *Metro Industries v. Sammi Corp.*, 92 F.3d 839, 844-45 (9th Cir. 1996)).

112 15 U.S.C. § 6(a).

113 *Hsiung*, 2014 WL 3361084, at *13.

114 *See id.* at *14.

115 *Id.*

116 *See id.* citing *Minn-Chem*, 683 F.3d at 855 ("transactions that are directly between the [U.S.] plaintiff purchasers and the defendant cartel members *are* the import commerce of the United States…."); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438 n.3, 440 (6th Cir. 2012) (labeling goods manufactured abroad and sold in the United States "import commerce").

117 *Id.* at *15.

U.S.-based competitors, which those employees did do.[118] These allegations supported the sufficiency of the indictment.

At trial the evidence showed that AUO imported over one-million price-fixed TFT-LCD panels into the United States each month, and that the co-conspirators earned over $600 million from the importation of TFT-LCD panels.[119] AUO and AUOA only imported the component panels, not any consumer products containing them. Nonetheless, the court held that "[i]mportation of this critical component of various electronic devises is surely 'import trade or import commerce.'"[120] This evidence was sufficient to allow the jury to convict the defendants for violating the Sherman Act.

The Ninth Circuit's analysis in this regard is expansive. Because import commerce involves direct transactions between foreign cartel members and purchasers in the United States, a wide variety of conduct is implicated. Thus, evidence of the defendants' negotiating prices with United States companies in the United States to sell panels at price targets fixed at conspiratorial meetings in Taiwan supported the government's import trade theory.[121]

B. Domestic Effects Analysis

In analyzing the domestic effects exception to the FTAIA, the Ninth Circuit explained the distinctions between that provision and the import commerce exclusion: "Unlike import trade, which is exempted from the FTAIA altogether, if the government proceeds on a domestic effects theory, … the government must plead and prove the requirements for the domestic effects exception to the FTAIA, namely that the defendants' conduct had a 'direct, substantial, and reasonably foreseeable effect' on United States commerce."[122] The court concluded that the allegations of the indictment were sufficient in this regard.[123]

As an initial matter, the same allegations in the indictment that the court had considered sufficient with respect to import trade, also supported the domestic effects exception.[124] The court noted the indictment's allegation that "price-fixed TFT-LCDs were used in computers and other monitors that were sold in and substantially affected interstate commerce."[125] In fact, according to the indictment, "'the substantial terms' of the conspiracy were an agreement 'to fix the prices of TFT-LCDs for use in notebook

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118 *Id.* at *14.

119 *See id.* at *15.

120 *Id.*

121 *See id.* The court noted, however, "We need not determine the outer bounds of import trade by considering whether commerce directed at, but not consummated within, an import market is also outside the scope of the FTAIA's import provisions because at least a portion of the transactions here involves the heartland situation of the direct importation of foreign goods into the United States." *Id.* at *14 n.7 (citing *Animal Sci Prods.*, 654 F.3d at 471 & n.11 (holding that the import trade exclusion to the FTAIA applies to importers and to defendants whose "conduct is directed at a U.S. import market," even if the defendants did not themselves import the products into the United States).

122 *Id.* (quoting 15 U.S.C. § 6(a)).

123 *See id.*

124 *See id.* at *16.

125 *Id.*

computers, desktop monitors, and televisions in the United States and elsewhere.'"[126] That the indictment did not use the words "direct effects" did not render it defective, because the allegations clearly focused on the effects of foreign sales of TFT-LCD panels on United States commerce.[127]

The defendants also challenged the sufficiency of the evidence as to the domestic effects exception. As the Ninth Circuit explained, "The essence of [the defendants'] objection is that the offshore conduct is too attenuated from the United States; that the intervening development, manufacture, and sale of the products worldwide resulted in a diffuse effect; and that the evidence does not support a 'direct, substantial, and reasonably foreseeable effect' on United States commerce."[128] The court avoided the question, however, choosing instead to affirm the defendants' convictions on the alternative ground that the government had proved they engaged in import trade.[129]

By resolving the appeal on an import trade analysis, the Ninth Circuit was able to acknowledge the tension among the circuits concerning the FTAIA but avoid wading into the thick of it. For example, the court recognized that its interpretation of "direct" effects as an "immediate consequence" was at odds with the Second Circuit's "reasonably proximate causal nexus" standard, but simply sidestepped further discussion.[130] Similarly, by resolving the matter on import commerce grounds, the Ninth Circuit did not need to address whether fixing the price of a component sold abroad for incorporation into a consumer good later sold in the United States was too attenuated to cause a "direct" effect on domestic commerce as a matter of law, as the Seventh Circuit originally decided in its now-vacated opinion in *Motorola Mobility*.[131] These hotly-contested issues remain open for further clarification by the circuits and are likely to wind their way to the U.S. Supreme Court.

VI. CONCLUSION

Except for the vacated opinion of a Seventh Circuit panel, the courts are reading the FTAIA broadly enough to punish international antitrust violators for the consequences of the harm they cause to American businesses and consumers. Recourse by U.S. victims to remedies in U.S. courts is increasingly important as more and more manufacturing shifts overseas. Access to U.S. courts should be facilitated by the Ninth Circuit's interpretation of the "import trade" exclusion to the FTAIA and the Second Circuit's *Lotes* opinion

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126 *Id.*

127 *See id.* at *17.

128 *Id.*

129 *See id.* at *18 ("In any event, we need not resolve whether the evidence of the defendants' conduct was sufficiently 'direct,' or whether it 'give[s] rise to an antitrust claim,' because, as we noted earlier, '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' with respect to import trade.") (footnote omitted; quoting *Jackson v. Virginia*, 443 U.S. 307, 339 (1979)).

130 *See id.* at *18 (citing *LSL Biotechnologies*, 379 F.3d at 680-81 ("An effect cannot be 'direct' where it depends on such uncertain intervening developments.") & n.8 (citing *Lotes*, 2014 WL 2487188, at *13-16).

131 *See id.* at *18 n.9 (Because "the Seventh Circuit vacated the [*Motorola Mobility*] opinion and set the case for rehearing … , we do not address the substance of the original opinion.").

adopting the flexible "reasonably proximate causal nexus" standard for determining a "direct" domestic effect. It is now up to the Seventh Circuit in the pending *Motorola Mobility* appeal whether it will follow this apparent trend. If, instead, it adheres to its absolutist view that U.S. antitrust law does not reach foreign price fixing of components unless those components are imported into the U.S., then the Supreme Court will have occasion once again in the near future to construe the FTAIA.

PLAINTIFF PERSPECTIVE: THE LONG ARM OF STATE ANTITRUST LAW

By Marc A. Pilotin[1]

I. INTRODUCTION AND OVERVIEW

As manufacturing of consumer products and their component parts continues to move offshore,[2] consumers face a greater risk of suffering injuries resulting from anticompetitive conduct occurring outside of the United States.[3] The antitrust docket in the Northern District of California speaks to this point. From TFT-LCD panels to memory chips to optical disk drives to lithium-ion rechargeable batteries, the District has seen numerous consumer lawsuits for damages arising from alleged price-fixing of consumer-product components.[4] Each of these cases has involved international cartels.

To recover damages against such cartels, however, aggrieved consumers who purchased products containing price-fixed components (*i.e.*, finished products) generally must turn to state antitrust statutes because of the bar on indirect purchaser recovery under the Sherman Act.[5] Many state antitrust regimes permit indirect purchasers to sue

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1 Marc A. Pilotin is an associate at Lieff Cabraser Heimann & Bernstein, LLP. He is grateful for the insightful guidance of Brendan P. Glackin on this topic. He also appreciates the suggestions and edits of Eric P. Enson..

2 *See, e.g.,* Susan Housemann et al., *Offshoring Bias in U.S. Manufacturing,* 25 J. of Econ. Perspectives 111, 113 (2011) (finding "dramatic rise in imports of manufactured goods, which more than doubled from 1997 to 2007").

3 *See, e.g.*, D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 Berkeley Bus. L.J. 37, 44 (2008) ("Increased globalization has opened markets to anticompetitive conduct by foreign actors or exported anticompetitive practices to other countries."); S. Hammond, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades (Feb. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.htm (attributing exponential increase in criminal fines in part to "the Antitrust Division's reallocation of resources to focus on international cases involving larger volumes of commerce").

4 *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI (N.D. Cal.); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. M 07-1819 CW (N.D. Cal.); *In re Optical Disk Drive Prods. Antitrust Litig.*, No. M 10-2143 RS (N.D. Cal.); *In re Lithium Ion Batteries Antitrust Litig.*, No. M 13-2420 YGR (N.D. Cal.).

5 *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The *Illinois Brick* bar is subject to various exceptions. *See Lotes v. Hon Hai Precision Indus. Co.*, Ltd., __ F.3d __, 2014 U.S. App. LEXIS 10521, at *47 n.7 (2d Cir. June 4, 2014) (noting that the "indirect purchaser doctrine . . . is subject to exceptions"). Moreover, in a recent *amicus* brief, the Department of Justice, Antitrust Division and the Federal Trade Commission have suggested that, where direct purchasers cannot recover under the Sherman Act based on a failure to meet the "gives rise to" requirement of the Foreign Trade Antitrust Improvements Act of 1982, "it may be that indirect purchasers whose claims do arise from the effect on U.S. commerce can recover damages because full recovery cannot be concentrated in the direct purchaser and duplicative recoveries are not possible." Br. for the U.S. & the Fed. Trade Comm'n as Amici Curiae in Support of Panel Rehearing or Rehearing *En Banc* at 14 n.2, *Motorola Mobility LLC v. AU Optronics, Corp.*, No. 14-8003 (7th Cir.) (ECF No. 30).

for damages resulting from anticompetitive conduct.[6] And the fact that state antitrust laws provide relief where its federal counterpart does not is acceptable. As the U.S. Supreme Court recognized, the federal antitrust regime was intended "to supplement, not displace, state antitrust remedies."[7]

But as state antitrust laws are increasingly being used to target offshore anticompetitive conduct, courts have grappled with the precisely how far these statutes reach. While antitrust defendants have attempted to muddle the analysis, as explained further below, the requisite analysis is simply whether—like the extraterritorial application of any state statute—applying the state law offends due process or that state's choice-of-law principles in light of the challenged conduct. As the Ninth Circuit recently elaborated in the context of California's Cartwright Act, so long as

> a defendant's conspiratorial conduct is sufficiently connected to California, and is not 'slight and casual,' the application of California law to that conduct is 'neither arbitrary nor fundamentally unfair,' and the application of California law does not violate that defendant's rights under the Due Process Clause.[8]

With respect to choice-of-law considerations, while states have adopted varying analyses, such analyses typically consider whether the state has a "significant relationship" to the conduct or, alternatively, whether the state has a "government interest" in proscribing it.[9] Contrary to antitrust defendants' views,[10] neither the Foreign Antitrust Improvements Act of 1982 ("FTAIA"), the dormant Foreign Commerce Clause, nor notions of international comity limit state antitrust laws to domestic conduct.

State antitrust laws constitute one of the only protections consumers have against international cartels. As long as applying these laws to an international cartel's anticompetitive conduct does not violate due process or choice-of-law principles, consumers should be entitled to obtain relief under them.

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6 *See, e.g., Clayworth v. Pfizer, Inc.,* 233 P.3d 1066, 1082 (Cal. 2012) (noting that the Cartwright Act contains "a repudiation of Illinois Brick's ban on indirect purchaser suits, allowing suit by any injured person 'regardless of whether such injured person dealt directly or indirectly with the defendant'") (quoting Cal. Bus. & Prof. Code § 16750(a)).

7 *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989) ("Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.")

8 *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1107 (9th Cir. 2013) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)).

9 *See* Restatement (Second) of Conflict of Laws § 145(1) (in choice-of-law analysis, favoring state with "significant relationship to the occurrence," considering "the place where the injury occurred"); Carijano v. Occidental Petrol. Co., 643 F.3d 1216, 1233 (9th Cir. 2011) (outlining California's "'governmental interest approach,'" which is used to "determine choice of law in the absence of an effective choice-of-law agreement").

10 *See, e.g., In re Intel Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452, 457-58 (D. Del. 2008); Defs.' Jt. Mot. to Dismiss at 15-18, *Motorola, Inc. v. AU Optronics Corp.*, No. 09-5840 SI (N.D. Cal. Feb. 23, 2010) (ECF No. 26).

II. STATE ANTITRUST LAW, LIKE OTHER STATE STATUTORY AND COMMON LAW REGIMES, REACHES AS FAR AS DUE PROCESS AND CHOICE-OF-LAW PRINCIPLES ALLOW

As explained in our high school civics class, in our federal system, the states have a "general power of governing,"[11] unlike our federal government, which is one "of limited powers."[12] Pursuant to its "numerous and indefinite" powers,[13] a state need not have federal permission to act, so long as it remains within the bounds imposed by the U.S. Constitution.[14]

Against this grade school backdrop, there is nothing remarkable about state antitrust law reaching conduct outside of the United States. State tort law has regularly applied to conduct occurring abroad, including with respect to products liability,[15] trade secret misappropriation,[16] and injuries resulting from terrorist attacks.[17] It is also well settled that states can regulate foreign entities through their respective tax regimes, even if those regimes sweep in conduct occurring abroad,[18] and through requiring foreign ships operating outside the state's territorial waters to use certain fuels.[19] Indeed, as the U.S. Supreme Court has restricted extraterritorial application of certain federal laws, primarily based on the judicially-created presumption that Congress did not intend for federal laws

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11 *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (citation and quotation marks omitted).

12 *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

13 *Id.* at 457-58 (citation and internal quotation marks omitted).

14 *Sebelius,* 132 S. Ct. at 2578 (noting that the "Constitution may restrict state governments . . . where such prohibitions do not apply, state governments do not need constitutional authorization to act).

15 *See, e.g., Spin Star AG v. Kimich*, 310 S.W.3d 868 (Tex. 2010); *Sproul v. Rob & Charlies, Inc.*, 304 P.3d 18 (N.M. Ct. App. 2012); *Russell v. SNFA*, 965 N.E.2d 1 (Ill. App. Ct. 2011).

16 *See, e.g., Twister B.V. v. Newton Research Partners, LP*, 364 S.W.3d 428 (Tex. Ct. App. 2012)

17 *See, e.g., Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 154-55 (D.D.C. 2011) (applying District of Columbia common law); *Wyatt v. Syrian Arab Republic,* 398 F. Supp 2d 131, 139-41 (D.D.C. 2005) (applying Tennessee and Texas law)

18 *Barclays Bank PLC v. Franchise Tax Bd. Of Cal.*, 512 U.S. 298 (1994) (approving California tax regime that required foreign companies to pay taxes based on foreign commerce, even though it was inconsistent with federal law); *Wardair Canada Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 4 (1986) (state tax on fuel used by foreign airline exclusively in foreign commerce).

19 *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1177 (9th Cir. 2011).

to extend extraterritorially,[20] commentators have pointed to corresponding state laws as alternative avenues for relief.[21]

This is not to say that a state's power to reach conduct occurring abroad is limitless. The Due Process Clause of the United States Constitution constrains the extent to which state laws reach international conduct.[22] Due process requires that "'for a State's substantive law to be selected [and applied to a particular case] in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'"[23]

Ultimately, however, the restraints due process imposes are "only modest," with the Ninth Circuit finding that "most commentators have viewed" the analysis as "setting a highly permissive standard."[24] The "Due Process Clause . . . requires a court to invalidate the application of a state's law *only* where the state has no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."[25] Thus, as the Ninth Circuit has observed, a "'state court is rarely forbidden by the Constitution to apply its own state's law.'"[26]

The due process analysis was recently applied in *AT&T Mobility LLC v. AU Optronics Corp.,* in which the Ninth Circuit held that California's Cartwright Act could apply to out-of-state purchases affected by the foreign antitrust conspiracy at issue in *In re TFT-*

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20 *See, e.g., Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013) (limiting extraterritorial applicability of Alien Tort Statute); *Morrison v. Nat'l Aust. Bank. Ltd.*, 130 S. Ct. 2869 (2010) (limiting the same with respect to claims under section 10(b) of the Securities Exchange Act of 1934).

21 *See, e.g.,* Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?,* 102 Geo. L. J. 301, 306 (arguing "against imposing new limits on the international extraterritorial application of state common law"); Roger P. Alford, *The Future of Human Rights Litigation After Kiobel,* 89 Notre Dame L. Rev. 1749, 1749-50 (2014) (opining that "the future of human rights litigation in the United States depends on refashioning human rights claims as state . . . tort violations"); Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of Morrison v. National Australia Bank,* 92 B.U.L. Rev. 535, 538 (2012) (noting that "current law sharply restricts the applicability of federal law to cases with some substantial component, while imposing virtually no limit on states' abilities to apply their longs so long as some tenuous connection exists between the state and the case").

22 *See, e.g.,* Gary B. Born & Peter B. Rutledge, Int'l Civil Litig. in U.S. Courts 590 (4th ed. 2007).

23 *Experience Hendrix L.L.C. v. Hendrixlicensing.com L.L.C.*, 742 F.3d 377, 384 (9th Cir. 2014) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)).

24 *AT&T Mobility LLC*, 707 F.3d at 1111 (citing Philips Petrol. Co. v. Shutts, 472 U.S. 797, 818 (1985); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process,* 105 Harv. L. Rev. 1217, 1240 (1992); Russell J. Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?,* 10 Hofstra L. Rev. 17, 17 (1981)).

25 *AT&T Mobility LLC,* 707 F.3d at 1111.

26 *Id.* at 1113 (quoting *Sullivan v. Oracle Corp.*, 662 F.3d 1265, 1271 (9th Cir. 2011)); *see also id.* at 1111 (the "Due Process Clause . . . requires a court to invalidate the application of a state's law only where the state has no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.)

LCD (Flat Panel) Antitrust Litigation.[27] There, the district court dismissed the plaintiffs' claims under the Cartwright Act, holding that its application would violate due process because the plaintiffs' purchases of allegedly price-fixed goods took place outside of California.[28] The Ninth Circuit held that this conclusion erroneously and "severely truncates the scope of anticompetitive conduct that the [Cartwright] Act proscribes."[29]

Due process, the *AT&T* court reasoned, permitted the Cartwright Act to reach much further. The court explained,

> The Cartwright Act can be lawfully applied without violating a defendant's due process rights when more than a *de minimis* amount of that defendant's alleged conspiratorial activity leading to the sale of price-fixed goods to plaintiffs took place in California.[30]

Thus, while the defendants' sale of the price-fixed products in California may satisfy due process concerns, so will in-state conduct that constitutes "more than a *de minimis* amount" of the alleged conspiratorial activity, even if the conspiracy was primarily foreign in nature.[31]

In addition to satisfying federal due process considerations, the application of a state's substantive law must comport with that state's choice-of-law principles. For instance, California applies the "governmental interest approach" to identify the law of decision, which requires

> (1) determining if the foreign law "materially differs" from California law; (2) and if so, next determining each respective state's interest in application of its law; (3) and finally, if the laws materially differ and both states have an interest in the litigation, selecting the law of the state whose interest would be "more impaired" if its law were not applied.[32]

With respect to the second consideration, California "has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."[33] Thus, when considering whether a California consumer may apply the Cartwright Act to conduct occurring outside the state, a court need only consider the first and third factors.

Accordingly, while state antitrust statutes may be applied to offshore conduct, like other state laws, there must be some connection between the foreign conspiracy and

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27 *Id.* at 1113-14; *see also United States v. Hsiung,* __ F.3d __, 2014 U.S. App. LEXIS 13051 (9th Cir. July 10, 2014) (explaining conspiracy).

28 *AT&T Mobility LLC*, 707 F.3d at 1109.

29 *Id.* at 1110.

30 *Id.* at 1113.

31 *See id.* at 1113-14.

32 *Carijano,* 643 F.3d at 1233 (applying California choice-of-law principles to dispute involving conduct in Peru) (citing *Wash. Mut. Bank v. Superior Court*, 15 P.3d 1071, 1080 (Cal. 2001)).

33 *Vons Cos., Inc. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1093 (Cal. 1996) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-74 (1985)).

the forum state. Moreover, that state's choice-of-law doctrine must support application of the state's substantive law. As explained further below, outside of express statutory limits set by the state, these are the primary constraints on applying state antitrust law to foreign conduct.

III. CONGRESS HAS NOT PREVENTED APPLICATION OF STATE ANTITRUST LAW TO FOREIGN CONDUCT

Likely because due process and choice-of-law principles do not erect substantial barriers to applying state antitrust statutes to anticompetitive conspiracies occurring abroad, antitrust defendants have turned to the FTAIA to place limits on them. However, nothing in the FTAIA suggests that Congress intended for the statute—which, by its own terms, applies only to the Sherman Act and the Federal Trade Commission ("FTC") Act[34]—to constrain state antitrust law. This conclusion is reinforced further by the presumption that federal law does not preempt state statutes.[35] Thus, while the Supremacy Clause grants Congress the power to restrict state antitrust law,[36] it has not yet done so.

A. Legislative History of the FTAIA

The FTAIA originated in a package of laws Congress passed "[t]o encourage exports by facilitating the formation and operation of export trading companies, export trade associations and the expansion of export trade services generally."[37] The package contained three new statutory schemes that addressed antitrust laws. Two of the three—the Export Trading Company Act of 1982 and a title concerning "Export Trade Certificates of Review"—addressed "antitrust laws," defining the term to mean *both* federal and state antitrust or unfair competition law.[38] The FTAIA, by contrast, specifically addressed only the Sherman Act and the FTC Act.[39]

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34 Pub. L. No. 97-290, §§ 402-403, 96 Stat. 1233, 1246-47 (1982) (amending the Sherman Act and the FTC Act) (codified at 15 U.S.C. §§ 6a, 45(a)) ; *see also* S. Rep. No. 97-644 ("Senate Rpt."), at 29 (1982) (stating that the FTAIA's provisions "modify the Sherman Act and Section 5 of the Federal Trade Commission Act").

35 *See, e.g., Aguayo v. U.S. Bank*, 653 F.3d 912, 918 (9th Cir. 2011).

36 *See Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012).

37 Pub. L. No. 97-290, 96 Stat. 1233 (1982).

38 Export Trading Company Act of 1982, Pub. L. No. 97-290, § 103(a)(7), 96 Stat. at 1235 (defining "antitrust laws" to mean "the antitrust laws as defined in subsection (a) of the first section of the Clayton Act, section 5 of the Federal Trade Commission Act to the extent that section 5 applies to unfair methods of competition, *and any State antitrust or unfair competition law*") (citations omitted and emphasis added); *id.* § 311(6), 96 Stat. at 1245 (defining "antitrust laws" similarly).

39 Pub. L. No. 97-290, §§ 402-403, 96 Stat. at 1246-47; *see also* S. Rep. No. 97-644, at 29 (1982) (stating that the FTAIA's provisions "modify the Sherman Act and Section 5 of the Federal Trade Commission Act"). Even with regard to federal law, the FTAIA's scope was more limited than the other laws with which it was passed. Unlike the Export Trading Company Act and the title regarding Export Trade Certificates of Review, the FTAIA ultimately did not refer to or amend the Clayton Act. *Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236, 247 (S.D.N.Y. 2008) (concluding that the FTAIA did not apply to the Clayton Act).

In passing the law, Congress expressed no interest in limiting state antitrust law as it applied to conduct outside of the United States. Instead, Congress intended for the FTAIA to address an "apparent perception among businessmen that American antitrust laws are a barrier to joint export activities that promote efficiencies in the export of American goods and services."[40] Specifically, Congress wanted

> to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets.[41]

Congress also sought to eliminate the "possible ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction."[42]

B. The FTAIA Does Not Preempt State Law in Any Way

For the FTAIA to preempt or limit a state antitrust statute, at least one of three circumstances must exist: (1) Congress expressly provided for such preemption or limits, (2) Congress determined that the field of antitrust law "must be regulated by its exclusive governance," or (3) the state antitrust law actually conflicts with the FTAIA.[43] These three types of preemption are commonly known as "express, field, and conflict preemption, respectively."[44]

Irrespective of which form of preemption is at issue, congressional intent controls.[45] Determining congressional intent must always begin "'with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[46] "So long as Congress has set foot in a 'field which the States have traditionally occupied,' the presumption applies."[47] This presumption is particularly strong in the context of state consumer-protection laws, like the Cartwright Act, which "fall in an area that is traditionally within the state's police powers to protect its own citizens."[48]

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40 H.R. Rep. No. 97-686 at 2 (1982).

41 *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 161 (2004)

42 H.R. Rep. No. 97-686 at 5. The House Report on the FTAIA repeatedly referred to "United States antitrust jurisdiction" and "American antitrust law." *See, e.g.*, H.R. Rep. No. 97-686 at 2, 5. This is because, as noted above, the FTAIA amended not only the Sherman Act, but also the FTC Act.

43 *Arizona*, 132 S. Ct. at 2500-01; *see also Aguayo*, 653 F.3d at 918 (citation and internal quotation marks omitted).

44 *Aguayo,* 653 F.3d at 918.

45 *Id.* ("Regardless of the name attached to the type of preemption, the dispositive issue in any federal preemption question remains congressional intent.")

46 *Id.* (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

47 *McDaniel v. Wells Fargo Invs., LLC*, 717 F.3d 668, 675 (9th Cir. 2013) (quoting *Wyeth, 555 U.S. at 565).*

48 *Aguayo,* 653 F.3d at 917.

As explained further below, there is no clear congressional intent for the FTAIA to limit state antitrust law. And, because state antitrust law occupies an area traditionally within the states' powers to regulate, the general presumption against preemption applies.

1. Rather Than Expressly Limit the Scope of State Antitrust Statutes, the FTAIA's Plain Language Expressly Restricts Its Application to the Sherman Act and the FTC Act

The "'text of the provision in question'" is paramount in considering whether preemption applies.[49] The FTAIA's plain language works against any claim that the statute applies to state antitrust law.

The FTAIA unambiguously restricts its application to the Sherman Act and the FTC Act.[50] To be certain, the statute specifically enumerates the sections to which it applies and fails to refer to state law, meaning that Congress purposefully excluded state laws from the FTAIA's reach.[51]

This is reinforced by another principle of statutory interpretation: Congress has expressly limited state antitrust laws in *other* federal statutes it passed before and along with the FTAIA. When other laws show that Congress knows how to address a subject in clear terms, Congress' failure to address that subject in a particular act is regarded as intentional. As one circuit court explained,

> [W]hen Congress remains silent regarding the preemptive effect of its legislation on state laws it knows to be in existence at the time of such legislation's passing, Congress has failed to evince the requisite clear and manifest purpose to supersede those state laws.[52]

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49 *Air Cond. & Refrig. Inst. v. Energy Res. Conserv. & Dev. Comm'n,* 410 F.3d 492, 495 (9th Cir. 2005) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)).

50 15 U.S.C. § 6a (referring to "Sections 1 to 7 of this title"); *id.* § 45(a)(3) (applying FTAIA standard to "[t]his subsection")

51 *See ARC Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092, 1099-1100 (9th Cir. 2005) (explaining that "the doctrine of *expressio unius est exclusio alterius* . . . teaches that omissions are the equivalent of exclusions when a statute affirmatively designates certain persons, things, or manners of operation") (citation omitted).

52 *Penn. Med. Soc. v. Marconis*, 942 F.2d 842, 850 (3d Cir. 1991) (citing *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 287 (1987)); *see also Wyeth*, 555 U.S. at 575 (explaining that congressional silence on an issue, coupled with awareness of state litigation, "is powerful evidence" that Congress did not intend for preemption); In re Pharma. Indus. Average Wholesale Price Litig., 582 F.3d 156, 175 (1st Cir. 2009) (rejecting preemption argument because Congress was silent as to state law, even though it "was aware of the existence of state law liability schemes so ubiquitous as common law fraud and consumer protection statutes"); *Greene v. Sprint Commc'ns Co.*, 340 F.3d 1047, 1051 (9th Cir. 2003) (rejecting existence of private right of action under the federal law, reasoning that "Congress knew how to create a private action for violating a regulation when it wanted to"); *E. & J. Gallo Winery v. Cantine Rallo, S.P.A.*, 430 F. Supp. 2d 1064, 1083 (E.D. Cal. 2004) (finding "an examination of similar provisions in other federal laws provides meaningful guidance" to interpretation analysis).

At the time it enacted the FTAIA, Congress was fully aware of state antitrust laws and knew how to restrict them, but was silent about such laws in the FTAIA. Indeed, concurrent with passing the FTAIA, Congress passed two other laws relating to exports that specifically encompassed state antitrust and unfair competition laws.[53] And, prior to passing the FTAIA, Congress did the same, passing two laws that limited liability under federal *and* state antitrust laws.[54] Congress clearly knew how to limit state antitrust statutes, and chose not to with respect to the FTAIA. This is "powerful evidence" that Congress did not intend for the FTAIA to reach state laws.[55]

2. Because Congress Has Not Occupied the Field of Antitrust Law, the FTAIA Cannot Limit State Antitrust Statutes Based on Field Preemption

There is likewise no compelling evidence that the FTAIA applies to state antitrust law because Congress preempted the field. Field preemption applies in two circumstances: (1) when federal regulation is "so pervasive . . . that Congress left no room for the States to supplement it" or (2) "where there is a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[56]

The Supreme Court has already held that "Congress has not pre-empted the field of antitrust law."[57] Instead, as mentioned above, Congress intended to leave the field open to state regulation, specifically providing that "the federal antitrust laws . . . supplement, not displace, state antitrust remedies."[58] Courts have repeatedly rejected field preemption of state consumer protection laws because this field has been historically occupied by the states, not Congress.[59] Congress neither has a "dominant interest" in antitrust nor has

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53 *See, supra*, note 38 and accompanying text.

54 *See* Trade Act of 1974, Pub. L. No. 93-618, § 607, 88 Stat. 1978, 2073 (providing immunity "under the Federal Trade Commission Act or the Antitrust Acts (as defined in section 4 of the Federal Trade Commission Act, or under any similar State law" for participating in agreements limiting exports of steel and steel products to the United States) (codified at 19 U.S.C. § 2485) (1974) (citations omitted); Energy Policy & Conserv. Act of 1975, Pub. L. No. 94-163, § 252(f), 89 Stat. 871, 897 (1975) (providing immunity from "any civil or criminal action brought under the antitrust laws (or any similar State law)" for participation in voluntary agreements regarding petroleum products) (1975) (codified at 42 U.S.C. § 6272(f)(1)). In 2004, Congress did the same, limiting recovery under federal and state antitrust laws for those who enter into an antitrust leniency agreement with the U.S. Department of Justice. Antitrust Crim. Penalty Enhancement & Reform Act of 2004, Pub. L. No. 108-237, § 213(a), 118 Stat. 661 (2004).

55 *Wyeth*, 555 U.S. at 575.

56 *Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022-23 (9th Cir. 2013) (citation and internal quotation marks omitted).

57 *ARC Am.*, 490 U.S. at 101 (citation omitted).

58 *Id.* at 102 (citation omitted).

59 *Aguayo*, 653 F.3d at 917 (noting that "consumer protection law is a field traditionally regulated by the states") (citation omitted); *see also* Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113, 1125 (11th Cir. 2004) (rejecting field preemption argument based on finding that "consumer protection is a field traditionally regulated by the states"); Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig., 621 F.3d 781, 794 (8th Cir. 2010) (rejecting field preemption argument, finding that "[c]onsumer protection is quintessentially a field which the States have traditionally occupied") (citation and internal quotation marks omitted).

Congress so pervasively regulated that the States have no room to act. Field preemption therefore does not apply, particularly in light of the presumption against preemption.

3. Because State Antitrust Law Does Not Conflict with the FTAIA, Conflict Preemption Does Not Apply

Finally, there is no clear evidence that state antitrust law conflicts with the FTAIA. Conflict preemption takes "two forms: impossibility and obstacle preemption."[60]

Impossibility preemption applies "'where it is impossible for a private party to comply with both state and federal law.'"[61] The FTAIA does not require or prohibit any particular conduct. Thus, impossibility preemption does not apply.

Obstacle preemption is also inapplicable. This form of conflict preemption applies if a state law creates "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[62] "What is a sufficient obstacle is a matter of judgment, to be informed by the examining the federal statute as a whole and identifying its purposes and intended effects."[63] One must take "into account the law's text, application, history, and interpretation."[64] The burden to establish obstacle preemption is "heavy." As a result, courts have generally relied on multiple sources to hold that a clear and manifest purpose existed to preempt conflicting state law.[65] Obstacle preemption does not apply "unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together."[66]

As explained above, Congress intended for the FTAIA to address American exporters' purported uncertainty regarding the effect federal antitrust laws had on their joint activity abroad. The FTAIA's text reflects its limited purposes. As already explained, the FTAIA lacks any language suggesting that Congress had any intention to eliminate this uncertainty, which it viewed skeptically,[67] by limiting state antitrust law or broadly immunizing companies from state antitrust liability. The law explicitly states that it applies only to the Sherman Act and the FTC Act. And, as noted above, the

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60 *Whiting*, 732 F.3d at 1023.

61 *Id.* (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)).

62 *Chae*, 593 F.3d at 943 (citation and internal quotation marks omitted).

63 *Crosby*, 530 U.S. at 373.

64 *McDaniel*, 717 F.3d at 674.

65 *See, e.g.*, *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 101 (2d Cir. 2013) (explaining burden); *McDaniel*, 717 F.3d at 676 (relying on "statute, rules, the regulatory scheme's history, the [enforcing] agency's contemporaneous explanation, and its consistently held interpretive view") (citation and internal quotation marks omitted); *Chae*, 593 F.3d at 944-50 (relying on congressional statements, statutes, regulatory scheme, and enforcing agency's interpretation).

66 *MTBE*, 725 F.3d at 102 (citation and internal quotation marks omitted).

67 Although Congress sought to address the American business community's concerns, it expressed strong skepticism regarding their bases, noting that the assertions "are at best speculative." H.R. Rep. No. 97-686 at 2; *see also id.* (describing "apparent perception" regarding impact on exports). Congress readily acknowledged that the FTAIA "will not be a panacea for the many problems that may be afflicting American export trade." *Id.* at 2.

FTAIA's silence with respect to state laws is particularly telling because, prior to the law's enactment, Congress readily passed legislation that specifically limited state antitrust law.[68] Reading the FTAIA to reach state antitrust law would require reading into the statute language that Congress was aware of, but omitted.

The FTAIA's legislative history also does not reveal a clear and manifest purpose of limiting state law. Mirroring the statute's text, the FTAIA's legislative history is devoid of any references to state law. At most, a House Judiciary Committee report on the law ambiguously refers to "United States antitrust law" and "American antitrust law,"[69] which could arguably be interpreted to include state antitrust law. But other portions of that report foreclose this interpretation. The Committee report states that the FTAIA as then drafted was intended to "amend the Sherman Act, the Clayton Act, and the Federal Trade Commission Act."[70] Thus, references to "United States antitrust law," when read in the context of the entire report and in conjunction with the FTAIA's text, are most reasonably interpreted to refer to *federal* antitrust law only.

The U.S. Supreme Court's recent decision in *Wyeth* is on point. There, a drug manufacturer asserted that a state-law requiring a "stronger warning" about the manufacturer's drug obstructed Congress' purported intent to "entrust an expert agency to make drug labeling decisions that strike a balance between competing objectives."[71] The Court disagreed, finding support in the fact that the purportedly conflicting federal law was intended "to bolster consumer protection," that Congress was aware of state law that posed tensions but never enacted an express preemption provision, and that Congress had preempted state law with respect to medical devices, but not with respect to prescription drugs.[72]

As *Wyeth* teaches, obstacle preemption does not apply to state antitrust law.[73] As the Supreme Court explained in *Wyeth:*

> The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.[74]

As in *Wyeth*, the Sherman Act was intended to supplement state law, Congress knew that there were potentially conflicting state laws at the time the FTAIA was passed, and

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68 *See, supra,* note 54.

69 *See, e.g., id*. at 5

70 *Id*. at 1.

71 *Wyeth*, 555 U.S. at 573 (citation and internal quotation marks omitted).

72 *Id*. at 574-75.

73 *See also In re Pharma. Industry,* 582 F.3d at 174-75 (noting congressional awareness of "the existence of state law liability schemes so ubiquitous as common law fraud and consumer protection statutes" and holding that such schemes were not preempted absent clear congressional intent); *MTBE*, 725 F.3d at 103 (noting that congressional sensitivity to an issue "hardly establish[es] that that Congress had a 'clear and manifest intent' to preempt state tort judgments").

74 *Wyeth*, 555 U.S. at 575 (citation and internal quotation marks omitted).

Congress had limited state antitrust law in other contexts. Given that Congress was readily aware of analogous state antitrust regimes, the assertion that the FTAIA limits state antitrust law is particularly weak.

IV. APPLYING STATE ANTITRUST LAW TO CONDUCT OCCURRING ABROAD DOES NOT INTERFERE WITH CONGRESS'S POWER TO REGULATE FOREIGN COMMERCE

In addition to arguing that the FTAIA limits state antitrust law, antitrust defendants often also invoke Congress' dormant powers under the Foreign Commerce Clause. Some commentators, however, have viewed the dormant Foreign Commerce Clause doctrine to be largely defunct[75] and have criticized it as "yield[ing] few criteria for meaningfully distinguishing conduct by states that can, or cannot, be tolerated."[76] Indeed, the First Circuit deemed the Clause to be a "complex and largely undeveloped area of constitutional law."[77] However, irrespective of whether the doctrine persists, Congress' knowledge of state antitrust statutes and its corresponding failure to restrict them dooms any challenge under the Foreign Commerce Clause.

Challenges under the dormant Foreign Commerce Clause require courts to first evaluate whether the Interstate Commerce Clause is violated.[78] Such an inquiry is readily answered with respect to state antitrust statutes: the "Supreme Court has made clear that neither the Sherman Act nor the Commerce Clause preempts state antitrust laws."[79]

Thus, in determining whether Congress' dormant Foreign Commerce Clause powers limit state antitrust law, the only consideration is whether "the federal government's 'capacity to speak with one voice when regulating commercial relations with foreign governments.'"[80] *Japan Line, Ltd. v. County of L.A.* is the only case in which the Supreme Court has determined that a particular state law impedes the need of the United States to "speak with one voice" in a particular area of foreign commerce.[81] There, the Supreme Court invalidated a state law that levied a tax on foreign containers as they

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75 Leanne M. Wilson, Note, *The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby,* 107 Colum. L . Rev. 746, 789 (2007) ("The dormant Foreign Commerce Clause has outlived its usefulness. With the Court favoring a strong preemption model over dormant doctrine, the utility of the dormant Foreign Commerce Clause has diminished."); Jack L. Goldsmith*, Federal Courts, Foreign Affairs, and Federalism,* 83 Va. L. Rev. 1617, 1700 (1997) (noting that Supreme Court's later decisions on the dormant Foreign Commerce Clause "gutted the essential components of the federal common law of foreign relations").

76 Sarah H. Cleveland, *Crosby and the "One-Voice" Myth in U.S. Foreign Relations*, 46 Vill. L. Rev. 975, 984 (2001).

77 *Antilles Cement Corp. v. Fortuno*, 408 F.3d 41, 46-47 (1st Cir. 2005).

78 *Goldstene*, 639 F.3d at 1177-78; *see also Barclays*, 512 U.S. at 323 (considering "'one voice' argument only after determining that the challenged state action was otherwise constitutional").

79 *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 993 (9th Cir. 2000) (citing *ARC Am.).*

80 *Goldstene*, 639 F.3d at 1178 (quoting *Barclays*, 512 U.S. at 311).

81 441 U.S. 434, 449 (1979); *see also Barclays*, 512 U.S. at 327; *see also Fortuno*, 408 F.3d at 46 (noting that the Supreme Court's "only iterations of [the dormant Foreign Commerce Clause] have come in situations involving state taxation of foreign commerce").

were transiting through California.[82] The Court believed the state's taxation could cause foreign nations to "retaliate against American-owned instrumentalities" and cause the "Nation as a whole [to] suffer," causing a dormant Foreign Commerce Clause violation.[83]

The Supreme Court refined and restricted its dormant Foreign Commerce Clause doctrine in the two decades following *Japan Line*. In *Barclays Bank PLC v. Franchise Tax Board of California*, the Court rejected a challenge under the Clause to California's taxpayer reporting requirements, even though federal law imposed a different method of reporting taxes.[84] In reviewing its prior precedent, the Court observed that "Congress may more passively indicate that certain state practices do *not* 'impair federal uniformity in an area where federal uniformity is essential.'"[85] The Court found compelling "Congress' willingness to tolerate States' worldwide combined reporting mandates, even when those mandates are applied to foreign corporations."[86] Such congressional acquiescence, the Court reasoned, meant that Congress' Foreign Commerce Clause powers were not threatened, eliminating any need for Court intervention.[87]

Moreover, Congress has demonstrated a tolerance for state antitrust law reaching foreign commerce. As already explained, while Congress has restricted federal antitrust liability in the international context,[88] it has done nothing to limit state antitrust law in the way that it geographically limited the Sherman Act and the FTC Act through the FTAIA. This knowing acquiescence, as *Barclays* held, shows that Congress' dormant Foreign Commerce Clause powers are not offended by the foreign application of state antitrust law.

V. NOTIONS OF INTERNATIONAL COMITY DO NOT LIMIT STATE ANTITRUST LAW

Finally, antitrust defendants often seek dismissal of state antitrust claims challenging overseas conspiracies on international comity grounds. Such arguments should also fail.

The doctrine of international comity is "a consideration guiding courts, where possible, towards interpretations of domestic law that avoid conflict with foreign law."[89] "No conflict exists . . . where a person subject to regulation by two states can comply with the laws of both."[90]

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82 *Japan Line,* 441 U.S. at 436-37.

83 *Id.* at 450-55.

84 *Barclays*, 512 U.S. at 301-03.

85 *Id.* at 324 (citing *Wardair* and *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983)).

86 *Id.* at 327.

87 *Id.* at 327-28; *Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862, 873 n.5 (3d Cir. 2012).

88 *See, supra*, notes 37 and 53; 42 U.S.C. § 6272(f) (providing for qualifying "international voluntary agreements" concerning petroleum products a "defense to any civil or criminal action brought under the antitrust laws (or any similar State law)").

89 *Linde v. Arab Bank*, PLC, 706 F.3d 92, 111 (2d Cir. 2013).

90 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993).

Comity arguments require a "weighing of all of the relevant interests of all of the nations affected by the court's decision."[91] Arguments over comity will not insulate a foreign entity that has availed itself of the protection of a jurisdiction's laws.[92] Moreover, dismissal on international comity grounds is reserved for "rare (indeed often calamitous) cases in which powerful diplomatic interests of the United States and foreign sovereigns aligned in supporting dismissal."[93]

Because many other nations condemn anticompetitive conduct and now cooperate to eliminate price-fixing cartels,[94] applying state antitrust statutes to conduct overseas is unlikely to raise comity concerns. The fact that other nations have laws proscribing anticompetitive dispels the notion that comity is offended by applying similar state antitrust laws abroad.[95] Indeed, if a foreign actor can comply with state antitrust law without running afoul of the law of the nation in which it resides, there is no conflict that can give rise to comity issues.[96]

VI. CONCLUSION

When relying on state antitrust law to seek damages based on foreign antitrust conspiracies, plaintiffs need only ensure that due process and choice-of-law principles are not offended. The FTAIA, through a preemption theory; the dormant Foreign Commerce Clause; and notions of comity simply do not limit the geographic scope of state antitrust regimes.

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91 *Linde*, 706 F.3d at 111.

92 *See Fed. Treas. Enter. Sojuzplodoimport v. SPI Spirits Ltd.*, 726 F.3d 62, 82 (2d Cir. 2013).

93 *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1034 (11th Cir. 2014).

94 Org. on Econ. Co-Operation & Dev., Hard Core Cartels: Third Report on Implementation of the 1998 Council Recommendation 8-17 (discussing trends in international antitrust enforcement with respect to cartels) (2005), *available at* http://www.oecd.org/competition/cartels/35863307.pdf; *id.* at 29-32 (discussing cooperative enforcement efforts).

95 *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997) (finding no comity issues where challenged conduct was illegal under both United States and Japanese law).

96 *Hartford Fire,* 509 U.S. at 799.

THE FTAIA LIMITS THE EXTRATERRITORIAL REACH OF STATE ANTITRUST LAWS

By Dominique-Chantale Alepin[1] and Jonathan Guss[2]

I. INTRODUCTION

The importance of foreign trade of material and industrial goods to the United States economy cannot be overstated. In 2013, total U.S. trade with foreign countries (goods and services) was $5.02 trillion.[3] Goods are the most important piece of foreign commerce: in 2013, they accounted for more than 80% of all U.S. imports ($2.263 trillion) and 66% of U.S. exports ($1.5 trillion).[4]

Labels like "Made in America" and "Made in China" belie the complex international networks of production underlying many products. "Nothing is more common nowadays than for the products imported to the United States to include components that producers had bought from foreign manufacturers."[5] Take the average smartphone: a device may be assembled in China using parts from multiple suppliers manufactured on several different continents.[6] As modern manufacturing has become increasingly globalized, the production of goods has been fragmented across the globe and dispersed among many different companies.

Whether and how much the U.S. antitrust laws should touch the complex, globalized production of goods is an important issue that affects foreign and U.S. companies alike. U.S. competition law can have a meaningful impact on imports to, and exports from, the United States as well as the extraterritorial production of goods. Policies that raise import barriers in the United States may increase costs for foreign producers, but they also have a parallel effect on U.S. multinational companies with foreign manufacturing operations.

Three decades ago, Congress passed the Federal Trade Antitrust Improvement Act ("FTAIA") to provide clearer guidance on what foreign conduct could be tried in the United States. The FTAIA sets consistent boundaries on the extraterritorial reach of U.S. antitrust laws; it requires that to implicate liability under U.S. law, the conduct must have

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3 Kimberly Amadeo, "U.S. Imports and Exports Components," available at http://useconomy.about.com/od/tradepolicy/p/Imports-Exports-Components.htm.

4 *Id.*

5 *Motorola v. AU Optronics*, Case No. 14-8003 (7th Cir. 2014) available at http://law.justia.com/cases/federal/appellate-courts/ca7/14-8003/14-8003-2014-03-27.html.

6 Alex Hillsberg, "How and Where iPhone is Made: A Surprising Report on How Much of Apple's Top Product is US-Manufactured," Finances Online, available at http://financesonline.com/how-iphone-is-made/.

had *direct effects* on U.S. commerce.[7] This limit serves an important role in ensuring that U.S. competition law does not reach too far into foreign affairs. As the Supreme Court has recognized, the foreign application of U.S. law "creates serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs."[8] It can also create friction and "resentmen[t at] the apparent effort of the United States to act as the world's competition police officer."[9]

In recent years, indirect purchasers have been trying to get around the limitations imposed by the FTAIA by using state antitrust laws to sue foreign manufacturers for conduct that has an indirect effect on U.S. commerce. Courts that have encountered these claims have rejected them.[10] Courts should continue to block these efforts. Foreign commerce "is preeminently a matter of national concern," over which the federal government has exclusive power of regulation.[11] With respect to foreign commerce, "the need for uniformity" of the U.S.'s policies is "essential."[12] "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."[13] The application of state antitrust laws to foreign conduct outside the reach of federal antitrust laws is no exception.

Given the importance placed on uniformity in the area of foreign commerce, courts must maintain the consistent boundaries imposed by the FTAIA and block efforts to undermine federal policy through the use of state antitrust laws. Subjecting foreign manufacturers to a patchwork of state antitrust laws for conduct that has no direct effects in the United States undercuts the ability of the federal government to regulate foreign commerce and creates unnecessary uncertainty in business transactions. Allowing state laws to reach further than the FTAIA will deny "businessmen, attorneys, and judges as well as our trading partners" a "clear benchmark" as to liability for antitrust violations in the United States.[14] It also ensures that the federal government can "continue[] to speak with a single, unified voice" over foreign commerce which is "pre-eminently a matter of national concern."[15] By enforcing consistent boundaries for state and federal antitrust law and ensuring that only one body speaks on foreign trade, the United States can reduce friction with trading partners and continue to increase its stature in the global marketplace.[16]

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7 15 U.S.C. §6(a) (2006).

8 *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004).

9 *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 960-62 (7th Cir. 2003) (en banc) (dissenting opinion).

10 *See infra* note 34.

11 *Japan Line, LTD v. County of Los Angeles*, 441 U.S. 434, 448 (1979)

12 *Id.*

13 *Id.* (citing *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933)).

14 H.R. Rep. No. 97-686, at 2-3.

15 *In re Intel Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452, 457 (D. Del. 2007).

16 *Empagran,* 542 U.S. at 165 (holding that clear limitations on the reach of U.S. antitrust law are "particularly needed in today's highly interdependent commercial world.").

II. FOREIGN COMMERCE IS AN AREA OF EXCLUSIVE FEDERAL JURISDICTION

The Commerce Clause gives Congress *exclusive* power over commerce with foreign countries.[17] The commerce clause of the Constitution provides Congress the power "[t]o regulate Commerce with foreign Nations."[18] This clause has given rise to the dormant commerce clause, which is the negative – or dormant – corollary to the commerce power. It is negative in that it implicitly limits states' power in interstate and foreign commerce.[19] Article I, Section 8 reflects a desire by the Framers of the Constitution to ensure uniform regulation of foreign commerce and consistent regulation of foreign affairs by one body.[20] Congress' exclusive jurisdiction derives from the principle that "[f]oreign commerce is pre-eminently a matter of national concern."[21] Exclusive policy making by one body is important to ensuring that the federal government can "speak with one voice when regulating commercial relations with foreign governments."[22] State laws must be consistent with federal law and policy in their effect on foreign commerce. So if a state law implicates foreign commerce, courts must examine the regulation to determine whether it "may impair uniformity in an area where federal uniformity is essential."[23] State laws that are not consistent with federal law and policy as to foreign commerce violate the Commerce Clause. [24]

III. CONGRESS INTENDED TO ESTABLISH A CONSISTENT STANDARD FOR THE EXTRATERRITORIAL REACH OF ANTITRUST LAWS BY PASSING THE FTAIA

The Sherman Act explicitly prohibits acts unreasonably restraining trade in the course of "commerce among the several States, or with foreign nations."[25] However, what Congress meant by "commerce with foreign nations" was not entirely clear. This ambiguity created inconsistent legal decisions in different parts of the country in civil, government, and criminal cases.[26] Prior to the enactment of the FTAIA, there was "disparity among judicial interpretations and between those interpretations and executive

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17 U.S. Const. art. I § 8, cl 3.

18 U.S. Const. art. I, § 8, cl. 3.

19 Cheryl Tate, *The Constitutionality of State Attempts to Regulate Foreign Investment,* 99 Yale L.J. 2023, 2033 (1990).

20 Brannon P. Denning & Jack H. McCall, Jr.*, "The Constitutionality of State and Local 'Sanctions' Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?", 26 HSTCLQ 307, 317. Indeed, it has been argued that one of the primary purposes of the Constitution was to place control of foreign relations firmly in the hands of the federal government. Louis Henkin, Foreign Affairs and the Constitution 227 (1972).*

21 *Japan Line*, 441 U.S. at 448; *see also Intel,* 476 F.Supp.2d at 457.

22 *Japan Line,* 441 U.S. at 449 (citations omitted).

23 *Pac. Nw. Venison Producers v. Smith*, 20 F.3d 1008, 1014 (9th Cir. 1994) (citing *Japan Line*, 441 U.S. at 448).

24 *See e.g., Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991) (collecting cases).

25 15 U.S.C. §1.

26 H.R. Rep. No. 97-686, at 5-6.

enforcement policy regarding the quantum and nature of the effects required to create jurisdiction."[27]

In 1982, Congress enacted the FTAIA to establish clear boundaries for the extraterritorial reach of the Sherman Act.[28] The House Judiciary Report reflects that one of the major concerns Congress sought to address with the FTAIA was the ambiguity in the legal test used to determine whether American antitrust laws applied to foreign transactions.[29] Congress was concerned that inconsistency as to whether foreign conduct could be tried in the United States had made "American antitrust law an unnecessarily complicating factor in a fluid environment in which prompt decision-making may be critical."[30] Congress wanted to create a "single, clear standard" which would "reduce the amount of legal research and analysis that will be necessary to make an accurate prediction as to whether United States antitrust laws 'indicate problems.'"[31] The consistent application of one standard was intended to free companies "from the possibility of dual and conflicting antitrust regulation."[32]

Congress struck a delicate balance with the FTAIA, weighing the interests of U.S. consumers against the unnecessary interference in foreign affairs. The FTAIA established that the Sherman Act is applicable to conduct that involves foreign commerce, but that conduct must have a "*direct, substantial, and reasonably foreseeable effect"* on commerce within the United States.[33]

In recent years, indirect purchaser plaintiffs have tried to evade the FTAIA requirement of "direct, substantial, and reasonably foreseeable effect[s]" by filing claims under state antitrust laws to reach conduct beyond the purview of the federal antitrust laws.[34] Given the growing amount of litigation attempting to apply California (and other state) law to foreign conduct, it is important that there be clarity and consistency that California law reach no further than the FTAIA permits for federal antitrust law.

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27 *Id.* at 5. Very recent decisions by the Ninth and Seventh Circuit have held that the issue of "direct effects" on U.S. commerce goes to the merits of the case. *Motorola, supra* note 5; *United States v. AU Optronics*, Case No. 12-10514 (9th Cir. July 10, 2014), available at http://cdn.ca9.uscourts.gov/datastore/opinions/2014/07/10/12-10492.pdf.

28 15 U.S.C. § 6a (2006).

29 H.R. Rep. No. 97-686, at 5-6.

30 *Id.* at 6.

31 *Id.*

32 *Id.* at 10.

33 15 U.S.C. §6(a) (2006).

34 *In re Intel Corp. Microprocessor Antitrust Litig.*, 476 F.Supp.2d 452 (D. Del. 2007); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, Case No. 3:12-cv-03802-SI (N.D. Cal.); *In re Optical Disk Drive Products Antitrust Litigation Acer Inc. v. Life-On It Corp.*, Case No. 13-cv-04991-RS (N.D. Cal.); *Sony Electronics v. LG Display Co. Ltd.*, Case No. 10-cv-05616 (N.D. Cal.); *In re Cathode Ray Tube Antitrust Litigation*, Case No. 06-01665-PJH (N.D. Cal.); *In re Rubber Chemicals Antitrust Litigation*, Case No. 07-cv-01057 (N.D Cal.); *Commercial Street Express LLC v. Sara Lee Corporation*, Case No. 08-cv-01179 (N.D. Ill.); *In re Refrigerant Compressors Antitrust Litig.*, Case No. 09-MD-02042-SFC (E.D. Mich.); *In re Air Cargo Services Antitrust Litigation*, Case No. 06-MDL-1775-JG (E.D.N.Y. 2008). The majority of these cases were brought in California and include a California antitrust claim (either under the Cartwright Act or the Unfair Competition Law).

IV. CONSTITUTIONAL PRINCIPLES CLEARLY LIMIT THE REACH OF CALIFORNIA'S CARTWRIGHT ACT AND UNFAIR COMPETITION LAW

The FTAIA clearly bars plaintiffs from reaching foreign transactions that have no "direct, substantial and reasonably foreseeable effect" under the Sherman Act. If California law is allowed to reach those same transactions, Congress cannot speak with "one voice" as to antitrust liability for foreign conduct and the FTAIA's goal of setting a "benchmark" for businessmen, attorneys, judges and trading partners will be obstructed.

A growing number of federal and state courts have agreed that state law cannot exceed the boundaries imposed by the FTAIA.[35] Those courts have correctly concluded that that principles of federalism including the commerce clause, supremacy clause, comity, and statutory construction support the conclusion that state law must not create a standard different from the FTAIA regarding foreign conduct.

A. California Law Must Comport with the FTAIA or Run Afoul of the Commerce Clause

The purpose of the foreign commerce clause is "to promote uniformity and to allow the federal government to set an appropriate uniform level of regulation of trade with other nations."[36] Under the dormant commerce clause, the states' role in foreign affairs, if any, is deliberately limited.[37] State laws infringing on Congress' foreign commerce power and obstructing national uniformity have been held by the Supreme Court to be unconstitutional.[38] This rule protects the "unified" voice of the federal government with respect to issues touching on foreign commerce.

Allowing California law to touch foreign conduct and commerce beyond the reach of the FTAIA would violate the Commerce Clause. Courts should construe California law as subject to the limitations of the FTAIA in order to respect the goals of the FTAIA. This will allow the United States to continue to speak with "one voice" on issues involving antitrust and foreign commerce.[39] In enacting the FTAIA, Congress specifically sought to eliminate the different standards being imposed by courts across the country as to what foreign conduct would implicate liability in the United States. If California law were allowed to reach additional conduct that was beyond the bounds of federal law, it would undermine that unitary voice.

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35 *Intel*, 476 F. Supp. 2d at 457-58 (holding the FTAIA barred indirect purchaser's Cartwright Act and UCL claims); *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, No. C 12-2582 CW,2013 WL 368365, at *9 (N.D. Cal. Jan. 29, 2013); Amarel v. Connell, 202 Cal. App. 3d 137, 149 (1988); *see also CSR Ltd. v. Cigna Corp.*, 405 F. Supp. 2d 526, 552 (D.N.J. 2005); *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494, 502, n.8 (M.D.N.C. 1987); *In re Potash Antitrust Litig.*, No. 08-C-6910, 2009 WL 3583107, at *23 (N.D. Ill. Nov. 3, 2009).

36 *Japan Line*, 441 U.S. at 448.

37 Richard A. Bilder, *The Role of States and Cities in Foreign Relations,* 83 Am. J. Int'l, L. 821, 823-24 (1989).

38 *Japan Line*, 441 U.S. at 448.

39 *See In re. Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-MD-01819, 2010 WL 5477313, at *4 (N.D. Cal. Dec. 31, 2010).

And those involved in the foreign production of goods will be no better off trying to predict whether their conduct implicated U.S. antitrust laws than they were before Congress enacted the FTAIA. It would make it impossible for those involved in foreign manufacturing to "make an accurate prediction to whether U.S. antitrust laws 'indicate problems.'"[40] With production of goods becoming increasingly global, it is even more important today to ensure consistent and reliable standards as to what foreign conduct will be prosecuted in the United States.[41]

B. California Law must comport with the FTAIA or run afoul of the Supremacy Clause

The Supremacy Clause also constrains the reach of California law over foreign commerce. The Supremacy Clause establishes that federal statutes are to be treated as "the supreme law of the land."[42] It mandates that all state law is preempted by federal law when a conflict between federal law and state law arises.

While the Sherman Act was not intended to preempt state antitrust regimes altogether, the Act does preempt state law when the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[43] A court determines the "full purposes and objectives" by discerning "congressional intent."[44]

As noted above, Congress' "ultimate purpose" in enacting the FTAIA was "to promote certainty in the applicability of American antitrust law to international business transactions."[45] Applying California law beyond the limits established in the FTAIA would hinder these important objectives by reinserting "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction."[46] A patchwork of state laws each with different standards of liability for foreign conduct would create significant uncertainty for foreign manufacturers and would impede their ability to "make accurate predictions" as to whether U.S. antitrust laws "indicate problems."[47] Congress would be unable to give

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40 H.R. Rep. 97-686, at 6.

41 *Id.* (finding that uncertainly regarding application of U.S. antitrust laws interfered with "a fluid environment in which prompt decision-making may be critical.").

42 U.S. Const. art. 6, cl. 2.

43 *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (holding that a state law prohibiting doing business with Burmese companies was "an obstacle to the accomplishment of Congress' full objectives" of a federal law imposing sanctions on Burma).

44 *Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, 955 (2004).

45 H.R. Rep. 97-686, at 5, 9.

46 For all of Mr. Pilotin's rhetorical maneuverings around the preemption issue and what the statute says or does not say, he cannot obscure a simple and sensible conclusion: if Congress's intent in passing the FTAIA was to create certainty around when American antitrust laws do and do not apply to foreign transactions, how could it possibly countenance a scenario in which an international transaction could be subject to as many as fifty different legal regimes? Why even enact the FTAIA if it envisions such a scenario?

47 *Id.* at 6.

foreign and U.S. companies confidence regarding when they would encounter liability for certain activities.[48]

In addition, preemption of California law is especially important where foreign affairs are implicated.[49] This is because extraterritorial matters are traditionally viewed as a markedly national concern.[50] The Supreme Court has recognized that international relations are "the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority," and that, as a consequence, "[a]ny concurrent state power that may exist is restricted to the narrowest of limits."[51] California courts have also acknowledged that preemption issues are particularly important when a state law touches on foreign affairs.[52]

Application of state law beyond the bounds of the FTAIA violates the Supremacy Clause because it would pose a significant obstacle to the implementation of the FTAIA and would intrude on the federal government's traditionally singular role in foreign affairs.[53]

C. California Law is subject to the extraterritorial limitations of the FTAIA under California principles of statutory construction

Not only does the Supremacy Clause preempt California law from reaching beyond the FTAIA's boundaries, California principles of statutory construction require that California law be construed in harmony with federal law. With respect to antitrust law in California, courts have held that California law follows the federal courts' interpretation of the federal antitrust laws.[54]

Because the Sherman Act is subject to the limitations of the FTAIA, California law cannot be construed to disavow those boundaries. If it did, it would not "prevent clashes between the laws of the United States and other nations" or avoid ensnaring the "conduct occurring in a foreign jurisdiction in the prohibitions and remedies of a domestic statute."[55]

And if California intended to protect its citizens by extending liability to conduct excluded by the FTAIA, it could seek to pass a law expressly stating so just as it did in

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48 *Id.* at 5-6.

49 While Mr. Pilotin invokes high school civics for the proposition that the federal government is one of limited powers, those same civics lessons also teach that one of those limited powers—arguably the foundational one—is the exclusive power to conduct foreign affairs. *See Intel*, 475 F.Supp.2d at 457.

50 *Intel,* 475 F.Supp.2d at 457.

51 *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).

52 *See e.g. Viva! Int'l. Voice for Animals v. Adidas Promotional Retail Operations,* Inc., 41 Cal. 4th 929, 939 (2007) (assuming, without formally deciding, that the normal presumption against preemption does not apply in the context of foreign affairs).

53 *Japan Line,* 441 U.S. at 448; *see also Intel,* 476 F.Supp.2d at 457.

54 *See Partee v. San Diego Chargers Football Co.*, 668 P.2d 674, 677 (Cal. 1983); *Vinci v. Waste Mgmt., Inc.*, 36 Cal. App. 4th 1811, 1814 n.1 (Cal. Ct. App. 1995).

55 *Diamond Multimedia Sys., Inc. v. Superior Court*, 968 P.2d 539, 554 n.20 (Cal. 1999).

allowing indirect purchasers to recover under state law.[56] In 1977, the Supreme Court held that the Sherman Act would not allow indirect purchasers to recover for violations of Section 1 or 2.[57] The California legislature disagreed with this precedent, and, in 1978, amended the Cartwright Act to allow indirect purchasers to recover under California antitrust law.[58] Had the California legislature not wanted courts to construe California law as limited by the FTAIA, it could have passed legislation explicitly seeking to allow for such recovery.

D. California Law must comport with the FTAIA or run afoul of fundamental principles of comity

Well-established principles of comity also caution against extending California law beyond the limits set forth in the FTAIA. Comity is the legal principle that political entities (such as states, foreign nations, and courts from different jurisdictions) will mutually recognize each other's legislative, executive, and judicial acts. The FTAIA seeks to respect foreign sovereign regulatory prerogatives and to "encourage our trading partners to take more effective steps to protect competition in their markets."[59]

Since 1982, countries around the globe – especially those where manufacturing has exploded – have risen to this occasion. International antitrust enforcement is at an all-time high. Today, 115 countries have antitrust regimes in place; several strongly enforce their laws.[60] For example, China passed its first comprehensive competition law and it went into effect in 2008.[61] It recently prosecuted conduct that took place outside its borders.[62] India passed a comprehensive competition law in 2002 which established a quasi-judicial party for enforcing provisions of India's competition laws[63] and has opened investigations into the practices of some major U.S. companies.[64] Likewise, countries that had existing antitrust regimes have strengthened them and shown a desire to begin to more strictly enforce them. For example, although Japan has had an antitrust enforcement body and antitrust laws since 1947, it is only recently that the Japanese Fair Trade Commission began putting some teeth in its prosecution of cartel

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56 Cal. Bus. & Prof. Code § 16750(a).

57 *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977).

58 *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.,* 191 Cal.App.3d 1341, 1346 (1987).

59 H.R Rep. 97-686, at 9.

60 John Terzaken, "Antitrust Enforcement Goes Global," Reuters, November 22, 2013, available at http://blog.reuters.com/great-debate/2013/11/22/antitrust-enforcement-goes-global/.

61 China Anti-Monopoly Law.

62 Susan Ning and Kate Peng, "NRDC Imposed Stiff Fines on Multinational LCD Manufacturers in China's First Antitrust Enforcement Action against International Cartels," January 15, 2013, available at http://www.chinalawinsight.com/2013/01/articles/corporate/antitrust-competition/ndrc-imposed-stiff-fines-on-multinational-lcd-manufacturers-in-chinas-first-antitrust-enforcement-action-against-international-cartels/.

63 The India Competition Act of 2002

64 John Ribeiro, "Google under antitrust investigation in India over AdWords," May 13, 2014, available at http://www.pcworld.com/article/2154501/google-under-antitrust-investigation-in-india-over-adwords.html.

activity.[65] In 2009, for the first time in many years, the JFTC pursued criminal liability for a price-fixing cartel.[66] It also recently was given the power to conduct "compulsory" investigations of potential criminal offenses.[67]

Given that foreign enforcement of antitrust laws is strengthening and will provide consumers more protection worldwide, it is even more imperative that U.S. or state antitrust laws do not interfere with foreign competition regulation. As the Supreme Court in *Empagran* noted, applying United States antitrust regulations to foreign conduct that was independent of any domestic injury seriously risks interfering with a foreign nation's ability to regulate and enforce its own antitrust laws.[68] *Empagran* also recognized that a consistently-applied limitation was better than a "case-by-case approach," which would generate uncertainty as to which laws applied and which jurisdiction had the authority to hear the case. The specter of "procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system."[69]

The application of any state's antitrust law beyond the reach of the FTAIA would implicate the same concerns—interference with a foreign nation's antitrust enforcement scheme and the practical difficulties of determining which jurisdiction's laws applied to certain conduct—and multiply them fiftyfold.

V. CONCLUSION

The principles of federalism in the sphere of foreign affairs restrain state antitrust law's ability to reach conduct that does not have a "direct, substantial, and reasonably foreseeable effect" on the United States. Courts should continue to respect the limitation of U.S. law over foreign conduct as provided by the FTAIA. This policy will assist the U.S. in continuing to grow its participation in global trade and manufacturing by allowing U.S. and foreign business leaders to listen to "one voice" in determining whether their conduct implicates U.S. antitrust laws.

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65 James Fry, "Struggling to teethe: Japan's antitrust enforcement regime," Law and Policy in International Business, Summer 2001.

66 Yoji Maeda, "Japan Antimonopoly Act: Precedent-Setting Criminal and Administrative Fines in Japanese Galvanized Steel Sheet Cartel Investigation," September 25, 2009.

67 *Id.*

68 542 U.S. at 165-67.

69 *Id. at 168-69.*

SO YOUR SUPPLIERS CONSPIRED AGAINST YOU: AN ANTITRUST CLASS ACTION OPT-OUT PRIMER

By Paula Blizzard, Justina Sessions, and Daniel Gordon[1]

I. INTRODUCTION

You've just learned that one of your company's suppliers has pled guilty to an antitrust violation. A quick internet search reveals that international government antitrust authorities raided several suppliers a few months ago. And hot on the heels of the guilty pleas, a series of civil class action suits are filed against your supplier and others. The class actions may already have been consolidated into a Multi-District Litigation ("MDL"), or consolidation may be imminent. At first it may be difficult to believe. How could trusted and long-term suppliers conspire against a major customer? It may be hard to grasp, but the reality is that it happens. If there have been guilty pleas, then almost certainly your company has been overcharged for products. The question is: what to do about it?

Large companies are generally far more used to being defendants than plaintiffs, and figuring out how to proceed as an antitrust victim can be unchartered territory. At the outset, the company's options and avenues for recovery must be assessed and preserved. One of the most important decisions may be whether and when to opt out of civil class action lawsuits. Large purchasers often opt out of antitrust class actions in favor of pursuing individual recovery. Those who have taken their individual claims to trial have achieved mixed results. Far more commonly, large purchasers pursue their own private resolution with antitrust defendants.

This article discusses practical considerations for large purchasers who are victims of an admitted antitrust conspiracy, and focuses on federal and California-law issues. First, we provide a simple decision-making process for large purchasers comprised of three steps: (1) assess your company's relationship to the suppliers; (2) preserve your claims; and (3) determine whether to remain in the class or pursue your claims independently. Second, we provide a more detailed analysis of two types of antitrust claims for which the application of California or federal law could yield different outcomes: (1) indirect-purchaser claims with a pass-on defense, and (2) antitrust claims that implicate foreign conduct or injury.

II. HOW SHOULD YOU PROCEED? A THREE-STEP PROCESS

A. First, assess what types of claims you might have: are you a direct purchaser, indirect purchaser, or both?

Different rules—including standing, statute of limitations, applicable defenses, and potential for monetary relief—govern claims by direct and indirect purchasers. Thus, it is important to know at the outset what types of claims your company may have. A direct

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purchaser is one that bought affected goods directly from a cartel member. An indirect purchaser is one that bought affected goods sold by a cartel member, but through an intermediary. Direct purchasers can bring federal and California-law claims for injunctive and monetary relief, whereas indirect purchasers can bring federal claims for injunctive relief and California-law claims for injunctive and monetary relief.

Once you learn that you may be the victim of an antitrust conspiracy, investigate your purchasing structure and practices to ensure that you understand whether you have direct and/or indirect claims. Keep in mind that companies may be both direct and indirect purchasers; for example, subsidiary A might buy price-fixed steel and manufacture it into a finished product that subsidiary B sells to customers. Or it might be even more complicated: foreign subsidiary A might purchase directly from the cartel, but the product is then shipped to an intermediary that finishes it into a final product, which may be transferred to subsidiary B for import into the U.S. Is the foreign subsidiary a direct purchaser that can bring claims in the U.S.?[2] Is the product actually sold to the intermediary, or is the intermediary just a contractor? Moreover, you need to figure out the relationship and chain of custody not just for today, but for the life of the conspiracy, which may go back many years.

Unless you are certain that you know the corporate relationships and purchasing history for the entire period of the cartel, and that all your purchases will be considered either direct or indirect by the courts, it is safest to assume that you have both direct and indirect claims.

B. Second, preserve your claims

1. Check the statute(s) of limitations

Before considering your options for participation in litigation and/or private recovery against cartel members, you must first ensure that your company still has claims to bring (or use as negotiating leverage). The statute of limitations for federal antitrust actions for damages is four years. 15 U.S.C. § 15B. California's Cartwright Act has the same four-year statute of limitations as the federal antitrust statute. *See* Cal. Bus. & Prof. Code § 16750.1 (four-year statute of limitations in civil actions). However, the limitations period generally does not begin to run until the plaintiff discovers or should have discovered the injury. *See, e.g., In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 536 (6th Cir. 2008); *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal. 4th 623, 634 (2007). The discovery rule is fact dependent, but a conservative approach assumes that the latest date the statute begins running is when a defendant's plea agreement is announced.[3] Thus, your company may have four years from

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2 The extent to which federal antitrust claims can reach foreign conduct is a hotly-debated area of law. *See, e.g., United States v. Hui Hsiung*, --- F.3d ---, No. 12-10514, 2014 WL 3361084 (9th Cir. July 10, 2014); *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, --- F.3d ---, No. 13-2280, 2014 WL 2487188 (2d Cir. June 4, 2014); *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014), reh'g granted and opinion vacated (July 1, 2014). The article by Craig Corbitt and Aaron Sheanin in this issue addresses this question, so we do not address it here, other than to note that it affects large companies and potential opt-outs just as much, if not more, than class members.

3 *See* Areeda & Hovenkamp, Antitrust Law, ¶ 320c2 (4th ed. 2013) (hereinafter "Areeda & Hovenkamp") ("[C]ourts tend to start the statute of limitation once the cartel becomes publicly known---for example, when one of its members is caught or convicted.").

the date of the plea agreement to decide what to do. In individual cases, defendants may try to argue for an earlier date (for instance, the date of the government raids) or you may argue for a later date (for instance, based on tolling of the statute.)

2. Consider whether government investigations or pending class actions toll the statute

Although the statute of limitations generally begins to run at the time of injury or discovery of that injury, government investigations and civil class actions may toll the limitations period under federal and California law.

The four-year limitations period for federal-law claims is suspended while related antitrust enforcement actions by the United States are pending and for one year thereafter. 15 U.S.C. § 16(i). In order to receive the benefit of this suspension provision, however, a private plaintiff must bring suit within one year of the termination of the enforcement proceeding. *Id.* The government enforcement period begins when the government files an indictment, criminal information, or complaint for injunctive relief, and continues until litigation against all defendants is completed.[4] The limitations period is suspended with respect to all conspirators, rather than just those conspirators named in an enforcement action. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 335-36 (1971) (holding that the statute of limitations is tolled "against all participants in a conspiracy which is the object of a Government suit, whether or not they are named as defendants or conspirators therein"). This tolling statute does not, however, explicitly apply to California-law claims. Federal courts addressing the issue have generally relied on the parties' agreement that tolling did or did not apply. *Compare In re Reformulated Gasoline Antitrust & Patent Litig.*, No. MLCV 05–1671 CAS, 2006 WL 7123690, at *15-16 (C.D. Cal. June 21, 2006) (holding that the statute of limitations was tolled where the parties agreed that commencement of an FTC action tolled the Cartwright Act claims), *with In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07–1827 SI, 2013 WL 1164897, at *4 n.3 (N.D. Cal. Mar. 20, 2013) (dismissing claims where "Plaintiffs concede that . . . 15 U.S.C. § 16(i) does not toll state law claims" under the Cartwright Act). Thus, while your company may be able to take advantage of a short tolling period due to prosecutions for your federal claims, you should not assume that California-law claims are similarly tolled.

As to class actions, the limitations period for a federal antitrust claim is suspended during the time that the plaintiff could have been covered by a pending federal class action. *See Amer. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552-54 (1974). Likewise, California law allows tolling of the Cartwright Act's statute of limitations by a class action where "the class action and the later individual action or intervention are based on the same claims and subject matter and similar evidence." Becker v. McMillin Constr. Co., 226 Cal. App. 3d 1493, 1499 (1991). Before relying on class-action tolling, however, you must be sure (a) your company is a member of the putative class; (b) all claims your company might bring are asserted in the putative class action; and (c) all potential defendants are named in the putative class action. Generally, a pending class action tolls the statute of limitations for putative class members until a class is certified or denied. *Crown, Cork & Seal Co. v. Parker*,

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4 Areeda & Hovenkamp ¶ 321a. Courts have considered criminal litigation completed on the date that the court clerk enters judgment of conviction of the last remaining defendant. *See Marine Firemen's Union v. Owens-Corning Fiberglass Corp.,* 503 F.2d 246, 250 (9th Cir. 1974).

462 U.S. 345 (1983). Thus, a class action tolls the statute of limitations for only those claimants that fall within the putative class definition. Similarly, the statute of limitations may not be tolled for claims that were not raised in the class complaint. For example, in the Cathode Ray Tube litigation, Sharp, an opt-out plaintiff, could not avail itself of class-action tolling for claims under certain state laws where the class complaint did not allege claims under those same state laws. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-5944 SC, 2014 WL 1092293, at *3-4 (N.D. Cal. Mar. 13, 2014). Finally, class-action tolling may not operate against defendants that are not named in the class complaint. In the Processed Egg Products litigation, individual grocery-store plaintiffs could not use class-action tolling against a defendant that had not been named in the class complaint. *See In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, 2013 WL 4504768 (E.D. Pa. Aug. 23, 2013). Companies should carefully examine the class definitions and allegations before relying on class-action tolling.

3. Request tolling agreements from potential defendants

Regardless of when the statute of limitations is anticipated to expire, your company should request tolling agreements from potential defendants. Parties can agree that statutes of limitations will not run for a set period of time or during the pendency of a tolling agreement. Many potential defendants—especially those who have already admitted criminal antitrust liability—will be eager to avoid or delay additional civil litigation and willing to suspend the statute of limitations while private negotiations occur. Often, the cartel members are still your company's business partners, and the last thing they want is for their customers to sue them.

To preserve the most claims, tolling agreements should cover both federal and state-law claims. The facts and law concerning whether your company's purchases are direct or indirect may be unclear, so it is best to preserve all possible claims. Moreover, tolling agreements should be with all cartel members, even if they are not your company's suppliers. Your company can seek recovery against any cartel member regardless of whether they sold to you or only to your competitors. At the outset, there is little harm in seeking a tolling agreement with all defendants, particularly if your purchasing history is unknown or complicated.

C. Third, decide whether to take advantage of class recovery or proceed independently

Once you have preserved your potential claims, you now have time to learn more about the various civil class action lawsuits and determine whether it is in your company's best interest to remain in the class as an unnamed class member or proceed independently.

1. Should you pursue a claim independently?

To determine whether to remain in the class or pursue a separate claim, your company should compare the relative cost of litigating as an absent class member/third party or as a sole plaintiff, the risk of loss on the merits, and the potential upside of a higher recovery

as an individual plaintiff.[5] If it decides to pursue a claim independent of the class, it must decide whether to file a lawsuit or negotiate in private, or some combination of the two. Many companies will decide to negotiate a settlement in private for a variety of reasons – the confidentiality, the desire to avoid being a plaintiff that sues its suppliers, and the lower risk and transaction costs. An independent lawsuit is a significant expense, both in costs and the time of company employees, and will probably be worthwhile only if the company's potential recovery is very large and the suppliers recalcitrant. Even if the company settles with its suppliers before the start of trial, modern pre-trial litigation, and particularly discovery (including extensive e-discovery) is capital and labor-intensive. Unfortunately, even if it settles independently, a large-volume purchaser may not avoid discovery, because the large-volume purchaser is likely to possess documents and knowledge regarding the supplier, affected volume of commerce, or pass-on defense that may be subpoenaed by both plaintiff and defendant in the class case. If your company is a small-volume purchaser, it may make more sense to remain in the class and let class counsel take care of managing the litigation and taking discovery.

An example of the above scenario can be found in *In re Automotive Parts Antitrust Litigation*, No. 2:12-MD-02311 (E.D. Mi.). Ford Motor Company, a large-volume purchaser of automotive parts, pursued a claim against Fujikura independent of the ongoing class actions. At least with respect to Fujikura, both Ford's and the class plaintiffs' claims allege price fixing and overcharges by Fujikura (and other suppliers in the case of the class actions) for sales of a particular automobile component known as a "wire harness." The various class actions were consolidated in the Eastern District of Michigan, and Ford's lawsuit was similarly consolidated with the MDL. Even though Ford sued only a single supplier, the MDL court allowed Ford to (1) receive all discovery produced to the class plaintiffs by the other wire harness supplier-defendants, subject to specific objections, and (2) enforce discovery that it requested jointly with the class plaintiffs. In exchange, Ford will likely face its own broad discovery obligations to all the wire-harness-supplier defendants, including those it did not individually sue.

Another consideration is whether the company should control its own litigation. Your company and class counsel will likely have differing opinions concerning case strategy, including discovery, expert and witness presentations, and damages. For example, will the damages model used by class counsel and its experts sufficiently represent your company's injuries? Or will it be adequate for the class action process, but because of certain assumptions and modeling, not sufficiently tailored to the facts specific to your company? Is class counsel suing the defendants your company would choose to sue? Does your company desire nonmonetary remedies (such as favorable business terms) from some suppliers but monetary awards from others? Under these circumstances, a separate lawsuit or private negotiations will provide greater control of the case and of the settlement.

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5 If the largest-volume purchasers pursue their own claims, then the remaining volume of commerce may not yield a compelling recovery to the class. See *In re Vitamins Antitrust Class Litigation*, MDL No. 1285 (D.D.C.), in which the largest purchasing companies opted out of the class action and obtained a substantial recovery relative to the class settlement. Research from other types of class actions suggests that larger plaintiffs who opt out of a class action settlement may succeed in obtaining a larger recovery than would have been possible had they remained in the class. *See* Amir Rosen, Joshua B. Shaeffer, and Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements*, (Cornerstone Research 2013) (available at http://www.cornerstone.com/ Publications/ Reports/Opt-Out-Cases-in-Securities-Class-Action-Settlemen.aspx).

2. If proceeding independent from the class, decide when to proceed

If you have decided that it is in the company's best interest to pursue claims separate from the class plaintiffs, you must then decide *when* to proceed. A company can pursue its own claims at any point, either by filing a case or negotiating in private. Regardless of whether the company decides to pursue its own claims early or late in the litigation, when a class is certified, either for trial or as a settlement class based on at least one defendant's settlement, the company should file an opt-out notice.

At least three factors will help inform a company's decision regarding the timing of when to pursue its claims. First, pursuing claims relatively late in the litigation will likely provide the company with the most fulsome discovery at the lowest cost because the parties will have almost certainly completed substantial document productions and fact and expert depositions. However, a plaintiff that pursues claims late in the litigation and benefits from class counsel's work on the case may be obligated to pay a share of the class counsel's attorneys' fees as a form of "common fund." *See, e.g., In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644 (E.D. Pa. 2003).

Second, as discussed above, allowing class counsel effectively to run your company's litigation through class certification will strip the company of influence and control over litigation strategy and discovery. Class counsel may do an excellent job of pursuing the claims of the entire class, but whether the approaches and sought-after recovery match up with the needs of your particular company must be determined independently. As a large purchaser, your company may be subpoenaed in any event and dragged into the litigation.

Third, depending on the forum and the timeliness of your company's claims, you may have to wait until the class is certified in order to benefit from tolling and preserve your claims. In most courts, a putative class member may benefit from tolling at any time up to the point at which the class-action court issues its decision on class certification. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1234 (10th Cir. 2008); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2007). But a minority rule in the First and Sixth Circuits provides that the statute of limitations is tolled only for a putative class member who waits to file an independent suit until the class-action court issues its decision on class certification, and not for putative class members who file their own lawsuits before class certification is resolved. S*ee Wyser-Pratte Mgmt. Co., Inc. v. Telxon Corp. Eyeglasses*, 413 F.3d 553, 568-69 (6th Cir. 2005); Glater v. Eli Lily & Co., 712 F.2d 735, 739 (1st Cir. 1983).

In any event, a large company that knows it will eventually opt out of class actions should monitor the proceedings closely and keep track of all associated class certifications, dismissals, or settlements.

III. LAST, BE SURE TO CONSIDER SPECIAL FEDERAL/STATE ISSUES FOR CALIFORNIA-LAW CLAIMS BEFORE YOU DECIDE TO PURSUE YOUR STATE-LAW CLAIMS INDEPENDENTLY

There are several special considerations that a company deciding to bring California state-law claims should weigh in their overall litigation strategy. First, when assessing your prospective recovery in a California action, you may need to factor in the availability of

a pass-on defense for the defendants. And second, you should assess whether you will be able to recover for any damages resulting from antitrust conduct involving solely foreign or export trade or commerce.[6]

A. Your company's indirect purchaser damages award may be limited only to the overcharge not passed on to downstream purchasers

The "pass-on defense" is an antitrust defense whereby a supplier-defendant argues that the plaintiff passed on the alleged overcharge to others down its distribution chain and therefore suffered no damage. Federal law does not permit a pass-on defense.[7] However, because California's Cartwright Act explicitly allows indirect-purchaser claims, the California Supreme Court, in *Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758 (2010), suggested that the defense may be available where there is a risk of multiple or duplicative recovery:

> In instances where multiple levels of purchasers have sued, or where a risk remains where they may sue, trial courts and parties have at their disposal and may employ joinder, interpleader, consolidation, and like procedural devices to bring all claimants before the court. In such cases, if damages must be allocated amount the various levels of injured purchasers, the bar on consideration of pass-on evidence must necessarily be lifted; defendants may assert a pass-on defense as needed to avoid duplication in the recovery of damages.

Id. at 787. Thus, although the *Clayworth* decision left significant room for uncertainty, some form of pass-on defense might be available in California if multiple levels of purchasers have or might sue concerning the same antitrust violation. While the facts of some antitrust cases will not implicate the *Clayworth* exception, cases involving lengthy supply and/or distribution chains present multiple levels of purchasers, both direct and indirect, who have already filed or may file claims against the various price-fixing cartels. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, 2012 WL 6709621 (N.D. Cal. Dec. 26, 2012) (finding a likelihood of duplicative recovery because multiple levels of purchasers were seeking to recover for the same overcharge); *Best Buy v. AU Optronics*, No. 10-cv-4572-SI, Dkt. 579 (N.D. Cal. Aug. 28, 2013) (jury instructed to reduce plaintiff's recovery to deduct the downstream pass-on from any damages awarded).

In light of *Clayworth*, if your company's antitrust injuries occurred along a lengthy chain of multiple purchasers, it would be prudent to factor any potential pass-on reduction in damages into your company's overall strategy and decision-making process when analyzing which claims to pursue as an opt-out plaintiff.

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6 We address here only the state-law issues. See *supra* note 2.

7 This rule derives from two well-known Supreme Court cases holding, respectively, that (i) antitrust defendants cannot assert a pass-on defense to defeat or reduce their liability, *see Hanover Shoe, Inc. v. United Shoe Machine Corp.*, 392 U.S. 481, 494 (1968), and (ii) that antitrust plaintiffs cannot demonstrate harm by showing that an overcharge was passed on to them—which means only direct purchasers may bring suit, *see Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

B. Your company's foreign antitrust claims may not be protected by the Cartwright Act

There is an additional consideration if your company's antitrust claims involve either foreign commerce, such as a sale from one foreign entity to another foreign entity, or export commerce, such as sales from a U.S. entity to a foreign entity. The Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a limits federal antitrust claims involving foreign trade or commerce or export trade or commerce, subject to the exceptions described below. While plaintiffs may hope to avoid the FTAIA by litigating their claims under state law, they should exercise caution before bringing state-law claims for foreign antitrust violations.

The first question you should ask when foreign commerce or a foreign entity is implicated in an antitrust conspiracy is whether the defendant's conduct involves only domestic trade or commerce (i.e., trade within the United States between two U.S. entities) or import trade or commerce (i.e., trade from a foreign entity directly to a U.S. entity). If so, the conduct is subject to U.S. federal antitrust law under the Sherman Act, and the FTAIA does not apply. However, when there is either (i) trade between foreign entities or (ii) trade from a U.S. entity to a foreign entity, the FTAIA is triggered, and there is a presumption that the foreign trade or commerce at issue is not subject to U.S. federal antitrust law unless the conduct at issue meets the "domestic effect" exception articulated in the FTAIA. To meet this exception, the plaintiff must first prove that the defendant's conduct had a "direct, substantial, and reasonably foreseeable effect" on the domestic market, whether on domestic or import trade or commerce, or on opportunities to export from the United States. The plaintiff must then prove that the effects analyzed in the previous step "give rise to" the plaintiff's Sherman Act claim. In other words, did the direct, substantial, and reasonably foreseeable effect (i.e., supracompetitive prices) proximately cause the plaintiff's injuries? *See Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).[8]

If your company is bringing indirect-purchaser claims under state antitrust law, consider whether the FTAIA's bar on foreign-commerce-based federal antitrust claims also bars your company's Cartwright Act claims. Although there is almost no case law addressing this question, both state and federal cases suggest that California's antitrust law cannot reach further than the bounds of federal antitrust law. S*ee, e.g., In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-MD-01819, 2010 WL 5477313, at *4 (N.D. Cal. Dec. 31, 2010) (finding that the FTAIA would bar indirect purchasers from reaching foreign market transactions under state laws unless plaintiffs could prove "jurisdictional facts" bringing their claims within the FTAIA's domestic injury exception); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 927 (N.D. Ill. 2009) ("[T]here could potentially be conflict with certain constitutional provisions if state antitrust laws reached foreign commercial activity that [the FTAIA] did not."); *In re Intel Corp. Microprocessor Antitrust Litig.*, 476 F. Supp. 2d 452, 457 (D. Del. 2007) ("Congress has spoken under the FTAIA with the 'direct, substantial and reasonably foreseeable effects' test, and the Court is persuaded that Congress' intent would be subverted if state antitrust laws were interpreted to reach conduct which the federal law could not.").

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8 See *supra* note 2.

For their part, California courts have not been wholly consistent in applying the FTAIA to Cartwright Act claims. For example, a California appellate court has explicitly adopted the FTAIA's limitations on extraterritorial commerce. *See Amarel v. Connell*, 202 Cal. App. 3d 137, 150 (1988) (concluding that the FTAIA does not preclude state law claims "[s]o long as the anticompetitive conduct in question has a direct, substantial, and reasonably foreseeable effect within the state"). But a different state court has also found that the FTAIA "does not apply to plaintiff's claims brought under the law of California." *See In re Hynix Antitrust Cases*, Nos. 4607, 04-043 1105, 1-06-CV-076688, 2010 WL 4256345, at *1 (August 17, 2010) (no discussion of the merits).

Although state courts have ruled both ways, the decisions discussed above suggest that plaintiffs cannot apply the Cartwright Act to harm from restraints on trade in foreign markets having no direct, substantial and foreseeable anti-competitive effects on trade or commerce in the United States, as would be required for federal antitrust jurisdiction under the FTAIA. Moreover, for those plaintiffs litigating their Cartwright Act indirect-purchaser claims in federal court, it is even less likely that a federal court would find that the plaintiff's state-law claims may reach foreign commerce or trade where the plaintiff's Sherman Act claims would clearly not. If your company has a mix of (i) foreign or export claims and (ii) domestic or import antitrust claims, consider how best to present the facts related to your foreign or export claims such that they demonstrate a direct, substantial, and reasonably foreseeable effect on your domestic business or commerce.

IV. CONCLUSION

For a company that does not often find itself in the role of antitrust victim, determining what to do when faced with a supplier cartel can be difficult. At a minimum, we recommend following the steps outlined in this article, setting up a procedure for tracking and setting deadlines related to the class action settlements and notices, and working with in-house and outside counsel, along with the procurement teams and business leadership at your company, to analyze and resolve the claims in a way that balances maximizing potential recovery with the costs of investigation and litigation.

CAFA: RECENT DEVELOPMENTS ON THE JURISDICTIONAL AND SETTLEMENT FRONTS

By Michael L. Mallow[1]

Since Congress enacted the Class Action Fairness Act (CAFA) in 2005, the nation's class action litigation has increasingly migrated to the federal stage, with plaintiffs bringing more class actions directly to federal court and corporate defendants exercising the right of removal. Although the Supreme Court's class action jurisprudence has been relatively thin for many years, a handful of recent decisions have addressed class actions, including jurisdictional issues specific to CAFA. While these decisions—particularly in the arbitration realm—may be regarded as favoring defendants,[2] there have also been several unanimous decisions directed at achieving consistency in the federal courts' application of CAFA and preventing "artful pleading" by class plaintiffs to avoid CAFA jurisdiction.

A legislative response to a number of perceived problems and abuses in class action litigation, CAFA transformed the class action landscape in two important ways: expanding the diversity jurisdiction of federal courts over class actions, and providing a "Class Action Bill of Rights" that requires courts to engage in more exacting scrutiny of proposed settlements. While the Supreme Court's CAFA decisions have, so far, focused primarily on jurisdictional and class certification issues, there has been ample judicial activity at the settlement review stage, with district and circuit courts inspecting coupon settlements, *cy pres* allocations, and attorneys' fees through CAFA's remedial lens. This article examines developments at both ends of the class action "life-cycle." The first section discusses the Supreme Court's recent jurisdictional decisions—and some of the open issues that still surround removal and remand under CAFA. The second section looks at recent decisions considering the post-CAFA viability of coupon settlements and *cy pres* distributions, even in class actions outside of CAFA's jurisdictional reach.

I. CAFA'S JURISDICTIONAL PROVISIONS

CAFA's jurisdictional provisions lower the barriers to federal court jurisdiction over class actions by providing relief from conventional diversity jurisdiction rules governing class actions. CAFA also amended the traditional requirement that all class members must meet the amount-in-controversy requirement ($75,000). Under the statute, federal diversity jurisdiction exists as long as there is a putative class that includes at least 100 members, minimal diversity – at least one class member is from a different state than at least one defendant – and the total amount in controversy exceeds $5 million (exclusive

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2 *See, e.g.*, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (enforcing class action waivers in arbitration agreements, even where doing so would have the practical effect of precluding plaintiffs from bringing individual antitrust claims).

of interest and costs).[3] CAFA also affords defendants more opportunities for removal of actions filed in state court. Any defendant in a class action that meets CAFA's jurisdictional thresholds can move for removal, including defendants from the state where the state court action is filed, can seek removal without the consent of other defendants. Of course, CAFA does not alter the availability of federal court jurisdiction over claims arising under federal law (federal question jurisdiction), which remains available to defendants as a basis for removal.

CAFA does include several important exceptions. One, the so-called "Delaware carve out," exempts from CAFA cases that concern covered securities, as defined by certain federal laws, or that relate to corporate governance issues arising under the state laws of a company's state of incorporation, or that concern fiduciary duties created by securities laws.[4] CAFA also creates two mandatory exceptions (the federal court *must* decline jurisdiction) over "local controversy" and "home state" actions. The exceptions apply to class actions in which more than two thirds of the class members are from the forum state and *either* one of two conditions are met: (1) the primary defendant is from the forum state *or* (2) a significant defendant is from that state, the principal injuries occurred in the forum state, and no other class action on the issue has been filed in the preceding three years.[5]

The statute also provides a permissive exception (the court, in its discretion, *may* refuse jurisdiction over the case) that covers cases in which the primary defendants and between one third and two thirds of the class members are from the forum state.[6] In those situations, the court will look at six factors, the overall thrust of which is geared toward assessing whether the forum state has a particular interest in, and nexus with, the class and the claims being asserted.[7] Finally, federal courts must decline jurisdiction in cases implicating the sovereign immunity of states, state officials, or other entities against which the court may be foreclosed from ordering relief.[8]

Even with these exceptions, CAFA marks a clear expansion of the federal courts' jurisdiction over diversity-based class actions. While CAFA was expected to result in an increase of removals by class action defendants, less expected was the increase in class actions filed directly in federal court. And as CAFA has reduced the barriers to federal court jurisdiction over class actions, it also has resulted in federal courts grappling with significant questions including evidentiary issues related to removal and remand, as well as post-jurisdictional issues related to Rule 23 certification and settlements.

II. CAFA MANIPULATOR OR MASTER OF THE COMPLAINT?

While plaintiffs increasingly have filed suit directly in federal courts, many plaintiffs (and their counsel) continue to regard state courts as more attractive and amenable forums

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3 28 U.S.C. § 1332(d)(2).

4 28 U.S.C. §1332(d)(9).

5 28 U.S.C. §1332(d)(4).

6 28 U.S.C. §1332(d)(3).

7 *See id.*

8 28 U.S.C. § 1332(d)(5)(A).

for large class action claims, leaving the work of removing cases to federal court to defendants. While CAFA has eased the requirements for the removal of state court cases to federal court, the practical application of the statute has also generated a number of removal-related questions, including the appropriate evidentiary standards and burdens of proof for removal and remand of CAFA cases. Over the years, courts have split as to the appropriate evidentiary standard, with the majority of circuit courts now taking the position that defendants seeking removal under CAFA must demonstrate diversity and aggregate amount-in-controversy by a preponderance of the evidence, while the party resisting removal or seeking is left to demonstrate that one of CAFA's exceptions applies.[9]

While the Supreme Court has not yet squarely decided the issue, its 2013 decision in *Standard Fire Insurance Co. v. Knowles*[10] supports a "preponderance of the evidence" approach (generally applicable outside the context of CAFA actions), while also making it clear that plaintiffs may not escape removal by stipulating to damages under the $5 million CAFA threshold. In *Standard Fire*, the class representative attempted to avoid removal by entering a stipulation that the class would seek less than $5 million in damages. The district court had found, by a preponderance of the evidence, that the damages would exceed that threshold, but for the stipulation, yet ultimately honored the terms of the stipulation and declined removal. The Eighth Circuit declined to hear an appeal, but the Supreme Court took the case and reversed.

In an 8-0 decision, the Court took aim at plaintiffs' counsel filing multiple, near-identical suits, each framed as falling slightly under the $5 million amount-in-controversy threshold for CAFA, and held the stipulation unenforceable, finding that the class representatives could not strategically evade removal through stipulation. The decision did not squarely address the burden on the removing party and may be read narrowly, framed in terms of whether class representatives possess the authority to bind class members prior to class certification. While it is often noted that a plaintiff is the "master of his complaint," the Court viewed the attempt to stipulate around CAFA as impermissible and "runn[ing] directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'"[11]

The Ninth Circuit, before *Standard Fire*, was among the minority of circuit courts that required that defendants must establish the $5 million amount in controversy as a matter of legal certainty. In *Lowdermilk v. U.S. Bank, N.A.*,[12] the Ninth Circuit based its adoption of the legal certainty test on the reasoning that plaintiffs are the masters of their complaint and therefore have the choice to seek damages below the jurisdictional threshold. In that case, the court also held that the four corners of the complaint must provide all of the information necessary to assess removal jurisdiction.

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9 *See, e.g, Rodriguez v. AT&T Mobility Services, LLC* , 728 F.3d 975 (9th Cir. 2013). The Third Circuit remains the notable outlier. In a recent decision, a Third Circuit panel denied plaintiff's remand request on the basis that plaintiff had not demonstrated "to a legal certainty" that the aggregate value of the putative class claims would fall under $5 million. *See Hoffman v. Nutraceutical Corp.*, No. 13-3482 (3d Cir. April 10, 2014).

10 133 S.Ct. 1345 (2013).

11 *Id. at 1350.*

12 479 F.3d 994 (9th Cir. 2007).

In *Standard Fire*, however, the Supreme Court held that that named plaintiffs—without the authority to bind the as-yet uncertified class—may not avoid CAFA jurisdiction by stipulating to an amount of damages below the jurisdictional amount.[13] The Court found that the district court must look beyond the complaint when determining the amount in controversy and "add[] up the value of the claim of each person who falls within the definition of [the] proposed class."[14] Recognizing that the foundation of the *Lowdermilk* legal certainty test had been eroded, the Ninth Circuit in *Rodriguez v. AT&T Mobility Services, LLC* held that *Standard Fire* had effectively overruled its previous decision and changed the evidentiary standard to bring it in line with the majority.[15]

The Supreme Court will once again examine removal issues under CAFA in the coming term, having agreed to hear an appeal from the Tenth Circuit, *Dart Cherokee Basin Operating Co. v. Owens*[16], that centers on whether a defendant seeking removal to federal court must include evidence supporting federal jurisdiction in its notice of removal, or whether it is sufficient to allege the required "short and plain statement of the grounds for removal." Again, the issue is fairly narrow, bearing on the notice of removal required under 28 U.S.C. § 1446(a). While there is no question that a court must consider evidence supporting a defendant's motion for removal, the Tenth Circuit, deviating from its sister circuits, took the position that the notice itself needed to be accompanied by evidence supporting CAFA jurisdiction.

Of course, a removing defendant's satisfaction of CAFA eligibility thresholds—diversity, amount-in-controversy and class action status—does not necessarily mean that a case is safe from remand. This stage, again, raises questions as to the evidentiary burden the party (usually class representatives) bears in showing that the matter is a "local controversy" or subject to CAFA's "home state" exceptions. While the Supreme Court has yet to squarely address the burden of proof for parties resisting removal and seeking remand, courts typically place the burden on the remanding party to demonstrate the applicability of one of CAFA's exceptions. Where remand is sought under CAFA's permissive exception for controversies with particularly strong ties to a particular state, the district court exercises fairly broad discretion weighing the various factors.

For example, courts have tangled with the question of where a defendant corporation's principal place of business may be. The Ninth Circuit, in *Davis v. HSBC BANK NEVADA, N.A.* (2009),[17] reversed a district court's decision to remand a consumer class action based on CAFA's "local controversy" exception. The suit involved fraud claims against, among other defendants, Best Buy stores, and the plaintiffs contended that Best Buy was a "citizen" of California. The Ninth Circuit disagreed, maintaining that the corporation's "nerve center" was outside of California, despite the predominance of stores and employees in California. The panel took the view that the corporation's substantial retail activities in California merely reflected the state's larger population: "If

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13 *See 133 S.Ct.* at 1350.

14 *Id.* at 1348.

15 728 F.3d 975 (9th Cir. 2013).

16 730 F.3d 1234 (10th Cir. 2013).

17 557 F.3d 1026 (9th Cir. 2009).

a corporation may be deemed a citizen of California on this basis, nearly every national retailer—no matter how far flung its operations—will be deemed a citizen of California for diversity purposes. Such a result is untenable."[18]

Separate from CAFA's class action requirements, the statute provides for "mass actions," defined as non-class actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the [$75,000] jurisdictional amount requirements under subsection (a)."[19] The Supreme Court, once again entering the CAFA fray, recently rejected a case brought on behalf of the state of Mississippi, *Mississippi ex rel. Hood*, concluding that because the state was the only named plaintiff, the suit did not constitute a mass action under CAFA.[20] Although the suit was brought on behalf of a larger class of allegedly injured parties, the Court concluded that CAFA's "100 or more persons" phrase does not encompass unnamed persons who are real parties in interest to claims brought by named plaintiffs. Even if the named plaintiff was suing on behalf of a larger group of aggrieved parties of interest, the Court construed the language of CAFA strictly. Just as a class representative could not legally bind an as-yet-uncertified class in *Standard Fire*, the Court would not allow a state "proxy" to satisfy CAFA's jurisdictional requirements. To the extent a state seeks to bring a *parens patriae* suit on behalf of its citizens, the Court indicated, it cannot merely aggregate claims without conforming to CAFA's class action standards. While the Court may generally favor allowing the vindication of large claims in federal court, recent decisions suggest the Court's commitment to giving full force to both the words and intent of CAFA.

Along similar lines, the Ninth Circuit recently declined to allow CAFA jurisdiction over a wage-and-hour claim brought under California's Private Attorney General Act (PAGA). In *Baumann v. Chase Investment Services, Corp.*,[21], a Ninth Circuit panel held that the claim brought under PAGA was not similar enough to a class action, as contemplated by Federal Rule 23, to be considered a class action for CAFA purposes. In an earlier decision, the Ninth Circuit had held that PAGA damages cannot be aggregated to meet general federal "amount in controversy" requirement. The *Baumann* court essentially considered the separate question of whether a PAGA claim may be deemed a "class action" subject to CAFA. "Unlike Rule 23(c)(2)," the panel noted, "PAGA has no notice requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA action. In a PAGA action, the court does not inquire into the named plaintiff's and class counsel's ability to fairly and adequately represent unnamed employees."[22] This is so despite the fact that a resolution of a PAGA claim serves as a bar to subsequent PAGA claims on the same issue as to the same defendant.

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18 *Id.* at 1029-30.

19 28 U.S.C. § 1332(d)(11)(B)(i).

20 *See* 134 S. Ct. 736 (2014).

21 747 F.3d 1117 (9th Cir. 2014).

22 *Id.* at 1122.

The Supreme Court's recent rulings in *Mississippi ex rel Hood* and the Ninth Circuit's ruling in *Baumann* reflect the courts' inclination to scrutinize the nature of quasi-class action mechanisms—such as private attorney general suits—in determining CAFA eligibility.

III. SETTLEMENTS AND ATTORNEYS' FEES

While the Supreme Court has signaled its intent to apply CAFA's jurisdictional elements rigorously, lower courts have been invoking the remedial goals of CAFA's Bill of Rights and applying exacting standards to review proposed settlement agreements.

As background, in its avowed effort to deter class action abuses, Congress enacted a Consumer Class Action Bill of Rights—CAFA's substantive core. The Bill of Rights explicitly addressed the concern that coupon settlements have the potential to provide only meager relief to the affected class and to leave defendants relatively unaffected monetarily, while affording class action counsel substantial fees. The Congressional findings noted: "Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—(A) counsel are awarded large fees while leaving class members with coupons or other awards of little or no value[.]"[23] CAFA instituted a variety of substantive mandates concerning how attorneys' fees should be determined in class actions resulting in "coupon settlements," as well as a variety of procedural safeguards designed to bring enhanced oversight of proposed settlements. Specifically, the act requires that in any proposed settlement in which class members would be awarded coupons, the court may approve the settlement only after a hearing to determine that the settlement is "fair, reasonable, and adequate for class members."[24] The Court must also issue an order in writing setting forth its findings. That section also contemplated the award of *cy pres* distributions, as agreed to by the parties, but warned that the distribution and redemption of coupon proceeds not be used to calculate attorneys' fees.[25]

Although the "fair, reasonable, and adequate" language was not new— it mirrors identical language in FRCP Rule 23(e)(2)—a number of courts have construed CAFA as imposing an elevated level of scrutiny for coupon settlements, given Congressional findings aimed at eliminating "abuses" in these settlements. [26]

One recent Ninth Circuit decision, *In re HP Inkjet Printer Litigation*,[27] exemplifies a court's strict enforcement of CAFA's coupon settlement protections. The case involved claims against Hewlett-Packard (HP) asserting that various disclosures made to consumers about its printers were false and misleading. The proposed settlement provided "e-credits"—a euphemism for coupons, according to the Ninth Circuit —for

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23 *See Class Action Fairness Act 01 2005, Pub. L. No.* 109-2, 119 Stat. 4 (Feb. 18, 2005).

24 28 U.S.C. § 1712(e).

25 *See* 28 U.S.C. § 1712.

26 *See, e.g., True v. American Honda Motor Co.*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010 (rejecting the proposed settlement, which would have provided for cash rebates, and noting that coupon settlements "are generally disfavored"); *Figueroa v. Sharper Image Co.*, 517 F. Supp. 2d 1292 (S.D. Fla. 2007) (rejecting proposed settlement and applying a heightened level of scrutiny in evaluating a settlement's fairness).

27 716 F.3d 1173 (9th Cir. 2013).

class members to apply toward HP printers and other products. While the district court had registered concerns about the settlement – and reduced the attorneys' fee award from that proposed by the parties—it ultimately approved the settlement. On appeal, the Ninth Circuit accepted the objectors' argument that the proposed settlement violated CAFA's terms and reversed the district court's decision. The panel majority expressly relied on CAFA's language concerning the award of attorneys' fees: "When a settlement provides for coupon relief, either in whole or in part, any attorney's fee 'that is attributable to the award of coupons' must be calculated using the redemption value of the coupons."[28]

The panel was troubled by the dichotomy in coupon settlements, "where class counsel is paid in cash, and the class is paid in some other way[.]"[29] Although the panel majority acknowledged the difficulty in quantifying the true redemption value of coupon settlements (where coupons bear restriction and, often, will never be redeemed by class members), the panel insisted that the statutory language be strictly enforced. In a mixed case, such as it was, a court may consider the redemption value of the coupons in determining fees "attributable to" the coupons, and also apply the lodestar method in determining fees associated with non-coupon recovery (such as injunctive relief). The panel concluded that the district court abused its discretion when it made a rough estimate of the ultimate value of settlement, and "awarded fees in exchange for obtaining coupon relief without considering the redemption value of the coupons."[30]

Some courts, including the Ninth Circuit, have also expressed their skepticism at the use of *cy pres* awards.[31] The drafters of CAFA acknowledged that *cy pres* distributions might be appropriate to supplement coupon settlements, and the statute indeed authorizes courts to "require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to [one] or more charitable or governmental organizations, as agreed to by the parties."[32]

Although the theory is that *cy pres* may be used to distribute unclaimed or unredeemed funds, or to provide a remedy (or punitive measure, some have said) where providing meaningful monetary relief to class members would be impracticable, concerns exist about the fairness and adequacy to class members—particularly if the *cy pres* award influences the calculation of attorneys' fees. Under CAFA, while *cy pres* awards cannot *technically* be used to calculate attorneys' fees, they can indirectly influence judicial determinations as to a settlement's benefit to the class.

In *Dennis v. Kellogg Co.,* the Ninth Circuit struck down a settlement on the basis that the proposed *cy pres* award failed to benefit class members and that the proposed

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28 *Id.* at 1175-76.

29 *Id.* at 1179.

30 *Id.* at 1175-76.

31 *See, e.g., In re Baby Prods. Antitrust Litig.,* 708 F.3d 163, 169 (3d Cir. 2013) ("*Cy pres* distributions, while in our view permissible, are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action—to compensate class members."); *In re Groupon, Inc.*, 2012 U.S. Dist. LEXIS 185750 (S.D. Cal. Sept. 28, 2012) (noting the lack of "nexus" between the claims alleged in the case and the cy pres beneficiary).

32 28 U.S.C. § 1712(e).

attorneys' fees for class counsel were excessive.[33] In reversing the district court, the Ninth Circuit noted that it was obliged to pay "special attention" to the risk that the agreement "favor[ed]" class counsel's "pursuit of [their own] self interests rather than the class's interests." In the court's words, "[c]*y pres* distributions present a particular danger in this regard" because "the selection process may answer to the whims and self interests of the parties, their counsel, or the court."[34]

Cy pres remedies are hardly on their way to extinction, however. In *Lane v. Facebook, Inc.*, a divided panel of the Ninth Circuit ultimately approved a proposed settlement in litigation brought against Facebook, concerning a program that plaintiffs claimed violated various state and federal privacy statutes.[35] The settlement provided that Facebook would end the program and provided for a $9.5 million recovery, consisting of attorneys' fees and a *cy pres* remedy – $6.5 million distribution to a new charity organization. Objectors had claimed that the settlement amount was too low, and further, that it was an abuse of discretion for the district court to approve the *cy pres* remedy, because the funds would be disbursed to a new foundation with Facebook affiliations. A divided Ninth Circuit panel rejected these arguments, maintaining that the beneficiary of the funds did not have to be the charity that most class members might choose. The foundation's mission was consistent with the underlying goals of plaintiffs' suit, and the panel did not view any purported conflict of interest as undermining the settlement.

Objectors then petitioned for an *en banc* hearing, which was denied.[36] Six judges, however, dissented to the denial, and objectors sought Supreme Court review. Although the Court denied certiorari, Chief Justice Roberts wrote an intriguing opinion concerning the decision to pass on that particular case:

> Granting review of this case might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of such [*cy pres*] remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on. This Court has not previously addressed any of these issues. *Cy pres remedies, however, are a growing feature of class action settlements. In a suitable case, this Court may need to clarify the limits on the use of such remedies*.[37]

These comments, quite clearly, emphasize the Roberts Court's attention to class actions, and suggest that the Court's consideration of CAFA settlement issues is all but inevitable.

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33 697 F.3d 858 (9th Cir. 2012).

34 *Id*. at 867 (quoting *Nachshin v. AOL, LLC,* 663 F.3d 1034, 1039 (9th Cir. 2011).

35 696 F.3d 811 (9th Cir. 2012).

36 709 F.3d 791(9th Cir. 2013).

37 *Marek v. Lane*, 134 S.Ct. 8 (2013) (citations omitted; emphasis added).

IV. CONCLUSION

Overall, it is clear that CAFA has expanded the authority of federal courts to hear class actions, and recent rulings by the Supreme Court have reiterated that CAFA was intended, in part, to prevent parties from engaging in forum-shopping gamesmanship. Moreover, the Chief Justice's comments in the *Facebook* case quite clearly demonstrate the Court's increased attention to class actions, suggesting that a judicial foray into CAFA settlement issues is all but inevitable.

FEDERAL AND STATE CLASS ANTITRUST ACTIONS SHOULD NOT BE TRIED IN A SINGLE TRIAL

By Steve Williams[1]

I. INTRODUCTION

The antitrust remedies provided to direct purchasers by federal law and to indirect purchasers by state law are separate and independent, and neither can infringe on the other.[2] The Class Action Fairness Act ("CAFA")[3] has caused federal antitrust class actions and state antitrust class actions to be litigated together through centralization or coordination in federal courts, typically as part of multidistrict litigation. The tensions between the substantive and procedural aspects of federal and state antitrust law have been recognized since CAFA was enacted, with the issue of whether and how to reconcile the different antitrust regimes being studied without any action by the federal or state legislatures.[4]

In considering this issue, the Antitrust Modernization Commission considered questions including whether Congress should act to address the differences between federal and state antitrust law, whether Congress should preempt *Illinois Brick*[5] repealer statutes or overrule *Illinois Brick,* whether *Hanover Shoe*[6] should be overruled or modified to permit allocation of damages between direct and indirect purchaser cases, and whether changes to procedure should be made to facilitate the coordination of state and federal antitrust litigation.[7] In the absence of action by legislatures and rulemakers to address the tensions CAFA created, courts have fashioned procedures which seek to balance the distinct federal and state claims private plaintiffs assert with the need to conserve judicial resources and to efficiently manage litigation as mandated by Fed. R. Civ. Proc. 1.

Since CAFA, concurrent state and federal antitrust litigation has been prevalent. For example, the electronics industry civil antitrust actions litigated in the Northern District of California over the last twelve years – *DRAM, SRAM, Flash, TFT-LCD, GPUs, CRTs, ODDs,* and *Lithium Ion Batteries* – have involved concurrent state and federal antitrust actions. In two of those actions – *SRAM* and *TFT-LCD* – the specter of a single trial of the state and federal claims was presented. The parties avoided joint trials in these cases only by settlements shortly before trial – in *SRAM* a settlement that resulted in a lack of a common defendant in the remaining state and federal actions, and in *TFT-LCD* a settlement that resolved the state law cases. There can be no doubt that this situation will present itself again, creating tension between the desire of the courts

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2 *California v. ARC Am. Corp. ("ARC America")*, 490 U.S. 93, 105 (1989).

3 28 U.S.C. §§ 1332(d), 1453, and 1711-1715.

4 Antitrust Modernization Commission, Request for Public Comment, 70 Fed. Reg. 28,902 (May 19, 2005).

5 *Ill. Brick Co. v. Illinois,* 431 U.S. 720 (1977) ("*Illinois Brick*").

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

7 Antitrust Modernization Commission, Request for Public Comment, supra N.Y.

to more efficiently manage litigation and to avoid repetitive trials of the same issues, the desire of defendants who seek finality in the resolution of claims asserted against them, and the need to prevent prejudice to the ability of federal and state plaintiffs to prove their claims.

Defendants tend to favor a single trial, arguing that a joint trial creates greater efficiencies for the court and the parties and will avoid what defendants call "duplicative damages." In seeking to avoid "duplicative damages," Defendants maintain that only one "overcharge" results from an antitrust violation, and that their liability should be limited to this single "overcharge." This creates a tension with the separate remedies provided under federal law and state law.[8] Defendants also assert that a single trial involving all claimants will prevent them from being subject to "one-way" collateral estoppel because defendants may be bound by adverse determinations made against them but subsequent plaintiffs are typically not bound by determinations in favor of defendants in a preceding trial.[9] In plaintiffs' view, the joint trial causes juror confusion and prejudice on issues of liability and damages. Defendants may also view a joint trial as a wedge which may force an allocation of damages between the direct and indirect purchasers, as arguably the presence of parties representing multiple levels in the chain of distribution permits an analysis and determination of which plaintiffs suffered what damages based upon the expert analysis of the indirect purchasers – an analysis which is required under state laws permitting indirect purchaser claims, but which is forbidden for federal antitrust claims under *Hanover Shoe*.

A primary concern which defendants have raised about joint trials is the possibility that instructing the jury on state law consumer protection claims, which have different standards for liability, will confuse the jury's analysis of the antitrust claims. An additional concern arises when defendants have settled with one group of plaintiffs but not the other. This complicates the cooperation which is typically part of settlements, as a defendant may be obligated to provide cooperation to one set of plaintiffs but that cooperation could benefit the plaintiffs with whom that defendant has not yet settled. Notwithstanding these concerns, joint trials appear to be defendants' general preference.

Direct purchasers object to joint trials with indirect purchasers because a joint trial would necessarily violate the bar on pass-on evidence of *Hanover Shoe*. Direct purchasers assert that the presence of the indirect purchasers during trial will necessarily cause the jury to conclude that illegal overcharges were passed on by the direct purchasers to the indirect purchasers. Direct purchasers contend that even with limiting instructions, the presentation of their case will be prejudiced and they will be denied a fair trial.[10] Indirect purchasers have similar concerns about jury confusion as they would prefer to have the jury focused on the typical consumer or business at the end of the chain of distribution, who cannot pass on overcharges to a subsequent purchaser. Indirect purchasers assert that presentation of evidence by the direct purchasers about their impact and injury would

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8 *See ARC America,* 490 U.S. at 105.

9 *See, e.g.*, Gary A. Winters, *Trial Issues in Consolidated Direct and Indirect Purchaser Cases: Lessons from the SRAM Litigation*, ABA Antitrust Trial Practice Newsletter, Spring 2011.

10 *See, e.g., United States v. Candoli,* 870 F.2d 496, 510 (9th Cir. 1989).

confuse the jury in evaluating the indirect purchasers' claims of impact and injury, and thus deny them a fair trial.

In addition, the business practices of vertically integrated companies could lead to cumulative or conflicting presentations of expert analysis of pass through of costs. This has been a concern in the electronics industry antitrust cases in the Northern District of California. For example, one Samsung entity might manufacture a component product such as a cathode ray terminal, which is then sold to another Samsung entity for sale directly to plaintiffs alleging Sherman Act claims, and indirectly to state law plaintiffs. These plaintiffs may have different analyses of the cost issues between the Samsung entities before the first sale outside of the conspiracy, and if the direct purchasers are permitted to go first it would be difficult for the indirect purchasers to present their evidence of pricing without confusing the jury.

Despite all of this, busy federal courts have a strong desire to conduct joint trials of state and federal antitrust actions to further the goal of judicial efficiency. However, it is difficult to envision a joint trial of direct and indirect purchaser claims that would not impair the plaintiffs' claims. Conducting a joint trial would frustrate the paramount intention of Congress and the state legislatures that private enforcement of the antitrust laws be used to deter antitrust cartels and collusion. These issues played out in two post-CAFA cases in the Northern District of California, *SRAM* and *TFT-LCD.*

II. *SRAM*

A. Background

In *In re Static Random Access Memory ("SRAM") Antitrust Litigation*,[11] direct purchaser class plaintiffs and indirect purchaser class plaintiffs asserted claims against a number of defendants involving allegations of price-fixing in the market for static random access memory. As trial approached, the direct purchasers had settled with all defendants except Samsung Electronics Corp. and Cypress Semiconductor Corp. The indirect purchasers had settled with all defendants except Cypress.

The *SRAM* court sought to try as many common issues as possible, but myriad complications were present. For example, Samsung – which was no longer a defendant in the indirect purchaser case – had previously pled guilty to price fixing in the DRAM market, and evidence of this guilty plea was likely to come in as part of the direct purchaser case. Cypress contended that this evidence would unduly prejudice it, and asked that a separate jury be seated to consider the claims against Cypress to alleviate any potential taint from introduction of the guilty plea. In addition, Samsung had not only settled with the indirect purchasers on terms that included providing cooperation, but was also the amnesty applicant under the Department of Justice's leniency program and thus under the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA")[12] had duties to cooperate with the direct purchasers if it hoped to receive the benefit of limited damages under ACPERA.

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11 MDL no. 1819, N.D. Cal. Case no. 07-cv-1819-CW.

12 Pub. L. No. 108-237, § 213(b), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 note).

Further complications included the fact that the indirect purchaser claims included consumer protection and deceptive practices claims in addition to the antitrust claims. These state law claims involved different standards for liability than did the antitrust claims, and the defense raised concerns over whether the jury would be able to apply properly the different legal standards while applying the proper standard to the federal antitrust claim. Defendants argued that the jury instructions might undermine the "basic antitrust instructions" and thus prejudice defendants.

Direct purchasers asserted that the conflict between the evidence that indirect purchasers would introduce to show pass-through of overcharges, and thus antitrust impact and damages, and the strict bar on the pass through defense established by *Hanover Shoe*, made it impossible to fully try indirect and direct purchaser claims together. There are no jury instructions that could meaningfully prevent a jury from concluding that the direct purchaser plaintiff was not injured, and no way to prevent the result that *Hanover Shoe* bars – the defeat of a direct purchaser claim due to evidence that the overcharge was passed on to subsequent purchasers.

B. Plaintiffs' Trial Proposals

The *SRAM* plaintiffs made several proposals to deal with the irreconcilable conflict a potential joint trial presented.[13] The first proposal was that the two cases proceed jointly in trying the issue of whether the alleged conspiracy existed and violated federal and state law. If a conspiracy was found, the direct and indirect cases would then proceed separately on the issues of impact and damages. A second proposal was that the sole issue of whether there was a conspiracy in violation of the Sherman Act would be tried jointly. If the conspiracy was found, the direct purchasers would continue with their impact and damages case before the same jury, while a second jury would consider the state law issues, either concurrently with the direct purchaser case or after the direct purchaser case. Plaintiffs cited in support of their proposal Fed. R. Civ. Proc. 42(b), Manual for Complex Litigation, Fourth, Federal Judicial Center, § 11.632, and numerous antitrust cases where bifurcation had been ordered.[14]

As a final alternative, plaintiffs proposed that the direct purchasers' case be tried first, followed by the indirect purchaser case with the indirect purchaser case benefitting from the potential collateral estoppel effect of findings made in the direct purchaser trial.

C. Samsung's Trial Proposals

Samsung sought a joint trial of all of the direct and indirect purchaser claims. If the court did not permit a joint trial, Samsung proposed that the direct and indirect cases be severed for trial. Samsung argued that the court should reject the direct purchasers' proposals for a joint trial on the issue of conspiracy because they would require duplication of evidence, create unnecessary disputes about what evidence was admissible

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13 N.D. Cal. case no. 07-md-1819-CW, Dkt. no. 1170 at 17.

14 *M2 Software, Inc. v. Madacy Entertainment*, 421 F.3d 1073, 1088 (9th Cir. 2005); *Hydrite Chemical Co. v. Calumet Lubricants Co.*, 47 F.3d 887 (7th Cir. 1995); *Impervious Paint Industries v. Ashland Oil, Inc.*, 1980 WL 1789, at *9 (W.D. Ky., Jan. 4, 1980); *Knutson v. Daily Review, Inc.*, 479 F.Supp. 1263, 1266 (C.D. Cal. 1979).

in which phase, would unfairly prejudice Samsung, and would "potentially infringe upon Samsung's constitutional right to a fair trial."[15]

D. Cypress' Trial Proposals

Cypress argued that no decision could be made about trial structure until the court determined whether evidence of Samsung's guilty plea to fixing prices for DRAM would be admissible. Cypress then offered qualified support for a bifurcated trial with a first phase limited to conspiracy issues. These qualifications included (1) that plaintiffs be precluded from introducing expert testimony of increased SRAM prices during the conspiracy phase, *i.e.*, price inflation could not be used to prove the conspiracy; (2) that extensive negotiations over what economic evidence would be permitted during the conspiracy phase were necessary; and (3) a determination of whether the indirect purchaser's consumer protection claims would be tried under the same standard as their antitrust claims would need to be made to identify any potential risk of jury confusion from conflicting instructions.[16] If bifurcation was not permitted, Cypress proposed that the direct purchaser trial proceed and the indirect purchaser case be stayed.

E. The Court's Order

The court ruled that the trial on the direct and indirect conspiracy claims would proceed jointly, and that if the conspiracy was established the direct purchasers would proceed with the remainder of their case and then the indirect purchasers would proceed with their case. The Court said:

> [Try the] conspiracy for IPs and DPs first. ... Reach a verdict on that. ... Send the IPs home. ... And then go on to impact and damages for the DPs only. And then after that, bring the IPs back and try impact and damages ... with the IPs.[17]

Shortly before trial, the direct purchasers settled with Cypress – the sole remaining common defendant with the indirect purchasers – and the case was set for the direct purchasers only to try against Samsung without the indirect purchasers.[18] The direct purchasers and Samsung settled the day before trial was to begin.

II. TFT-LCD

Like *SRAM, In re TFT-LCD (Flat Panel) Antitrust Litigation*[19] involved the trial of claims brought by both direct and indirect purchasers. The case also involved claims by numerous "direct action plaintiffs", or "DAPs" – *i.e.,* opt-out plaintiffs asserting their own claims under federal or state law, sometimes as both direct and indirect purchasers – and claims brought by various state attorneys general. Defendants filed a motion to hold

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15 N.D. Cal. case no. 07-md-1819-CW, Dkt. no. 1170 at 24:2.

16 *Id.* at 31-33.

17 Hr'g Tr. 27-28, *In re Static Random Access Memory (SRAM) Antitrust Litig.*, Case No. 4:07-md-01819-CW (N.D. Cal.) (Dec. 14, 2010).

18 N.D. Cal. Case no. 07-1819, Dkt. No. 1282.

19 MDL No. 1827, N.D. Cal. Case No. M-07-1827 SI.

a single trial, titled "Motion of Defendants Regarding Trial Structure and for Relief to Avoid Duplicative Recovery."[20]

A. Defendants' Trial Proposals

The defendants offered a smorgasbord of five trial plans, and encouraged the court to mix-and-match various aspects of the proposals as it saw fit. Almost all of defendants' proposals were premised on their underlying goal of avoiding the dual recoveries permitted by federal and state law. These proposals were:

1. Bifurcate the damage issues in class trials and consolidate for trial with all DAP and AG actions.

This proposal ignored the fact that federal and state law permit separate recoveries,[21] and was based on the conceit that there was one *res* – the overcharge resulting from the conspiracy – and that all plaintiffs were claimants to that same *res*. By forcing all of them to try their claims in one venue, before one jury, at the same time, Defendants hoped to avoid what they called "duplicative damages." Some of the defendants who filed this motion had pled guilty to violating the Sherman Act. Many defendants had pled guilty, and while some disputed the scope of the conspiracy or, for those who had not pled guilty, whether they had been involved, it was not subject to dispute that there had been a conspiracy. The Department of Justice has stated that the conspiracy had a significant impact on American businesses and consumers.[22] Defendants offered no acceptable rationale for their attempt to end-run governing law providing for separate remedies for federal and state plaintiffs. Defendants' proposal, if accepted, would have hopelessly confused the jury.

2. Join all Parties for Interpleader.

Defendants' second proposal was to bifurcate liability and damages,[23] and then order that all parties in all cases – direct and indirect purchaser classes, DAPs, state attorneys general, and all other known "possible other parties"[24] – be joined pursuant to Fed. R. Civ. Proc. 22 or 28 U.S.C. § 1335. While defendants argued that there would be no

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20 N.D. Cal. Case No. 07-1827, Dkt. No. 5258.

21 *ARC America,* 490 U.S. at 105.

22 *See, e.g.*, Department of Justice press release "LG, Sharp, Chunghwa Agree to Plead Guilty, Pay Total of $ 585 Million in Fines for Participating in LCD Price-fixing Conspiracies" (noting sales of price-fixed TFT-LCD panels to Dell Inc., Motorola Inc., and Apple Computer, Inc. and stating "'[t]hese price-fixing conspiracies affected millions of American consumers who use computers, cell phones and numerous other household electronics every day,' said Thomas O. Barnett, Assistant Attorney General in charge of the Department's Antitrust Division.") Available at http://www.justice.gov/opa/pr/2008/November/08-at-1002.html.

23 Defendants' bifurcation proposal was heavily qualified: "Defendants suggest bifurcation only if the Court orders consolidation of the damages phase of all actions to avoid duplicative recovery. Defendants do not believe that bifurcation would be appropriate otherwise and would oppose bifurcating liability and damage phases in any particular case." N.D. Cal Case No. D7-1827, Dct. No. 5258. 18 n. 7.

24 *Id.* at 18:20.

need for interpleader if they prevailed on liability, they provided no suggestion as to what would happen if they lost on liability.

3. "Declare the parties not before the Court in the class cases indispensable parties under Rule 19 and require the class plaintiffs to propose a resolution."[25]

Defendants argued that parties not before the court had identical or overlapping claims for damages, and that the court was required to delay the trial to ascertain whether the absence of those parties created a risk that the defendants would incur "double, multiple, or otherwise inconsistent obligation[s]."[26] If the court agreed with defendants about this risk, the court would be required to determine whether the risk could be alleviated, and if not defendants proposed that the court consider dismissing the action.

4. Coordinate all State Actions with the Federal Action

Defendants' next proposal was that the court coordinate the state court attorney general actions with the federal action, again to avoid duplicative recovery. Defendants cited admiralty cases to support their argument that remedies in antitrust cases should be viewed as a *res,* and that the proper approach was to determine a "just allocation of the *res*."[27]

5. "Either issue an order that the direct action plaintiffs and state Attorneys General be estopped in their damage claims from taking any position inconsistent with the award made in the class trial, or issue an order that 'vouches in' anyone who has a related claim, alerting all interested parties that their claims may be waived if they do not seek to intervene in the class trial."[28]

This proposal analogized the potential recoveries to victims of an antitrust conspiracy to a bankruptcy estate, and asserted that principles and procedures from bankruptcy law should be applied to the class plaintiffs, DAPs, state attorneys general, and anyone else who could potentially have a claim. Defendants argued "[l]ike bankruptcy, the underlying premise is that if there has been a wrong that resulted in alleged overcharges, that universe is not unlimited. Instead it would create a pool – the total found overcharge (if any) – against which claims could be drawn."

B. The Indirect Purchasers' Trial Proposal

The indirect purchasers filed a motion to hold separate trials, arguing that the different defendants and the risk of prejudicial jury confusion counseled in favor of

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25 *Id.* at 19:4-5.

26 *Id.* at 19:12-13 (quoting Fed. R. Civ. P. 19(a)(1)(B)(ii)).

27 *Id.* at 20:24.

28 *Id.* at 21:6-10.

separate trials. Indirect purchasers also argued that the cooperation obligations of LG Display, which was a defendant in the indirect purchaser case but which had settled with the direct purchasers, would create complications in a joint trial and that there would be greater collateral estoppel benefits and a higher likelihood of future settlements if the indirect purchasers were to go to trial first. The indirect purchasers also argued that the damages to their class were much larger than those to the direct purchaser class, and that they should have trial priority based on that fact.

C. The Direct Purchasers' Trial Proposal

The direct purchasers filed a motion to bifurcate the trial into two phases. The direct purchasers proposed the following phases:

> **PHASE ONE**: Direct and Indirect Purchasers present evidence of Defendants' price-fixing conspiracy and resulting increases in TFT-LCD panel prices. Direct Purchasers present evidence of their damages. The jury determines whether Defendants conspired to fix prices, whether that conspiracy resulted in overcharges on TFT-LCD panels to Direct Purchasers, and Direct Purchasers' damages.
>
> **PHASE TWO**: If the jury returns a Plaintiffs' verdict on the issue of conspiracy, Indirect Purchasers present evidence concerning their state law claims, including that overcharges were passed through to them. The jury determines Defendants' liability to Indirect Purchasers and Indirect Purchasers' damages.[29]

The direct purchasers argued in sum that their case presented a subset of the indirect purchasers' case – that the issues of the existence of a conspiracy and whether the conspiracy caused the prices of TFT-LCD panels to be increased were common and only needed to be determined once. Direct purchasers argued that their proposal "helps head off a potential misapplication of the law by the jury and eases the burden on the Court, the parties, and the panel." [30] Direct purchasers argued strenuously that under no circumstances could the jury be permitted to consider whether they had passed on overcharges to subsequent purchasers, citing *Hanover Shoe, Kendall v. Visa U.S.A., Inc.,*[31] *Royal Printing Co. v. Kimberly-Clark Corp.*[32] and *Meijer, Inc. v. Abbott Labs.*[33] Under the direct purchasers' proposal, all issues would be tried to the same jury. The direct purchasers did not provide any explanation of how the jury would react upon hearing that, in the event of a plaintiff verdict, it would return to award additional damages to a second set of plaintiffs.

Indirect purchasers opposed the direct purchaser motion,[34] calling it an "unprecedented" proposal that would create a "severe risk of prejudice to the IPPs based

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29 N.D. Cal. Case No. 07-1827, Dkt. No. 5455.

30 *Id.* at 2:23-24.

31 518 F.3d 1042 (9th Cir. 2008).

32 621 F.2d 323 (9th Cir. 1980).

33 251 F.R.D. 431, 433 (N.D. Cal. 2008).

34 N.D. Cal. Case No. M-07-1827, Dkt. No. 5488.

on the jury potentially reducing the IPP damages by any amount it may award first to the DPPs."[35] Citing section 21.5 of the Manual on Complex Litigation, Fourth, indirect purchasers argued that the direct purchasers' proposal would deny them their right to a fair and balanced presentation of their claims and defenses. Indirect purchasers argued that if bifurcation were ordered, their claims should proceed to trial first because their claims were larger and involved more defendants.

In *TFT-LCD*, the direct purchasers asserted claims based on *Royal Printing* for purchases not from the conspirators, but from wholly-owned subsidiaries of the conspirators – that is, indirect purchases within an exception to *Illinois Brick*. This exception is based upon the policy of encouraging private enforcement of the antitrust laws as a way to deter illicit conduct.[36] If *Illinois Brick* were construed to mean that only the wholly-owned subsidiary or affiliate of a conspirator could bring a claim, price-fixers could insulate themselves from liability simply by selling price-fixed products through an entity which they controlled.

The indirect purchasers argued that the majority of the direct purchasers' proof of impact and damages involved class members' claims based upon *Royal Printing* who had purchased their TFT-LCD products indirectly from defendants as a result of purchases from affiliates or subsidiaries of defendants. The direct purchasers intended to present expert economic evidence including an analysis of the "downstream effect of panel prices as part of finished product prices as a basis for an estimate of the finished product overcharge."[37] Indirect purchasers argued that the direct purchasers' expert witness on these issues offered a different analysis and measure of pass-through and overcharge than did the indirect purchasers' experts, and that they would be prejudiced by being forced to rely on the direct purchasers' expert testimony. As an alternative, the indirect purchasers proposed holding a "single, joint class action trial, and handle any issues with appropriate instructions to the jury."[38]

D. The Court's Order

The Court ordered that the two cases would proceed to trial jointly as follows:

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35 *Id.* at 1:3-5.

36 *See, e.g., In re Optical Disk Drive Antitrust Litigation,* case no. 3:10-md-2143 RS, 2012 U.S. Dist. LEXIS 55300, *32 (N.D. Cal. April 19, 2012) ("[m]oreover, as *Royal Printing* observed, 'blind application' of the *Illinois Brick* rule should be avoided where it 'would eliminate the threat of private enforcement.'").

37 N.D. Cal. Case No. M-07-1827, Dkt. No. 5488 at 2:2-3.

38 *Id.* at 4:11-13.

> In the first phase, Direct- and Indirect-Purchaser Plaintiffs ("DPPs" and "IPPs") will present evidence of Defendants' price-fixing conspiracy. In addition, DPPs will present their evidence of increases in TFT-LCD panel prices and of their damages. The jury will be asked to make a finding on the existence of the alleged price-fixing conspiracy, and if their finding is positive, on liability to the DPPs and the amount of DPP damages. In the second phase, IPPs will present their evidence concerning their state law claims, including increases in TFT-LCD panel prices and pass-ons, and the amount of damages. The jury will then be asked to make a finding on liability to the IPPs and the amount of IPP damages.
>
> The jury will be informed, at the outset, that the trial will proceed in these two phases, and will be given a general statement as to the purpose of each of the phases. [39]

The indirect purchasers then settled their remaining claims, and only the direct purchaser claims went to trial.

III. LESSONS FROM *SRAM* AND *TFT-LCD*

The experience of *SRAM* and *TFT-LCD* illustrate the difficulty in protecting the rights of federal plaintiffs, state plaintiffs, and defendants to a fair trial when all of the claims proceed in the same court. Private enforcement of the antitrust laws has been a primary goal of Congress and the state legislatures from the time that the antitrust laws were enacted, and that goal has been repeatedly recognized by the United States Supreme Court and the California Supreme Court.[40]

One of CAFA's unfortunate consequences has been to move state law antitrust actions to federal court, further burdening already busy federal courts and impeding the states' ability to develop their own law. There can be no doubt that the situation presented in *SRAM* and *TFT-LCD* will be repeated – indeed, on July 3, 2014, an order providing for separate trials of direct, indirect, and opt-out claims was entered in *In re Polyurethane Foam Antitrust Litig.*[41] In its order, the *Polyurethane Foam* court provided for three trials – first for the direct purchaser class, then for direct action plaintiffs, and then for the indirect purchaser class.

The desire of federal courts presiding over these actions to create judicial efficiencies by trying federal and state antitrust cases together creates a substantial risk of prejudicing either the federal or state plaintiffs, and consequently could lead to diminished private antitrust enforcement. This would violate the goals of Congress and the state legislatures,

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39 N.D. Cal. Case No. M-07-1827, Dkt. No. 5518.

40 *See, e.g., Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.,* 381 U.S. 311, 318-19 (1964) ("*Minn. Mining*") ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws"); *Clayworth v. Pfizer, Inc.,* 49 Cal.4th 758, 764 (2010) (noting "Legislature's overarching goals [in enacting and amending the Cartwright Act] of maximizing effective deterrence of antitrust violations, enforcing the state's antitrust laws against those violations that do occur, and ensuring disgorgement of any ill-gotten proceeds").

41 MDL 2196, N.D. Ohio case no. 1:10-md-2196, Dkt. no. 1272 at 2.

and would impair cartel deterrence. To further the goal of deterrence – especially in the face of cartels such as the automotive parts conspiracy, which the United States Department of Justice has termed the largest it has ever encountered in terms of impact on American consumers and businesses[42] – caution must be exercised to conduct trials in a manner that protects the rights granted to federal claimants under the Sherman and Clayton Acts and the rights granted to state law plaintiffs bringing claims under state antitrust laws.

42 "Auto parts price –fixing probe has expanded –DOJ" *Reuters,* February 15, 2013 ("'It's still very much ongoing, but it already appears to be the biggest criminal antitrust investigation that we've ever encountered,' [Deputy Assistant Attorney General Scott] Hammond said. 'I say (it is) the biggest with respect to the impact on U.S. businesses and consumers, and the number of companies and executives that are subject to the investigation.'").

JOINT TRIAL OF DIRECT AND INDIRECT PURCHASER CLAIMS

By Robert E. Freitas, Jason S. Angell, and Jessica N. Leal[★]

As a result of the Class Action Fairness Act ("CAFA"), and the regular use of multidistrict litigation procedures, class actions presenting direct purchaser claims under federal law are now commonly litigated in proceedings in a single district court with indirect purchaser claims under state law. CAFA is not the only occasion for direct and indirect purchaser claims to be grouped together in the same court. Corporate plaintiffs who choose to opt out of class actions sometimes plead both federal claims based on direct purchases of price-fixed goods and state law claims based on indirect purchases of the same goods or of finished products containing price-fixed components. Opt-out plaintiffs asserting only direct purchaser or only indirect purchaser claims are also commonly parties in the same MDL court. In addition to actual direct purchase claims, some opt-out plaintiffs rely on indirect purchases they seek to bring within the "owned or controlled" or "co-conspirator" exceptions to *Illinois Brick*.[1] This, too, can result in potential trial contexts including both "direct" purchaser federal law claims and state law indirect purchaser claims.

Under *Illinois Brick*, indirect purchasers lack standing to seek price-fixing damages under federal law, and *Hanover Shoe*[2] prevents Sherman Act defendants from defending against direct purchaser claims with evidence that overcharges paid by direct purchaser plaintiffs were passed on to their customers. In the wake of *Illinois Brick*, various states have amended their antitrust laws to allow indirect purchaser claims. Under these so-called *Illinois Brick* "repealer" statutes, the plaintiffs' claims depend on proof of "upstream" pass on of overcharges,[3] sometimes by the direct purchaser plaintiffs suing the same defendants in cases pending in the same court. State indirect purchaser laws also commonly allow pass on as a defense.

With common factual and evidentiary issues typically presented by direct purchaser and indirect purchaser claims arising out of the same price fixing conspiracy, a compelling demonstration of significant judicial economy and tremendous cost savings for private parties from joint trials can usually be made. With common liability evidence, the potential for significant overlap in damages evidence and damages theories, and many common legal and evidentiary issues likely to be presented despite the differences between federal and state law, it is no surprise that defendants typically request joint trials.

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1 *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

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

3 *See generally California v. ARC America Corp.*, 490 U.S. 93, 98 (1989) ("[A]ppellants also alleged violations of their respective state antitrust laws under which, as a matter of state law, indirect purchasers are arguably allowed to recover for all overcharges passed on to them by direct purchasers.").

It is also typical for plaintiffs to resist the call for joint trials. A focal point for the plaintiffs' position is the potential for prejudice resulting from the different treatment of pass on under federal and state law. Direct purchaser plaintiffs contend that a joint trial with indirect purchasers will likely prejudice them as a result of the jury hearing expert testimony and other evidence of pass on in connection with the indirect purchaser claims. Indirect purchasers fear that they will be prejudiced because jurors will hesitate to return verdicts that seem duplicative or otherwise unfair.

Given the federal law prohibition of evidence of downstream pass on, and the necessity under state law of proof that overcharges to direct purchasers were passed on to indirect purchasers, there is a clear and obvious potential for multiple or inconsistent recovery by direct and indirect purchasers. Defendants argue that state law or due process considerations forbid multiple recovery, and they argue that a joint trial structure involving all, or as many as possible, direct and indirect claimants is the only way to protect their rights. Defendants also argue that duplicative recovery can result in excessive punitive damages inconsistent with *Campbell*,[4] especially when the mandatory trebling of damages required by federal law and some state laws is considered.

The due process questions are beyond the scope of what we address in this article. If due process forbids all duplicative recovery, or if multiple antitrust recovery results in punitive damages that are excessive under *Campbell*, some of the important questions are easily answered. We discuss below the issues that are presented if it is assumed that recovery that can fairly be portrayed as duplicative is not absolutely forbidden as a matter of due process.

Our consideration of these issues begins with reflection on our experience representing a defendant in a trial against Best Buy Co. and affiliates in which both federal law "direct" purchaser claims and Minnesota law indirect purchaser claims were tried together.[5] While the single plaintiff context does not capture all of the issues likely to be presented when the claims of multiple individual plaintiffs or direct and indirect purchaser classes are tried together, the potential for conflict and pass-on related prejudice was present in a joint trial of multi-hundred million dollar direct and indirect purchaser claims.

Our experience convinces us that the properly-defined rights and expectations of all plaintiffs and all defendants are best served in the joint trial of direct and indirect purchaser claims.

I. BACKGROUND

Inevitably, trial lawyers and their clients forced into joint trials with other parties will find a reason to complain. The addition of other lawyers or parties will often mean the injection of different trial perspectives or strategies, some of which may not be compatible. In many situations, compromise or accommodation among the plaintiffs or defendants grouped together is necessary, and departure from a shared path can mean disaster for the ostensibly aligned parties. In a price-fixing case with strong evidence

4 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

5 *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal.).

of collusion, the overall defense effort would not be well served by an attempt by one defendant to deny the existence of a conspiracy. Significant variations on damages issues might also hurt some or all of the plaintiff or defendant parties, by making the group position seem incredible.

One result of the inevitable differences in trial position or trial strategy is that a joint effort may not truly reflect the views of any single member of a plaintiff or defense group. This fact alone may provide a strong motivation for a party to request a separate trial, even where there are no conspicuous legal or factual differences in the position of the party as compared to others on the same side of a case. But complaints of this nature are rarely likely to merit a separate trial. The interests of the judicial system are such that most courts will require that parties find a way to harmonize their positions, rather than conduct multiple lengthy and expensive trials simply to avoid strategic conflicts.

For the same reasons, general complaints by federal or state claimants that their interests are different from those of the other claimants are not likely to justify separate trials, and should not automatically do so. Direct and indirect purchaser plaintiffs try to overcome the typical unwillingness of courts to allow the burdens of separate trials by claiming that the different treatment of pass on under federal and state law requires extraordinary steps to avoid unique prejudice, and by insisting that the potential for duplicative recovery does not require a joint trial of direct and indirect purchaser claims.

The principal question to be answered is therefore whether there are unique factors associated with the trial of direct and indirect purchaser price fixing claims that stand out in a manner that prevents them from being tried together. Given the substantial judicial economy associated with joint trials, the plaintiffs who seek to make the case for separate trials face a heavy burden.

II. CAN DIRECT AND INDIRECT PURCHASER CLAIMS BE TRIED TOGETHER?

We think the issue of whether direct and indirect purchaser claims can be tried together requires consideration of the following questions.

Are there substantial benefits likely to result from a joint trial?

Does the governing law require or encourage a joint trial?

Can the benefits of a joint trial be achieved in a manner that does not result in unfair prejudice to the parties or burdens on the court that outweigh the benefits?

Are there alternatives to a joint trial that reduce the prejudice or burden associated with a fair trial in a manner that does not unreasonably surrender the benefits of a joint trial or ignore the requirements of the relevant law?

A. Benefits Of Joint Trials

1. Efficiency

Most price fixing cases have an overwhelming commonality of evidence between direct and indirect purchaser claims. Multiple trials of different claims arising out of the same conspiracy lead to "inefficiency in the court system and potential prejudice to the parties."[6] Separate trials "multipl[y] the determinations of liability and damages involving the same set of facts against the same defendants."[7] "The multiplication of trials . . . lengthens the resolution of antitrust cases, increases costs on litigants and courts, raises the specter of inconsistent rulings . . . and significantly increases the risk that duplicative damages may be awarded if antitrust plaintiffs push towards trial in lieu of settling."[8] Resolving the issues presented by the common evidence in a single trial is more efficient than trying the same or similar issues twice. Common defendants, common fact witnesses, common expert witnesses (or common expert witness subject matter), common exhibits, common damages theories, and damages cases with common elements all present the possibility of very significant duplication in the case of multiple trials.

There are also tremendous costs to the judicial system associated with multiple trials. A given courtroom is unavailable for an extended period of time in which other cases may not be tried, and the ability of a busy district judge to address other important matters is impaired. Depending on the configuration of separate trials, jurors or additional jurors will be required to commit substantial additional time.

2. Cost Savings

There are material cost savings for the parties associated with joint trials. Even parties with contingent fee counsel incur major out of pocket expenses in a price fixing trial. Expert witness fees, technology expenses, and housing for parties, witnesses, and out of town lawyers are all likely to be expensive. Add to these items the hourly fees typically charged by defense counsel, and there is no doubt that joint trials result in substantial cost savings.

B. Avoidance of Multiple Recovery

The combination of the *Hanover Shoe* rule forbidding the use of pass on as a defense, and state laws allowing recovery by indirect purchasers who must prove that any overcharge paid by the direct purchasers and other indirect purchasers above them in the distribution chain was passed on, results in the possibility of multiple claims based on the same overcharge. Not all litigation configurations of direct and indirect purchasers present a possibility of multiple recovery, but recurring combinations of direct and indirect purchaser classes and opt-out plaintiffs present the occasion for substantial multiple recovery.

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6 Emilio E. Varanini, *Exiting the Fun House of Mirrors: Clayworth v. Pfizer and the Handling of Pass-On in Post-Trial Allocation Proceedings in Federal and State Court*, 20 Competition 28, 40 (2011) ("*House of Mirrors*").

7 *Id.* at 41.

8 *Id.*

Defendants typically express great concern about the possibility of duplicative recovery.[9] Plaintiffs' advocates often seek to brush the issue aside with arguments based on the idea that separate claimants are permitted full recovery under separate laws, or embracing the idea that multiple or inconsistent recovery is consistent with the objective of strong private enforcement of the antitrust laws.[10] Neither of these ideas can justify multiple recovery that is not allowed by the relevant state law, and neither provides a reason to refrain from reasonable steps to avoid multiple recovery that is forbidden by state law.

There is no enforcement policy that calls for multiple or inconsistent recovery. Congress has made vigorous private enforcement an important part of competition policy,[11] but it is wrong to suggest that Congress has endorsed multiple recovery, much less that the important policies reflected in the federal remedial scheme would be frustrated if duplicative antitrust damage recovery is not allowed. *ARC America* teaches that prior cases did not "identify a federal policy against States imposing liability in addition to that imposed by federal law," and that state law "liability over and above that authorized by federal law" does not automatically result in a conclusion that the state law is preempted,[12] but *ARC America* also acknowledges a general federal law policy against multiple recovery.[13]

There is no evidence that enforcement through indirect purchaser claims under state law occupies an essential place in federal policy. One of the reasons for the *Illinois Brick* direct purchaser rule is the Supreme Court's view that "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under § 4 is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it."[14] Private enforcement under federal law is thus satisfactorily implemented without indirect purchaser recovery. What is the basis on which indirect purchaser recovery under state law can be portrayed as an essential part of the framework of federal regulation? More to the point, how has Congress taken action suggesting an

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9 *See*, *e.g.*, Defendants' Motion to Dismiss Indirect Purchaser Plaintiffs' Consolidated Class Action Compliant at 23 of 35, *In re Flash Memory Antitrust Litigation*, No. 07-CV-00086 SBA (N.D. Cal.), Dkt. No. 374; Defendants' Motion to Dismiss Consolidated Class Complaints at 43 of 71, *In re Automotive Parts Antitrust Litigation*, No. 12-MD-02311 (E.D. Mich.), Dkt. No. 230.

10 *See*, *e.g.*, Indirect Purchaser Plaintiffs' Opposition to Defendants' Motion Regarding Trial Structure at 1-7 of 10, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal.), Dkt. No. 5411.

11 *See, e.g., Illinois Brick*, 431 U.S. at 745.

12 *ARC America*, 490 U.S. at 105.

13 *Id. See Associated Gen'l Contrs. v. California State Council of Carpenters*, 459 U.S. 519, 543-44 (1983).

14 *Illinois Brick*, 431 U.S. at 745-46 (citation omitted); *see id*. at 745 ("Added to the uncertainty of how much or an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement."). *See also ARC America*, 490 U.S. at 103 ("We construed § 4 as not authorizing indirect purchasers to recover under federal law because that would be contrary to the purposes of Congress.").

intention to foster multiple recovery under federal law or state law? Where Congress has taken a step in the direction of providing a remedy for harm to indirect purchasers, by allowing *parens patriae* recovery on behalf of consumers, it has explicitly prohibited multiple recovery under federal law.[15]

State indirect purchaser laws are "consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct,"[16] but indirect purchaser recovery is by no means essential to those purposes. Even the dissenters in *Illinois Brick* assumed that, if federal law permitted both direct and indirect purchasers to sue, it would be necessary to take steps such as consolidating direct and indirect purchaser actions for trial to avoid multiple liability.[17] The most that can be said is that the failure by Congress affirmatively to preempt state indirect purchaser laws means that, as the *ARC America* Court observed, Congress has never intended for federal law to be the exclusive means by which competition concerns are addressed.[18] To paraphrase *ARC America*, it is one thing to say that federal law does not preempt state indirect purchaser statutes, it is "something altogether different"[19] to insist that the allowance of multiple recovery is essential to the aggressive, effective private enforcement of the federal or state antitrust laws. No competition policy objective requires duplicative recovery of price fixing damages.

Rejection of the false claim that multiple recovery is essential does not necessarily mean that multiple recovery is forbidden, or automatically justify all action taken in the name of preventing multiple recovery. Defendants sometimes argue that "allocation" of the damages sought by all claimants throughout the distribution chain is required. Full allocation, as in division of the overcharge among the various claimants who seek recovery, is not a possibility, for various practical and other reasons. Even if all parties are present in the same district court, allocation among federal direct purchaser claimants and indirect purchasers claiming under state law is not available because direct purchasers are entitled to the full amount of the overcharge under federal law, and state law cannot impact their rights.

No antitrust court has accepted the due process and *Campbell* arguments defendants sometimes make in an attempt to achieve overarching allocation among all claimants.[20] But resolution of the due process arguments is not a prerequisite to all protection against

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15 15 U.S.C. § 15c(a)(1) (in state attorney general *parens patriae* action: "The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury.").

16 *ARC America*, 490 U.S. at 102.

17 *Illinois Brick*, 431 U.S. at 761-64 (Brenan, J., dissenting).

18 *Id.* at 101 ("it is plain that this is an area traditionally regulated by the States"); *id.* ("There is not claim that the federal antitrust laws expressly pre-empt state laws permitting indirect purchaser recovery."); *id.* at 103 ("It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust authority.").

19 490 U.S. at 103.

20 *See, e.g.*, Order Regarding Trial Structure, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal.), Dkt. No. 5518.

multiple recovery. By statute or case law, various states have either explicitly forbidden multiple recovery or directed courts to adopt procedures to guard against multiple recovery.[21] Plaintiff advocates frequently deny that multiple recovery is of genuine concern, or argue that both federal direct purchaser and state indirect purchaser plaintiffs are entitled to "full" recovery under the statutes on which their claims are based,[22] but these arguments do not take account of the limits of state indirect purchaser laws. Despite the rhetoric from the plaintiff side, there does not appear to be a real dispute about the fact that "in some states, a court should exclude from a damage award any amount that has already been awarded for the same injury in a previous case," or that "in some states, courts are authorized to use their discretion to transfer or consolidate cases if necessary in order to manage duplicative recovery issues."[23]

The form of the state laws varies. Some statutes direct or authorize courts to take action to prevent multiple recovery.[24] Others either prohibit multiple recovery or provide a pass on or other defense specifically directed to the prevention of multiple recovery.[25] In some states, prevention of multiple recovery is based, at least in part, on case law.[26]

The California Supreme Court's *Clayworth* opinion is an example of a judicial decision recognizing the appropriateness of action directed to the avoidance of multiple recovery.

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21 *See* ABA Section of Antitrust Law, Indirect Purchaser Litigation Handbook, Appendix A (2007).

22 *See*, *e.g.*, Indirect Purchaser Plaintiffs' Opposition to Defendants' Motion Regarding Trial Structure at 1-7 of 10, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal.), Dkt. No. 5411.

23 Direct Action Plaintiffs' Response to Defendants' Motion Regarding Trial Structure And Duplicative Recovery at 11 of 23, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, Dkt. No. 5414 (April 4, 2012).

24 *E.g.*, Fla. Stat. § 542.22(2)(a) (*parens patriae*); 740 Ill. Comp. Stat. 10/7(2) ("[I]n any case in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability for the same injury including transfer and consolidation of all actions."); New York General Business Law § 340(6), ("in any action in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability, including but not limited to the transfer and consolidation of all related actions"); S.D. Codified Laws § 37–1–33 (In any subsequent action for the same conduct, "the court may take any steps necessary to avoid duplicative recovery."); Vt. Stat. Ann. tit. 9, § 2465(b) ("The court shall take all necessary steps to avoid duplicate liability, including but not limited to the transfer or consolidation of all related actions.").

25 *E.g.*, N.M. Stat. Ann. § 57–1–3(C) ("In any action under this section, any defendant, as a partial or complete defense against a damage claim, may, in order to avoid duplicative liability, be entitled to prove that the plaintiff purchaser or seller in the chain of manufacture, production, or distribution who paid any overcharge or received any underpayment, passed on all or any part of such overcharge or underpayment to another purchaser or seller in such chain."); Wash. Rev. Code 19.86.080 ("The court shall exclude from the amount of monetary relief awarded in an action pursuant to this subsection any amount that duplicates amounts that have been awarded for the same violation. The court shall consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery.").

26 *E.g.*, *Bunker's Glass Co. v. Pilkington PLC*, 206 Ariz. 9, 18 (2003); *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 787 (2010).

> In instances where multiple levels of purchasers have sued, or where a risk remains they may sue, trial courts and parties have at their disposal and may employ joinder, interpleader, consolidation, and like procedural devices to bring all claimants before the court. In such cases, if damages must be allocated among the various levels of injured purchasers, the bar on consideration of pass-on evidence must necessarily be lifted; defendants may assert a pass-on defense as needed to avoid duplication in the recovery of damages.[27]

Some plaintiffs argue that California law does not limit multiple recovery in cases other than those in which multiple recovery is had under the Cartwright Act.[28] In other words, they contend that only if direct purchasers, or multiple layers of indirect purchasers, seek recovery, or have recovered, under the Cartwright Act, is it necessary to consider allocation of damages or other steps to avoid multiple recovery. *Clayworth* should not be read to recognize an anti-duplication rule that is limited to situations in which all claimants assert Cartwright Act claims.

The statutory authorization for Cartwright Act *parens patriae* actions contains a broadly worded requirement, taken from federal law, that requires courts to exclude from the amount awarded "*any* amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury."[29] "Any" means any, and there is no reason why the *parens patriae* statute, or California law in general, should be read to be unconcerned about multiple recovery resulting from federal law direct purchaser recovery. Indeed, it would make little sense to forbid duplicative recovery only when the duplicative relief is obtained under the Cartwright Act.[30] Absent a reason to believe that the Legislature considered multiple recovery to be necessary, or even appropriate, the argument for a narrow role for the need "to avoid duplication in the recovery of damages" is not convincing.

That California law more thoroughly forbids multiple recovery is shown by the fact that the *Clayworth* court created an exception to its adoption of the *Hanover Shoe* rule forbidding the use of pass on as a defense based on the need "to avoid duplication in the recovery of damages."[31] If "defendants may assert a pass-on defense as needed to avoid duplication in the recovery of damages," there must be a prohibition on "duplication in the recovery of damages."

Some plaintiffs also rely on the California Supreme Court's decision in *Union Carbide v. Superior Court*[32] to require a conclusion that the California concern with

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27 *Clayworth*, 49 Cal. 4th at 787.

28 *See*, *e.g.*, Indirect Purchaser Plaintiffs' Opposition to Defendants' Motion Regarding Trial Structure at 6-7 of 10, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal.), Dkt. No. 5411.

29 Cal. Bus & Prof. Code § 16760(a)(1) (emphasis added).

30 *See also House of Mirrors*, 20 Competition at 36-37 (procedures to avoid duplication available "if the different groups of plaintiffs cannot be joined or consolidated into one proceeding but rather remain in different proceedings or even different state and federal forums").

31 49 Cal. 4th at 787.

32 36 Cal. 3d 15 (1984).

multiple recovery is limited to multiple Cartwright Act recovery.[33] In *Union Carbide*, the defendants argued that a federal lawsuit "expose[d] them to a substantial risk of multiple liability, i.e., liability to direct purchasers under the Sherman and Clayton Acts for damages based on the same alleged overcharges for which plaintiffs in the present action seek damages under the Cartwright Act as indirect purchasers and consumers,"[34] and they accordingly sought joinder of the direct purchasers under a general statute allowing joinder to prevent a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations."[35] The California Supreme Court stated that the defendants were not entitled to relief "simply because [they] may be held liable in a federal suit under a federal statute to a person or class wholly different from the person or class to whom they are sought to be held liable in a California action under a California statute for the same tortious conduct."[36] The court's rejection of the defendants' request for joinder was not based on a holding that the duplicative recovery from which protection is available does not include the duplication that results when a defendant is required to pay damages to a federal law claimant making a direct purchaser claim, and then pay damages to a Cartwright Act indirect purchaser based on evidence that the damages awarded to the direct purchaser under federal law were passed on. Instead, the court said that joinder was not required because "[q]uestions of whether overcharges were passed on, essential to the indirect purchaser's California claim, are irrelevant to, and thus not subject to inconsistent determination in, a suit on the direct purchaser's federal claim. Thus, federal actions such as the Illinois [action] do not give rise to a 'substantial risk' of multiple liability under section 389, subdivision (a)(2)(ii)."[37]

This is not an answer to the claim of duplicative recovery. Regardless of whether "inconsistent" determination of pass on issues is possible in the two cases, duplicative recovery is possible for the very reason cited by the court. The federal law direct purchasers may be awarded damages, and the state law indirect purchasers may be awarded damages based on a finding that the damages awarded to the federal direct purchaser plaintiffs were passed on by them to the state law plaintiffs. Thus, the defendants would pay the same damages to two different plaintiffs or groups of plaintiffs. That is "multiple" by any measure, as pointed out in a dissenting opinion,[38] and it is "duplication" of sufficient concern to fall within the prohibition recognized in *Clayworth*.

At least one other California case has assumed that recovery under federal law could lead to a finding that federal direct purchaser liability and state indirect purchaser liability

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33 *See*, *e.g.*, Direct Action Plaintiffs' Response to Defendants' Motion Regarding Trial Structure and Duplicative Recovery at 5-6 of 23, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal.), Dkt. No. 5414.

34 36 Cal. 3d at 20.

35 *See* Cal. Code Civ. Proc. § 389(a)(2)(ii).

36 *Id.* at 22-23.

37 *Id.* at 23.

38 *Id.* at 29 (Richardson, J., dissenting) ("Thus, both federal direct purchaser plaintiffs and state indirect purchaser plaintiffs may recover based on the same overcharge. This potential arithmetic expansion is further complicated by the possibility of further damage awards for others in the chain of distribution. Despite the rather cavalier approach of my colleagues, the risk is neither speculative nor clearly permissible.").

are duplicative. In *Crown Oil Corp. v. Superior Court*,[39] the court of appeal rejected a due process-based double recovery argument, stating that although an agreed final judgment was entered pursuant to a settlement agreement, "no liability under the Sherman Act was admitted and, certainly, the issue of damages was never adjudicated. Thus, there is no indication of the actual damages in the federal action, which would form the basis for a charge of multiple liability."[40]

Multiple recovery is a problem to be addressed, not a right held by indirect purchasers. Due process considerations aside, state laws in various jurisdictions make the prevention of multiple recovery an important objective of trial organization.

C. Burdens

Given the unquestionable cost and efficiency benefits, why not try direct and indirect purchaser cases together? Several subsidiary reasons why the benefits of joint trials are outweighed by other concerns are suggested, but the dispute over trial structure boils down to a disagreement over the likely role of pass on evidence.

1. Different Legal Standards Leading To Jury Confusion

An argument that is sometimes made is that the different legal standards applicable to federal and state claims, or to Sherman Act claims and state consumer protection or unfair competition claims, may result in confusion among jurors required to apply different standards.[41] In some cases, federal and state statutory claims, state common law tort claims, and contract claims may be asserted. Arguments about jury confusion are not unique to price fixing cases, and the potential jury confusion relevant here does not justify abandoning the cost saving and efficiency associated with a joint trial of all of the claims arising out of an alleged price fixing conspiracy.

Different or even inconsistent theories are presented in various types of cases in different areas of the law. There is no reason to believe that jurors will have a unique difficulty following the court's instructions when considering price fixing claims. We saw no indication of jury confusion in the *Best Buy* trial.

2. Different Measures of Damages

A related issue involves the fact that some types of state law claims may call for different measures of damages than Sherman Act claims. We see no reason why juries cannot keep track of different measures of damages. Clear instructions from the court and good work by the plaintiff and defense trial teams will ensure an orderly process.

3. Different Evidence

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39 177 Cal. App. 3d 604 (1986).

40 *Id.* at 613.

41 *See, e.g.*, Direct Purchaser Class Plaintiffs and Indirect Purchaser Class Plaintiffs' Joint Statement Regarding Suggested Trial Order at 5-6 of 11, *In re Polyurethane Foam Antitrust Litigation*, No. 10-MD-2196 JZ (N.D. Ohio), Dkt. No. 1243.

It is also worth considering the extent to which federal and state law claims might call for the admission (or exclusion) of different classes or items of evidence. Pass on evidence is addressed below. Pass on aside, there is not a strong possibility of differences that would create such a high likelihood of confusion or prejudice as to justify foregoing the cost and efficiency benefits of joint trials.

4. The Impact of Pass On Evidence

There are two types of pass on evidence that may play a role in price fixing cases. The first is usually referred to as "upstream" pass on, and it refers to an overcharge being passed to a plaintiff when it buys a price fixed good or a finished product of which a price fixed good is a component. "Downstream" pass on occurs when, rather than absorbing an overcharge, the plaintiff passes the overcharge on to its customers in the form of higher prices for the products it sells. *Hanover Shoe* forbids the use of evidence of downstream pass on as a defense; the *Illinois Brick* direct purchaser rule means that a prospective plaintiff cannot base a claim on upstream pass on of an overcharge from its seller.

Evidence of downstream pass on is likely to play an important role in the trial of an indirect purchaser case in which the plaintiffs are not consumers, and evidence of upstream pass on to the indirect purchaser plaintiff is an essential part of any indirect purchaser case. By definition, indirect purchasers do not themselves suffer injury in a transaction with a defendant or another member of a conspiracy. An indirect purchaser must prove that an overcharge was paid by a direct purchaser, and that the overcharge was passed through as many levels of the distribution system as necessary to reach the plaintiff. The demonstration of "upstream" pass on is likely to include a mix of economic theory and case-specific factual information necessary to convince the jury that pass on is both something that can be expected to occur at some levels in the chain of distribution, and did occur in the specific context of the conspiracy and distribution system at issue.

The *Best Buy* plaintiffs were retailers, and an important part of the defense to their indirect purchaser claims was a contention that they passed on any overcharge that reached them. The jury appears to have decided that the overcharges that reached the plaintiffs were passed on in their entirety, as no indirect damages were awarded, despite a modest award of direct damages.[42]

Our experience in the *Best Buy* trial convinces us that evidence of pass on is not inevitably toxic on direct purchaser claims, and that any potential for jury confusion on the relevance of pass on evidence to direct and indirect purchaser claims does not justify abandoning the tremendous judicial economy available from joint trials. Given the trial context, we see no reason to believe that the *Best Buy* pass on evidence admitted on the state law claims had a meaningful impact on the federal claims. The court was able to fashion jury instructions that differentiated between the federal and state law claims on pass on and all other relevant issues, and the case was tried with the differences in mind. The jurors were told, by witnesses and counsel, and eventually, by the court, that the pass on evidence had a limited role, and there is nothing about the conduct of the trial or the jury's verdict that suggests confusion about the role of pass on.

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42 Special Verdict, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal.), Dkt. No. 8562 at 5 of 5 (Question 10).

In the *Best Buy* trial, the convention of using the terms "direct" and "indirect" to refer to the federal and state claims was consistently used, with no apparent confusion. Both sides employed separate damages experts to address the distinct issues presented by the federal and state law claims, and the damages presentations included detailed information enabling the jury to differentiate between the claims for which pass on was and was not a defense. The lawyers for the plaintiffs and the defendants were scrupulously precise when addressing pass on and the respective claims.

Independent of our specific *Best Buy* experience, we think the expectation of unique and inevitable prejudice overlooks the dynamic of most trials. Damage cases that are contested have real issues; no defendant will decide to go to trial in a case with serious direct purchaser claims based on an expectation of success because the direct purchasers will be prejudiced by the pass on evidence admitted on the indirect purchaser claims. In the *Best Buy* trial, the indirect purchaser claims were based on the overcharge calculations that also provided the foundation for the direct purchaser claims. Our primary focus was convincing the jury to accept the defense expert's overcharge calculation. If we were not able to succeed on that score, any impact of inadmissible pass on evidence would not have saved us. Nothing about the trial context suggests that the verdict on the direct purchaser claims was an "unofficial" pass on verdict.

In *ARC America*, relying in part on the idea that many state indirect purchaser claims would be tried in state court, but recognizing the possibility that some would be tried in federal court, the Supreme Court characterized the burden on federal direct purchaser actions presented by state indirect purchaser laws as "minimal."[43] While this observation was likely directed to the possibility of big picture conflict between direct and indirect purchaser claims, clearly the Court did not perceive that the trial of state law indirect purchaser claims would inevitably interfere with the efficient trial of federal law direct purchaser claims in a matter prejudicial to any group of plaintiffs. Based on our experience, we agree.

In a joint trial, the potential for prejudice to the direct purchasers from evidence of pass on is likely to be manageable because one of the foundational predicates of the trial will be that the direct purchasers are entitled, as *Hanover Shoe* requires, to the full overcharge they pay. In a trial conducted with *Hanover Shoe* and the state law prohibition of multiple recovery in mind, pass on plays a role only to the extent the indirect purchasers can prove the pass on of overcharges other than those for which recovery is had by the direct purchasers. Thus, in a trial in which the jury is told the direct purchasers recover for any overcharge they pay, and in which the indirect purchasers are not allowed to recover damages based on overcharges for which the direct purchasers recover, the occasion for pass-on related prejudice is muted.

Any trial has a legal, factual, and thematic context. Given the way juries are instructed regarding direct and indirect purchaser claims, and the typically intense disputes presented on all of the economic issues, a direct purchaser defense strategy based on fall out from pass on evidence is not likely to be successful. We agree that the potential for confusion or prejudice from pass on evidence should not be dismissed out

43 *ARC America*, 490 U.S. at 104.

of hand, but our experience is that the issues that are legally relevant to direct purchaser damages are far more important than pass-on fallout.

D. Alternatives

Another reason to hold a joint trial is that the alternatives are not, on balance, as good.

1. Separate Trial

A full separate trial is the most expensive and least efficient alternative. We do not believe that the case can be made for such a drastic abandonment of cost and efficiency concerns, and we doubt that the return on this investment is worth it. The assumed or potential prejudice expected to result from a joint trial is not sufficient to justify the cost, delay, and burden on the judicial system associated with a full trial.

One of the reasons why separate trials are not justified is that the burdens of them fall more heavily on the defendants. The defendants incur the substantial extra expense and other burdens associated with a separate trial, and they also face a potential one-sided estoppel risk. Success in defending the liability side of an initial trial, or a favorable result on damages, will not result in an estoppel enforceable against non-privy plaintiffs waiting for a second trial, but the defendants are likely to face an issue preclusion argument if they are not successful in the first trial. While the general rule forbids the use of offensive, non-mutual issue preclusion under these circumstances,[44] there is no absolute prohibition.

2. Post-Trial Action by the Court

Plaintiffs who acknowledge the limits on multiple recovery imposed by state law argue that the interest in avoiding multiple recovery and the direction to take "all steps necessary" to avoid duplicative damages can be satisfied by post-verdict or post-judgment action by the court.[45] Waiting until a verdict is returned or a judgment is entered does not involve all necessary steps, however, and refraining from straightforward confrontation of the potential for multiple recovery at trial may result in avoidable complications that can frustrate the attempt to avoid multiple recovery.

Duplicative recovery is not present in every case in which plaintiffs at multiple levels of the chain of distribution recover damages. The specific indirect purchaser plaintiffs whose claims are in issue may not have purchased from, or through, the direct purchasers who have pursued federal law claims. Complications associated with settlements may make it difficult to prove duplication. It is therefore important that the specific facts associated with each plaintiff's claim be probed in detail if "all steps necessary" to avoid multiple recovery are to be taken.

When the possibility of multiple recovery is present and multiple recovery is forbidden by state law, the necessary steps begin with a recognition that multiple recovery

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44 *Parklane Hosiery v. Shore*, 439 U.S. 322, 331 (1979).

45 *See* Indirect Purchaser Plaintiffs' Opposition to Defendants' Motion Regarding Trial Structure at 1-7 of 10, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal.), Dkt. No. 5411.

is a problem to be avoided. Those steps also require that the trial of the respective claims be structured in a manner that will allow a determination of whether the indirect purchaser claims would result in multiple recovery. If direct and indirect purchaser claims are tried together, it is easier to resolve the multiple recovery issues in a clear and efficient manner by coordinating the evidence regarding the sameness or difference of the distribution chains in which the respective plaintiffs purchased price-fixed goods or finished products containing price-fixed components, the extent of pass on, and any other issues needed to make a proper assessment of the existence and extent of multiple recovery. Appropriately worded verdict forms can be used to ensure that the relevant facts are resolved in a meaningful way.

If, rather than taking all steps, courts defer consideration of multiple recovery to post-trial proceedings, there is a risk that uncertainty about the basis for the recovery by the various parties might result and interfere with the defendants' ability to establish that the recovery awarded to parties at different levels of distribution is duplicative. Direct purchasers have no interest in the resolution of some of the issues that are essential to the avoidance of multiple recovery, and they are likely to contest attempts to complicate the trial of their claims with attention to multiple recovery-issues of no concern to them. A joint trial presents the simplest and best forum for achieving clarity on the issues. Even in the absence of a specific legislative command to take "all steps necessary" to avoid multiple recovery, there is no reason to avoid reasonable steps helpful in making a clear record.

Emilio Varanini argues that post-trial allocation is acceptable because pass-on related issues are equitable and not within the right to jury trial.[46] We are skeptical about this argument. Pass on is an element of the indirect purchaser's claim to damages because an indirect purchaser cannot recover unless it proves that an overcharge was passed on by its seller. As such, pass on appears to us to be a factual issue within the indirect purchaser plaintiff's and the defendant's Seventh Amendment right to jury trial. That is a further reason why an attempt by a trial court to make sense of the results of multiple trials is not an acceptable way to avoid the possibility of multiple recovery.

3. Collateral Estoppel (Issue Preclusion)

It is sometimes argued that joint trials are unnecessary because similar judicial efficiency can be achieved through the use of collateral estoppel (issue preclusion). Issue preclusion-based solutions avoid direct consideration of multiple recovery and are generally not useful efficiency-creating tools.

Issue preclusion-based solutions are, at best, one-sided, and only helpful when the defendants, or at least a significant number of them, lose whichever trial occurs first. It is possible that a defendant found liable for price fixing will not be able to relitigate aspects of its liability or damages defenses in a subsequent trial, but issue preclusion cannot benefit a successful defendant in most cases. A plaintiff that is not a privy of an unsuccessful plaintiff will not be bound by a verdict in favor of a defendant on any issue.[47] It is not helpful to build a trial structure around issue preclusion because it cannot be

46 *See, e.g., House of Mirrors*, 20 Competition at 29.

47 *See ReadyLink Healthcare, Inc. v. State Compensation Fund*, --- F.3d ----, 2014 WL 2611166, at *5 (9th Cir. June 12, 2014).

assumed that all defendants will be held liable, or, as discussed below that they will be held liable in a manner supporting the efficiency-producing use of issue preclusion.

Traditionally, issue preclusion required full "mutuality."[48] Issue preclusion was available only when both parties would be bound by the facts determined in the underlying proceeding.[49] A bystander plaintiff could not, for example, offensively employ collateral estoppel against a defendant held liable in a trial against another party not its privy.[50] The first significant departure from the mutuality rule occurred in 1942 when mutuality was eliminated as a requirement by the California Supreme Court in *Bernhard v. Bank of America*.[51] The Supreme Court first approved the use of defensive non-mutual collateral estoppel in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.[52] "Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely 'switching adversaries.'"[53]

In *Parklane Hosiery v. Shore*, the Supreme Court approved the discretionary use of offensive non-mutual issue preclusion, but with an important protection that is inconsistent with the use of issue preclusion as a substitute for a joint trial.[54] "[O]ffensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does."[55] When offensive issue preclusion is available, "a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins."[56] A plaintiff therefore has an incentive "to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment."[57] As a result, "offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action."[58]

The *Parklane Hosiery* Court considered the various arguments in favor of and against mutuality in the offensive non-mutual issue preclusion context, and concluded that the proper solution was to allow offensive use of issue preclusion where mutuality is lacking on a discretionary basis.[59] This result came with an important limitation that renders issue preclusion a poor solution for the issues presented in price fixing cases. "The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the

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48 *See Parklane Hosiery*, 439 U.S. at 326-27.

49 *Id.*

50 *Id.* at n. 7.

51 19 Cal. 2d 807 (1942).

52 402 U.S. 313 (1971).

53 *Parklane Hosiery*, 439 U.S. at 329 (citing *Bernhard*, 19 Cal. 2d at 813).

54 *Id.* at 331.

55 *Id.*

56 *Id.* at 330.

57 *Id.*

58 *Id.*

59 *Id.* at 331.

application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."[60]

Solutions based on issue preclusion are also questionable in light of the requirements for application of the doctrine. Issue preclusion is not available unless the "identical" issue has been resolved following "actual litigation" in a manner that is sufficiently final.[61] In cases in which bifurcation has been ordered, "the existence of a conspiracy" is sometimes identified as an issue to be tried apart from impact and damages.[62] "The existence of a conspiracy" is not, however, likely to be an issue with "identical" application to all direct and indirect purchaser claims, or an issue that can be efficiently separated from other issues in a manner that saves meaningful trial time.

In every case, proof of impact and damages will include substantial liability evidence. A finding of the existence of a conspiracy will not eliminate the need for much of the evidence in a later trial phase involving the damages claimed by a different group of claimants. Evidentiary duplication aside, it will not always be the case that the "conspiracy" issue resolved in a price fixing trial is "identical" to the "conspiracy" issue presented in a subsequent trial.

For example, it is common for different plaintiffs to rely on different damages periods. A determination that there was "a" conspiracy may not be sufficient to support the specific damage case presented by another group of claimants. Differences in the duration, membership, and scope of a conspiracy claimed by different plaintiffs may make the use of issue preclusion impractical.

The mere existence of "a" conspiracy is usually not a central disputed fact in the trial of a price fixing case. Some defendants are likely to admit the existence of a conspiracy, or their participation in a conspiracy, especially where, as is common, a criminal investigation has resulted in one or more guilty pleas. The "conspiracy"-related disputes often involve nuance important to the specifics of a given damage case and not generally relevant. For example, in the *Best Buy* trial, our client had pleaded guilty to price fixing and acknowledged liability to the plaintiffs. It argued, however, that there was no evidence of its participation in a conspiracy outside of the temporal period identified in its plea agreement. In addition, the plaintiffs' claims about the scope of the conspiracy by product, product grouping, and participants were disputed.

A finding that there was "a" conspiracy would have had no benefit in a subsequent trial in which the same acknowledgement would presumably be made, and where the other plaintiffs might not care about the specifics of the conspiracy alleged by the *Best Buy* plaintiffs.

4. Separate "Conspiracy" Trial

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60 *Id.*

61 *See ReadyLink Healthcare, Inc.*, 2014 WL 2611166, at *4-5.

62 *See, e.g.*, Order Regarding Trial Structure, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI (N.D. Cal.), Dkt. No. 5518.

For similar reasons, bifurcating a trial with all parties participating in a "conspiracy" focused phase may not be helpful. Most price fixing cases that survive summary judgment will be based on a conspiracy of some sort that can be proved, and the existence of a conspiracy will often be conceded. The conspiracy-related issues likely to matter are not always sufficiently common or separable from the questions of impact and damages to make a "conspiracy" phase productive.

Suppose, for example, that one group of plaintiffs alleged a conspiracy with a starting point and an ending point that are disputed. Suppose further that the evidence of whether a conspiracy was active during at least part of the period included the presence or absence of price impact, perhaps in a comparison of the overcharges revealed by the plaintiffs' damages model and the conduct of the alleged conspirators. These and other issues link proof of conspiracy and proof of impact and damages in ways that make a separate "conspiracy" trial inefficient and not likely on average to generate useful information in a verdict. It is clearly preferable, for example, for the same jury at the same time to consider evidence of conduct and the impact alleged to have resulted from the conduct. Even when "conspiracy" issues suitable for a separate trial can be identified, there will be substantial duplication of evidence when impact and damages are subsequently considered.

5. Sequenced Trials

Hybrid solutions providing for an initial trial on "conspiracy" issues, combined with damages issues for one group of plaintiffs or another are sometimes proposed. One such solution was adopted by the MDL court during the class action phase of the *TFT-LCD (Flat Panel) Antitrust Litigation*.[63] The court's order provided for the direct and indirect class purchasers to present their case on the existence of a conspiracy in a first phase, and, if they succeeded, the jury would be asked to assess the question of liability to the direct purchasers, and the amount of direct purchaser damages. In the second phase, the indirect purchasers were to present their case for liability and the amount of damages.

A sequenced trial structure does not fairly address the possibility of multiple recovery in the legal context required under the law of various states. When state law forbids multiple recovery, the potential for multiple recovery should be directly and forthrightly confronted. In a joint trial, the parties can efficiently address the question of whether the indirect purchasers are customers of the direct purchasers, and, if so, whether they seek to recover damages that duplicate those that will be awarded to the direct purchasers under federal law. Where state law directs the taking of "all steps necessary" to avoid multiple recovery, or simply forbids multiple recovery, these issues should be confronted at trial.

An assumption behind sequencing trial of the damages claims appears to be that the indirect purchasers have an unrestrained right to recovery that duplicates the damages awarded to the direct purchasers. Under the state laws commonly in issue, that is not so, and a sequenced trial structure does not provide an efficient way to address the possibility of multiple recovery.

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63 Order Regarding Trial Structure, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, Dkt. No. 5518.

ARC America makes clear that state indirect purchaser statutes are not preempted by federal law, but *ARC America* does not define the content of the state laws. Regardless of whether they might provide for "liability over and above that authorized by federal law," state laws tend not to provide for the duplicative recovery by indirect purchasers of damages that have been recovered by direct purchasers under federal law. The trial structures used for the trial of direct and indirect purchaser claims should accordingly reflect the need for orderly avoidance of multiple recovery.

RECOVERIES FOR VIOLATIONS OF FEDERAL AND CALIFORNIA ANTITRUST STATUTES SHOULD NOT BE APPORTIONED

By Steve Williams and Elizabeth Tran[1]

There is increased cartel behavior today, affecting more businesses and people, than at any time since the enactment of state antitrust laws and the Sherman Act. Private enforcement of the antitrust laws was established to protect the economy from collusion. It was for this reason that quasi-criminal fines were included as remedies available to private plaintiffs, such as double – and then treble – damages as well as attorneys' fees and costs.

The Sherman Act has been called a "charter of freedom"[2] and the "Magna Carta of free enterprise"[3] and described as a

> [c]omprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[4]

Congress passed the Sherman Act to protect consumers from inflated prices, foster free competition in the marketplace, and encourage efficient behavior by firms.[5]

Congress and the state legislatures that enacted the nation's antitrust laws intended private enforcement to be an important tool in preventing cartel behavior. Courts have interpreted the antitrust laws with a view to promoting that purpose.[6] The primacy of the deterrent goals of the Sherman Act and the Cartwright Act (and other state antitrust laws) has been a constant since the enactment of those statutes.

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2 *Appalachian Coals, Inc. v. United States,* 288 U.S. 344, 359 (1933).

3 *United States v. Topco Assoc., Inc.,* 405 U.S. 596, 610 (1972).

4 *N. Pac. Ry. Co. v. United States,* 356 U.S. 1, 4 (1958).

5 E. Thomas Sullivan, Herbert Hovenkamp & Howard A. Shelanski, Antitrust Law, Policy and Procedure: Cases, Materials, Problems 11 (6th ed. LEXISNEXIS 2006).

6 *See, e.g., Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.,* 381 U.S. 311, 318-319 (1964) ("*Minn. Mining*") ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws"); *Clayworth v. Pfizer, Inc.,* 49 Cal.4th 758, 764 (2010) ("*Clayworth*") (noting "Legislature's overarching goals [in enacting and amending the Cartwright Act] of maximizing effective deterrence of antitrust violations, enforcing the state's antitrust laws against those violations that do occur, and ensuring disgorgement of any ill-gotten proceeds").

Congress provided for private remedies and penalties to enforce the Sherman Act because it recognized that government resources were limited and that compliance with the antitrust laws was critical to the economic health of the nation. It is for this reason that Congress provided broad remedies for private plaintiffs who would act as "private attorneys general."[7] The Supreme Court has stated that "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress" and that the "system depends on strong competition for its health and vigor."[8] Congress believed that providing remedies – including treble damages – to private plaintiffs would "open the doors of justice to every man"[9] while furthering the Sherman Act's overarching goal of deterring collusion. The importance of private actions as a tool in the enforcement of the antitrust laws has been repeatedly recognized by the Supreme Court and invoked in its construal of the Sherman Act.[10]

The California State Legislature premised its decision to provide remedies to indirect purchasers on these same goals. The availability of remedies to indirect purchasers, in addition to those remedies available to direct purchasers under federal law, is necessary to effectuate that policy and to deter antitrust violations. Further, it has long been recognized that the states' power to regulate economic conduct and to protect consumers and competition is not limited by federal antitrust laws. For this reason, damages should not be apportioned between plaintiffs suing under federal and state laws. To do so would contravene the intent of Congress and the state legislatures, and would contradict the rulings of the United States Supreme Court and California Supreme Court in interpreting these statutes. Apportioning damages between claimants under federal and state antitrust laws would frustrate the goal of deterring antitrust violations and would embolden cartels to continue their behavior.

As discussed below, three cases unequivocally establish that the states may provide remedies for antitrust violations that are in addition to those provided by federal law, that those remedies cannot affect federal law, and that federal law does not limit the remedies provided by state law. Limiting the availability of the full range of remedies provided by both state and federal law by apportioning damages would contravene the intent of the respective sovereigns, violate fundamental principles of federalism, and frustrate the primary goal of state and federal antitrust laws of protecting competition and preventing collusive conduct at a time when such conduct is pervasive.

I. *HANOVER SHOE*

In *Hanover Shoe, Inc. v. United Shoe Mach. Corp.,* 392 U.S. 481 (1968) ("*Hanover Shoe*") the Supreme Court held that an antitrust defendant could not assert as a defense that a

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7 *See, e.g.,* 21 Cong. Rec. 2456 (1890) (remarks of Sen. Sherman).

8 *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 262 (1972).

9 51 Cong. Rec. 9073 (1914) (statement of Rep. Webb).

10 *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969) ([T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief but was to serve as well the high purpose of enforcing the antitrust laws) (citation omitted); *Minn. Mining,* 381 U.S. at 318; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 486 n. 10 (1997) (treble damages were regarded by Congress as a way of "giv[ing] the injured party ample damages for the wrong suffered" and as an important means of enforcing the law)(citation omitted).

(direct plaintiff did not suffer injury because it had passed on overcharges to its customers. The Court concluded that when a plaintiff shows that it paid an illegal overcharge and also shows the amount of the overcharge, it "has made out a prima facie case of injury and damage."[11]

The Court identified two reasons why accepting the pass-on defense would frustrate the purposes of the Sherman Act. First, it would require courts to consider numerous complex factors and create a burden of proof on plaintiffs that "would normally prove insurmountable."[12] In *Clayworth,* the California Supreme Court acknowledged the United States Supreme Court's concern that such a defense would depend on "massive and complex showings and rebuttals, potentially sidetracking every antitrust trial in a host of issues collateral to the central claim – whether the defendant had engaged in illegal anticompetitive conduct."[13] The Court's second rationale was that accepting this defense would discourage private antitrust enforcement. If the pass-on defense were permitted, "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them" seriously compromising the enforcement of the antitrust laws.[14]

II. *ILLINOIS BRICK*

In *Ill. Brick Co. v. Ill.,* 431 U.S. 720 (1977) ("*Illinois Brick*"), a sharply divided Supreme Court held that indirect purchasers could not use a pass-on theory to sue for overcharges from antitrust violations. In *Illinois Brick,* the State of Illinois alleged that concrete block manufacturers had engaged in price fixing in violation of the Sherman Act. The resulting illegally increased prices had then been passed on to masonry contractors, who passed them on to general contractors, who then charged the State of Illinois higher prices to build buildings. The majority of the Court deemed the result necessary as a corollary to *Hanover Shoe – i.e.,* it would be unfair to deny the pass-on defense to defendants being sued by direct purchasers, while allowing indirect plaintiffs to recover the overcharges that had been passed on to them.

The Court identified three primary rationales for its result. The first rationale was that permitting indirect purchaser claims under federal law would create a risk of double recovery in cases where both direct and indirect purchasers brought claims against the same defendants.[15] The second rationale – similar to one of the underpinnings of *Hanover Shoe* – was that indirect purchaser claims would involve unmanageably complex issues as courts tried to trace overcharges through the chain of distribution of price-fixed products.[16] The third rationale was that *Hanover Shoe* was correct in its judgment that the Sherman Act would "be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than allowing every plaintiff potentially

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11 *Hanover Shoe*, 392 U.S. at 489.

12 *Id.* at 494.

13 *Clayworth,* 49 Cal. 4th 758, 768 (2010), *citing Hanover Shoe,* 392 U.S. at 493.

14 *Hanover Shoe,* 392 U.S. at 494.

15 *Illinois Brick,* 431 U.S. at 730-31.

16 *Id.* at 730-31.

affected by the overcharge to sue only for the amount it could show was absorbed by it."[17] It is important to note that the limitations of *Illinois Brick* are not based on the text of the Clayton Act. The Clayton Act specifically authorizes "any person" to recover under the Sherman Act.[18] Instead they were created by the Court for the policy reasons set forth in the opinion.

The *Illinois Brick* dissenters asserted that the rationales of *Hanover Shoe* – in particular encouraging private enforcement of the antitrust laws – should have led the Court to permit indirect purchaser claims. It is implicit in the rationale of *Hanover Shoe* that direct purchaser plaintiffs might be *overcompensated*, but this result was preferable to the risk of weakened deterrence of antitrust violations and allowing antitrust violators to keep their ill-gotten gains.[19] The dissent argued that permitting indirect purchaser claims under the Sherman and Clayton Acts would therefore further the same policies of deterrence that led to the result in *Hanover Shoe*.[20]

California, like many other states, responded to *Illinois Brick* almost immediately by amending its antitrust statute, the Cartwright Act, to prevent *Illinois Brick* from creating any limitations on the right to recover under state law. A.B. 3222 passed both houses of the California State Legislature unanimously. It rejected *Illinois Brick* as a matter of state law by providing that a suit under the Cartwright Act could be brought by any injured person, "regardless of whether such injured person dealt directly or indirectly with the defendant."[21] As the California Supreme Court stated not long after this amendment, "California's 1978 amendment to section 16750 in effect incorporates into the Cartwright Act the view of the dissenting opinion in *Illinois Brick* (431 U.S. at p. 748) that indirect purchasers are persons 'injured' by illegal overcharges passed on to them in the chain of distribution."[22] In addition to California, more than half of the states, by either judicial decision or legislation, have rejected *Illinois Brick* as a matter of state law and granted indirect purchasers the right to bring suit under state antitrust law.[23]

III. *ARC AMERICA*

California v. ARC Am. Corp. ("ARC America")[24] directly presented the question of whether the states could provide antitrust remedies for indirect purchasers even if those

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17 *Id.* at 735.

18 15 U.S.C. § 15(a) ("any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee").

19 *See also Clayworth,* 49 Cal.4th at 783 ("[t]he goal of deterring antitrust violations and concerns that a given private party may receive a windfall are not of equal weight").

20 *Id.* at 752-53.

21 Cal. Bus. & Prof. Code § 16750(a), added by Stats. 1978, ch. 536, § 1, p. 1693.

22 *Union Carbide Corp. v. Super. Ct.,* 36 Cal.3d 15, 20 (1984).

23 ABA Section of Antitrust Law, Indirect Purchaser Litigation Handbook Chapter XV, 5-8 (6th ed. 2007).

24 *ARC America*, 490 U.S. 93 (1989).

remedies were duplicative of remedies available to direct purchasers under the Sherman Act. In *ARC America*, the States of Alabama, Arizona, California, and Minnesota brought suit alleging "violations of their respective state antitrust laws under which, as a matter of state law, indirect purchasers arguably are allowed to recover for all overcharges passed on to them by direct purchasers."[25] These state claims were centralized before the United States District Court for the District of Arizona as part of the multidistrict litigation *In re Cement and Concrete Antitrust Litig.*, MDL No. 296, along with direct purchaser claims. Several classes were certified and several defendants settled, creating a settlement fund in excess of $32 million intended to cover both the federal and state antitrust claims. Distribution of the settlement fund was left for later resolution.

The states sought payment out of the settlement funds, and direct purchasers objected. The district court refused to permit the states to recover pursuant to the state indirect purchaser statutes, holding that "[s]uch statutes are clear attempts to frustrate the purposes and objectives of Congress, as interpreted by the Supreme Court in *Illinois Brick,* and, accordingly, are preempted by federal law."[26]

The Ninth Circuit affirmed[27] on the basis of the "three purposes or objectives of antitrust law in this context": (1) avoiding unnecessarily complicated litigation; (2) providing direct purchasers with incentives to bring private antitrust actions; and (3) avoiding multiple liability of defendants.[28] The Ninth Circuit concluded that state laws permitting indirect purchasers to recover were preempted because they would conflict with these three policy goals.[29]

The Supreme Court framed the issue before it as "whether this rule limiting recoveries under the Sherman Act also prevents indirect purchasers from recovering damages flowing from violations of state law, despite express state statutory provisions giving such purchasers a damages cause of action."[30] The Court conducted an analysis of pre-emption principles and concluded that there was no bar to the state law indirect purchaser claims. In noting the "pre-sumption against finding pre-emption of state law in areas traditionally regulated by the States," the Court concluded that "[g]iven the long history of state common-law and statutory remedies against monopolies and unfair business practices,[ ] it is plain that this is an area traditionally regulated by the States."[31]

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25 *Id.* at 98.

26 *Id.* at 99.

27 *In re Cement and Concrete Antitrust Litig.,* 817 F.2d 1435 9th Cir. (1987).

28 *Id.* at 1445.

29 *Id.*

30 *ARC America*, 490 U.S. at 100.

31 *Id.* at 101; *see also* n. 4, recognizing that "[a]t the time of the enactment of the Sherman Act, 21 States had already adopted their own antitrust laws" and that "[m]oreover, the Sherman Act itself, in the words of Senator Sherman, 'does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.'"(citation omitted).

In reversing the Ninth Circuit, the Court relied on several prior decisions holding that federal antitrust laws do not pre-empt state law.[32] The Court stated that state indirect purchaser laws are "consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct."[33] In a critical passage, the Court stated:

> It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows states to do under their own antitrust law. As construed in *Illinois Brick,* § 4 of the Clayton Act authorizes only direct purchasers to recover monopoly overcharges under federal law. We construed § 4 as not authorizing indirect purchasers to recover under federal law because that would be contrary to the purposes of Congress. But nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws.[34]

The Court further noted that state indirect purchaser statutes "cannot and do not purport to affect remedies available under federal law."[35] The Court rejected arguments that state indirect purchaser statutes might create a disincentive to direct purchaser suits before turning to the Ninth Circuit's conclusion that permitting state indirect purchaser claims "might subject antitrust defendants to multiple liability, in contravention of the 'express federal policy' condemning multiple liability."[36] The Supreme Court emphatically rejected this argument:

> [ ] *Illinois Brick,* as well as *Associated General Contractors* and *Blue Shield,* all were cases construing § 4 of the Clayton Act; in none of those cases did the Court identify a federal policy against States imposing liability in addition to that imposed by federal law. Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law, see *Silkwood v. Kerr-McGee Corp.,* 464 U.S. [238], at 257-258; *California v. Zook,* 336 U.S. 725, 736 (1949), and no clear purpose of Congress indicates that we should decide otherwise in this case.[37]

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32 *Watson v. Buck,* 313 U.S. 387, 403 (1941); *Puerto Rico v. Shell Co.,* 302 U.S. 253, 259-260 (1937).

33 *ARC America*, 490 U.S. at 102.

34 *Id.* at 103.

35 *Id.*

36 *Id* at 105, quoting *In re Cement and Concrete Antitrust Litig.,* 817 F.2d at 1446; the Ninth Circuit had cited *Associated Gen. Contractors of Cal., Inc. v. Carpenters,* 459 U.S. 519, 544 (1983) ("*Associated General Contractors*"), and *Blue Shield of Va. v. McCready,* 457 U.S. 465, 474-75 (1982) ("*Blue Shield*") for this proposition.

37 *ARC America*, 490 U.S. at 105.

IV. FEDERAL AND STATE REMEDIES ARE EXCLUSIVE AND SHOULD NOT BE ALLOCATED

Since *ARC America*, critics have advocated changes to the law that would upset the federal and state policies of deterrence supported by private enforcement. Among the arguments advanced is the claim that it is unfair to subject an antitrust violator to "duplicative" damages as a result of concurrent federal and state claims. The critics also claim that *Hanover Shoe* suggested a "catch-all" exception to the rule barring evidence of pass through of overcharges.

In *In re TFT-LCD (Flat Panel) Antitrust Litig.* ("*TFT-LCD*"),[38] direct purchaser class plaintiffs, indirect purchaser class plaintiffs, opt out plaintiffs – some direct purchasers and some indirect purchasers – and state attorneys general all asserted claims against the defendants for a price-fixing conspiracy. As trial approached, a group of defendants filed a motion "Regarding Trial Structure and for Relief to Avoid Duplicative Recovery."[39] Defendants argued that there must be an allocation of damage claims of direct purchasers under federal law and indirect purchasers under state law, and introduced a parade of horribles – including "crippling liability" – that would result if the relief they asked for was not granted.

The defendants made three arguments to support their position. First they claimed that due process required an allocation. Citing *W. Union Tel. Co. v. Commonwealth of Penn.*[40] ("*Western Union*"), defendants argued that Supreme Court precedent concerning the Sherman Act – including *Hanover Shoe* – "must yield to the dictates of due process."[41] But *Western Union* was not an antitrust case. It addressed the question of whether the State of Pennsylvania could compel a telephone company to escheat unclaimed and unpaid money orders originating from other states to Pennsylvania. Pennsylvania law provided that property within the Commonwealth and unclaimed for seven years escheated to the Commonwealth. Western Union argued that other states might argue that the personal property at issue was subject to their jurisdiction, and thus that it would be denied due process if Pennsylvania took the property without protecting Western Union from claims by individuals with an interest in the unclaimed property or the other states which might assert a similar claim to escheat the funds.

In holding that Western Union's right to due process was violated because Pennsylvania took the property without protecting Western Union from future claims from other states, the Supreme Court drew from a long line of precedent, holding that "when a state court's jurisdiction purports to be based, as here, on the presence of property within the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment."[42]

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38 Case No. 3:07-md-1827 SI. MDL No. 1827.

39 *Id.* (Dkt. 5258).

40 368 U.S. 71 (1961)

41 Case No. 3:07-md-1827 SI. MDL No. 1827 (Dkt. 5258, 2:25-27).

42 *Western Union*, 368 U.S. at 75.

Western Union concerned claims to escheat funds by multiple sovereigns with claims to those funds and had nothing to do with the purposes and policies of the federal and state antitrust laws. The arguments made by defendants in *TFT-LCD* stretched the holding in *Western Union* beyond recognition and ignored the fact that *ARC America* – decided decades after *Western Union* – endorsed duplicative recoveries under federal and state law with no mention of the concerns underlying *Western Union*.

Second the *TFT-LCD* defendants argued that treble damage awards are "punitive in nature," and that multiple awards "for the same overcharge violate the constitutional protection against excessive punitive damages." Defendants relied on *State Farm Mut. Auto Ins. Co. v. Campbell*[43] and *BMW of N. Am., Inc. v. Gore.*[44] This argument is noteworthy for its acceptance that the purpose of treble damages for antitrust violations is deterrence, but the defendants made a great leap from stating that treble damages are similar to punitive damages to concluding that the same limitations on punitive damages apply to treble damages for antitrust violations. Furthermore, like their due process argument, this argument ignores the holding of *Arc America* that states are free to enact laws providing remedies "over and above" federal law.

The third argument made by the *TFT-LCD* defendants was that state laws like the Cartwright Act require that the court take steps to avoid duplicative recoveries. Defendants quoted the *Clayworth* Court when it said that "the bar on consideration of pass-on evidence must necessarily be lifted" when a court seeks to avoid duplicative recovery.[45] However, this portion of the *Clayworth* opinion was part of a longer discussion of potential future cases under the Cartwright Act in which multiple levels of purchasers asserting claims ***under the Cartwright Act*** were present and where the trial court in such future case had determined that "damages must be allocated amongst the various levels of injured purchasers."[46] While the California Supreme Court was envisioning what might happen in a potential future case, it was dicta and was certainly not intended to suggest that the bar of pass-through evidence required by federal law would be lifted in a federal action because of the presence of a coordinated or consolidated California action. As stated in *ARC America,* the Cartwright Act cannot limit remedies available under federal law.[47]

In support of their third argument, defendants also argued that California state law itself bars this duplicative recovery. For this proposition they cited Cal. Bus. & Prof. Code § 16760(a)(1), which provides that "[t]he court shall exclude from the amount of monetary relief awarded in the action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims . . . . and (ii) any business entity." However, this provision only applies to actions brought by the Attorney General on a *parens patriae* basis. The fact that the Legislature did not include a similar limitation on

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43 538 U.S. 408 (2003).

44 517 U.S. 559 (1996).

45 Case No. 3:07-md-1827 SI. MDL No. 1827 (dkt. 315)

46 *Id.*

47 *ARC America,* 490 U.S. at 103 (state indirect purchaser statutes "cannot and do not purport to affect remedies available under federal law").

actions brought by private plaintiffs demonstrates that no such limitation or allocation was intended.[48]

Finally, defendants quoted Judge Wilken's suggestion in a hearing in *In re Static Random Access Memory ("SRAM") Antitrust Litig.,*[49] that "It seems to me that wouldn't be allowed. There has to be some method of allocating . . . . 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."[50] However, these comments of Judge Wilken, made during a hearing on an issue not yet briefed, carry no force of law.

As to the argument that permitting duplicative damage claims under both federal and state law is unfair or violates due process, the first, and most simple, solution is the cessation of cartel and monopoly behavior. Beyond this, those critics can point to no basis in law to support their arguments, as the Supreme Court has made clear that in this field the states are free to impose liability above and beyond that imposed by federal law, and that both state and federal antitrust statutes serve the same purpose – to discourage and deter antitrust violations. Studies performed since *ARC America* indicate that defendants have not been actually subject to duplicative damages despite the existence of numerous claimants and damage multipliers.[51]

In addition to the arguments made in *TFT-LCD*, some argue that the exceptions to the rule barring the pass through defense identified in *Hanover Shoe* were only illustrative and other exceptions may be made. The two exceptions articulated in *Hanover Shoe* are (1) where the plaintiff had entered into a cost-plus pricing contract with an indirect purchaser before the plaintiff begins paying the artificially inflated price, and (2) where the direct purchaser is owned or controlled by the defendant, and thus is unlikely to bring a claim against the defendant. The first exception is grounded in *Hanover Shoe*'s concern with the immense complexity of determining indirect purchaser damages. It articulates the Court's recognition that where there is a pre-existing cost-plus contract the complexities of proving the pass through of overcharges is mitigated. The second exception is grounded in the need to promote the private enforcement of the antitrust laws or accomplish the deterrent purpose of those laws.

Advocates of a change argue that these exceptions were not intended to be the only circumstances in which a pass through defense should be allowed, and that if both direct purchasers and indirect purchasers are present before the same court the pass through defense should be permitted because the indirect purchasers will be presenting evidence of the pass through.[52] This argument, if accepted, would eviscerate the federal and

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48 Cal. Bus. & Prof. Code § 16750 (permitting private claims for violation of the Cartwright Act by "any person who is injured in his or her business or property") contains no language similar to that in § 16760(a)(1) requiring elimination of duplicative damages.

49 Case No. 3:07-md-1819 CW. MDL No. 1827.

50 *Id.,* [Hearing Tr. 9:2-4, 8-10 (December 14, 2010)].

51 *See e.g.* Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U. S.F. L. Rev. 651, 658 (2006). (finding there has "never been even one case where a cartel's total payouts exceeded three times the damages involved").

52 *See, e.g.*, Gary A. Winters, *Trial Issues in Consolidated Direct and Indirect Purchaser Cases: Lessons from the SRAM Litigation* ABA Antitrust Trial Practice Newsletter, Spring 2011.

state antitrust laws by overriding the explicit teachings of *Hanover Shoe, Illinois Brick,* and *ARC America.* It would diminish recoveries to injured plaintiffs, and thus eliminate the incentives for private plaintiffs to pursue antitrust claims – a primary purpose of the antitrust laws for over a century. At a time rife with cartel activity, private enforcement is needed more than ever before.

Providing incentives for both direct purchasers and indirect purchasers to pursue antitrust violations is not only wholly consistent with the broad purposes of the antitrust laws, it is one of the primary means by which the state and federal legislatures sought to enforce the antitrust laws. The recent discovery of massive, worldwide antitrust cartels which target American businesses and consumers – in industries including electronics products, automobiles, motorcycles, air transportation, air cargo transportation, and freight forwarding – demonstrates that retaining the incentives for private plaintiffs to enforce the antitrust laws is more necessary now than ever before. Congress and state legislatures have long-recognized the harm caused by cartels – the "supreme evil of antitrust"[53] in the words of Justice Scalia. Apportioning damages between federal and state claimants would remove a crucial incentive for plaintiffs to bring cases. The only outcome from such a move would be to embolden companies considering collusion and to promote cartel behavior.

Given the multiple hurdles that have been placed on antitrust plaintiffs in recent years,[54] cartelists will face liability only if they have, in fact, violated the antitrust laws.

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53 *Verizon Commc'ns v. Law Office of Curtis V. Trinko,* 540 U.S. 398, 408 (2004).

54 *Matsushita Electrical Industrial Co.., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986) (summary judgment standards); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007) (motion to dismiss standards); *Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (2013) (summary judgment standards).

THE PROBLEM OF DUPLICATIVE RECOVERY UNDER FEDERAL AND STATE ANTITRUST LAW

By Kyle W. Mach and Bradley E. Markano[1]

I. INTRODUCTION

Violations of the antitrust laws can have serious consequences for consumers and other players in the US economy. Understandably, federal and state legislatures have imposed significant penalties for those who commit such violations, and particularly for those who do so deliberately. These include not only criminal penalties, such as monetary fines and prison time, but also very substantial civil liabilities, with some allowing plaintiffs to recover treble damages.

Standing alone, any one of these types of actions—federal or state, criminal or civil—could serve as a strong deterrent to illegal behavior, and rightly so. But antitrust actions often do not come one-by-one. Instead, overlapping regulatory schemes allow concurrent enforcement by federal prosecutors, state attorneys general, and a long list of private plaintiffs, which can simultaneously hit defendants with enormous overlapping liabilities for the same conduct. Taken together, these liabilities create what Judge Richard Posner has called a "cluster-bomb effect" on the subject defendant,[2] in which the costs of the anti-competitive conduct are borne repeatedly through related litigation of many different types in many different fora.

Some would argue that even "excessive" antitrust damages are justifiable.[3] The goal of the antitrust laws is not merely to redress plaintiffs' losses on a case-by-case basis, but also "to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[4] In some cases, these interests could be best served through fines and other liabilities that exceed the amount of ill-gotten gain and the amount of the harm caused.[5] Some argue that extra-compensatory damages may actually be *necessary* for effective deterrence in certain circumstances, because potential malefactors will discount the expected value of punishment by the probability that they might "get away with it."[6]

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2 Richard Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940 (2001) ("No sooner does the Antitrust Division bring a case, but the states, and now the European Union, are likely to join the fray, followed at a distance by the antitrust plaintiffs' class-action bar. The effect is to lengthen the original lawsuit, complicate settlement, magnify and protract the uncertainty engendered by the litigation, and increase litigation costs.").

3 *See, e.g.*, Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. REV. 651, 669 (2006) (arguing that a reduction in statutory damages "would lead to less deterrence than currently exists, would be more complicated, and . . . would lead to less business certainty.").

4 *BMW of N. Am. v. Gore*, 517 U.S. 559, 567 (1996).

5 *See* William Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 653-57 (1983) (evaluating the economic balancing required to achieve optimal antitrust deterrence).

6 *See id.*

Large recoveries may also encourage private civil litigants to pursue claims which might otherwise have too little value to merit litigation. In appropriate circumstances, this could alleviate the burden on government regulators while enhancing deterrence.[7]

But there is a limit to how far these arguments can take us. Grossly elevated liabilities raise the risk of undesirable over-deterrence. Industries may respond to the risk of excessive antitrust liability by raising prices or leaving the business entirely.[8] Thus, windfall recoveries for relatively few plaintiffs could result in unnecessarily inflated prices for the general population—precisely the opposite of what antitrust laws are intended to achieve.[9]

Furthermore, excessive liability may be simply unjust. The potential for extreme punishment could encourage firms to settle even insubstantial claims, rather than betting the company on a jury trial on the merits. In part to prevent precisely this kind of inequitable result, the Supreme Court has held that the Due Process clause of the Constitution forbids repeat payment of the same debt and imposes a cap on excessive punitive damages.[10]

Needless to say, it can be difficult for some to feel sympathy for those accused of antitrust violations, particularly willful antitrust violations. But a full accounting of the total liabilities that threaten antitrust violators reveals that, in many cases, the total liability is unjustifiably high. As this article discusses, the "cluster-bomb" that threatens antitrust defendants leads to a risk of liability that in many cases violates practical, and perhaps constitutional, limits on excessive damages, and tilts the scales unfairly against defendants.

In this article, we begin by briefly discussing four separate, but overlapping, forms of antitrust liability: criminal prosecution, federal civil claims, state civil claims, and claims brought by the state acting on behalf of citizens in *parens patriae*. Reviewing the intersections between these four types, we show how easily a single antitrust violation can result in multiple liabilities for defendants. Then, we briefly assess the public policy and potential constitutional problems that arise from this explosion in liability. Finally, we conclude by introducing a few plausible methods by which litigants, courts and legislatures could mitigate the worst excesses of the current system.

II. A SINGLE ANTITRUST VIOLATION CAN SPAWN A TREMENDOUS VARIETY OF RELATED ACTIONS AND RAISE THE RISK OF DUPLICATIVE RECOVERIES

To establish the weight of antitrust penalties under the status quo, consider a fictional entity, Corporation X, which participates in illegal, collusive price fixing that results in overcharges (prices exceeding the non-collusive "but for" price) in an aggregate amount

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7 As is discussed below, the legislature's "longstanding policy of encouraging vigorous private enforcement of the antitrust laws" has weighed particularly heavily in judicial interpretation of these laws. *Ill. Brick Co. v. Ill.*, 431 U.S. 720, 745 (1977).

8 *See* Landes, *supra* note 6, at 655 ("[T]he purpose of penalties . . . is to deter inefficient offenses, not efficient ones. Stated differently, the optimal level of offenses is generally greater than zero.").

9 For a discussion of the special problems that overdeterrence presents in the antitrust context, *See, e.g.*, Micheal K. Block & Joseph Gregory Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then*?, 68 GEO. L.J. 1131 (1980).

10 *See infra*, notes 54-58 and accompanying text.

of 100 million dollars. Corporation X is based outside of the U.S., and its products only reach the market after being integrated into assorted other more complex units, in a chain of intermediate buyers and sellers that spans several other non-U.S. jurisdictions. Some of these products are sold without any knowledge of their ultimate destination or use, and with little expectation of liability in the United States. Although this may appear to be a highly stylized scenario, antitrust practitioners will recognize its similarity to a substantial number of recent cases.

Throughout the chain of distribution, there are numerous customers who can claim to have been injured, and multiple regulatory entities that may seek to punish the alleged antitrust violator. The result is a staggering degree of liability, which is rarely considered at a single time, or even before a single court. We summarize here some of the most prominent sources of that liability.

A. Federal Criminal Charges

Under federal law, both civil and criminal antitrust violations are governed by the Sherman Act, which proscribes "[e]very contract, combination . . . or conspiracy" in restraint of interstate or foreign commerce.[11] As with an alleged civil violation, criminal prosecutors must show "(i) an agreement to concerted action, such as a combination or conspiracy formed by two or more entities; (ii) that the agreement unreasonably restrained trade or commerce; and (iii) that the restrained trade or commerce is interstate or international in nature."[12] In addition, criminal claims require prosecutors to establish subjective intent—but courts have sometimes found that the burden of proof for this element is quite low.[13]

Although violation of the Sherman Act was once a misdemeanor, punishable by fines limited to $50,000 and up to one year's imprisonment, Congress reclassified such violations as felonies in 1974, and since then "potential criminal fines have increased dramatically."[14]

The stakes of criminal prosecution were brought home in 2012 with the record-tying fine of Taiwanese corporation AU Optronics ("AUO"), which was found guilty of conspiring to fix prices on liquid-crystal display ("LCD") panels. In one of only a few major antitrust cases recently to go to trial, Judge Susan Illston of the Northern District of California fined the corporation $500 million, and sentenced each of three senior executives to three years in prison and additional $200,000 fines.[15]

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11 15 U.S.C. § 1 (2006). Federal prosecutors also have authority to regulate antitrust behavior under sections 1 and 2 of the Sherman Act, section 3 of the Robinson-Patman Act, and section 14 of the Clayton Act. *See generally* Bahadur S. Khan, Nickolas H. Barber, *Antitrust Violations*, 50 Am. Crim. L. Rev. 639, 680 n.8 (2013) (summarizing criminal antitrust regulations).

12 *Id.* at 640-41.

13 *Id.* at 651-52.

14 Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 Ariz. L. Rev. 413, 428 (1997).

15 *See* Don Clark & Brent Kendall, *AU Optronics Fined $500 Million in Price-Fixing Case*, Wall Street Journal (Sept. 20, 2012), http://online.wsj.com/news/articles/SB10000872396390444032404578008420937555176.

But even this fell far short of the penalties sought by federal prosecutors, who asked for a $1 billion fine and ten year prison terms. During sentencing, the prosecutors argued that the Alternative Fine Statute[16] allows criminal fines up to twice the gain or twice the loss caused by the violation—in this case, a figure far exceeding the Sherman Act's statutory maximum penalty of $100 million.[17] And the calculations recommended by the U.S. Sentencing Guidelines suggested fines between $936 million and over $1.8 billion.[18] However, Judge Illston limited the fine to the jury's determination of actual damages, at least in part "because AU Optronics had already paid out millions to settle a class-action lawsuit and still faced other lawsuits in the United States and around the world."[19]

While the fines issued to AUO were exceptional even among high-profile antitrust cases, they are representative of a trend toward larger and more frequent fines.[20] As of June this year, the DOJ had already issued $709 million in fines for criminal antitrust violations, and was on track to easily surpass last year's high of $1.02 billion in total fines.[21] The largest of these fines was $425 million, levied upon Japan-based Bridgestone Corp., which saw an increased penalty due to its status as a "repeat offender" after allegedly failing to disclose conspiratorial behavior in 2011.[22] And criminal prosecution is very often just the first of many claims for antitrust defendants: An adverse criminal verdict may presage unfavorable civil outcomes in federal and state courts.[23]

B. Federal Civil Claims: *Illinois Brick* and *Hanover Shoe*

When that civil litigation comes, at least some of it will be brought under federal law. These federal claims, and the available defenses, are subject to a number of important

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16 18 U.S.C. § 3571.

17 15 U.S.C.A. § 1.

18 *See* United States' Sentencing Memorandum at 23, *United States v. AU Optronics Corp.*, 09-CR-0110 SI, 2012 WL 2120452 (N.D. Cal. June 11, 2012), *available at* http://www.justice.gov/atr/cases/f286900/286934_1.pdf.

19 Associated Press, *Taiwan Company Fined $500 Million for Price-Fixing*, New York Times (Sept. 20, 2012), http://www.nytimes.com/2012/09/21/business/au-optronics-fined-500-million-in-us-price-fixing-case.html?_r=0.

20 For a record of the 115 corporate defendants fined over $10 Million for violation of the Sherman Act, see DOJ Antitrust Division, *Sherman Act Violations Yielding A Corporate Fine of $10 Million or More*, *available at* http://www.justice.gov/atr/public/criminal/sherman10.pdf. The DOJ records 26 defendants fined $100 million or more—all of them in 1999 or later. *Id*.

21 *Global Antitrust Enforcement 2014 Mid-Year Report*, Allen & Overy (June 24, 2014), http://www.allenovery.com/SiteCollectionDocuments/Global_Antitrust_Enforcement_2014_(Mid-Year)_Report.PDF.

22 *See id*. at 4.

23 At the start, whether Corporation X faces any liability at all will likely depend on whether federal prosecutors think the case worth their time. The initial investigation and discovery for antitrust cases can be resource-intensive, and so individual plaintiffs often (though by no means always) wait for the state to make the first strike. *See* Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 Chi.-Kent L. Rev. 207, 236 (2003) ("Frequently, but not always, . . . civil suits are preceded by government criminal prosecutions of the defendants, enabling the plaintiffs to take advantage of a statutory provision making any verdict in a government antitrust case prima facie evidence in subsequent private litigation.").

limitations. For our purposes, the most important of these limitations originate with the Supreme Court's decisions in *Hanover Shoe*[24] and *Illinois Brick*.[25]

The defendant in *Hanover Shoe*, a manufacturer of "complicated and important shoe machinery," maintained an illegal monopoly, which led to increased prices for the direct purchaser, a shoe manufacturer.[26] However, the defendant claimed that the plaintiff had suffered no real injury, because the inflated cost of machinery had simply been passed down the chain of production in the form of higher shoe prices for consumers.[27]

The Supreme Court rejected the "passing-on" defense for two reasons. First was the difficulty of calculating the actual harm suffered by any given plaintiff downstream of the direct purchaser, given the "wide range of factors" at play and the concern that lawsuits would then require "long and complicated proceedings involving massive evidence and complicated theories."[28] Second was the need to encourage plaintiffs to file suit, lest violators "retain the fruits of their illegality," and justice be thwarted. The fear was that antitrust defendants might be too successful in arguing that illegal overcharges were passed down, leaving the end purchasers—who may have suffered only attenuated and comparatively minimal overcharges—with the only valid cause of action.[29] Therefore, the Court concluded, the direct purchaser must be considered *de jure* victim of 100% of the harm caused by the antitrust violation, without any need to determine whether that purchaser had actually absorbed the overcharge or passed it on to customers.

But *Hanover Shoe* raised a fundamental problem: what if an indirect purchaser filed suit against an antitrust violator in federal court, and successfully established that it had suffered a loss due to the defendant's behavior? Should the court allow the plaintiff to recover, even though the defendant was already liable to the direct purchaser for 100% f all damage, plus treble damages?

In *Illinois Brick*,[30] the Court confronted just this situation. A price-fixing conspiracy perpetrated by a concrete manufacturer had led to increased prices for concrete, inflating costs for masonry and in turn increasing the price of buildings sold to the state of Illinois. Concerned about the "risk of multiple liability for defendants," [31] and unwilling to overturn the recent decision of *Hanover Shoe*, the Court held that federal law did not allow the State of Illinois to recover any damages arising from illegal overcharges—even if it had in fact suffered a loss. Subsequent cases have confirmed that the *Illinois Brick*

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

25 *Ill. Brick Co. v. Ill.*, 431 U.S. 720 (1977).

26 *Hanover Shoe, Inc.*, 392 U.S. at 483-84.

27 *Id.* at 487-88.

28 *Id.* at 492-93.

29 *Id.*

30 *Ill. Brick Co.*, 431 U.S. at 728.

31 *Id.* at 731.

rule is a "rigid and expansive" bright-line rule, which applies even when damages are easily calculated and the indirect purchaser is likely to be the sole claimant.[32]

The net result of *Illinois Brick* and *Hanover Shoe* is that direct-purchasers recover all of the alleged overcharges caused by the antitrust violation, plus treble damages, regardless of whether defendants can prove that those overcharges under federal law were passed on to another party. Meanwhile, indirect purchasers generally cannot recover, regardless of whether they can prove that they, and not the direct purchasers, actually absorbed the overcharge.[33]

The *Illinois Brick* rule has sat uneasily with many observers, and has met with frequent calls for judicial or legislative repeal, including one from 2007's Antitrust Modernization Commission.[34] But if we accept *Hanover Shoe,* then *Illinois Brick* makes perfect sense; contrary to Justice Breyer's dissent, any system that allowed repeat calculation of the same overcharge in suits by indirect *and* direct purchasers would be certain to cause unpredictable results, especially if those suits are not in the same tribunal. And given that one of the primary goals of the antitrust laws is to deter violations, a regime that requires wrongdoers to fully compensate *someone* may be desirable—even if the plaintiff is not necessarily the ultimate victim.

However, as the next section discusses, the logic of *Hanover Shoe* and *Illinois Brick* has been severely undermined by contradictory approaches taken in state courts.

C. State Antitrust Claims

Although many states model their antitrust laws on the Sherman Act and other federal statutes,[35] almost half reject the approach taken by the Supreme Court in *Hanover Shoe* and *Illinois Brick*. Under "*Illinois Brick* repealer" statutes, indirect purchasers may recover on the theory that the direct purchaser passed the overcharge down the supply chain.[36]

These variations are not preempted by federal law, but instead exist concurrently, providing an alternate set of controls over the same conduct. The Supreme Court has held that state laws allowing recovery by indirect purchasers "are consistent with the broad

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32 *See Kan. v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990) (White, J., Dissenting) (objecting to denial of recovery to indirect purchasers in the highly-regulated gas market).

33 Note that the *Illinois Brick* rule *is* subject to certain "limited exceptions" which are beyond the scope of this article. *See, e.g., In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 749 (9th Cir. 2012) *cert. denied*, 134 S. Ct. 257 (2013).

34 *See* Antitrust Modernization Comm'n, Report and Recommendations 18 (2007), available at http://www.amc.gov/report_recommendation/amc_final_report.pdf.

35 *See State v. Sterling Theatres Co.*, 394 P.2d 226, 228 (Wash. 1964) (noting "nearly identical wording" of a Washington state statute and the Sherman Act); Jonathan T. Tomlin, Dale J. Giali, *Federalism and the Indirect Purchaser Mess*, 11 Geo. Mason L. Rev. 157, 161 (2002) (observing that "state and federal antitrust laws generally proscribe the same type of conduct").

36 A few other states have accomplished the same end without resorting to formal legislation, by rejecting the *Illinois Brick* rule through judicial interpretation, even without a legislated repealer. *See id.* (describing this phenomenon (citing *Comes. v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002); *Bunker's Glass Co. v. Pilkington*, 47 P.3d 1119 (Ariz. Ct. App. 2002*); Hyde v. Abbott Labs., Inc.*, 473 S.E.2d 680, 684 (N.C. Ct. App. 1996)).

purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct."[37] Indeed, some view "the coordination of federal and state antitrust enforcement [as] a prime example of 'cooperative federalism.'"[38]

But this coincidence of regulations has a peculiar result: federal law permits upstream plaintiffs to claim damages based on the amount of harm caused by the defendant, as though the plaintiff suffered all of the damage without passing any of the costs on to downstream buyers. Then, at the state level, a downstream plaintiff has the option to claim as much of 100% of the total damage as well, often in a separate court and before a separate jury.

Given the complexity of many modern supply chains, this does not begin to describe the degree of the problem. In many cases, there are multiple tiers of indirect purchasers that act as intermediaries on the product's path to market, and each has the option to claim that it and it alone has suffered the full amount of the harm caused by the defendant. In the case of complex, cross-border supply chains, some of these indirect purchasers may make a huge volume of purchases, but be several steps, and perhaps several jurisdictions, removed from the defendants' conduct. All of this multiplies the potential liability, and makes the ultimate cost of any particular violation extremely difficult to foresee.

In fact, the imbalance between plaintiff and defendant is still greater. Under the rationale of *Illinois Brick*, a legal system that allows indirect purchaser actions should also permit the use of the pass-through defense to avoid some of the risk for duplicative damages. Indeed, many state antitrust statutes are explicit in denying plaintiffs the option to pursue damages that have already been recovered in a different suit or different forum.[39] This usually means allowing defendants in indirect purchaser suits to use the defense of "pass-on" to avert duplicative recovery.[40] Some of these statutes go further,

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37 *Cal. v. ARC Am. Corp.,* 490 U.S. 93, 102 (1989) (citing *Ill. Brick Co.,* 431 U.S. at 746).

38 *Younger v. Jensen*, 26 Cal. 3d 397, 405 (1980).

39 *See e.g.*, Ark. Stat. Code Ann. § 4-75-212(b)(1)(B) ("The court shall exclude from the amount of monetary relief awarded in the action any amount which duplicates amounts that have been awarded for the same injury already"); Cal. Bus. & Prof. Code § 16760(a)(1) ("The court shall exclude from the amount of monetary relief awarded in the action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims . . . , and (ii) any business entity."); Fla. Stat. Ann. § 542.22(2) (in parens patriae action, "[t]he court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief which: (a) [d]uplicates amounts which have been awarded for the same injury"); Or. Rev. Stat. § 646.775(1)(b)(A) (similar); R.I. Gen. Laws § 6-36-12(g) (similar).

40 *See* D.C. Code § 28-4509(b) ("a defendant shall be entitled to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of damages."); Haw. Rev. Stat. § 480-13(c)(2) (same); N.Y. Gen. Bus. Law § 340(6) (same); N.M. Stat. Ann. § 57-1-3(C) ("any defendant, as a partial or complete defense against a damage claim, may, in order to avoid duplicative liability, be entitled to prove that the plaintiff purchaser or seller in the chain of manufacture, production, or distribution who paid any overcharge . . ., passed on all or any part of such overcharge"); N.D. Cent. Code Ann. § 51-08.1-08(4).

and authorize judges to consolidate cases, apportion damages, and delay disbursement of awards in order to avoid duplication.[41]

But some state laws are more ambiguous, and state caselaw has not always developed sufficiently to clearly establish the permissibility of the pass-on defense. In the absence of judicial precedent or statutory guidance, some plaintiffs have argued that indirect purchase claims are not subject to a pass-on defense under state law, just as direct claims are not subject to the defense under federal law.[42] Few courts seem likely to agree with this extreme position, but the issue remains open in some states. Any court to accept this position would permit an explosion in duplicative damages claims under the relevant state law.

D. *Parens Patriae* Actions

While many indirect purchaser suits, particularly those bringing consumer claims, are pursued as class actions, state attorneys general can in some cases pursue claims on behalf of their citizens in *parens patriae*. The Hart-Scott-Rodino Act ("HSR A") explicitly grants state Attorneys General the authority to pursue *parens patriae* claims for monetary relief under the Clayton Act on behalf of both direct and indirect purchasers.[43] At present, twenty-two states allow their attorneys general to file such actions on behalf of indirect purchasers.[44] However, only four of these states prevent indirect purchaser suits in other forms, meaning that there is at least a risk that defendants will be simultaneously

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41 *See* D.C. Code § 28-4509(c) (permitting courts to "delay disbursement of damages to avoid multiplicity of suits and duplication of recovery of damages"); Haw. Rev. Stat. § 480-13(c)(5); Minn. Stat. Ann. § 325D.57 (authorizing courts to "take any steps necessary to avoid duplicative recovery against a defendant"); Miss. Code Ann. § 75-21-9 (authorizing antitrust suits for both direct and indirect injuries, and stating that "[a]ll recoveries herein provided for may be sued for in one suit"); N.Y. Gen. Bus. Law § 340(6) (requiring that "the court shall take all steps necessary to avoid duplicative recovery, including but not limited to the transfer and consolidation of all related actions"); Vt. Stat. Ann. tit. 9 § 2465(b) ("The court shall take all necessary steps to avoid duplicate liability, including but not limited to the transfer or consolidation of all related actions.").

42 For example, in the *TFT-LCD Antitrust Litigation*, certain retailer plaintiffs took the position that a number of state laws permitted indirect purchase claims but did not permit a pass-on defense to those claims. Fortunately (for the defendants, anyway), the court rejected this argument. *See In re TFT-LCD (Flat Panel) Antirust Litigation*, No. 07-1827 SI, Dk. No. 315 (Dec. 26, 2012).

43 15 U.S.C. § 15c.

44 *See* Cal. Bus. & Prof. Code § 16750 (West 1997 & Supp. 2002); Colo. Rev. Stat. § 6-4-111(3) (West 2002); Conn. Gen. Stat. § 35-32 (West 1997 & Supp. 2002); Del. Code Ann. tit. 6, § 2107 (1999); D.C. Code Ann. § 28-4507 (2001); Fla. Stat. Ann. § 542.22 (West 2002); Haw. Rev. Stat. § 480-14 (2002); Idaho Code § 48-108 (Michie 1997 & Supp. 2002); 740 Ill. Comp. Stat. 10/7 (2002); Kan. Stat. Ann. § 50-103 (1994 & Supp. 2001); Md. Code Ann. [Com. Law 1] § 11-209 (2000 & Supp. 2002); Minn. Stat. Ann. § 325D.59 (West 1995); Neb. Rev. Stat. § 59-828 (2002); Nev. Rev. Stat. § 598A.160 (1999); Ohio Rev. Code Ann. § 109.81(A) (Anderson 2001); Okla. Stat. Ann. tit. 79, § 205 (West 2002); Or. Rev. Stat. § 646.775 (1999); R.I. Gen. Laws § 6-36-12(g) (2001); S.D. Codified Laws § 37-1-33 (Michie 2000); Utah Code Ann. § 76-10-916 (1999); Vt. Stat. Ann. tit. 9, § 2458 (1993 & Supp. 2002); Va. Code Ann. § 59.1-9.15 (Michie 2001); W. Va. Code § 47-18-17 (1999).

faced with suits by indirect purchasers filing in their own capacity, and by state attorneys general who seek to vindicate similar interests.[45]

E. Total Potential Liability

Returning to hypothetical Corporation X, which caused $100 million in overcharges. What does it stand to pay for its conduct?

First, federal prosecutors could hypothetically pursue penalties amounting to twice the loss caused by the antitrust activity, or up to $200 million.[46] This federal prosecution may be accompanied by state criminal prosecution under similar statutes, resulting in additional fines in the relevant jurisdictions. Although state penalties are typically modest, they contribute meaningfully to the overall cost for defendants.

Second, federal civil claims brought by direct purchasers could lead to damages of $300 million—even if substantially all of the actual loss was suffered by indirect purchasers.

Finally, indirect purchasers could file suit under state law, either individually, in class actions, or represented by the state in *parens patriae* (or all three) leading to damages up to or exceeding $300 million, depending on how many layers of the distribution chain bring indirect purchase claims.

In the aggregate, the price tag has the potential to easily surpass $1 billion in the United States alone. And this amount does not account for additional fines levied in other jurisdictions, which can rival or even surpass United States penalties. For instance, in 2012 the European Commission alone levied a total of $1.92 billion in fines for LCD price-fixing, on top of the civil and criminal penalties issued in the U.S.[47] Furthermore, the calculations above assume that Plaintiffs do not claim damages in excess of those actually suffered, and do not account for the tremendous cost and inconvenience of defending what may be dozens of suits in different courts. If plaintiffs are even moderately successful, Corporation X will be required to pay far more than the treble damages envisioned by the Sherman Act and by the many state laws which adopt similar damages provisions.

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45 *See id.* This possibility of redundant trials may be exacerbated by the Supreme Court's recent decision of *Mississippi ex rel. Hood v. AU Optronics Corp.*, which held that a *parens patriae* suit on behalf of state residents is not subject to the same removal requirements as a class action by those same residents under the Class Action Fairness Act ("CAFA"). 134 S. Ct. 736 (2014). At best, this disparity in treatment raises the threat that antitrust defendants will be required to simultaneously defend functionally similar claims in both federal and state courts, depending on whether those claims are brought by class plaintiffs or state representatives.

46 Note that under the Federal Sentencing Guidelines, calculation of damages is a somewhat more complex process. Rather than merely applying a set multiplier to the estimated harm caused, fines are calculated based on a series of factors, including the size of the organization, the affected volume of commerce, and whether the defendant is a repeat offender. *See* U.S. Sentencing Guidelines Manual § 1B1.1 (2013).

47 *See* James Kanter, *Europe Fines Electronics Makers $1.92 Billion*, New York Times (Dec. 5, 2012), http://www.nytimes.com/2012/12/06/business/global/europe-fines-7-companies-for-picture-tube-price-fixing.html?_r=0.

III. DUPLICATIVE RECOVERY CREATES MORE PROBLEMS THAN IT SOLVES

Although there is a credible argument to be made for damages exceeding the extent of the harm caused by an antitrust violation, there are real problems with the kind of extreme deterrence that results from the current system. These problems arise both as a matter of policy and as a matter of law.

A. Duplicative Recovery Raises Substantial Public Policy Concerns

As a preliminary matter, the very risk of duplicative or excessive liability in antitrust disputes has problematic public policy implications. Three policy issues merit special discussion.

1. Excessive Punishment Can Deter Pro-Competitive Conduct

In the antitrust field, the boundaries between legal and illegal behavior can at times be hard to identify *ex ante*.[48] The facts of these cases can be highly complex, evidence of violations is frequently unclear or circumstantial, and jury verdicts can be unpredictable in the best of situations.[49] All of these factors raise the possibility of over-deterrence, in which legal, procompetitive conduct is impeded by the well-intentioned but zealous enforcement of existing law. This outcome threatens innovation and can deter aggressive, but pro-competitive, forms of competition, as businesses moderate any conduct that poses even a modest risk of antitrust scrutiny, whether the conduct is anticompetitive or not.[50] The effort to punish antitrust violators can in this way harm competition and, ultimately, consumers.

The risk of over deterrence is exacerbated by our system of joint state-federal regulation, which allows local variations in antitrust enforcement to dramatically alter defendants' liability. For example, a violator whose products make their way only

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48 *See* Tomlin & Giali, *supra* note 35, at 173 ("The borderline between legitimate, productive competitive behavior and anticompetitive behavior is not always well defined, such as the distinction between (illegal) price fixing and (not-illegal) tacit collusion.").

49 *See id* (describing the challenges of defending modern antitrust cases).

50 As the Supreme Court has noted:
"The imposition of criminal liability on a corporate official, or for that matter on a corporation directly, for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of over-deterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment."
United States v. United States Gypsum Co., 438 U.S. 422, 440-41 (1978). *See also* Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777, 801 (1987) ("Fear of treble damages leads corporate managers to shy away from conduct which, although permissible, may fall close enough to the mythical line separating legality from illegality to trigger a lawsuit. The threat of treble damages, thus, deters good as well as bad conduct and may deny society the benefits of procompetitive business practices.").

through states with *Illinois Brick* repealer statutes will have dramatically more liability than one whose products enter only states without such statutes. However, a defendant may find that its products have entered a state in which indirect purchasers are permitted to sue only long after the first litigation is underway. The end result is that the same conduct may be subject to very different outcomes, depending on the location of indirect purchasers.[51] For those making business decisions, this added uncertainly can further expand the scope of legal conduct that is deterred by the risk of antitrust liability.

2. Excessive Liability Leads to Excessive Settlement Pressure and Undesirable Litigation

The magnitude of the potential damages also increases the already imposing pressure on defendants to settle antitrust suits. A *single* antitrust suit, and the accompanying treble damages, is too much for many defendants to risk at trial. Multiple suits, and multiple trials, greatly magnify this problem, and increase the chances that defendants will be intimidated into settling even meritless claims. Of course, this practice also further spurs the filing of groundless lawsuits.[52]

3. Excessive Liability Has Disproportionate Effects on Foreign Entities, Raising Comity Concerns

As the Supreme Court has observed, "application of [US antitrust] laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs."[53] And, for a variety of reasons, over-enforcement of antitrust laws may also have a disproportionate effect on foreign defendants.[54] In fact, thus far in 2014, the Department of Justice has *only* imposed fines on foreign corporations, with seven of eight fines issued going to Japanese corporations.[55] As the claims and

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51 *See* Tomlin & Giali, *supra* note 35, at 176 ("Under the current system, the confluence of factors determining pass-through and the presence of highly varying state laws lead to outcomes in which firms levying identical overcharges and causing identical reductions in social welfare can incur penalties that are dramatically different.").

52 *See* Richard Posner, Antitrust Law: An Economic Perspective 228 (1976) ("Students of the antitrust laws have been appalled by the wild and woolly antitrust suits that the private bar has brought—and won. It is felt that many of these would not have been brought by a public agency and that, in short, the influence of the private action on the development of antitrust doctrine has been on the whole a pernicious one."); Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777, 809 (1987) ("The lure of treble damages may encourage the filing of baseless suits which otherwise might not have been filed.").

53 *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004).

54 The DOJ records that of the 115 highest fines levied against criminal antitrust defendants, only 16 were issued to domestic corporations. DOJ Antitrust Division, *Sherman Act Violations Yielding A Corporate Fine of $10 Million or More*, *available at* http://www.justice.gov/atr/public/criminal/sherman10.pdf. The DOJ records 26 defendants fined $100 million or more—all of them in 1999 or later. *Id.*

55 *Global Antitrust Enforcement 2014 Mid-Year Report*, *supra* note 21, at 4.

damages against foreign entities (or relating to foreign conduct) multiply, concerns about international implications increase. [56]

B. Duplicative Recovery Raises Substantial Due Process Concerns

"Common sense dictates that a defendant should not be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs."[57] But the possibility of repeat liability allowed by contradictory state and federal laws is not only bad policy; it may also be unconstitutional.

1. Due Process Bars Multiple Payment of the Same Debt

The Constitution demands "assurance" that defendants will not be required to render the same property to multiple parties. In *Western Union Telephone Company v. Pennsylvania*, the state of Pennsylvania sought to take possession of assorted unclaimed funds sent through Western Union's telegraphic money order system.[58] This was permitted by state statute, which stipulated that funds unclaimed after a certain period of time would escheat to the state.[59] But the Court found that Due Process foreclosed Pennsylvania's recovery, because the state could not guarantee that the defendant would be free from subsequent repeat demands for the same funds, either by senders of money orders who would not be bound by the escheat judgment, or by other states.[60] Without the possibility of "a full hearing and a final, authoritative determination," the lower court lacked the constitutional authority to resolve the dispute.[61] This holding has been affirmed in other cases, which have repeatedly held that "[i]t ought to be and it is the object of courts to prevent the payment of any debt twice over."[62]

However, the redundant recoveries allowed by contradictory state and federal laws put defendants at risk of precisely this kind of unconstitutional repeat liability. Of course, state and federal statutes are permitted to create multiple causes of action for the same activity—there is nothing controversial in having two avenues for recovery on the same antitrust behavior. But "if a federal claim and a state claim arise from the same operative facts, and seek identical relief, an award of damages under both theories will constitute

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56 The harmful effect on foreign corporations is exacerbated by increasingly-vigorous antitrust measures taken by other governments: at the time of this writing, both Brazil and the European Union have issued criminal antitrust fines of more than twice the amount of the U.S. Department of Justice. *See id.* at 2 (reporting a total of $1.95 billion in cartel fines by the European Union and $1.58 billion in fines by Brazil as of mid-2014).

57 *In re N. Dist. Of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 900 (1981).

58 *W. Union Tel. Co. v. Pa.*, 368 U.S. 71 (1961).

59 *Id.* at 72-73.

60 *Id.*

61 *Id.* at 80.

62 *Harris v. Balk*, 198 U.S. 215, 226 (1905); *see also Cities Serv. Co. v. McGrath*, 342 U.S. 330, 334-35 (1952) (holding that the Fifth Amendment required that defendant be allowed to recoup property seized by the U.S. government if future claims from foreign governments "would effect a double recovery against" the defendant).

double recovery."[63] In cases in which direct purchasers can claim all of the damages while protected from the pass-on defense under federal law, while indirect purchasers proceed under state law and claim to have suffered the same harm, the damages are not just excessive, they are redundant, since precisely the same "damages" may be claimed by multiple plaintiffs.

2. Due Process Bars Excessive Punitive Damages

The Due Process clause of the Fourteenth Amendment also imposes a limit on the permissible amount of punitive damages. This limit applies to statutorily prescribed damages that are not expressly "punitive," including treble damages allowed in civil antitrust claims, because such damages serve the same deterrent and retributive functions, and are legislated with the same intent as punitive damages.[64]

As set forth in *BMW of North America, Inc. v. Gore*,[65] and reaffirmed in *State Farm Mutual Automobile Insurance Company v. Campbell*,[66] the propriety of extra-compensatory damages is determined by three "guideposts":

> "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[67]

We will assume, for the purposes of this discussion, that an antitrust violation constitutes "reprehensible" conduct, because there is no doubt that the consequences of certain violations can be significant.[68] However, the other factors do not support the imposition of such extreme damages.

The disparity between actual damages and damages awarded can be great under the current system, and could be unconstitutionally excessive under the Supreme Court's test in *Gore*. The Court has held that punitive damages in a given case "must have a

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63 *Medina v. Dist. of Columbia*, 643 F.3d 323, 326 (D.C. Cir. 2011) (citations omitted).

64 *See Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) (refusing to find a right of contribution in antitrust law, holding that "[t]he very idea of treble damages [in antitrust] reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers"); *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 715 (9th Cir. 2010) ("[T]he treble damages provisions in the Clayton and Sherman Acts act as statutory punitive measures in which two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose." (internal quotation marks omitted)).

65 517 U.S. 559 (1996).

66 538 U.S. 408 (2003).

67 *Gore*, 517 U.S. at 575.

68 However, even this point may be subject to debate—especially when damages are extreme. In the vast majority of antitrust cases, the harm is purely economic, not physical, there is rarely disregard of health or safety, and many plaintiffs are large corporations rather than financially vulnerable individuals. This lack of "indicia of reprehensibility" suggests that courts should take care to limit punitive damages. *See S. Union Co.v. Irvin*, 563 F.3d 788, 791-92 (9th Cir. 2009) (reversing a punitive damage award against defendant after determining that the harm was purely economic, victim was a large corporation, and "most of the indicia of reprehensibility do not appear").

nexus to the specific harm suffered by the plaintiff."[69] While this test is broad, the Court has made clear that the ratio between compensatory and punitive damages should only rarely exceed a single digit, and that damages calculations should account for legislative decisions to impose "double, treble, or quadruple damages to deter and punish."[70] For instance, in *Campbell*, the Court struck down a punitive damages award of $145 million which accompanied compensatory damages award of $1 million, finding that such damages were excessive, and contrary to the Due Process Clause of the Fourteenth Amendment.

The total amount at risk for our imaginary Corporation X—$1 billion or more for $100 million of damages—may be excessive under these standards. But if this is the case, then what is the "right" amount of damages? The answer is indicated in the third *State Farm* factor: the appropriate damages are those that the legislature has authorized: at most, treble damages.[71] The current system of multiplying these damages by allocating them to both direct and indirect purchasers may violate the Constitution in extreme cases and, when compounded with fines levied in foreign jurisdictions, the risk of harmful over deterrence is hard to ignore, even if the result was not constitutionally problematic.

IV. WHAT SHOULD BE DONE?

In his dissent in *Illinois Brick*, Justice Brennan argued that judges had adequate procedural means at their disposal to avoid duplicative liability, even absent repeal of *Hanover Shoe*.[72] Among the mechanisms he suggested were consolidation of cases, application of the Sherman Act's four year statute of limitations, and use of statutory interpleader under 28 U.S.C. § 1335.[73] And in addition to those the Justice mentioned in the opinion, many of the states that have enacted *Illinois Brick* repealers have included provisions intended to reduce the risk of duplicative recovery. For example, Minnesota's antitrust statute provides that "the court may take any steps necessary to avoid duplicative recovery against a defendant."[74]

But in spite of modern pre-trial consolidation tools, existing law provides no easy method of bringing cases together from state and federal court, or of accounting for potential future lawsuits by absent plaintiffs. Some, like state claims brought in *parens patriae*, are not subject to removal under CAFA and therefore cannot be easily consolidated with actions pending in Federal Court.[75] And in any case, the Eleventh Amendment may

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69 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003)

70 *Id.* at 424 (finding such legislative awards "instructive," but not determinative).

71 In *Gore*, the Court held that "legislative judgments concerning appropriate sanctions" require "substantial deference." *Gore*, 517 U.S. at 583 (internal citations omitted).

72 *Ill. Brick Co. v. Ill.*, 431 U.S. 720, 761 (1977) (Brennan, J., Dissenting) ("[A]s a practical matter, existing procedural mechanisms can eliminate this danger in most instances. Even though . . . no procedure currently exists which can eliminate the possibility entirely.").

73 *Id.* at 761-62.

74 Minn. Stat. §325D.57.

75 *Miss. ex rel. Hood v. AU Optronics Corp,*. 134 S. Ct. 736 (2014).

obstruct use of statutory interpleader to resolve claims among the states.[76] To overcome such obstacles, more creative solutions may be necessary—including potentially by going so far as to notify and "vouch in" absent parties, or by exploring other ways in which subsequent claimants may be bound by earlier judgments.

Any efforts in this vein are likely to be both controversial and constitutionally problematic, to say the least. But the alternative option—allowing cases to proceed toward trial or settlement under the threat of redundant and excessive damages—is untenable. Therefore, both courts and legislatures should take action to bring sanity and stability back to antitrust law. In the meantime, defendants in such cases should use all existing tools as early and as aggressively as they can, in order to limit the impact of the current arrangement.

76 *Cory v. White*, 457 U.S. 85, 89-90 (1982).

THE MISAPPLICATION OF *ASSOCIATED GENERAL CONTRACTORS* TO CARTWRIGHT ACT CLAIMS

By Jodie M. Williams and Kristen M. Anderson[1]

I. INTRODUCTION

The private right of action under the federal antitrust laws is conferred by Section 4 of the Clayton Act,[2] which provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ." Antitrust standing under Section 4 is distinct from constitutional standing under Article III, in which a showing of harm in fact establishes the necessary injury.[3] In *Associated General Contractors of California v. California State Council of Carpenters* ("*AGC*"),[4] the Supreme Court identified certain factors for determining whether a plaintiff has "antitrust standing" under Section 4.[5]

Recently, defendants have urged federal courts to apply *AGC* to determine whether plaintiffs have antitrust standing to bring state law antitrust claims, including claims under California's Cartwright Act.[6] According to defendants, because courts may look to the federal laws for "guidance" in interpreting Cartwright Act claims, the *AGC* standing test should be applied to determine standing under state antitrust law claims as well.[7] The issue has become most prevalent in Cartwright Act claims brought by indirect purchaser plaintiffs.[8]

From the plaintiffs' perspective, *AGC* has no bearing on whether plaintiffs, particularly indirect purchasers, have standing to pursue claims under the Cartwright

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2 15 U.S.C. § 15 (2014).

3 *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1054 n.3 (9th Cir. 1999).

4 459 U.S. 519 (1983).

5 *Id.* at 536-545. These factors include (1) the nature of the plaintiff's alleged injury; that is, whether it was the type of injury 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.

6 Cal. Bus. & Prof. Code §§ 16700-16770 (2014).

7 *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 985 (9th Cir. 2000).

8 *See, e.g.*, *In re Dynamic Random Access Memory (DRAM) Antitrust Litig. ("DRAM I")*, 516 F. Supp. 2d 1072, 1093 (N.D. Cal. 2007); *In re Dynamic Random Access Memory Antitrust Litig. ("DRAM II")*, 536 F. Supp. 2d 1129, 1142 (N.D. Cal. 2008); *In re Graphic Processing Units Antitrust Litig. ("GPUs I")*, 527 F. Supp. 2d 1011 (N.D. Cal. 2007); *In re Graphic Processing Units Antitrust Litig. ("GPUs II")*, 540 F. Supp. 2d 1085 (N.D. Cal. 2007); *In re TFT-LCD Antitrust Litig. ("TFT-LCD")*, 586 F. Supp. 2d 1109 (N.D. Cal. 2009); *In re Flash Memory Antitrust Litig. ("Flash Memory")*, 643 F. Supp. 2d 1133 (N.D. Cal. 2009); *In re Cathode Ray Tube Antitrust Litig.*, 738 F. Supp. 2d 1011 (N.D. Cal. 2010); *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 782 F. Supp. 2d 1059 (E.D. Cal. 2011); *Dang v. S.F. Forty Niners*, 964 F. Supp. 2d 1097 (N.D. Cal. 2013).

Act. This position is well grounded in California law. California's antitrust laws are broader in scope and deeper in reach than federal counterparts, and expressly grant standing to indirect purchaser plaintiffs.[9] Although the parameters of antitrust standing under the Cartwright Act have yet to be precisely defined by the California Supreme Court,[10] California state court rulings demonstrate that our high court would not adopt the antitrust standing test outlined in *AGC*.[11] This article examines federal and state courts' analyses of antitrust standing under the Cartwright Act and explains why the courts that applied *AGC* were wrong to do so.

II. COURTS SHOULD NOT APPLY FEDERAL ANTITRUST STANDING DOCTRINE TO THE CARTWRIGHT ACT

A. The Cartwright Act Expressly Repudiates the *Illinois Brick* Bar Against Indirect Purchaser Recovery

The Cartwright Act was enacted in 1907. Prior to 1978, the Act paralleled Section 4 of the Clayton Act, and authorized anyone "injured in his [or her] business or property" by reason of anything forbidden or declared unlawful by the Act to bring an action for treble damages.[12] The Cartwright Act was amended in 1978 to provide that "[s]uch action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, *regardless of whether such injured person dealt directly or indirectly with the defendant*."[13] The amendments were in direct response to the Supreme Court's holding in *Illinois Brick Co. v. Illinois*.[14]

In *Illinois Brick*, the State of Illinois and 700 localities brought antitrust damages claims against concrete block manufacturers for price-fixing in violation of Section 1 of the Sherman Act.[15] The defendants manufactured concrete blocks and sold them to masonry contractors who submitted bids to general contractors for work on masonry portions of construction projects. The general contractors submitted bids for these projects to the plaintiffs. The plaintiffs sought, as the Supreme Court put it, "to demonstrate that masonry contractors, who incorporated [the] block into walls and other masonry structures, passed on the alleged overcharge on the block to general contractors, who incorporated the masonry structures into entire buildings, and that the general

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9 *See Stanislaus Food Prods. Co.*, 782 F. Supp. 2d at 1079-80.

10 *See Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224, 1234 (1993).

11 *See id.*; *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1189 (2003); *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 781-82 (2010).

12 *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 15, 19-20 (1983).

13 *Union Carbide*, 36 Cal. 3d at 19 (emphasis added) *See also* Cal. Bus. & Prof. Code §16750

14 431 U.S. 720 (1977). To date, 25 states and the District of Columbia have passed *Illinois Brick* repealer statutes, and the courts of numerous other states have interpreted their antitrust statutes to allow indirect purchaser suits. *Clayworth*, 49 Cal. 4th at 782 (citing Daniel R. Karon, "*Your Honor, Tear Down That Illinois Brick Wall!" The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice*, 30 Wm. Mitchell L. Rev. 1351, 1361-62 (2004)).

15 *Illinois Brick*, 431 U.S. at 726.

contractors in turn passed on the overcharge to [plaintiffs] in the bids submitted for those buildings."[16]

The Supreme Court held that, in general, only a direct purchaser is "injured in his business or property" within the meaning of Section 4 of the Clayton Act.[17] This holding followed the Court's prior decision in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*,[18] where the Court held that the pass-on defense was no longer available to antitrust defendants. More precisely, under *Hanover Shoe*, defendants could no longer argue that plaintiffs who had purchased a product directly from defendants did not have standing under Section 4 of the Clayton Act because the plaintiff passed on the overcharge to its customers.[19] In *Illinois Brick*, the Court applied the rule symmetrically to the offensive use of the pass-on theory by plaintiffs.[20] Driving the Court's decision were policy concerns about the danger of multiple liabilities and the complexity of proof of damages.[21] The Court determined that indirect purchasers could not recover damages by reason of violations of the federal antitrust laws.[22]

Justice Brennan dissented from the *Illinois Brick* majority opinion. According to Justice Brennan, "[i]t would indeed be 'paradoxical to deny recover[y] to the ultimate consumer while permitting the middlemen a windfall recovery.'"[23] Justice Brennan explicitly rejected the contention that an indirect purchaser should not be allowed to sue, as a matter of law, if the price-fixed product is a component part of the purchased item.[24] He concluded that antitrust standing must extend to "those within defendant's chain of distribution."[25]

The 1978 amendments to the Cartwright Act did not constitute a change in, but rather were, "declaratory of [] existing law."[26] Also known as the "*Illinois Brick* repealer"

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16 *Id.* at 735.

17 *Id.* at 729. *Illinois Brick* noted two exceptions to the indirect purchaser bar: (1) where the direct purchaser is owned or controlled by the indirect purchaser or the defendant; and (2) where the indirect purchaser obtained the product from the direct purchaser under a "cost-plus" contract. *Id.* at 726 n.2, 735 n.16; *see also Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1213 n.2 (9th Cir. 1984) (recognizing the ownership/control and cost-plus exceptions). The Ninth Circuit also recognizes a "co-conspirator exception" to *Illinois Brick*. *Shamrock Foods*, 729 F.2d at 1211. Further, as the Ninth Circuit has recognized, *Illinois Brick* does not bar indirect purchasers from obtaining equitable relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1145 (9th Cir. 2003).

18 392 U.S. 481 (1968).

19 *Id.* at 494.

20 *Illinois Brick*, 431 U.S. at 729, 735.

21 *Id.* at 730-47.

22 *Id.* at 746.

23 *Id.* at 761 (Brennan, J., dissenting) (internal citations omitted).

24 *Id.* at 759 (Brennan, J., dissenting).

25 *Id.* at 760-61 (Brennan, J., dissenting).

26 *Union Carbide*, 36 Cal. 3d at 19 (internal citations omitted).

law, the amendments wrote into the Cartwright Act a repudiation of *Illinois Brick*'s ban on indirect purchaser suits.[27] As the California Supreme Court recently explained in *Clayworth v. Pfizer, Inc.*,[28] the *Illinois Brick* repealer law was introduced specifically to "prevent a federal case interpretation of the Sherman Act precluding an indirect purchaser's standing to sue in antitrust actions [*i.e.*, *Illinois Brick*] [from] being applied to actions under the Cartwright Act."[29] In *Clayworth*, the California Supreme Court considered whether the pass-on defense should be permitted under California law. In concluding that the defense may not be asserted, the court confirmed that the Cartwright Act was amended to protect indirect purchaser actions in the wake of *Illinois Brick*.[30] It further explained that California's Legislature, in amending the Cartwright Act, "fully embraced" Justice Brennan's dissenting opinion in *Illinois Brick*.[31]

In *California v. ARC America Corp.*,[32] the U.S. Supreme Court held that *Illinois Brick* repealer laws, such as the law passed by California, are not preempted by federal antitrust laws or the policies announced in *Illinois Brick*.[33] The Court expressly stated that it would be "inappropriate" to consider the policies identified in *Illinois Brick* as defining what federal law allows states to do under their own antitrust laws.[34] Moreover, "*Illinois Brick*, as well as *Associated General Contractors* and *Blue Shield*, all were cases construing § 4 of the Clayton Act; in none of those cases did the Court identify a federal policy against States imposing liability in addition to that imposed by federal law."[35] As a result, since 1978, California's antitrust laws have diverged from federal law in favor of an enlarged set of plaintiffs with standing to sue for antitrust violations.

B. Neither California State Courts Nor the Ninth Circuit Have Interpreted the Cartwright Act as Encompassing the *AGC* Factors

Because California permits a broader range of plaintiffs to sue under the Cartwright Act, the analysis determining who has antitrust standing under the Act must also be broader than the analysis under federal law. The California Court of Appeal considered this issue in *Cellular Plus, Inc. v. Superior Court*,[36] which involved a lawsuit by a number of individual consumers and corporate sales agents against the two licensed providers of

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27 *Clayworth*, 49 Cal. 4th at 781-82.

28 49 Cal. 4th 758 (2010).

29 *Id.* at 781 n.18 (internal citations omitted).

30 *Id.* at 782.

31 *Id.* at 782; *see also Union Carbide*, 36 Cal. 3d at 19-20.

32 490 U.S. 93 (1989).

33 *Id.* at 105-06.

34 *Id.* at 103 ("It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law.").

35 *Id.* at 105.

36 14 Cal. App. 4th 1224 (1993).

cellular telephones in San Diego.[37] The question before the court was whether plaintiff Cellular Plus, an indirect purchaser, had standing to sue under the Cartwright Act.[38] The court determined that it did,[39] explaining that to have standing under California's antitrust laws, plaintiffs must allege injuries that are "not secondary, consequential, or remote, but the direct result of the unlawful conduct and were the kind of injuries the antitrust laws seek to prevent."[40] The fact that a plaintiff is not a competitor of the defendant was not fatal to plaintiff's claims; the Cartwright Act does not "'*confine its protection to consumers, or to purchasers, or to competitors,* or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.'"[41] Nowhere did the appellate court even mention the standing factors set out in *AGC*.

The court in *Cellular Plus* reasoned that to have standing under the Cartwright Act, plaintiffs must properly allege "antitrust injury."[42] Quoting the Supreme Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[43] the Court of Appeal explained that, as in federal antitrust cases, California plaintiffs must also "prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[44] But, "[a]lthough California law similarly requires an 'antitrust injury,' the scope of that term is broader" than the term "antitrust injury" for purposes of the federal antitrust laws, such as the Clayton Act and the Sherman Act.[45] Because the Cartwright Act provides for lawsuits by injured persons who dealt either directly or indirectly with the offending parties, the more "restrictive definition" of antitrust injury under federal law does not apply to California state antitrust claims.[46] While the "exact parameters" of antitrust injury under the Cartwright Act have not been established, it is generally defined as "the 'type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful.'"[47] Notably, the California Supreme Court declined to review *Cellular Plus*.[48] It therefore follows that the more restrictive standing analyses under federal antitrust laws, particularly that set forth in *AGC*, are inappropriate for determining whether indirect purchasers have standing under the Cartwright Act.

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37 *Id.* at 1229.

38 *Id.*

39 *Id.* at 1235.

40 *Id.* at 1232-33 (citing *Kolling v. Dow Jones & Co.*, 138 Cal. App. 3d 709, 724 (1982)).

41 *Id.* at 1233 (quoting *Saxer v. Philip Morris, Inc.*, 54 Cal. App. 3d 7, 26 (1975)) (emphasis in original).

42 *Id.* at 1234 (internal quotation marks omitted).

43 429 U.S. 477, 489 (1977).

44 *Cellular Plus*, 14 Cal. App. 4th at 1234 (emphasis in original) (internal citations omitted).

45 *Id.*(internal citations omitted).

46 *Id.*

47 *Id.* (quoting *Kolling*, 137 Cal. App. 3d at 723).

48 *Cellular Plus, Inc. v. Superior Court*, No. S032640, 1993 Cal. LEXIS 3613 (Cal. July 1, 1993).

AGC was considered by the California Court of Appeal in *Vinci v. Waste Mgmt., Inc.*,[49] which is often relied on by defendants as California state court authority for the proposition that *AGC* applies to the Cartwright Act. Such reliance is misplaced. While *Vinci* recited the *AGC* factors at the outset of its discussion, it did not discuss them in analyzing the plaintiff's antitrust standing under the Cartwright Act.[50] Thus, several courts have found that *Vinci* is not a clear directive that *AGC* should be applied to determine antitrust standing under the Cartwright Act, given the factual dissimilarities between the vast majority of Cartwright Act claims and the claim in *Vinci*.[51]

Vinci arose in the employment context and involved an attempt to transform a time-barred wrongful termination claim into an antitrust claim.[52] The plaintiff was an employee and the sole shareholder of a company acquired by the defendant; post-acquisition the defendant terminated plaintiff's position, allegedly because of the plaintiff's refusal to participate in his employer's anticompetitive practices. The Court of Appeal affirmed dismissal because the loss of the plaintiff's job "was not the type of loss the antitrust statute was intended to forestall,"[53] the injury did not result from the defendant's "acquisition of market power,"[54] and the plaintiff was not a target of the alleged anticompetitive scheme.[55] In fact, there was no connection whatsoever between the plaintiff's alleged injury and the anticompetitive conduct at issue.[56] The court held that the plaintiff's remedy was a wrongful termination claim, not an antitrust claim.[57] Accordingly, while it did consider *AGC*, the court did not adopt *AGC's* standing analysis in its holding.

Similarly, in *Knevelbaard Dairies v. Kraft Foods, Inc.*,[58] the Ninth Circuit used the *AGC* factors to frame its discussion of the plaintiffs' antitrust standing under the Cartwright Act, but did not expressly hold that *AGC* applied to the Cartwright Act. In a preface

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49 36 Cal. App. 4th 1811 (1995).

50 *Id.* at 1814-17.

51 Christopher T. Micheletti, *Indirect Purchaser Standing Under California Antitrust Law and Federal* Antitrust *Law: Plaintiff Perspective*, 22 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 1, 23 (2013) (citing *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d at 1097; *In re Pool Prods. Distribution Mkt. Antitrust Litig.*, 946 F. Supp. 2d 544, 564 (E.D. La. 2013); *but see DRAM I* , 516 F. Supp. 2d at 1088; *Flash Memory*, 643 F. Supp. 2d at 1151-52; *In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-MD-02042, 2013 WL 1431756, at *10 (E.D. Mich. Apr. 9, 2013); *see also Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 269 F. Supp. 2d 1213, 1224-25 (C.D. Cal. 2003) (finding *AGC* not applicable to Cartwright Act claim and interpreting *Vinci* to hold that "while the scope of actionable injury is slightly different under the Cartwright Act, the standing analysis is nonetheless informed by many of the same factors").

52 *Vinci*, 36 Cal. App. 4th at 1816-17.

53 *Id.* at 1816.

54 *Id.*

55 *Id.*

56 *See id.* at 1817.

57 *Id.* at 1813, 1816.

58 *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000).

to its analysis of the Cartwright Act claims, the Court of Appeals stated that "federal antitrust precedents are properly included in a Cartwright Act analysis, but their role is limited: they are 'often helpful' but not necessarily decisive."[59] The opinion treated *AGC* in exactly that manner. In its antitrust standing analysis, the court recognized that *AGC* was the test of antitrust standing under federal law and that antitrust standing was also a requirement under California law.[60] The court could have, but declined to, taken the extra step to hold that *AGC* was the test under California law.

As a further indication that *Knevelbaard Dairies* did not hold that *AGC* applied to the Cartwright Act, the court did not cite *Vinci* in its discussion of antitrust standing but, rather, cited to *Cellular Plus* for the proposition that the scope of the Cartwright Act is broader than that of the federal antitrust laws.[61] Indeed, the Ninth Circuit repeatedly referred to the broader scope of antitrust standing afforded by California law[62] and cited California precedents in its analysis of the *AGC* factors.[63] Because the court found that the plaintiffs easily established antitrust standing under the admittedly narrower federal standard, it did not need to reach the issue of whether *AGC* was the appropriate standard for Cartwright Act claims. As one court later put it, it was not necessary to "undertake the back-breaking labor involved in deciphering the state of antitrust standing" among state law claims where the plaintiff has "shown standing under *AGC*."[64]

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59 *Id.* at 985.

60 *Id.* at 987.

61 *Id.* at 991.

62 *Id.* at 985 ("There are, however, differences in statutory wording and legislative history that lead, in some respects, to different results."); *id.* ("Thus, federal antitrust precedents are properly included in a Cartwright Act analysis, but their role is limited: they are 'often helpful' but not necessarily decisive."); *id.* at 987 ("California law affords standing more liberally than does federal law"); *id.* at 991 ("The extent to which antitrust injury is recognized under the Cartwright act is enlarged, by statute, in comparison to federal law."). *See also Cianci v. Superior Court*, 40 Cal. 3d 903, 920 (1985) ("the Cartwright Act is broader in range and deeper in reach than the Sherman Act"); *Freeman*, 77 Cal. App. 4th at 183 n.9 ("federal precedents must be used with caution because the [antitrust] acts, although similar, are not coextensive"); *Cellular Plus, Inc.*, 14 Cal. App. 4th at 1234 (holding scope of "antitrust injury" under California Cartwright Act "broader" than federal law); *State ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1164 (1988) (judicial interpretation of the Sherman Act "is not directly probative of the Cartwright [Act's] drafters' intent").

63 *Knevelbaard Dairies*, 232 F.3d at 988 (citing *Speegle v. Bd. of Fire Underwriters*, 29 Cal. 2d 34, 44 (1946) on antitrust injury factor); *id.* at 991 (citing *Cellular Plus, Inc.*,14 Cal. App. 4th at 1234 on directness of injury factor).

64 *GPUs II*, 540 F. Supp. 2d at 1097; *see, e.g., In re Auto. Parts Antitrust Litig.*, No. 12-MD-02311, 2013 WL 2456612, at *18 (E.D. Mich. June 6, 2013) ("Because the Court finds that the pleadings are sufficient to demonstrate that the *AGC* factors do not undermine standing, there is no need to determine whether the various states identified in the . . . complaints apply those factors, whether mandatory, permissive, or not at all in assessing the existence of antitrust standing."); *In re Napster, Inc. Copyright Litig.*, 354 F. Supp. 2d 1113, 1122, 1125-26 (N.D. Cal. 2005) (holding allegations of antitrust standing under Section 4 of the Clayton Act sufficient and therefore concluding antitrust standing sufficient under the "less restrictive" Cartwright Act).

The only time the California Supreme Court has addressed whether *AGC* applies to state law claims was in *Korea Supply Co. v. Lockheed Martin Corp.*[65] Although not an antitrust case, the California Supreme Court declined to apply *AGC* to the state's common law tort of interference with prospective economic advantage, noting that whether a plaintiff has standing to bring such a claim is not subject to the same considerations and limitations found in the Clayton Act.[66] This decision, in conjunction with the Court of Appeal's ruling in *Cellular Plus* that the scope of antirust injury is broader under the Cartwright Act than under federal law, supports the conclusion that federal courts should not apply *AGC* when determining whether indirect purchasers have standing to sue for antitrust violations under California state law.

C. Splintered Opinions Develop in the Northern District of California

1. Courts Incorrectly Apply *AGC* to Cartwright Act Claims

Despite the fact that California has a broader definition of antitrust standing and California state courts have ruled on antitrust standing without relying on *AGC*, some federal courts have applied *AGC* when determining whether plaintiffs have standing to bring Cartwright Act claims. Federal district court cases that have applied *AGC* to Cartwright Act claims erroneously rely on *Vinci* and *Knevelbaard Diaries*. As demonstrated above, neither *Vinci* nor *Knevelbaard Diaries* are properly viewed as a clear directive that the *AGC* factors apply to determine antitrust standing under the Cartwright Act.

The earliest federal case that expressly applies *AGC* to Cartwright Act claims is *In re Dynamic Random Access Memory Antitrust Litigation*.[67] After concluding that indirect purchaser status alone does not confer antitrust standing under the Cartwright Act, Judge Hamilton examined what additional showing must be made under California law. Interpreting *Vinci* and *Knevelbaard Dairies* to require an application of the *AGC* test to determine antitrust standing for Cartwright Act claims, the court concluded that "under the Cartwright Act [the plaintiffs] are required to satisfy general antitrust standing requirements enunciated by the Supreme Court in *AGC*."[68] The court went on to analyze the allegations against the *AGC* factors and, in two separate orders, found the indirect purchaser plaintiffs who purchased DRAM as a component in computers—as distinct from the indirect purchaser plaintiffs who purchased free-standing DRAM modules—lacked antitrust standing.[69] Recognizing that its rulings were "not without controversy or uncertainty" and "not expect[ing] to be the last word on this issue,"[70] the

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65 29 Cal. 4th 1134 (2003).

66 *Id.* at 1163 n.13.

67 *In re Dynamic Random Access Memory (DRAM) Antitrust Litig. ("DRAM I")*, 516 F. Supp. 2d 1072 (N.D. Cal. 2007).

68 *Id.* at 1088–89.

69 *Id.* at 1093. The court also dismissed an amended complaint on an analysis of *AGC* factors. *DRAM II*, 536 F. Supp. 2d at 1142.

70 *DRAM II*, 536 F. Supp. 2d at 1142.

court certified several issues for interlocutory appeal.[71] The California Attorney General and others filed amicus briefs in the Ninth Circuit arguing that the district court's analysis was incorrect.[72] The case settled before the resolution of the appeal.

Nevertheless, the analysis in *DRAM* has found footing in the Northern District of California. *In re Flash Memory Antitrust Litigation*,[73]Judge Armstrong relied on *DRAM*, *Vinci*, and *Knevelbaard Dairies* to hold that *AGC* applied to the Cartwright Act claims.[74] Under an application of the *AGC* factors, however, the court found antitrust standing.[75] In *In re Cathode Ray Tube (CRT) Antitrust Litigation*,[76] Judge Conti relied exclusively on *Flash Memory*, but sustained the Cartwright Act claim, finding the allegations of antitrust standing sufficient to satisfy *AGC* factors.[77] Similarly, in *Dang v. San Francisco Forty Niners*,[78] Judge Davila held that *AGC* factors applied to the plaintiff's Cartwright Act claim, citing to *Vinci*, *Knevelbaard Dairies*, *Flash Memory*, and *DRAM*.[79] The court went on to find those factors satisfied by the complaint's allegations of antitrust standing.[80]

The analysis in *DRAM* took hold outside the Northern District of California in *In re Refrigerant Compressors Antitrust Litigation*.[81] There, the court concluded that *DRAM* was "the most persuasive of the decisions"[82] and held that *AGC* applies to determine antitrust standing for Cartwright Act claims.[83] *Refrigerant Compressors*, a post-*Clayworth* decision, also relied on the California Supreme Court's citation of *AGC* and *Vinci* in *Clayworth* to

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71 The district court certified the following issues: (1) whether the requirements for standing under *AGC* apply to indirect purchaser plaintiffs' state law antitrust claims; (2) if the answer to the first question is yes, "whether indirect purchasers, who are not participants in the same market in which the defendants have allegedly fixed prices, but are participants in a related and interlinked market, have antitrust standing in light of *American Ad. Mgmt. v. GTE,* 190 F.3d 1051 (9th Cir.1990) and *Bhan v. NME Hosps., Inc.,* 772 F.2d 1467 (9th Cir.1985);" and (3) whether the dismissal of plaintiffs' state law antitrust claims for lack of antitrust standing was erroneous. *DRAM I*, No. M 02-1486 PJH, 2008 WL 863994, at *1 (N.D. Cal. Mar. 28, 2008).

72 Brief of Amicus Curiae the State of California in Support of Appellants, Supporting Reversal, *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2009 WL 2609769 (9th Cir. March 6, 2009) (No. 08-16478).

73 643 F. Supp. 2d 1133 (N.D. Cal. 2009).

74 *Id.* at 1151-52.

75 *Id.* at 1156.

76 738 F. Supp. 2d 1011 (N.D. Cal. 2010).

77 *Id.* at 1023 (citing *Flash Memory,* 643 F. Supp. 2d at 1151); *id.* at 1024 (allegations sufficient to find antitrust standing).

78 964 F. Supp. 2d 1097 (N.D. Cal. 2013).

79 *Id.* at 1110-11.

80 *Id.* at 1114.

81 No. 2:09-MD-02042, 2013 WL 1431756, at *8 (E.D. Mich. Apr. 9, 2013).

82 *Id.* at *8.

83 *Id.* at *10.

support its application of *AGC*.[84] *Clayworth*, however, did not discuss those cases in the antitrust standing context. Rather, *Clayworth* cites to *AGC* and *Vinci* in its discussion of the analytically distinct issue of proximate causation.[85]

2. Courts Properly Decline to Apply *AGC* to Cartwright Act Claims

A competing line of cases, also with origins in the Northern District of California, have declined to apply *AGC* to Cartwright Act claims because *AGC* has not been expressly adopted as the law of this state.

First, in *In re Graphic Processing Units Antitrust Litigation* ("*GPU I*"),[86] Judge Alsup declined to apply *AGC* in determining whether the indirect purchasers had standing in that case.[87] The indirect purchaser plaintiffs, some of whom resided in California, alleged that they purchased the defendants' graphics processing units ("GPUs") indirectly, through intermediaries or in purchasing consumer electronics, such as computers, containing the GPUs.[88] In moving to dismiss the complaint, the defendants argued that the indirect purchasers' injuries were too remote to support standing and that *AGC* should be applied as the blanket standing test.[89] The district court disagreed, reasoning that it is "far from clear that *Associated General Contractors* should be automatically read into the substantive antitrust law of each and every state."[90] The court explained that standing under each state's antitrust statute is a matter of that state's law.[91] "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."[92] In the subsequent *In re Graphic Processing Units Antitrust Litigation ("GPUs II")* decision[93] Judge Alsup again declined to apply *AGC* to the indirect purchasers' claims,

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84 *Id.* (citing *Clayworth*, 49 Cal. 4th at 680).

85 *Clayworth*, 49 Cal. 4th at 774-75. The Supreme Court in *Clayworth* also approvingly discusses several early California Court of Appeal cases that held under the facts of those cases that there was no causal nexus between the plaintiffs' injury and the alleged unlawful restraint of trade. *Id.* at 774-76 (citing *Krigbaum v. Sbarbaro*, 23 Cal. App. 427 (1913) and *Overland Publ'g Co. v. Union Lithograph Co.*, 57 Cal. App. 366 (1922)).

86 527 F. Supp. 2d 1011 (N.D. Cal. 2007).

87 *Id.* at 1025-26.

88 *Id.* at 1013.

89 *Id.* at 1025.

90 *Id.*

91 *Id.* at 1026.

92 *Id.*

93 540 F. Supp. 2d. 1109 (N.D. Cal. 2007). Although the court in *GPU I* declined to apply *AGC* to determine whether the indirect purchasers had standing, it dismissed the complaint on other grounds. *See GPU I*, 527 F. Supp. 2d at 1026-27. *GPU II* addressed plaintiffs' motion for leave to amend the complaint.

ruling that it would be wrong to do so where it is not "clear" that the state has adopted or otherwise explicitly held that *AGC* applies.[94]

In *In re TFT-LCD Antitrust Litigation* ("*TFT-LCD*"),[95] Judge Illston considered whether it is appropriate to apply the *AGC* test to evaluate indirect purchaser plaintiffs' standing in "repealer states," including California.[96] After reviewing *GPUs I* and *GPUs II*, the court agreed that it is "inappropriate to broadly apply the *AGC* test . . . in the absence of a clear directive from those states' legislatures or highest courts."[97] Since neither the California legislature nor the California Supreme Court have advanced a clear directive concerning whether *AGC* should be applied to state law indirect purchaser claims, the court in *TFT-LCD* did not apply *AGC* to determine standing for the indirect purchaser plaintiffs' claims.[98]

The opinion by Judge Armstrong in *In re Flash Memory Antitrust Litigation* ("*Flash Memory*")[99] is also instructive. As discussed above, although the court (incorrectly) applied *AGC* to determine whether the indirect purchaser plaintiffs had sufficiently alleged antitrust standing, it explained that whether federal courts may apply federal law such as the *AGC* test is a question predicated on state law and that federal courts are bound by the decisions of the state's highest courts.[100] Moreover, "[i]t is settled that '[w]here the state's highest court has not decided an issue, the task of the federal courts is to predict how the state high court would resolve it.'If 'there is relevant precedent from the state's intermediate appellate court, the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it.'"[101] The appropriate intermediate court decision here is the *Cellular Plus* decision, which did not apply *AGC* and expressly held that standing under the Cartwright Act is broader than under the federal antitrust laws.

Other district courts in California have not considered *AGC*, but instead analyzed standing under the *Cellular Plus* rubric and determined that the indirect purchaser plaintiffs had standing under the Cartwright Act by virtue of their indirect purchaser status. For example, Eastern District of California Judge O'Neill in *Stanislaus Food*

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94 *GPUs II*, 540 F. Supp. 2d at 1097.

95 586 F. Supp. 2d 1109 (N.D. Cal. 2008).

96 *Id.* at 1120–21.

97 *Id.* at 1123.

98 *Id.* Although the Court did not determine standing based on the factors under *AGC*, it did note that, if *AGC* did apply to the indirect purchasers' state actions, they had alleged sufficient facts to have standing at the pleading stage. *Id.*; *see also Sidibe v. Sutter Health*, No. C 12-04854 LB, 2013 U.S. Dist. LEXIS 78521, at *47-*48 (N.D. Cal. June 3, 2013) (declining to decide whether the plaintiffs had standing under their Cartwright Act claim, but finding California district court decisions that did not require the factors in *AGC* to be satisfied to allege standing "persuasive").

99 643 F. Supp. 2d 1133 (N.D. Cal. 2009).

100 *Id.* at 1151; *accord Dang*, 964 F. Supp. 2d at 1110–11.

101 *Flash Memory*, 643 F. Supp. 2d at 1151 (internal citations omitted); *see also Dang*, 964 F. Supp. 2d at 1110–11.

Products Co. v. USS-POSCO Industries[102] ruled that the indirect purchasers had standing, applying the analysis articulated in *Cellular Plus*.[103] The court found that the scope of standing is broader under California law than federal law because, unlike the Sherman Act, the Cartwright Act permits both direct and indirect purchaser claims.[104] After observing that "California courts have held that a plaintiff whose injuries 'were not secondary. consequential, or remote, but the direct result of the unlawful conduct and were the kind of injuries the antitrust laws seek to prevent' have standing," the court concluded: "Thus, an indirect purchaser has standing under the Cartwright Act."[105] Courts in the Central and Southern Districts of California likewise have applied *Cellular Plus* to determine standing under the Cartwright Act.[106]

At least one other district court outside of California has refrained from applying *AGC* to determine indirect purchaser plaintiff antitrust standing. The Eastern District of Louisiana recently declined to apply *AGC* to the indirect purchaser plaintiffs' Cartwright Act claims in *In re Pool Products Distribution Marketing Antitrust Litigation*.[107] The court ruled that the "*AGC* factors apply to standing inquiries under state antitrust law claims only to the extent that a state has adopted them."[108] Relying primarily on *Clayworth*, the court determined that California is *not* one of those states.[109] The court rejected defendants' reliance on decisions in federal court and inferior California courts that applied *AGC* because those authorities "cannot overcome the California Supreme Court's decision in *Clayworth* to allow suit by indirect purchasers under the Cartwright Act and the [Unfair Competition Law] without applying the *AGC* factors."[110]

III. CONCLUSION

The California legislature sought to protect consumers and indirect purchasers, who typically bear the brunt of antitrust violations, by amending the Cartwright Act in 1978 to expressly state that plaintiffs may bring antitrust claims regardless of whether they dealt *directly or indirectly* with the defendant. Although the California Supreme Court has not articulated the precise antitrust standing test for Cartwright Act claims, the Court's opinion in *Clayworth*, as well as precedent from lower courts, demonstrate that the California Supreme Court has not, and will not, adopt the test the United States

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102 782 F. Supp. 2d 1059 (E.D. Cal. 2011).

103 *Id.* at 1079–80.

104 *Id.* at 1080 (quoting *Cellular Plus*, 14 Cal. App. 4th at 1233).

105 *Id.*

106 *See Metro-Goldwyn-Mayer Studios. Inc.*, 269 F. Supp. 2d at 1224–25; *Lorenzo v. Qualcomm Inc.*, 603 F. Supp. 2d 1291, 1302–03 (S.D. Cal. 2009); *Mayer v. Qualcomm Inc.*, No. 08cv655, 2009 WL 539902 (S.D. Cal. Mar. 3, 2009); *Valikhani v. Qualcomm Inc.*, No. 08cv786, 2009 WL 539915 (S.D. Cal. Mar. 3, 2009). In each of these four cases, the courts dismissed the Cartwright Act claim for lack of standing, applying the *Cellular Plus* decision.

107 946 F. Supp. 2d 554 (E.D. La. 2013).

108 *Id.* at 564.

109 *Id.*

110 *Id.*

Supreme Court set out in *AGC*. In fact, many California lower courts have rejected employing a narrow standing analysis under the Cartwright Act. Federal courts must respect our federal system, follow the state court's lead in applying state law, and refrain from engrafting *AGC* requirements onto state law to determine whether plaintiffs have standing to bring their state antitrust law claims.

WHY *ASSOCIATED GENERAL CONTRACTORS* SHOULD BE USED TO ASSESS STANDING IN CARTWRIGHT ACT CASES

By Anna M. Fabish[1]

I. INTRODUCTION

Courts are far from united in evaluating antitrust standing for indirect purchasers under California's antitrust laws—an inconsistency the California Supreme Court has yet to address. The solution, however, has been available for decades: the multi-factor analysis set forth by the United States Supreme Court in *Associated General Contractors v. Cal. State Council of Carpenters* ("*AGC*").[2] The decision provides a nuanced framework for assessing antitrust standing in all Cartwright Act claims, including—indeed, especially—claims by indirect purchasers.

The underlying principles of *AGC,* as well as the results of courts applying the *AGC* factors to Cartwright Act claims to date,[3] reveal that *AGC* and the Cartwright Act are consistent and complementary sources of law. *AGC* is persuasive federal precedent that can—and, in the interest of helping courts navigate the complex questions of antitrust standing for indirect purchasers, should—be applied to Cartwright Act claims.

While the California Legislature's 1978 amendment to the Cartwright Act was a rejection of the U.S. Supreme Court's 1977 holding in *Illinois Brick v. Illinois*,[4] which excluded indirect purchasers from the universe of plaintiffs that might have antitrust standing, the amendment has no effect on the applicability of *AGC* to Cartwright Act claims. Each addresses a distinct issue: Whereas the amendment makes clear that, as a threshold matter, indirect purchasers may properly be the subject of an antitrust standing analysis, *AGC* sets forth a framework for performing that analysis.

There is no tension between the *AGC* analysis and the amended Cartwright Act. The 1978 amendment protects indirect purchasers, not by *automatically granting* them antitrust standing, but by prohibiting a blanket rule that would *automatically deny* them antitrust standing. Applying *AGC* to determine which indirect purchasers have antitrust standing under the Cartwright Act does not resurrect a blanket rule or automatically adjudicate the

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2 459 U.S. 519 (1983).

3 In fall 2013, two articles appeared in this journal that thoughtfully surveyed and analyzed much of the case law on the applicability of *AGC* to Cartwright Act standing analyses. *See* David C. Kiernan & Lin W. Kahn, *Indirect Purchaser Standing Under California Antitrust Law and Federal Antitrust Law: Defense Perspective*, 22 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 24 (2013); Christopher T. Micheletti, *Indirect Purchaser Standing Under California Antitrust Law and Federal Antitrust Law: A Plaintiff Perspective*, 22 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 1 (2013). Few cases have considered this issue since those articles were published.

4 431 U.S. 720 (1977).

standing of indirect purchasers as a group. It thus does not abrogate the protection the Cartwright Act affords indirect purchasers.

The Cartwright Act as amended tees up an antitrust standing analysis, but it does not provide one. Not all indirect purchasers are created equal: their commercial relationships and position in the stream of commerce vary widely. And California case law is thin on how to determine which indirect purchasers should survive an antitrust standing analysis. *AGC* provides established guidance on antitrust standing that can serve, should serve, and in many instances already has served this role. Such guidance would be particularly helpful for courts because the group of plaintiffs the 1978 amendment swept within the potential scope of the Cartwright Act are as diverse as the outcomes of the *AGC* standing inquiry and present complex standing issues.

II. THE 1978 CARTWRIGHT ACT AMENDMENT AND THE *AGC* ANTITRUST STANDING ANALYSIS ADDRESS DISTINCT ISSUES

A. The Clayton Act and the Cartwright Act Both Require Antitrust Standing

On their face, both the federal Clayton Act and California's Cartwright Act grant the ability to sue to any would-be plaintiff who is "injured" "by reason of" an antitrust violation.[5] The potential reach of the Clayton Act and the Cartwright Act based on these criteria alone would be vast, as conduct that may be considered an antitrust violation can frequently cause harm with no or only a distant connection to the goals

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5 The Clayton Act provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (2014).

The Cartwright Act provides in relevant part:

> Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him or her, interest on his or her actual damages pursuant to Section 16761, and preliminary or permanent injunctive relief when and under the same conditions and principles as injunctive relief is granted by courts generally under the laws of this state and the rules governing these proceedings, and shall be awarded a reasonable attorneys' fee together with the costs of the suit.
>
> This action may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant

Cal. Bus. & Prof. Code § 16750(a) (2014).

of antitrust law.[6] To address these realities and avoid an unintended use of the antitrust laws, state and federal courts have imposed additional requirements on antitrust plaintiffs. Specifically, for a plaintiff "injured" "by reason of" an alleged antitrust violation to seek private antitrust damages under both federal and California law, he or she must establish antitrust standing.[7] Antitrust standing involves the concepts of (i) antitrust injury and (ii) a proximate causal connection with the anticompetitive conduct.[8] Thus, under both federal and California antitrust law, not all those injured by an antitrust violation are permitted to seek antitrust damages.[9]

B. *Illinois Brick* and the 1978 Cartwright Act Amendment Rejecting It Address Only the Threshold Issue of to Whom an Antitrust Standing Analysis May Properly Be Applied

1. *Illinois Brick* renders indirect purchasers automatically ineligible for antitrust standing under the Clayton Act

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6 *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986); *Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 664 (9th Cir. 1988) (due to "the generality of the antitrust statutes and the complexity and interdependence of modern business relationships; a violation of the antitrust laws often significantly affects many different economic actors in myriad ways, some of which are not within the intended scope of the antitrust laws. Courts therefore recognized the need to limit antitrust standing beyond the requirement of proximate causation."); *In re Dynamic Random Access Memory (Dram) Antitrust Litig. ("DRAM I")*, 516 F. Supp. 2d 1072, 1085 (N.D. Cal. 2007) ("plaintiff's right to sue for money damages is nonetheless subject to certain limitations, based upon policies found by the courts to be inherent in the structure and purpose of the antitrust laws") (citing *Cargill*, 479 U.S. at 110 n.5); *Leisure Marketing, Inc. v. Camp Coast to Coast*, No. 314452, 1987 WL 92053, at *11 (Cal. Super. Ct. Jan. 14, 1987) ("It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.").

7 *See AGC*, 459 U.S. at 535 n.31; *Kolling v. Dow Jones & Co.*, 137 Cal. App. 3d 709, 723-24 (1982) (applying a "standing to sue" requirement to Cartwright Act claims); *Saxer v. Philip Morris, Inc.*, 54 Cal. App. 3d 7, 26 (1975) (requiring antitrust standing for plaintiff to recover under Cartwright Act).

8 *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-89 (1977) (antitrust injury); *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 963 (9th Cir. 1999) (private right of action for antitrust damages "require[s] that the alleged violation of the law be a 'proximate cause' of the injury suffered" (internal citations omitted)); *AGC*, 459 U.S. at 535-37; *Kolling*, 137 Cal. App. 3d at 723-24 ("The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries.. . . An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (internal citations omitted)).

9 *See, e.g.*, *Cargill,* 479 U.S. at 110 n.5 (although showing of antitrust injury is necessary, it still is "not always sufficient[] to establish standing under § 4 because a party may have suffered antitrust injury but may not be the proper plaintiff under § 4 for other reasons"); *AGC*, 459 U.S. at 534 ("'Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.'" (internal citations omitted)); *Kolling*, 137 Cal. App. 3d at 723 (noting that a party "incidentally injured" by an antitrust violation may not recover under the Cartwright Act).

In *Illinois Brick*, the Supreme Court determined that, with limited exceptions,[10] indirect purchasers cannot have suffered "injury" for the purposes of a Clayton Act claim.[11] With this holding, indirect purchasers were automatically excluded from the universe of plaintiffs that might have antitrust standing under federal law. As a result, federal courts need not even consider whether indirect purchasers have antitrust standing under the Clayton Act; a prerequisite for antitrust standing is absent.[12]

The majority in *Illinois Brick* acknowledged that its holding is "analytically distinct" from the question of antitrust standing for all non-indirect purchaser plaintiffs.[13] Thus, *Illinois Brick* did not affect the antitrust standing analysis to be applied to all other Clayton Act plaintiffs not rendered ineligible.

2. The 1978 Cartwright Act amendment ensures that courts will not view indirect purchasers as automatically ineligible for antitrust standing

In a rejection of *Illinois Brick*, the California Legislature a year later amended the Cartwright Act to make clear that indirect purchasers may be considered "persons injured," and thus be eligible for antitrust standing.[14] The 1978 amendment is phrased as the rejection of a possible restriction: It adds language noting that a person may be deemed

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10 In *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), the majority noted two potential exceptions to the exclusion of indirect purchasers: when the direct purchaser and the indirect purchaser have already entered into "cost-plus" contracts, *id.* at 732 n.12, and when the direct purchaser is owned or controlled by the indirect purchaser, *id.* at 736 n.16.

11 *Id.* at 746-47, 748; *California v. ARC Am. Corp.*, 490 U.S. 93, 97 (1989) (describing *Illinois Brick* as holding that, "with limited exceptions, only overcharged direct purchasers, and not subsequent indirect purchasers, were persons 'injured in [their] business or property' within the meaning of § 4, and that therefore the State of Illinois was not entitled to recover under federal law for the portion of the overcharge passed on to it.").

12 The blanket exclusion of indirect purchasers from the antitrust standing analysis is not itself some truncated version of an antitrust standing analysis. *Illinois Brick* denied indirect purchaser plaintiffs the right to be considered for antitrust standing as a threshold matter of policy; it did not conclude that an indirect purchaser failed a standing analysis. Indeed, nothing in the *Illinois Brick* decision implies an antitrust standing analysis: it does not discuss proximate cause or antitrust injury with respect to the plaintiffs' claims, and instead focuses almost exclusively on pragmatic concerns, antitrust policy goals, and the need to be consistent with *Hanover Shoe's* rejection of a pass-on defense. *See generally Illinois Brick*, 431 U.S. at 720-47. In *AGC*, the Supreme Court also does not discuss or describe *Illinois Brick* as concluding that the indirect purchaser plaintiffs failed an antitrust standing analysis, or as setting out some alternative standing analysis applicable to indirect purchasers. *See AGC*, 459 U.S. at 544 (noting that in *Illinois Brick* "we held that treble damages could not be recovered by indirect purchasers of concrete blocks who had paid an enhanced price because their suppliers had been victimized by a price-fixing conspiracy.").

13 *Illinois Brick*, 431 U.S. at 728 n.7; *see also Blue Shield of Va. v. McCready*, 457 U.S. 465, 476 (1982).

14 *See* Cal. Bus. & Prof. Code § 16750(a) (1978); *Union Carbide v. Superior Court*, 36 Cal. 3d 15, 20 (1984) ("California's 1978 amendment to section 16750 in effect incorporates into the Cartwright Act the view of the dissenting opinion in *Illinois Brick* that indirect purchasers are persons 'injured' by illegal overcharges passed on to them in the chain of distribution.").

"injured" for purposes of the statute "regardless of whether such injured person dealt directly or indirectly with the defendant."[15]

Dictating that an indirect purchaser is a "person injured," however, simply permits the antitrust standing analysis to proceed. Unlike a court applying federal law post-*Illinois Brick*, a court applying the Cartwright Act is not required—indeed, is not permitted—to end its inquiry upon ascertaining a plaintiff is an indirect purchaser. Instead, a court must consider whether that plaintiff has antitrust standing under a more rigorous analysis, taking into account more than just the plaintiff's level of privity with the defendant.[16]

3. The 1978 Cartwright Act amendment does not affirmatively grant standing to all indirect purchasers

While the 1978 amendment prevents *Illinois Brick's* blanket exclusion, it does not automatically grant all indirect purchasers standing.[17] The California Supreme Court has recognized that the intent of the 1978 amendment was to ensure that the *possibility* of an indirect purchaser with license to enforce the antitrust laws remained on the table.[18] Beyond that, it does not affect the antitrust standing analysis at all.

This is plain from both the language of the Cartwright Act overall and the language added by the 1978 amendment. First, nothing in the amended language is relevant to establishing antitrust injury under the Cartwright Act, except to clarify that being an indirect purchaser does not preclude antitrust injury.[19] The California Court of Appeals recognized this same logic in a parallel context in *Morrison v. Viacom, Inc.*[20] In *Morrison*, the court recognized that California law establishing the plaintiffs' status as customers (rather than competitors) did not *prevent* them from proving antitrust injury, but nevertheless held that the plaintiffs had failed to do so:

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15 The amendments to the section since 1978 are not relevant for the purposes of this article. For the current language contained in Cal. Bus. & Prof. Code § 16750, *see supra* note 5.

16 *See, e.g.*, *Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224, 1234 (1993) (considering question of antitrust standing under the Cartwright Act as requiring "'antitrust injury,'" defined as "'the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendant's acts unlawful'" (quoting *Kolling*, 137 Cal. App. 3d at 723)); *Saxer*, 54 Cal. App. 3d at 26 (concluding that plaintiff had antitrust standing because "[p]laintiff's injuries were not 'secondary' or 'consequential,'" and "not 'remote,' for they were the direct result of the allegedly illegal conduct") (cited in *Cellular Plus*, 14 Cal. App. 4th at 1233).

17 *See DRAM I*, 516 F. Supp. 2d at 1087-88 ("[T]he court is of the opinion that the Cartwright Act's grant of indirect purchaser standing, while ensuring that plaintiffs' status as indirect purchasers cannot bar their claim under the Cartwright Act, does not in actuality set forth the sum total of what a give[n] plaintiff must establish in order to satisfy antitrust standing generally." (emphasis omitted)).

18 *See Union Carbide*, 36 Cal. 3d at 21 (describing the legislative intent of the 1978 amendment being to "retain the ***availability*** of indirect-purchaser suits as a viable and effective means of enforcing" the antitrust laws (emphasis added)).

19 *See Kolling*, 137 Cal. App. 3d at 723-24; *see also In re Napster, Inc. Copyright Litig.("Napster")*, 354 F. Supp. 2d 1113, 1125-26 (N.D. Cal. 2005) (noting that "the standing afforded to indirect purchasers under the Cartwright Act does not permit a court to dispense with the requirement that an antitrust plaintiff allege an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful." (internal citations omitted)).

20 66 Cal. App. 4th 534 (1998).

> Appellants allege that the fact that they are not competitors of Viacom does not prevent them from establishing antitrust injury. Although we agree, appellants completely miss the point. Appellants failed to allege antitrust injury not because they are customers rather than competitors of Viacom, but because they have failed to allege any facts to show they suffered an injury which was caused by restraints on competition.[21]

Similarly, the fact that indirect purchasers are not *prevented* from proving antitrust injury or standing based on their indirect purchaser status does not change the need for them to establish antitrust injury in order to have antitrust standing.

Moreover, nothing in the 1978 amendment disturbs the "by reason of" proximate cause language already in the Cartwright Act.[22] Indeed, the *Illinois Brick* dissent, on which the 1978 amendment is based,[23] acknowledges that its rejection of the majority's view does not affect the need to establish proximate cause limits on antitrust liability.[24,25] This becomes clear when one envisions a world but-for *Illinois Brick*: without the *Illinois Brick* decision, there is simply a lack of any special treatment – positive or negative – for indirect purchasers.

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21 *Id.* at 548 (emphasis added) (internal citations omitted).

22 *Kolling*, 137 Cal. App. 3d at 723-24; *see also Saxer*, 54 Cal. App. 3d at 26 (noting that "to have standing to maintain an action for violation of the antitrust laws the plaintiff must be within the 'target area' of the alleged violation—'the area which it could reasonably be foreseen would be affected' by the antitrust violation" (internal citations omitted)).

23 *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 782 (2010) ("Reviewing the legislative history behind this enactment, we find indications the Legislature fully embraced the *Illinois Brick* dissent"); *see also Union Carbide*, 36 Cal. 3d at 19-20 (explaining that Cartwright Act was amended to repudiate the *Illinois Brick* bar against indirect purchaser recovery).

24 *Illinois Brick*, 431 U.S. at 760 (Brennan, J., dissenting) ("[D]espite the broad wording of § 4, there is a point beyond which the wrongdoer should not be held liable.").

25 Certain statements from Justice Brennan's dissent are sometimes quoted out of context to support the proposition that Cartwright Act indirect purchaser plaintiffs categorically enjoy antitrust standing. *See, e.g.*, Micheletti, *supra* note 3, at 16 ("*Illinois Brick* dissent statements and facts support the view that the standing under the Cartwright Act should be broadly construed to find that indirect purchasers . . . have standing to pursue claims."). For example, Justice Brennan notes that "if the broad language of § 4 means anything, surely it must render the defendant liable to those within the defendant's chain of distribution." *Illinois Brick*, 431 U.S. at 761 (Brennan, J., dissenting). But this language actually speaks to Justice Brennan's position that the majority in *Illinois Brick* should not automatically deny all indirect purchasers standing, not that indirect purchaser standing automatically should be granted. The language that follows makes this clear: "It would indeed be 'paradoxical to deny recovery to the ultimate consumer while permitting the middlemen a windfall recovery.'" *Id.* (quoting P. Areeda, Antitrust Analysis: Problems, Text, Cases 75 (2d ed. 1974)).

Thus, the California Legislature's rejection of Illinois Brick, like the decision itself, does nothing to inform the "analytically distinct"[26] issue of what the *outcome* of an indirect purchaser standing analysis will be, except to allow that analysis to proceed.[27]

C. *AGC* Provides a Framework for an Antitrust Standing Analysis that Does Not Rely on or Incorporate the Holding of *Illinois Brick*

Several years after *Illinois Brick*, the U.S. Supreme Court in *AGC* provided guidance on how courts should analyze whether an "injured person" has antitrust standing under the Clayton Act and set forth factors to be weighed.[28] These factors have since been summarized as: "(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."[29] The first of these factors is the most important, but all factors are weighed together.[30]

The analysis set forth in *AGC* "determin[es] whether a plaintiff who has borne an injury has antitrust standing,"[31] but does not address which types of plaintiffs may have "borne an injury" or to whom this antitrust standing analysis can be applied. The analysis in *AGC* thus did not speak to the issue addressed in *Illinois Brick* or the 1978 Cartwright Act amendment spawned by *Illinois Brick*. *AGC* considers a distinct and much broader question of how to evaluate antitrust standing once a "plaintiff who has borne an injury" has been identified.[32]

Nor does the analysis set forth in *AGC* incorporate or build significantly on *Illinois Brick* or its underlying concerns. Both the majority and dissenting opinions in *Illinois Brick* focused on the practical difficulties of apportioning damages and avoiding multiple recovery, balanced against the need to ensure that private treble damages actions deter

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26 *Illinois Brick,* 431 U.S. at 728 n.7; *see also Blue Shield of Va.*, 457 U.S. at 476.

27 *See Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1058 (9th Cir. 1999) ("[I]t is not the status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff."); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 269 F. Supp. 2d 1213, 1224 (C.D. Cal. 2003) ("[T]he Cartwright Act's more expansive standing provision does not dispense with the requirement that an antitrust plaintiff allege an '"injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."' (internal citations omitted)); *accord Napster*, 354 F. Supp. 2d at 1125-26.

28 *See AGC*, 459 U.S. at 535; *Am. Ad Mgmt.*, 190 F.3d at 1054 ("the Supreme Court in *Associated General* identified certain factors for determining whether a plaintiff who has borne an injury has antitrust standing.").

29 *Am. Ad Mgmt.*, 190 F.3d at 1054-55.

30 *See AGC*, 459 U.S. at 538; *In re Cathode Ray Tube (CRT) Antitrust Litig. ("CRT")*, 738 F. Supp. 2d 1011, 1023 (N.D. Cal. 2010) ("No single factor is decisive; courts are to balance the factors, giving 'great weight to the nature of the plaintiff's alleged injury.'" (quoting *Am. Ad Mgmt.*, 190 F.3d at 1055)).

31 *Am. Ad Mgmt.*, 190 F.3d at 1054.

32 *See DRAM I*, 516 F. Supp. 2d at 1087 (noting federal standing analysis is much broader than the indirect/direct purchaser issues in *Illinois Brick*).

and punish antitrust violations.[33] The *Illinois Brick* holding is guided by these concerns.[34] By contrast, the first and most important factor in *AGC*—the nature of the injury—is aimed entirely at limiting private antitrust actions to those correcting the type of harm the antitrust laws were intended to prevent.[35] The directness and speculativeness factors are animated by proximate cause concepts,[36] which are similarly unrelated to the judicial manageability, deterrence, and enforcement policies at issue in the *Illinois Brick* opinions.[37] Only the risk of multiple recovery and difficulty of apportioning damages factors in *AGC* incorporate some of the same practical considerations motivating *Illinois Brick*.[38] These factors do not play a prominent role in the AGC analysis: the first mention of *Illinois Brick* or its underlying concerns occurs 24 pages into the 27-page *AGC* majority opinion, and is confined to two paragraphs.[39]

AGC therefore neither reinforces nor incorporates *Illinois Brick* into its holding. Instead, it sets forth a framework for analyzing antitrust standing, an issue distinct from *Illinois Brick*'s holding that dictates to whom such an analysis may be applied.

III. THE *AGC* FACTORS AND THE CARTWRIGHT ACT AS AMENDED ARE COMPATIBLE SOURCES OF LAW

Applying *AGC* to Cartwright Act claims will not demand (and thus far has not demanded) outcomes inconsistent with the spirit of the 1978 amendment.[40] Any concern that *AGC* will vitiate the Cartwright Act's protection of indirect purchasers is unfounded.[41]

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33 *Illinois Brick*, 431 U.S. at 737 ("Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge–from direct purchasers to middlemen to ultimate customers," which "would add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness."); *id.* at 759-60 (Brennan, J., dissenting) ("Lack of precision in apportioning damages between direct and indirect purchasers is thus plainly not a convincing reason for denying indirect purchasers an opportunity to prove their injuries and damages.").

34 *Illinois Brick*, 431 U.S. at 737; *Id.* at 759-60 (Brennan, J., dissenting).

35 *AGC*, 459 U.S. at 538.

36 *See id.* at 535.

37 *Illinois Brick*, 431 U.S. at 737; *Id.* at 759-60 (Brennan, J., dissenting).

38 *See AGC*, 459 U.S. at 543-44 (noting the "strong interest, identified in our prior cases, in keeping the scope of complex antitrust trials within judicially manageable limits" and "the importance of avoiding either the risk of duplicative recoveries on the one hand, or the danger of complex apportionment on the other" and discussing *Illinois Brick* and *Hanover Shoe*).

39 *See id.* at 543-45 (discussing concerns about multiple liability and managing complex actions); *see id.* at 544-45 (discussing *Illinois Brick*).

40 The U.S. Supreme Court has also determined in the context of a preemption analysis that federal and California antitrust laws do not conflict, the 1978 Cartwright Act amendment notwithstanding. *ARC*, 490 U.S. at 105-06.

41 *See, e.g.*, Micheletti, *supra* note 3, at 9 ("As a result, applying one or more *AGC* factors to bar indirect purchasers' damages claims arguably abrogates the remedies authorized by the repealer states, disregarding the Supreme Court's clear directive in *ARC America* that federal constraints addressed in *AGC* should not be applied to indirect purchaser claims under state antitrust laws.").

A. *AGC* Does Not Abrogate the Protection for Indirect Purchasers Created by the 1978 Cartwright Act Amendment

The Cartwright Act offers the *potential* for recovery by indirect purchasers who, with very limited exceptions, would not be able to recover under the Clayton Act.[42] This is the additional protection recognized by several courts:[43] preventing *automatic* exclusion of indirect purchasers from the pool of "persons injured" who may attempt to establish antitrust standing.[44] To abrogate such a protection, *AGC* would have to *automatically* exclude indirect purchasers from the potential pool of candidates for Cartwright Act standing—which *AGC* does not.[45] If anything, the hallmark of the *AGC* analysis is that it is a case-by-case inquiry without blanket rules. Even though an indirect purchaser might not ultimately establish antitrust standing under the *AGC* analysis for reasons unrelated to his indirect purchaser status as such—for example, because his *injury* was too remote, or because he did not suffer injury stemming from harm to competition—this would not abrogate the Cartwright Act's additional protections, as the Cartwright Act does not promise indirect purchasers standing in all circumstances.[46]

Nor does the *AGC* standing analysis *de facto* deny indirect purchasers standing in all circumstances.[47] Far from it. Where state and federal courts have applied *AGC* to indirect purchaser Cartwright Act claims, their analyses have yielded diverse results—including numerous findings of antitrust standing for indirect purchasers.[48,49]

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42 *See supra* Sections II.A & II.B.

43 *See Knevelbaard Dairies v. Kraft Foods*, 232 F.3d 979, 987 (9th Cir. 2000) (noting that "California law affords standing more liberally than does federal law"); *Cellular Plus*, 14 Cal. App. 4th at 1234 ("Although California law similarly requires an 'antitrust injury,' the scope of that term is broader."). These courts did not explain the scope of this additional protection.

44 *See supra* Section II.B.3.

45 Nor would it make sense for *AGC* automatically to exclude indirect purchasers, given that *Illinois Brick* had just done so.

46 *See supra* Section II.B.3.

47 *See* Micheletti, *supra* note 3, at 5 ("[T]he traditional federal antitrust standing and injury analysis used by the *AGC* court, if strictly enforced, would bar most indirect purchaser claims.").

48 *See infra* Section III B; *see, e.g.*, *Dang v. S.F. Forty Niners*, 964 F. Supp. 2d 1097, 1111-15 (N.D. Cal. 2013); *In re TFT-LCD (Flat Panel) Antitrust Litig.* ("*TFT-LCD")*, 586 F. Supp. 2d 1109, 1123 (N.D. Cal. 2008); *In re Graphics Processing Units Antitrust Litig.* ("*GPU II")*, 540 F. Supp. 2d 1085, 1098 (N.D. Cal. 2007); *In re Flash Memory Antitrust Litig. ("Flash Memory")*, 643 F. Supp. 2d 1133, 1154 (N.D. Cal. 2009); *CRT*, 738 F. Supp. 2d at 1023-24; *CRT*, No. C-07-5944-SC, 2013 WL 4505701, at *8-*13 (N.D. Cal. Aug. 21, 2013); *see also Knevelbaard,* 232 F.3d at 990 (plaintiffs included indirect sellers to defendants). It is outside the scope of this article to discuss whether these or other decisions properly applied the *AGC* analysis to Cartwright Act claims—it is sufficient for current purposes to identify the heterogenous outcomes.

49 Many of these decisions involved a motion to dismiss, and several have cited a reluctance to deny standing at such an early procedural stage based on some of the complex factual questions posed by *AGC*. *See, e.g.*, *Dang*, 964 F. Supp. 2d at 1111-15 (upholding Cartwright Act claims against an antitrust standing challenge where *AGC* factors presented more complex factual questions than could be answered at the motion to dismiss stage). *Cf. In re Dynamic Random Access Memory (DRAM) Antitrust Litig.* ("DRAM II"), 536 F. Supp. 2d 1129, 1141 (N.D. Cal. 2008) (denying standing to indirect purchasers after full discovery record).

B. Applying the *AGC* Factors to Indirect Purchaser Cartwright Act Claims Has Not Yielded Outcomes Inconsistent with the Cartwright Act

The factors set forth in *AGC* could potentially weigh in favor of or against conferring standing on any given indirect purchaser plaintiff. This is because how each of the *AGC* factors is applied depends on aspects of the plaintiff's claims wholly unrelated to the direct or indirect nature of the relationship between plaintiff and defendant. Indeed, most of the factors focus on the relationship between *conduct* and *harm*, not the level of privity between the parties: "[I]t is not the status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff."[50] For example, a court may deem damages sought by indirect purchasers of Product A too indirectly related to the overcharge alleged, due to the nature of Product A "as a ubiquitous component in all manner of personal electronic devices that are purchased for end use."[51] The same court could deem Product B to be a component that is sufficiently "traceable" through a "relatively short" production chain, and reject arguments that damages sought by indirect purchasers of Product B are too speculative or indirect.[52] Plaintiffs seeking recovery with respect to Product A and Product B are both indirect purchasers, but differences in the products and markets—not in the plaintiffs' indirect purchaser status—would determine the outcome under *AGC*. To date, courts' application of each *AGC* factor to indirect purchaser plaintiffs strongly supports this view.

1. Nature of injury / market participant

The heart of the first *AGC* factor is that the harm suffered by the plaintiff be "the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[53] The "market participant" analysis is included under the same rubric, which considers whether the market in which the plaintiff participates is the same as or sufficiently connected to the market in which competition was harmed.[54] Most federal courts considering this factor have concluded plaintiffs' standing allegations were sufficient to establish that the indirect purchaser plaintiff was a market participant

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50 *Am. Ad Mgmt.*, 190 F.3d at 1058.

51 *See DRAM I*, 516 F. Supp. 2d at 1091; *infra* Section III.B.2.

52 *See TFT-LCD*, 586 F. Supp. 2d at 1124; *infra* Section III.B.3.

53 *Am. Ad Mgmt.*, 190 F.3d at 1055.

54 "Antitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained." *Id.* at 1057. The "narrow exception" to the market participant rule allows plaintiffs "whose injuries are 'inextricably intertwined' with the injuries of market participants" or whose "injury the conspirators sought to inflict" to potentially have standing. *Id.* at 1057 n.5 (citing *McCready*, 457 U.S. 465); *Lorenzo v. Qualcomm Inc.*, 603 F. Supp. 2d 1291, 1300-01 (S.D. Cal. 2009) ("This exception applies when the claimant can be considered the 'direct victim' of a conspiracy or the 'necessary means' by which the conspiracy was carried out." (citing *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 744-47 (9th Cir. 1984)).

who suffered a requisite antitrust injury.[55] These decisions reflect a focus not on the level of privity between the parties, but on the nature of the harm alleged, as well as the specific characteristics of the industry and relationship between markets.

For example, whether the allegedly price-fixed product was a component part—and how big a role the component played, physically and economically—in the end product purchased by the indirect purchaser have proved to be key facts. In *TFT-LCD*, the court applied the *AGC* factors to purchasers of products containing allegedly price-fixed LCD panels, despite the plaintiffs not participating directly in the relevant market or purchasing the subject product directly from defendants.[56] The court found significant plaintiffs' allegations that the LCD panels "have no independent utility, and have value only as components of other products," that "the demand for LCD panels thus directly derives from the demand for such products," and that "LCD panels follow a traceable physical chain from the defendants to the OEMs to the purchasers of the finished products incorporating LCD panels."[57] The first *AGC* factor therefore did not hinge on the status of plaintiffs as indirect purchasers, but on these numerous other characteristics of the relevant product market and product itself.[58]

The nature of injury can also weigh against standing. But such rulings denying standing—as with cases in which indirect purchaser standing was upheld under *AGC*—do not depend on the status of the plaintiff as an indirect purchaser, but rather on the specific alleged characteristics of the market and products at issue. For example, in *Refrigerant Compressors Antitrust Litigation*, although plaintiffs alleged that the hermetic compressors at issue were a fundamental component of the refrigerators and water coolers that indirect purchaser plaintiffs had bought, the record did not support a connection between demand in the two markets or reveal that the components were economically traceable through the production chain.[59] As a result, the nature of injury factor weighed against a finding of antitrust standing.[60]

The plaintiffs in *TFT-LCD* and *Refrigerant Compressors* all indirectly purchased the price-fixed product, yet the outcomes of the *AGC* analysis on this first factor were vastly different.

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55 *See, e.g.*, *Dang*, 964 F. Supp. 2d at 1111-15; *TFT-LCD*, 586 F. Supp. 2d at 1123; *GPUs II*, 540 F. Supp. 2d at 1098; *Flash*, 643 F. Supp. 2d at 1154; *CRT*, 738 F. Supp. 2d at 1023-24; *In re Optical Disk Drive Antitrust Litig. ("ODD")*, No. 3:10–md–2143 RS, 2011 WL 3894376, at *12 (N.D. Cal. Aug. 3, 2011); *Aftermarket Filters Antitrust Litig.*, No. 08 C 4883, 2009 WL 3754041, at *7-*8 (N.D. Ill. Nov. 5, 2009); *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 782 F. Supp. 2d 1059, 1070-72 (E.D. Cal. 2011).

56 586 F. Supp. 2d at 1114.

57 *Id.* at 1123.

58 The court reached a similar conclusion in *CRT*, where the price fixed component part was alleged to represent 60 percent of the end product purchased by plaintiffs, and the price of the component directly correlated with the price of the end product, rendering the markets for the end product and component "inextricably linked." *CRT*, 738 F. Supp. 2d at 1024. The nature of injury/market participant factors weighed in favor of standing, and the plaintiffs' claims were upheld. *Id.*

59 *In re Refrigerant Compressors Antitrust Litig.*, No. 2:09–md–02042, 2013 WL 1431756, at *11-*12 (E.D. Mich. April 9, 2013).

60 *Id.* at *12.

2. Directness / remoteness factor

Under the second factor, courts look to "the chain of causation between the [] injury and the alleged restraint in the market."[61] This factor does not consider the directness of the relationship between the *parties*, but the relationship between the defendant and the *harm*—an analysis derivative of proximate cause concepts.[62] As a result, courts have successfully applied the *AGC* analysis to indirect purchaser claims without "[t]he fact that plaintiffs are indirect purchasers . . . hav[ing] negative bearing on this factor."[63] For example, in *Knevelbaard*, the Ninth Circuit considered a challenge to Cartwright Act claims brought by direct and indirect sellers of milk to defendant cheese manufacturers, who allegedly repressed the prices at which they purchased milk indirectly and directly from plaintiffs by fixing prices used by an auction agency.[64] In applying *AGC*, the court ultimately concluded that the directness of injury factor weighed in favor of antitrust standing because "[t]he milk sellers, insofar as the alleged conspiracy was meant to and did reduce their sales prices, suffered a direct injury."[65] Thus, despite the indirect relationship between the parties, the causal connection between the defendants' *actions* and the plaintiff's injury were sufficiently direct to satisfy *AGC*.

The directness analysis often considers what other factors may have contributed to the harm allegedly suffered: the more possible sources, the less clearly linked the harm and the defendant.[66] Especially when an indirect purchaser is a component part manufacturer, the specific details of the product market, relationship with other markets, and the nature of the product itself will help determine possible contributing sources and directness.[67] All these aspects can vary widely; they will not—and, in practice, have not—yielded a blanket refusal of standing for indirect purchaser plaintiffs.[68]

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61 *AGC*, 459 U.S. at 540.

62 *See, e.g., id.* at 540–41 (analyzing the "somewhat vaguely defined links" between the plaintiff's injury and the "alleged restraint in the market" in discussing the directness factor).

63 *DRAM I*, 516 F. Supp. 2d at 1091.

64 232 F.3d at 984–85.

65 *Id.* at 990.

66 *DRAM I*, 516 F. Supp. 2d at 1092 ("There are a variety of factors, for example, that could have influenced the price that each plaintiff paid for their computer (or other products)—the cost of various other components, whether those costs were themselves artificially high, etc."); *see, e.g., Lorenzo*, 603 F. Supp. 2d at 1302–03 (noting at least three intermediaries between plaintiff's injury and the alleged antitrust violation in concluding this factor weighed against standing); *Flash Memory*, 643 F. Supp. 2d at 1154–55 (noting in determining this factor favored standing that the component "makes up an overwhelming majority of the cost of NAND flash-based memory devices and a substantial portion of the consumer devices in which NAND Flash Memory is packaged to be sold as a component").

67 *See, e.g., Crouch v. Crompton Corp.*, Nos. 02 CVS 4375, 03 CVS 2514, 2004 WL 2414027, at *24 (N.C. Super. Ct. Oct. 28, 2004) ("the directness can be impacted by the nature of the item subject to price-fixing, be it a component, labor cost, or something used in the manufacturing process").

68 An indirect purchaser of an end product containing a price fixed component will necessarily have more factors potentially contributing to his claimed injury than would a direct purchaser of the price-fixed product. *See id.* at *19. But this is hardly a bias in the *AGC* analysis, as demonstrated by the varying results in courts' application of this factor to indirect purchasers.

For example, in *Flash Memory*, the court determined that purchasers of products containing a price-fixed component had antitrust standing under *AGC*.[69] In applying the directness factor to reach this conclusion, the court considered the plaintiffs' allegations that the component was "traceable through the product distribution chain."[70] By contrast, in *DRAM I*, the court declined to confer antitrust standing on purchasers of a product containing allegedly price-fixed components where the component's "nature as a ubiquitous component in all manner of personal electronic devices . . . lessens the directness of its impact on price."[71] Unlike the "traceable" components in *Flash Memory*, the *DRAM* complaint "set[] forth no allegations that demonstrate that, within the final purchase price of a given product purchased by plaintiffs for 'end use', the ultimate cost of the DRAM component is somehow directly traceable and/or distinguishable."[72]

3. Speculative nature of damages[73]

Claimed damages can be speculative or difficult to apportion due to aspects of commercial relationships unrelated to the plaintiff's status a direct or indirect purchaser. Courts' application of this factor, as well as the discussion of the factor in *AGC*,[74] confirms the importance of these other characteristics. For example, in *Flash Memory*, the defendants argued that "NAND flash memory is just one of many components of a finished product, and as such, any attempt to distinguish the impact of its allegedly inflated price on the purchase price of a retail product would be speculative and excessively complex."[75] Instead of accepting this argument based almost entirely on the plaintiffs' status as indirect purchasers, the court found sufficient to confer standing at the motion to dismiss stage allegations that "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."[76] In this way, the court considered the specific characteristics of the product and market at issue—not plaintiffs' indirect connection with the component manufacturer—as crucial to determining speculativeness.[77]

4. Duplicative recovery and difficulty of apportioning damages factors

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69 *Flash Memory*, 643 F. Supp. 2d at 1156.

70 *Id.* at 1155. The court reached the same conclusion with respect to the plaintiffs in *TFT-LCD*, 586 F. Supp. 2d at 1123, and *GPU II*, 540 F. Supp. 2d at 1098.

71 *DRAM I*, 516 F. Supp. 2d at 1091.

72 *Id.* at 1092.

73 The directness and speculativeness factors are often considered together, thus the discussion of the directness factor above is relevant to this section as well. *See, e.g.*, *TFT-LCD*, 586 F. Supp. 2d at 1124 (considering directness and speculativeness factors with one line of reasoning).

74 *AGC*, 459 U.S. at 542-43 ("Partly because it is indirect, and partly because the alleged effects on the Union may have been produced by independent factors, the Union's damages claim is also highly speculative.").

75 *Flash Memory*, 643 F. Supp. 2d at 1155.

76 *Id.*

77 *See also, e.g.*, *TFT-LCD*, 586 F. Supp. 2d at 1124 (finding speculativeness and directness factors weigh in favor of antitrust standing because LCD panels were a component part alleged to be traceable, and the distribution chain was alleged to be "relatively short").

Unlike the first three factors, which have no connection with *Illinois Brick*, the fourth and fifth *AGC* factors—duplicative recovery and difficulty apportioning damages—do touch on policy concerns that motivated the *Illinois Brick* majority to exclude indirect purchasers from the scope of federal antitrust standing. But this limited connection does not mean that any part of the *AGC* analysis incorporates the *Illinois Brick* rule. Nor does it prevent the application of the full *AGC* balancing test from being helpful in assessing antitrust standing of Cartwright Act plaintiffs.

The fourth and fifth factors are by no means a death knell for all indirect purchasers: they have weight for or against standing for reasons unrelated to the plaintiff's indirect purchaser status. In *Flash Memory*, for example, the court concluded that because "the alleged overcharges by Defendants are distinct and traceable. . . . the risk of duplicative recovery is less of a concern," and the indirect purchaser plaintiffs had standing.[78] Similarly, in *TFT-LCD*, the court determined that the difficulty of apportioning damages did not weigh against standing at the motion to dismiss phase, where indirect purchaser plaintiffs had "sufficiently alleged that damages are traceable and thus apportionable because LCD panels are a separate component."[79]

Moreover, these factors can play an important role in determining antitrust standing of indirect purchasers, even after one accepts that some risk of duplicative recovery between direct and indirect purchasers is inherent in any indirect purchaser suit. A court can and should consider whether there is a risk of multiple recovery beyond that which is inherent in indirect purchaser claims, such as multiple recovery by various groups of indirect purchasers.[80] Similarly, a court can and should consider whether, beyond the level of difficulty in apportioning damages that inherently exists when there are plaintiffs at multiple levels of the production chain, a given claim stretches the bounds of judicial manageability to such an extent that it cannot stand.

Bearing in mind that the risk of multiple recovery and the difficulty of apportioning damages are only two *AGC* factors (and secondary to the nature of the injury), there is no risk that they will overpower the analysis, or that indirect plaintiffs will be denied recovery solely because their claims impose *some* additional burdens on the court. In dissenting from the *Illinois Brick* holding, Justice Brennan did not view concerns about multiple recovery and apportioning damages as irrelevant to the antitrust standing analysis overall. Instead, he concluded that these concerns were real, but insufficient to warrant the majority's blanket rejection of standing for virtually any indirect purchaser

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78 *Flash Memory*, 643 F. Supp. 2d at 1156.

79 *TFT-LCD*, 586 F. Supp. 2d at 1124; *see also GPU II*, 540 F. Supp. 2d at 1098.

80 In assessing antitrust standing in *Cellular Plus*, the California Court of Appeals considered the risk of duplicate recovery as between allegedly overpaying consumers and sales agents who lost sales. 14 Cal. App. 4th at 1235 n.4. Similarly, in *Vinci v. Waste Management Inc.*, 36 Cal. App. 4th 1811 (1995), the California Court of Appeals applied the *AGC* factors and concluded that permitting a sole shareholder to sue for injuries experienced by the corporation created too great a risk of duplicative recovery, and that this factor weighed against standing for the plaintiff shareholder under the Cartwright Act. *Id.* at 1814–15.

plaintiffs.[81] Courts can apply the fourth and fifth *AGC* factors to Cartwright Act claims by taking this same approach: recognizing the role of these factors, yet understanding that they cannot be used to deny all indirect purchasers standing. In discussing the application of these factors to indirect purchaser Cartwright Act claims, the superior court in *Crouch v. Crompton Corporation* aptly described this approach:

> While these factors are limited by the General Assembly's creation of indirect purchaser standing, they should not be totally eliminated when considering the state claims. The courts still have the same interest in keeping the scope of a complex antitrust trial within judicially manageable limits. *AGC*, 459 U.S. at 543. The factors are simply taken down a level and the Hanover Shoe/*Illinois Brick* restrictions eliminated. State cases may present apportionment issues which are simply too complex and for which there exists no measure of recovery which is not speculative. It is clear that the General Assembly did not intend that every purchaser in the distribution chain have a right of recovery or that there be duplicative recovery among indirect purchasers.[82]

Finally, to the extent these factors could, in certain indirect purchaser cases, directly conflict with the Cartwright Act, courts can easily consider either factor neutral,[83] much as they have done where no facts are present that allow the factor to weigh for or against standing.[84]

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The *AGC* factors, both in theory and as applied by courts, do not *across the board* deny indirect purchaser standing. This makes sense, as all indirect purchaser plaintiffs are not created equal, and thus will not fare the same under a case-specific analysis, simply because they share a single characteristic. As a result, the outcome of the standing inquiry will be different for different indirect purchasers, and any concerns about the *AGC* analysis *de facto* blocking antitrust standing for indirect purchasers are misguided.

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81 *See Illinois Brick*, 431 U.S. at 761 (Brennan, J., dissenting) ("the hypothetical possibility that a few defendants might be subjected to the danger of multiple liability does not, in my view, justify erecting a bar against all recoveries by indirect purchasers without regard to whether the particular case presents a significant danger of double recovery"); *id.* at 759-60 ("Lack of precision in apportioning damages between direct and indirect purchasers is thus plainly not a convincing reason for denying direct purchasers an opportunity to prove their injuries and damages").

82 *Crouch*, 2004 WL 2414027 at *19 (emphasis added). The analysis in *Crouch* is persuasive notwithstanding that the opinion was by a North Carolina Superior Court.

83 *See, e.g.*, *Flash Memory*, 643 F. Supp. 2d at 1156 ("Defendants briefly assert that a duplicative recovery 'is a near certainty' given that the Direct Purchasers' claims also are before the Court. Such a concern, however, generally is inapposite in the context of indirect purchaser state law antitrust claims." (internal citations omitted)); *DRAM I*, 516 F. Supp. 2d at 1093 ("Duplicative recovery is . . . a necessary consequence that flows from indirect purchaser recovery. Accordingly, it is no bar against standing, and this factor does not weigh against standing.").

84 *See, e.g.*, *Knevelbaard*, 232 F.3d at 991 ("The Risk of Duplicative Recovery. There appears to be no risk of this nature . . . . Complexity of Apportioning Damages. This factor . . . is totally absent here.").

IV. THE *AGC* ANTITRUST STANDING ANALYSIS SHOULD BE APPLIED TO CARTWRIGHT ACT CLAIMS

For the reasons discussed above, there is no tension between the Cartwright Act and *AGC* that would *prevent* their joint application. For the reasons discussed below, courts *should* apply them together and seek guidance from *AGC* in analyzing indirect purchaser claims under the Cartwright Act. Indeed, the Cartwright Act's inclusion of indirect purchasers within its potential scope has rendered the *AGC* standing analysis *especially* helpful precedent.

Because the federal and California antitrust regimes share common goals and have a similar structure,[85] federal antitrust precedent is generally considered a persuasive source of authority in applying the Cartwright Act.[86] Even California state court jurisprudence on Cartwright Act standing that does *not* rely on persuasive federal decisions is substantively consistent with the *AGC* analysis.[87] Of course, the numerous cases applying *AGC* to Cartwright Act claims, such as those discussed in *supra* section III.B, also support the role of federal jurisprudence as persuasive authority in interpreting the Cartwright Act.

The 1978 Cartwright Act amendment creates the opportunity to apply an antitrust standing analysis to indirect purchasers, but it does not provide such an analysis. Nor does the California state jurisprudence provide concrete guidance in this area.[88] Given that indirect purchaser claims will likely trigger additional factual complexities, such guidance would be especially helpful. Analyzing these claims thus requires a particularly nuanced consideration of the connections between markets, nature of injury, the directness and speculativeness of the harm, and other practical considerations. The

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85 *Saxer*, 54 Cal. App. 3d at 19 ("The Cartwright Act is patterned upon the federal Sherman Anti-Trust Act and both derive their basic provisions from the common law policy against restraint of trade; thus cases decided under the latter act are applicable as an aid to decision in interpreting the former.").

86 *Knevelbaard*, 232 F.3d at 985 ("federal antitrust precedents are properly included in a Cartwright Act analysis"); *Marin Cnty. Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925 (1976) (federal precedent interpreting federal antitrust laws is persuasive authority in state antitrust cases because both statutes "have their roots in the common law"); *Vinci*, 36 Cal. App. 4th at 1814 n.1 ("Because the Cartwright Act has objectives identical to the federal antitrust acts, the California courts look to cases construing the federal antitrust laws for guidance on interpreting the Cartwright Act."); *Kolling*, 137 Cal. App. 3d at 717 ("The Cartwright Act is patterned after the federal Sherman Anti-Trust Act . . . so that decisions under the latter are applicable to the former.").

87 *Kolling*, 137 Cal. App. 3d at 723-24 ("The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. . . . An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions." (internal citations omitted)); *Saxer*, 54 Cal. App. 3d at 26 (plaintiff had antitrust standing because "[p]laintiff's injuries were not 'secondary' or 'consequential,' since they did not result from injury to third parties; they were not 'remote,' for they were the direct result of the allegedly illegal conduct. The fact that plaintiff was not a competitor of defendants presents no obstacle to recovery" (internal citations omitted)); *Cellular Plus*, 14 Cal. App. 4th at 1233-35 & 1235 n.4.

88 As discussed *supra* Section II.A, California law imposes an additional standing requirement on Cartwright Act plaintiffs.

persuasive and tested federal antitrust law framework provided in *AGC* is ideally suited for this task, and courts should look to it to help them navigate the complex questions posed by indirect purchaser standing claims.

Some courts have rejected or questioned the application of *AGC* to Cartwright Act claims,[89] but have often done so based at least in part on the lack of direction from the California Supreme Court that the analysis should apply.[90] Moreover, other courts—including the California appellate courts—have in other instances applied the *AGC* factors expressly,[91] or in substance,[92] to analyze antitrust standing of Cartwright Act plaintiffs. The handful of cases expressing an opposing view on this open issue of law do not foreclose the conclusion that the *AGC* factors should nonetheless apply, or the prospect of a California Supreme Court decision to that effect.

V. CONCLUSION

No persuasive basis exists for declining to apply *AGC*'s antitrust standing analysis to indirect purchaser claims under the Cartwright Act. The *AGC* framework addresses an issue distinct from that addressed by *Illinois Brick* and the 1978 Cartwright Act amendment "repealing" *Illinois Brick*. *AGC* is therefore wholly consistent with the Cartwright Act as amended, which continues to require plaintiffs to show antitrust standing, even for indirect purchasers. To conclude otherwise, one must either conflate the "analytically distinct" holdings of *Illinois Brick* and *AGC*, or treat the *Illinois Brick* repealer provision in the Cartwright Act as doing more than rejecting the federal blanket ban on a certain class of plaintiffs. Either approach would be an analytical mistake, and would deprive courts of helpful guidance on a complex area of law.

While application of *AGC* may help limit recovery under the Cartwright Act to only those plaintiffs that properly have antitrust standing, this is a shared goal of federal and

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89 *See, e.g.*, *Sidibe v. Sutter Health*, No. C 12-04854, 2013 WL 2422752, at *16 (N.D. Cal. June 3, 2013) (noting in the context of antitrust standing analysis for Cartwright Act claim that the Northern District of California "cases that do not require the [AGC] factors are persuasive"). *Cellular Plus* could potentially be characterized in this way. However, *Cellular Plus* more accurately may be viewed not as rejecting federal antitrust standing jurisprudence in *toto*, but rather specifically rejecting the threshold issue under federal law of exclusion of indirect purchasers from the pool of plaintiffs who might have antirust standing.

90 *See, e.g.*, *TFT-LCD*, 586 F. Supp. 2d at 1123 ("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"); *Sidibe*, 2013 WL 2422752, at *16. Other federal decisions have also viewed application of the *AGC* test to Cartwright Act claims by California intermediate courts as sufficient guidance for the federal court to choose to do the same. *See, e.g.*, *Flash Memory*, 643 F. Supp. 2d at 1151-52 ("As to California, its Supreme Court has not reached this issue, but at least one of its intermediate appellate courts has applied these factors to its antitrust law, the Cartwright. Accordingly, the Court finds that AGC applies to Plaintiffs' California law antitrust claims as well." (internal citations omitted)); *Knevelbaard*, 232 F.3d at 985.

91 *See, e.g.*, *Knevelbaard*, 232 F.3d at 985 (stressing that Sherman Act precedent was "often helpful" though "not necessarily decisive," but applying the *AGC* factors as such to Cartwright Act claims); *In re Wholesale Elec.*, 147 Cal. App. 4th 1293, 1309 (2007) (citing the *AGC* factors, as summarized in *Knevelbaard*, as the applicable law for analyzing antitrust standing under the Cartwright Act).

92 *See Cellular Plus*, 14 Cal. App. 4th at 1233-35 & 1235 n.4; *In re Wholesale Elec.*, 147 Cal. App. 4th at 1309.

California antitrust regimes. It is hardly a basis for arguing that *AGC* should not apply. To the contrary, this consideration vies in *favor* of seeking guidance from the Supreme Court's analysis in *AGC* as a means of ensuring that only proper antitrust plaintiffs—be they indirect purchasers or not—proceed with Cartwright Act claims. The *AGC* factors are best understood not as limiting the reach of antitrust laws, but rather as ensuring the correct, accurately shaped reach of those laws. Because *AGC* and the Cartwright Act are consistent and complementary sources of law, there is no sound reason for California courts not to use *AGC* as a tool.

"ALL NATURAL" CLASS ACTIONS: A PLAINTIFF PERSPECTIVE

By Jill M. Manning[1]

"Organic," "100% Natural," "Pure," "Free-Range," "Pesticide-Free," "Whole Wheat," "Reduced Fat," "0g Trans Fats," "Low Sodium." The formerly routine trip to the grocery store has turned into a maddening, thesaurus-requiring, label-deciphering exercise. Why the sudden explosion of health-related food labels? The consumers' desire and willingness to pay more for "healthy" products has caught the attention of the food industry. Food manufacturers, in turn, are seeking to take advantage of this trend by advertising their products as "All Natural" and "100% Natural," even when they are not. Consumers are challenging the legality of these types of labels when products contain artificial ingredients, such as genetically modified organisms ("GMOs"). The federal courts of California have become a common venue for these cases, due to California's expansive consumer protection statutes, with many now referring to the federal court in the Northern District of California as the "Food Court."[2]

How can a plaintiff successfully prosecute an "all natural" class action? Surviving a motion to dismiss is the first step. Defendants' primary jurisdiction arguments have lost steam since the FDA expressly declined the invitation of several federal courts to define what the term "natural" means on a food product label. With most cases now proceeding to the class certification phase of litigation, defendants have most often challenged the requirements of ascertainability and predominance of common issues. Although courts have issued opinions both granting and denying class certification in "all natural" cases for a variety of reasons, plaintiffs who can demonstrate that the class is ascertainable and that common issues predominate over those affecting individual ones are most likely to prevail on a class certification motion.

I. SURVIVING A MOTION TO DISMISS BASED ON PRIMARY JURISDICTION

Most defendants move to dismiss a plaintiff's false labeling claim on the ground that the United States Food and Drug Administration ("FDA") has primary jurisdiction over the claims. Primary jurisdiction is a common-law doctrine that is used to coordinate judicial and administrative decision-making. The doctrine allows courts, at their discretion, to stay or dismiss actions requiring technical expertise in deference to the administrative agency with "special competence" in that area.[3]

One area not currently regulated by the FDA, however, is the use of the word "natural." This inactivity has allowed plaintiffs to challenge the validity of "natural" labels

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2 Nicole E. Negowetti, "*Defining Natural Foods: The Search for a Natural Law*," 26 Regent U. L. Rev. 329, 333 (2014).

3 *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008).

under their state consumer protection laws. For example, in *In re ConAgra Foods, Inc.*, the plaintiffs allege that ConAgra's "100% Natural" label on its Wesson Oil products is misleading because the product is made from unnatural genetically modified corn, soybean and canola.[4] ConAgra moved to dismiss the case under the doctrine of primary jurisdiction. The court overruled the motion, in part, because the FDA has not regulated what "natural" means or does not mean on food labels.[5] The court concluded that absent FDA regulation, the court could adjudicate plaintiffs' claim because "every day courts decide whether conduct is misleading."[6]

Other courts have granted motions to dismiss and referred cases to the FDA for an administrative determination as to "whether and under what circumstances food products containing ingredients produced using bioengineered seed may or may not be labeled 'Natural' or 'All Natural' or '100% Natural.'"[7] The FDA responded that it would take no position on the matter, citing its limited resources that must be devoted to food safety issues.[8] It also noted that if it were to define "natural," it would do so through a public process, and not in the context of litigation.[9]

Following the FDA's response, the previously stayed cases now are proceeding through the court system, and the courts, not the FDA, will determine whether "natural" labels on food products are misleading.

II. CERTIFYING CLASS ACTIONS ALLEGING FALSE AND DECEPTIVE LABELING CLAIMS

Food manufacturers are vigorously defending cases that survive motions to dismiss at the class certification stage. They most often have challenged the ascertainability and predominance requirements under Rule 23, arguing that it is impossible to identify customers who purchased the products at issue, and that customers purchase products for a whole host of reasons unrelated to any representations made on the product's label. Courts are just now starting to issue opinions on whether these types of cases are suitable for class certification, with varying results.

On deciding a motion to certify the class, a court considers whether a plaintiff has demonstrated that the requirements of Rule 23 of the Federal Rules of Civil Procedure

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4 CV 11-05379, WL 4259467, *1 (C.D. Cal. Aug. 12, 2013).

5 *Id.* at *2.

6 *Id.*; *see also Parker v. J.M. Smucker Co.*, 13-cv-0690, 2013 WL 4516156, *6 (N.D. Cal. Aug. 23, 2013) (motion to dismiss denied because plaintiff provided a "simple" argument, namely that a reasonable consumer would assume products labeled as "all natural" would not contain bioengineered ingredients).

7 *See Cox v. Gruma Corp.*, No. 12-CV-6502 YGR, 2013 WL 3828800, at *2 (N.D. Cal. July 11, 2013) (granting a six-month stay); *Van Atta v. Gen. Mills*, 12-cv-02815, Docket No. 51, at 7 (D. Colo. July 17, 2013) (applying *Cox* and recommending a stay); *Barnes v. Campbell Soup Co.*, 12-cv-05185-JSW, Docket No. 55, at 15-16 (N.D. Cal. July 25, 2012) (granting a stay and referring to the FDA the issue of labeling of a food product containing GMOs as "100% Natural").

8 Leslie Kux, Letter re Referrals to the United States Food and Drug Administration, at 2 (Jan. 7, 2014), Docket No. 70, *Cox v. Gruma Corp.*, No. 12-CV-6502 (N.D. Cal.).

9 *Id.*

have been satisfied by a preponderance of the evidence. First, a plaintiff must show that the four requirements of Rule 23(a) – numerosity, commonality, typicality, and adequacy – are met. Second, a plaintiff must establish that one of the bases for certification in Rule 23(b) is met. A plaintiff seeking damages must demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual class members," and that a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy."[10] A class seeking injunctive relief may be certified when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[11]

A. Ascertainability: Courts in the Ninth Circuit Reject the Third Circuit's Heightened Ascertainability Requirement

Although not an express requirement of Rule 23, courts have required plaintiffs to demonstrate that the class is ascertainable.[12] "Ascertainability" has two requirements: (1) the class must be adequately defined; and (2) class members must be ascertainable by reference to objective criteria.[13] Courts have concluded that "[t]he class definition must be sufficiently definite so that it is administratively feasible to determine whether a particular person is a class member."[14]

The Court of Appeals for the Third Circuit issued a controversial decision in *Carrera v. Bayer Corp.*, rejecting class certification solely on the grounds that the class members were not identifiable. [15] In *Carrera*, the plaintiff brought a class action against Bayer for falsely and deceptively advertising its "One-A-Day WeightSmart" dietary supplement as having "metabolism-enhancing effects."[16] Carrera argued that class members could be ascertained through value cards from retailers[17] and from affidavits declaring their purchases of the product.[18] The district court granted certification, "characterizing the issue of ascertainability as one of manageability, stating 'speculative problems with case

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10 Fed. R. Civ. P. 23(b)(3); *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001).

11 Fed. R. Civ. P. 23(b)(2).

12 *See, e.g.*, *Astiana v. Ben & Jerry's Homemade, Inc.*, No. 10-4387, 2014 WL 60097, at *1 (N.D. Cal. Jan. 7, 2014) ("apart from the explicit requirements of Rule 23, the party seeking class certification must also demonstrate that an identifiable and ascertainable class exists.")

13 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 299 (N.D. Cal. 2010).

14 *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 482 (N.D. Cal. 2011).

15 727 F.3d 300 (3rd Cir. 2013). The Court of Appeals for the Third Circuit denied the petition for a rehearing *en banc*, with four judges dissenting and arguing for a lower burden of ascertainability.

16 *Id.* at 303.

17 Plaintiff cited the Federal Trade Commission's ("FTC's") settlement with CVS regarding the sale of a supplement that made false health claims. The FTC stated in a press release regarding the settlement that "[p]urchasers will be identified through the CVS ExtraCare card program and sales on cvs.com." *Id.* at 308.

18 *Id.* at 308-09.

management' are insufficient to prevent class certification."[19] Bayer appealed. The Court of Appeals for the Third Circuit vacated the class certification order, holding that a "defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim."[20] The court further held that "[a]scertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership." *Id.* Carrera argued that ascertainability was less important because Bayer's total liability would be proven at trial, and the amount would not increase or decrease based on the claims submitted by class members.[21] The court disagreed, finding that "Bayer too has an interest in ensuring it pays only legitimate claims."[22]

Most district courts in the Ninth Circuit have refused to adopt the heightened ascertainability standard set forth in *Carerra*, finding that doing so would eviscerate consumer class actions. In *McCrary v. The Elations Co., LLC*,[23] the court rejected the defendant's argument that there was no way to identify the consumers who purchased the products at issue, and that allowing class members to "self-identify" violates its due process rights, finding that:

> If Defendant's argument were correct, 'there would be no such thing as a consumer class action.' … *Carerra* eviscerates low purchase price consumer class actions in the Third Circuit. It appears that pursuant to *Carrera* in any case where the consumer does not have a verifiable record of its purchase, such as a receipt, and the manufacturer or seller does not keep a record of buyers, *Carerra* prohibits certification of the class. While this may now be the law of the Third Circuit, it is not currently the law in the Ninth Circuit. [Citations omitted.][24]

Similarly, in *Forcellati v. Hylands, Inc.*,[25] the court found that a class of purchasers of children's cold or flu products within a prescribed time period was ascertainable because defendants had no due process interest in how damages were distributed when total damages was based on the total amount of sales. "Given that facilitating small claims is 'the policy at the very core of the class action mechanism … we decline to follow *Carerra*."[26] Finally, in *Brazil v. Dole Packaged Foods, LLC*,[27] the court granted certification of a California class of consumers who purchased certain Dole products labeled as "all

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19 *Id.* at 304-05, *citing Carrera v. Bayer Corp.*, Civ. A. No. 08-4716, 2011 WL 5878376, at *4 (D.N.J. Nov. 22, 2011) (*quoting Klay v. Humana, Inc.*, 382 F.3d 1241, 1272-73 (11th Cir. 2004)).

20 727 F.3d at 307.

21 *Id.* at 309-10.

22 *Id.* at 310.

23 2014 WL 1779243 (C.D. Cal. Jan. 13, 2014).

24 *Id.* at *7-8; *see also Werdebaugh v. Blue Diamond Growers*, 12-CV-2724, 2014 WL 2191901, at *10 (N.D. Cal. May 23, 2014); *Lanovaz v. Twinnings N. Am., Inc.*, 2014 WL 1652338, *3 (N.D. Cal. Apr. 24, 2014) ("[i]f class actions could be defeated because membership was difficult to ascertain at the class certification stage, 'there would be no such thing as a consumer class action.'" [Citations omitted]).

25 2014 WL 1410264 (C.D. Cal. Apr. 4, 2014).

26 *Id.* at *5 (*citing Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

27 12-CV-01831, 2014 WL 2466559 (N.D. Cal. May 30, 2014).

natural." The court rejected defendant's argument that the class was not ascertainable because no company records exist to identify purchasers or which product they bought, finding that "[i]n this Circuit, it is enough that the class definition describes a set of common characteristics sufficient to allow a prospective plaintiff to identify himself or herself as having a right to recover based on the description."[28]

Consumers challenging health-related labels in the Ninth Circuit can take comfort (for now) in the majority of recent decisions of the district courts rejecting the heightened burden of ascertainability announced by the Court of Appeals for the Third Circuit.[29]

B. Predominance: Proving Damages with Common Evidence in the Post-*Comcast* World

One of the key questions affecting whether "all natural" claims may be certified as class actions is the extent to which damages are susceptible to classwide proof. In *Comcast*, the United States Supreme Court held that class certification was improper because the plaintiff had failed to demonstrate that "damages are capable of measurement on a class-wide basis."[30] The Ninth Circuit has held that even after *Comcast*, the fact that damages calculations would require an individualized inquiry does not defeat class certification.[31] Instead, the "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability."[32]

Two post-*Comcast* decisions show that plaintiffs can meet this burden, and that courts will certify consumer class actions alleging false and deceptive labeling under Rule 23(b)(3). In *Astiana v. Kashi Co.*, the court certified a consumer class action on behalf of persons who purchased Kashi food products labeled as "Nothing Artificial" or "All Natural."[33] The court rejected defendants' argument that difficulties in determining the damages owed to class members defeated predominance, finding that the "'amount of damages is invariably an individual question and does not defeat class treatment.'"[34] The court concluded that the plaintiffs did, in fact, articulate a damages theory connected to plaintiffs' harm that complied with *Comcast*: "Plaintiffs allege point-of-purchase loss and

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28 *Id.* at *6 (citations omitted); *see also Guido v. L'Oreal, USA, Inc.*, No. 11-1067, 2013 WL 3353857, at *18 (C.D. Cal. July 1, 2013) (finding the class ascertainable where "the requirement for membership in the class [was] whether a consumer purchased a product after a particular date.")

29 Two other district courts in the Ninth Circuit considering the issue of ascertainability in similar cases, however, reached a different result. *See, e.g.*, *In re POM Wonderful LLC*, No. 10-2199, 2014 WL 1225184, at *6 (C.D. Cal. Mar. 25, 2014) (finding the class unascertainable because "[f]ew, if any, consumers are likely to have retained receipts during the class period" and "there is no way to reliably determine who purchased Defendant's products or when they did so"); *Jones v. ConAgra Foods., Inc.*, C 12-01633, 2014 WL 2702726, at *17-24 (N.D. Cal. Jun. 13, 2014) (finding the class unascertainable, but noting that "a lack of ascertainability alone will generally not scuttle class certification.")

30 *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

31 *Ley v a v. Medline Industries*, 716 F.3d 510, 513-14 (9th Cir. 2013).

32 *Id.* at 514.

33 291 F.R.D. 493, 510 (S.D. Cal. 2013).

34 *Id.* at 506 (citations omitted).

seek restitution in the form of a refund of all of part of the purchase price" and that they can calculate damages from the defendants' records.[35]

Similarly, in *Werdebaugh v. Blue Diamond Growers*, the court certified a class of California consumers who purchased Blue Diamond products labeled as "All Natural" when they contain synthetic ingredients.[36] The plaintiffs proposed a damages model that would determine the defendants' monetary gains from the sales of its products with misleading labels, by examining sales of the product before and after the defendant placed the misleading label on the product.[37] "The real question before this court is whether the plaintiffs have established a workable multiple regression equation, not whether plaintiffs' model actually works."[38] The court concluded that the proposed damages model "provides a means of showing damages on a classwide basis by common proof" and thus concluded that plaintiffs satisfied Rule 23(b)(3)'s predominance requirement.[39]

III. ADVICE TO PLAINTIFFS' COUNSEL: PROCEED WITH CAUTION

Food manufacturers know that labels containing terms such as "All Natural" influence consumer purchasing decisions. As the California Supreme Court has found:

> Simply stated: labels matter. The marketing industry is based on the premise that labels matter—that consumers will choose one product over another similar product based on its label and various tangible and intangible qualities they may come to associate with a particular source.[40]

Consumers, believing that they are getting a healthier, more natural product than one without a natural label, pay a premium for these products. Now that consumers are challenging the legality of these labels, food manufacturers are seeking to avoid liability by invoking the doctrine of primary jurisdiction, and opposing class certification based on their own lack of record-keeping, dubious due process arguments and questionable interpretations of the *Comcast* decision. With courts publishing conflicting decisions on ascertainability, and carefully scrutinizing plaintiffs' damages model, Plaintiffs are

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35 *Id.* Other courts have rejected the "price premium" and "full refund" models, finding them inconsistent with plaintiffs' theories of liability. *See In re POM Wonderful LLC Mktg. and Sales Practices Litig.*, ML-10-02199, 2014 WL 1225184, at *2-3 (C.D. Cal. Mar. 25, 2014) ("[b]ecause the Full Refund model makes no attempt to account for benefits conferred upon Plaintiffs, it cannot accurately measure classwide damages"); *Jones*, *supra*, 2014 WL 2702726, at *37-43 (denying class certification based on plaintiffs' failure to provide an adequate damages model).

36 12-CV-2724, 2014 WL 2191901, at *27 (N.D. Cal. May 23, 2014).

37 *Id.* at *24.

38 *Id.* at *25 (citations omitted).

39 Id. at *26.

40 *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 328 (2011).

advised to proceed with caution. Successful litigation of these claims is the best way to keep companies honest and discourage mislabeling of food products.[41]

41 Several companies have removed "all natural" claims from the labels of their products following litigation. See, e.g., http://www.foodbusinessnews.net/articles/news_home/Business_News/2013/07/PepsiCo_dropping_all_natural_c.aspx?ID=%7B6C2132D9-23DA-462C-BE3F-8F66CD531951%7D&cck=1; "Some Companies Ditch 'Natural' Label," http://online.wsj.com/news/articles/SB10001424052702304470504579163933732367084?mg=id-wsj

DEFENSE PERSPECTIVE: "ALL NATURAL" CLASS ACTIONS

By Rhonda R. Trotter[1] & Oscar Ramallo.[2]

Since 2011, the courts have been flooded with hundreds of complaints involving "natural" and "all natural" advertising claims, with the majority of filings in California.[3] Most of the cases have involved food and beverages, but they have also been brought against defendants offering products as diverse as cosmetics[4] and diapers.[5] Many cases have led to seven-figure settlements, including a $5 million settlement by a Kellogg subsidiary for Pita Crisps and other products, a $3.4 million settlement by Trader Joe's, and a $9 million settlement from PepsiCo for Naked Juice. How can a defendant avoid a multi-million dollar payout?

As discussed below, arguments that labeling claims are preempted by United States Food and Drug Administration ("FDA") regulations have been a first line of defense. But these arguments have been hampered by the FDA's recent decision *not to decide* which "all natural" claims are proper. Defendants have accordingly turned to arguing in court that their "all natural" claims are not misleading and have achieved victories at the class certification, summary judgment, and the pleading stages. Additionally, defendants have challenged plaintiffs on the traditional prerequisites to class certification, with the greatest successes on ascertainability of the class and predominance of common issues with respect to damages.

I. PREEMPTION

A first line of defense in "all natural" cases has been federal preemption and the related doctrine of primary jurisdiction. In the food context, the Nutritional Labeling and Education Act ("NLEA") expressly preempts any state law regarding labeling of food products that is "not identical" to federal law.[6] Courts have interpreted this statute as not

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3 Elaine Watson, "Have 'all natural' lawsuits peaked? And what defense strategies are working?," FoodNavigator-usa.com (Feb. 21, 2014), *available at* http://www.foodnavigator-usa.com/Regulation/Have-all-natural-lawsuits-peaked-And-what-defense-strategies-are-working.

4 *E.g., Morales v. Unilever United States, Inc., 2014 WL 1389613 (E.D. Cal. Apr. 9, 2014) (TRESemme Naturals).*

5 *E.g., Jou v. Kimberly-Clark Corp.*, 2013 WL 6491158 (N.D. Cal. Dec. 10, 2013) ("pure and natural" diapers and "Natural Care" wipes).

6 21 U.S.C. § 343-1.

preempting "a requirement imposed by state law [that] effectively parallels or mirrors the relevant sections of the NLEA."[7]

California's Sherman Food, Drug, and Cosmetic Law ("Sherman Law")[8] incorporates federal food labeling law into California law with one major difference: unlike federal law, California law allows a private cause of action for enforcement. Defendants have argued that private causes of action are, accordingly, at least impliedly preempted by federal law, but, to date, the lower courts have not been receptive to that argument.[9]

While preemption is not a panacea for eliminating all claims, depending on the plaintiff's theory of the case, it can still be raised successfully. For example, in *Ang v. Whitewave Foods Company,*[10] the plaintiffs argued that products with names like natural "soy milk," "almond milk," and "coconut milk" were misleading because the FDA defines "milk" as a substance coming from lactating cows. In addition to finding the plaintiffs' claim implausible, the court also found it was preempted by FDA regulations governing the common names of food.[11]

II. PRIMARY JURISDICTION

The primary jurisdiction doctrine allows a court to stay proceedings pending the resolution of an issue by an administrative agency with special competence.[12] Because the FDA has only issued an informal policy rather than a formal definition of "natural" in food labeling, three courts stayed litigation involving bioengineered ingredients and asked the FDA to weigh in.[13] On January 6, 2014, the FDA responded to the courts' requests by more or less saying that it had better things to do than define "natural." The FDA refused to go through the process of defining "natural" because it "operates in a world of limited resources" and "necessarily must prioritize which issues to address."[14] For the foreseeable future, the FDA's response forecloses primary jurisdiction stays for the purpose of defining the term "natural."

III. DEFINING "NATURAL"

With the FDA stepping aside, the definition of "natural" is being fought in the courts, and defendants have had successes on this issue, even at the earliest stages of the

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7 *Pratt v. Whole Foods Mkt. Cal., Inc.*, 2014 WL 1324288, at *7 (N.D. Cal. March 31, 2014) (internal quotation marks omitted).

8 Cal. Health & Safety Code § 109875 *et seq.*

9 *E.g. Pratt*, 2014 WL 1324288, at *4 (rejecting argument and collecting similar cases).

10 2013 WL 6492353, at *1 (N.D. Cal. Dec. 10, 2013).

11 *Id.* at *4.

12 *Clark v. Time Warner Cable,* 523 F.3d 1110, 1114 (9th Cir. 2008).

13 *Cox v. Gruma Corp.*, 2013 WL 3828800 (N.D. Cal. July 11, 2013); *Barnes v. Campbell Soup Co.*, 2013 WL 5530017 (N.D. Cal. July 25, 2013); *In re Gen. Mills, Inc. Kix Cereal Litig.*, 2013 WL 5943972 (D.N.J. Nov. 1, 2013) .

14 Leslie Kux, Letter re Referrals to the United States Food and Drug Administration, at 2 (Jan. 7, 2014), *available at* http://www.hpm.com/pdf/blog/FDA%20Lrt%201-2014%20re%20Natural.pdf.

proceedings. In *Pelayo v. Nestle USA, Inc.*,[15] the court dismissed on the pleadings an "all natural" claim against Buitoni Pastas because "the reasonable consumer is aware that Buitoni Pastas are not 'springing fully-formed from Ravioli trees and Tortellini bushes.'" The court also noted that immediately below the "all natural" claim on the pasta boxes, Buitoni listed its ingredients, thereby "removing any ambiguity regarding the definition of 'All Natural.'"[16] While *Pelayo* is a heartening defense victory, it has been criticized by other courts as misreading consumer perceptions and as being at odds with Ninth Circuit precedent on whether small print on a box can cure misleading representations on the front of packaging.[17]

Moving beyond the pleading stage, the definition of "natural" can also provide opportunities for defense victories at the class certification and summary judgment stages. In *Astiana v. Kashi Co.*,[18] the Court denied class certification on a number of products under the commonality and predominance requirements of Rule 23 because plaintiffs could not "show that either consumers or food producers have any kind of definition of 'All Natural' that affects purchasing decisions, such that the 'All Natural' representation was not materially false." The court, however, did certify a class for products containing ingredients defined as synthetic by regulation and under the defendant's definition on its own website.[19] Similarly, in *Ries v. Arizona Beverages USA LLC*,[20] the Court granted summary judgment to the defendant where the plaintiff failed to present any evidence that high fructose corn syrup was not natural other than that it was man-made, or that the "all natural" label was likely to deceive consumers.

IV. CLASS CERTIFICATION CHALLENGES

Apart from challenging the plaintiff's definition of "natural," a defendant can also successfully raise traditional challenges to class certification. Among the more potent challenges in an "all natural" case are challenges to the measure of damages under statutes that provide for restitution and challenges to ascertainability.

A. Challenging Damages

Federal Rule of Civil Procedure 23(b)(3) requires a plaintiff to establish that "questions of law or fact common to class members predominate over any questions affecting only individual members."[21] The Supreme Court's 2013 decision in *Comcast Corp. v. Behrend*,[22] confirmed that "a [damages] model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that

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15 2013 WL 5764644, at *4 (C.D. Cal. Oct. 25, 2013).

16 *Id.* at *5.

17 *E.g., Jou*, 2013 WL 6491158, at *8 (discussing *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (2008)).

18 291 F.R.D. 493, 507-08 (S.D. Cal. 2013).

19 *Id.* at 509.

20 2013 WL 1287416, at *5 (N.D. Cal. Mar. 28, 2013).

21 Fed. R. Civ. Proc. 23(b)(3).

22 133 S.Ct. 1426, 1433 (2013).

theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." Challenging the connection of the plaintiff's damages model to the plaintiff's legal theory has been fertile ground for class action defendants in the "all natural" space.

To lighten their burden on this issue, plaintiffs often contend that, where the defendant's deception caused the plaintiff to buy a product she otherwise would have never purchased, a full refund is an appropriate remedy. Plaintiffs rely on *FTC v. Figgie Int'l*[23] in which the Ninth Circuit held the FTC could recover refunds on heat detectors, advertised as an alternative to smoke detectors, but whose warnings "in most instances . . . would come too late to save lives." The Northern District of California in *Jones v. ConAgra Foods, Inc.*[24] recently rejected that argument in the "all natural" context (and in consumer-class actions generally). As the Court in *Jones* noted, *Figgie* was brought under the FTC Act, which contains a broad set of statutory remedies such as "the refund of money."[25] The Court found there "is no reason to import the remedies from the FTC Act into a California UCL or FAL case."[26]

While in *Astiana v. Kashi Co.,*[27] the Court certified a class of plaintiffs seeking "restitution in the form of a refund of all or part of the purchase price," the Court noted, consistent with the later *Jones* decision, that "Plaintiffs, should they prevail, are likely not entitled to a full refund of the purchase price, having obtained some benefit from the products purchased even if they were not as advertised, Plaintiffs may seek some amount representing the disparity between their expected and received value."

Thus, in the "all natural" context, courts should continue to follow a restitutionary measure of damages as follows: "The proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received." *Lanovaz v. Twinnings N. Am., Inc.*[28] In *Lanovaz*, for example, the Court rejected the plaintiffs' damages model, which compared the price of the accused product with those of comparable products without a misleading label, because the model had no way of controlling for reasons for the differences in price not attributable to the label. The Court indicated it would have accepted a model comparing the defendants' increase in sales after adding the allegedly misleading label. The plaintiffs' expert could not provide this model, however, because the allegedly misleading claim had been on the product's label for the entire class period.[29] The Court accordingly refused to certify a damages class.[30]

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23 994 F.2d 595, 603, 606 (9th Cir 1993).

24 2014 WL 2702726, at *19 (N.D. Cal. June 13, 2014).

25 *Id.* (citing 15 U.S.C. § 57(b)).

26 *Id.*

27 291 F.R.D. 493, 506 (S.D. Cal. 2013) .

28 2014 WL 1652338, at *6 (N.D. Cal. Apr. 24, 2014).

29 There is no discussion in *Lanovaz* as to whether pre-class period data was available.

30 *Id.* at *7.

B. Challenging Ascertainability

Rule 23 does not expressly mention ascertainability, but "courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed."[31] "A class is sufficiently defined and ascertainable if it is administratively feasible for the court to determine whether a particular individual is a member."[32]

The Third Circuit's decision in *Carrera v. Bayer Corp.*[33] held that a class of purchasers of a diet supplement is not ascertainable if based solely on affidavits of putative class members without any documentary backup. Many California federal courts have refused to follow *Carrera* to the extent it categorically excludes all classes based on self-identification.[34] The ascertainability requirement nevertheless remains a significant barrier to class certification in California "all natural" cases.

For example, in *Astiana v. Ben & Jerry's Homemade, Inc.*,[35] Ben & Jerry's used alkalized cocoa, an allegedly unnatural ingredient, in some of its ice creams. Ben & Jerry's sourced its ingredients from 15 different suppliers, only one of which provided alkalized cocoa. Ben & Jerry's did not keep records of which ultimate customers received ice cream with alkalized cocoa from the one supplier of "unnatural" cocoa as opposed to "natural" cocoa from the other 14 suppliers. The Court, accordingly, concluded the plaintiff failed to meet the ascertainability requirement and denied class certification. Thus, defendants should continue to raise ascertainability challenges to class certifications, even in California.

V. AVOIDING "ALL NATURAL" CLAIMS

With the definition of "natural" remaining ambiguous in the consumer class action context, plaintiffs' lawyers are increasingly interested in "natural" product litigation. In the most conservative view of the landscape, given the uncertainty of how courts will resolve "all natural" claims, businesses should consider simply dropping "all natural" claims. Indeed, many business, such as Pepsi[36] and Kellogg,[37] have announced they are doing exactly that.

Businesses wishing to continue making "all natural" claims can use *Pelayo* as a roadmap to lower the chances of liability by listing all ingredients immediately below "all natural" claims. But businesses taking this approach should do so with eyes wide

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31 *Algarin v. Maybelline, LLC*, ___ F.R.D. ___, 2014 WL 1883772, at *6 (S.D. Cal. May 12, 2014).

32 *Id.* (internal quotation marks omitted).

33 727 F.3d 300 (3d Cir. 2013).

34 *E.g. McCrary v. The Elations Co. LLC,* 2014 WL 1779243, at *7-8 (N.D. Cal. April 24, 2014).

35 2014 WL 60097, at *3 (N.D. Cal. Jan. 7, 2014).

36 Eric Schroeder, "PepsiCo dropping 'all natural' claim from Naked Juices," Food Business News (July 30, 2013), *available at* http://www.foodbusinessnews.net/articles/news_home/Business_News/2013/07/PepsiCo_dropping_all_natural_c.aspx?ID={6C2132D9-23DA-462C-BE3F-8F66CD531951}&cck=1.

37 William White, "Kashi Is Dropping The 'All Natural' Label From Its Food," Business Insider (May 8, 2014), *available at* http://www.businessinsider.com/kashi-is-dropping-all-natural-label-2014-5.

open that many courts, especially in the Ninth Circuit, do not agree with *Pelayo's* view of the matter.

It is also important for businesses to review their marketing materials for consistency to avoid the mistake that led to partial class certification in *Astiana* where the defendant's "all natural" claims were allegedly inconsistent with the definition of "natural" on the defendant's own website. Counsel should ensure processes are in place both to review marketing materials when created and to monitor continued compliance once materials are let loose into the world.

While nothing short of ceasing "natural" advertising claims can guarantee avoidance of litigation, businesses making "natural" claims should keep the above principles in mind when creating their product labeling and marketing strategies to avoid litigation and increase their chances of successfully defending class action lawsuits.

FTC V. WYNDHAM WORLDWIDE CORPORATION, ET AL. AND THE FTC'S AUTHORITY TO REGULATE COMPANIES' DATA SECURITY PRACTICES

By Kathryn F. Russo[1]

I. INTRODUCTION

In a landmark decision, *FTC v. Wyndham Worldwide Corp.*,[2] a federal court held for the first time, that the FTC has authority under Section 5 of the Federal Trade Commission Act[3] to enforce the prohibition against unfair and deceptive acts or practices in the field of data security. Although the FTC has brought data security enforcement actions against companies under Section 5 for over a decade, the *Wyndham* decision is significant because it is the first time a federal court has held, in the face of robust opposition, that the FTC has authority under Section 5 to bring such actions. As detailed below, the FTC alleged that Wyndham's failure to maintain reasonable data security standards violated Section 5 of the FTC Act.[4] In response, Wyndham filed a motion to dismiss arguing, among other things, that (i) the FTC lacks authority to regulate data security under Section 5 of the FTC Act, (ii) the FTC failed to provide fair notice of what constitutes reasonable data security standards, and (iii) Section 5 does not govern the security of payment card data.[5] The District Court denied Wyndham's motion to dismiss and held, among other things, that (i) the FTC has authority pursuant to Section 5 of the FTC Act to assert an unfairness claim in the data security context, (ii) the FTC provided fair notice of what constitutes an unfair data security practice and is not required to issue regulations before bringing an unfairness claim, and (iii) the FTC's complaint sufficiently plead an unfairness claim under the FTC Act.[6] Because some California courts of appeal have applied the FTC's three-prong definition of unfair, the *Wyndham* decision has implications on California's Unfair Competition Law as well.

Although the District Court held that the FTC has authority under Section 5 to bring data security actions against companies, it is important to note that the Court's opinion is in the context of a motion to dismiss. The issue as to whether there was substantial injury to consumers will need to be litigated. Additionally, the Court makes clear that its decision is not a "blank check" for the FTC to bring lawsuits against any company that has experienced a data breach. [7]

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2 *FTC v. Wyndham Worldwide Corp.*, 2014 U.S. Dist. LEXIS 47622 (D. N.J. April 7, 2014).

3 15 U.S.C. § 45(a)(1).

4 *Federal Trade Commission v. Wyndham Worldwide Corporation, et al.*, First Amended Complaint for Injunctive and Other Equitable Relief (D. Ariz. Aug. 9, 2012) ("Wyndham Complaint").

5 *Federal Trade Commission v. Wyndham Worldwide Corporation, et al.*, Motion to Dismiss by Defendant Wyndham Hotels & Resorts LLC (D. N.J. Apr. 26, 2013) ("Wyndham Motion to Dismiss").

6 *See* 2014 U.S. Dist. LEXIS 47622.

7 2014 U.S. Dist. LEXIS 47622 at *11.

II. FTC V. WYNDHAM WORLDWIDE CORPORATION, ET AL.

A. The FTC's Complaint Against Wyndham

In August of 2012, the FTC brought an action[8] against Wyndham Worldwide Corporation and three of its subsidiaries pursuant to Section 5 of the FTC Act[9] alleging Wyndham violated Section 5(a)'s prohibition of "acts or practices in or affecting commerce" that are "unfair" or "deceptive." The FTC alleges that Wyndham's failure to maintain reasonable and appropriate data security standards for consumers' sensitive personal information allowed hackers to gain unauthorized access to Wyndham's computer networks on three occasions and resulted in "more than $10.6 million in fraud loss, and the export of hundreds of thousands of consumers' payment card account information to a domain registered in Russia."[10] Specifically, the FTC alleges that Wyndham (a) failed to use firewalls; (b) stored payment card information in clear readable text; (c) failed to implement adequate information security policies and procedures; (d) failed to remedy known security vulnerabilities; (e) used default user IDs and passwords; (f) did not require the use of complex passwords; (g) failed to adequately inventory computers; (h) failed to employ reasonable measures to detect and prevent unauthorized access to computer networks; (i) failed to follow proper incident response procedures; and (j) failed to adequately restrict third-party vendors' access to Wyndham's network.[11] The FTC alleges that taken together, such data security failures unreasonably and unnecessarily exposed consumers' personal data to unauthorized access and theft.[12] Further, the FTC argues that such unreasonable exposure has caused and is likely to cause substantial injury to consumers and businesses.[13] For example, the FTC states that consumers and businesses suffered financial injury including, "unreimbursed fraudulent charges, increased costs, and lost access to funds or credit."[14] Based on Wyndham's alleged unfair and deceptive acts and practices in violation of Section 5, the FTC requests the Court enter a permanent injunction and grant other relief the Court deems proper.[15]

B. Wyndham's Motion to Dismiss

In response to the FTC's complaint, Wyndham filed a motion to dismiss arguing, among other things, that (i) the FTC lacks authority to regulate data security under Section 5 of the FTC Act, (ii) the FTC failed to provide fair notice of what constitutes reasonable data security standards, and (iii) Section 5 does not govern the security of payment card data.[16]

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8 *See* Wyndham Complaint.

9 15 U.S.C. § 45(a).

10 Wyndham Complaint ¶ 2.

11 *Id.* ¶ 24.

12 *Id.*

13 *Id.* ¶ 40.

14 *Id.*

15 *Id.* at p. 20.

16 *See* Wyndham Motion to Dismiss.

First, Wyndham argues that the FTC's unfairness authority under Section 5 of the FTC Act does not extend to the regulation of data security practices of private companies.[17] Wyndham equates the FTC's action with *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).[18] In *Brown & Williamson*, the U.S. Supreme Court held that Congress did not grant the FDA jurisdiction to regulate tobacco products and stated, "if tobacco products were within the FDA's jurisdiction, the Act would require the FDA to remove them from the market entirely. But a ban would contradict Congress' clear intent as expressed in its more recent, tobacco-specific legislation."[19] Wyndham contends that akin to *Brown & Williamson*, since the enactment of the FTC Act, Congress has "settled on 'a less extensive regulatory scheme' and passed narrowly tailored legislation."[20] Wyndham cites various laws including the Fair Credit Reporting Act ("FCRA"), the Gramm-Leach-Bliley Act ("GLBA"), the Children's Online Privacy Protection Act ("COPPA"), and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") as evidence that the FTC lacks general authority under Section 5 to regulate data security practices.[21] Additionally, Wyndham argues that in light of pending cybersecurity legislation and the "important economic and political considerations involved in establishing data-security standards for the private sector…it defies common sense to think that Congress would have delegated that responsibility to the FTC…."[22] Further, Wyndham contends that like the FDA in *Brown & Williamson*, the FTC disclaimed its authority to regulate data security under its Section 5 unfairness authority on various occasions.[23]

Second, Wyndham argues that even if the FTC has authority under Section 5 of the FTC Act to regulate data security standards for private companies, Wyndham cannot be held liable because the FTC did not provide fair notice of what Section 5 requires.[24] Wyndham argues that fair notice requires the FTC to publish data security rules and regulations establishing guidance and performance measures for companies to follow.[25] Wyndham states, "[b]ecause the FTC has not published *any* rules, regulations, or other guidelines explaining what data-security practices the Commission believes Section 5 to forbid or require, it would violate basic principles of fair notice and due process to hold [Wyndham] liable in this case."[26] Additionally, Wyndham argues that agencies in general "cannot use enforcement actions simultaneously to make new rules and to hold a party liable for violating the newly announced rule."[27] In sum, Wyndham argues that

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17 *Id.* at 7.

18 *Id.* at 7-8, 14.

19 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

20 Wyndham Motion to Dismiss at 14.

21 *Id.* at 9.

22 *Id.* at 13.

23 *Id.* at 10.

24 *Id.* at 14.

25 *Id.* at 15.

26 *Id.*

27 *Id.*

the FTC would have to promulgate data security rules before holding Wyndham liable for any violations of Section 5 related to data security.

Third, Wyndham argues that Section 5 does not govern the security of payment card data.[28] Pursuant to Section 5, an act or practice is unfair if the act or practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[29] Wyndham argues that consumer injury from the theft of payment card data is "never substantial and always avoidable" because federal law limits a consumer's liability for unauthorized use of payment card data to $50 and all major credit card brands waive liability for any unauthorized charges.[30] Wyndham argues that because the injury posed by the theft of payment card data is not substantial and is reasonably avoidable by consumers themselves, the FTC cannot meet the unfairness requirements under Section 5 in its current action.

C. The District Court's Order Denying Wyndham's Motion to Dismiss

On April 7, 2014, the United States District Court for the District of New Jersey denied Wyndham's motion to dismiss and held, among other things, that (i) the FTC has authority pursuant to Section 5 of the FTC Act to assert an unfairness claim in the data security context, (ii) the FTC provided fair notice of what constitutes an unfair data security practice and is not required to issue regulations before bringing an unfairness claim, and (iii) the FTC's complaint sufficiently plead an unfairness claim under the FTC Act.[31]

First, the Court rejects Wyndham's claim that this case is analogous to *Brown & Williamson*.[32] The Court states that unlike in *Brown & Williamson*, where Congress acted to preclude the FDA from exercising its authority in the area of tobacco products, "[h]ere, subsequent data-security legislation seems to complement—*not preclude*—the FTC's authority."[33] The Court states that statutes such as the FCRA, GLBA, and COPPA grant the FTC tools in addition to its authority under Section 5.[34] Indeed, the Court states, "the FTC's unfairness authority over data security can coexist with the existing data-security regulatory scheme."[35] Further, the Court analyzed the statements put forth by Wyndham as evidence that the FTC disclaimed its authority to regulate data security. Following an analysis of these statements, the Court made clear that it was "not convinced" that these statements made by the FTC "equate to a resolute, unequivocal position under *Brown & Williamson* that the FTC has *no* authority to bring *any* unfairness

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28 *Id.* at 19.

29 15 U.S.C. § 45(n).

30 Wyndham Motion to Dismiss at 19.

31 *See* 2014 U.S. Dist. LEXIS 47622.

32 *Id.* at *16.

33 *Id.* at *18-19.

34 *Id.* at *19.

35 *Id.* at *19-20.

claim involving data security."[36] The Court, guided by precedent, rejects Wyndham's arguments and concludes that the FTC has authority pursuant to Section 5 to assert an unfairness claim in the data security context.

Second, the Court rejects Wyndham's claim that fair notice requires the FTC to formally issue rules and regulations before it can file an unfairness claim in the data security context.[37] The Court states, "Circuit Courts of Appeal have affirmed FTC unfairness actions in a variety of contexts *without* preexisting rules or regulations specifically addressing the conduct-at-issue."[38] Additionally, the Court states that requiring the FTC to publish rules and regulations before bringing an enforcement action would "require the Court to sidestep long-standing precedent," including the Third Circuit's affirmation that the FTC has discretion as to whether it pursues ad hoc litigation or regulation.[39] Further, the Court states that it is not persuaded by Wyndham's argument that regulations are the only means of providing sufficient fair notice, and cites Section 5's three-prong test that defines what constitutes an unfair act or practice.[40] The Court also points to the FTC's "many public complaints and consent agreements" as a "body of experience and informed judgment *to which courts and litigants may properly resort for guidance*."[41] The Court concludes that accepting Wyndham's argument that the FTC must promulgate rules and regulations before bringing unfairness actions is untenable and would produce a result that is "in direct contradiction with the flexibility necessarily inherent in Section 5 of the FTC Act."[42]

Third, the Court held that the FTC's complaint sufficiently pleads an unfairness claim under the FTC Act.[43] An act or practice is unfair if it (1) "causes or is likely to cause substantial injury to consumers," (2) "which is not reasonably avoidable by consumers themselves," and (3) is "not outweighed by countervailing benefits to consumers or to competition."[44] The Court found that the FTC adequately pleads the "substantial injury" requirement because the FTC alleges that some consumers suffered financial injury.[45] Additionally, the Court found that the FTC adequately pleads the alleged substantial injury was "not reasonably avoidable" and stated that this issue is fact-dependent.[46]

D. Wyndham's Interlocutory Appeal to the Third Circuit

Following the District Court's Order denying Wyndham's motion to dismiss, Wyndham immediately filed a motion to certify the Order for interlocutory appeal to

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36 *Id.* at *23.

37 *Id.* at *31.

38 *Id.* at *33.

39 *Id.* at *36.

40 *Id.* at *38; *See* 15 U.S.C. § 45(n).

41 2014 U.S. Dist. LEXIS 47622 at *41-42.

42 *Id.* at *43.

43 *Id.* at *45.

44 15 U.S.C. § 45(n).

45 2014 U.S. Dist. LEXIS 47622 at *47.

46 *Id.* at *54-55.

the Third Circuit.[47] The District Court, noting the "novelty of liability issues relating to data-security breaches" and "the nationwide significance of the issues," granted Wyndham's request for interlocutory appeal.[48] The District Court certified the following two questions to the Third Circuit: (1) Whether the FTC can bring an unfairness claim involving data security under Section 5 of the FTC Act; and (2) Whether the FTC must formally promulgate regulations before bringing its unfairness claim under Section 5 of the FTC Act.[49] If the District Court is reversed as to either of these controlling questions of law, the trial will be limited to the FTC's deception count.[50]

III. IMPLICATIONS OF THE *WYNDHAM* DECISION AND FUTURE HURDLES

A. Implications of *Wyndham* on California's Unfair Competition Law

Under California's unfair competition law, any "unlawful, unfair or fraudulent business act or practice" is prohibited.[51] There is a three-way split among the courts as to what definition of "unfair" should be applied in consumer cases.[52] Some California courts of appeal have applied the FTC's three-prong definition of unfair.[53] The District Court's recent decision denying Wyndham's motion to dismiss therefore has implications on the UCL. The Court held that the FTC's complaint sufficiently plead the unfairness claim under the FTC Act pursuant to its three-prong test.[54] A California court applying the FTC's three-prong definition of unfair will likely look to the *Wyndham* decision regarding whether a plaintiff has sufficiently plead an unfairness claim.

B. Wyndham and Showing Substantial Injury to Consumers

It is important to note that the Court's opinion is in the context of a motion to dismiss. As the case progresses the FTC will have to show evidence of substantial injury to consumers. Although in most cases substantial injury to consumers involves monetary harm, unwarranted safety risks may also support a finding of unfairness.[55] Further,

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47 *Federal Trade Commission v. Wyndham Worldwide Corporation, et al.*, Defendant's Notice of Motion to Certify Order Denying Motion to Dismiss for Interlocutory Appeal (D. N.J. April 17, 2014).

48 *Federal Trade Commission v. Wyndham Worldwide Corporation, et al.*, Memorandum Opinion and Order (D. N.J. June 23, 2014) ("Interlocutory Appeal Order").

49 Interlocutory Appeal Order at 9-10.

50 *Id.* at 8.

51 Cal. Bus. & Prof. Code § 17200 et seq.

52 *See Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1364 (2010); *Morgan v. AT&T Wireless Servs. Inc.*, 177 Cal. App. 4th 1235, 1254-55 (2009); *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1376 (2012).

53 *See Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th at 1376.

54 *See* 2014 U.S. Dist. LEXIS 47622 at *45.

55 *See* FTC Policy Statement on Unfairness, *appended to* Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984), *available at* http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

"[a]n injury may be sufficiently substantial … if it does a small harm to a large number of people, or if it raises a significant risk of concrete harm."[56]

Historically, showing financial harm to consumers has been the most difficult hurdle for plaintiffs to overcome in data privacy and security cases. Although outside of the data security context, a recent decision by the California Court of Appeal, *Heller v. Ralph's Grocery Co.*,[57] illustrates the difficulty plaintiff's face showing economic injury resulting from a company's data privacy practices. In *Ralph's*, the plaintiff, Heller, sued Ralph's Grocery Company for unfair competition based on violations of the Supermarket Club Card Disclosure Act of 1999,[58] by "selling and/or sharing its customers' personal identification information without their consent."[59] Heller argued, among other things, that he and his class members had suffered economic damages because "had they known that Ralphs was sharing their personal information and purchases with third parties in violation of the Club Card Act" they "would not have applied for a Ralphs rewards card and/or would not have shopped at Ralphs grocery stores and/or would not have purchased as many items from Ralphs grocery stores."[60] Heller relied on *Kwikset Corp. v. Superior Court*,[61] in which the California Supreme Court held that "plaintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise, have 'lost money or property' … and have standing to sue."[62] Although it seems that *Kwikset* should apply in the *Ralph's* case, the Court held that Heller lacked standing to sue and stated that Heller's reliance on *Kwikset* was "misplaced."[63] The Court stated that unlike the plaintiff in *Kwikset*, Heller does not allege "that any product Heller purchased at Ralphs was not as represented, and Heller paid nothing for the reward card itself, there is no nexus between Ralph's alleged unfair business practice (using Heller's personal information) and the money he paid for the products."[64] Even though the Court in *Ralphs* held that Heller did not have standing to sue, this case is unpublished and other courts may apply the reasoning in *Kwikset* to cases similar to the *Ralph's* case. A strong argument could be made that the Court in *Ralphs* applied too narrow a notion of injury. The sharing of a customer's personal information in violation of the Club Card Act could compromise the safety and security of such personal data. It is plausible that a customer would not apply for a rewards card or shop at a business that shares its customers' personal information without permission.

IV. CONCLUSION

The *Wyndham* decision is significant because it is the first time a federal court has held that the FTC has authority under Section 5 to bring data security actions against

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56 *Id.*

57 *Heller v. Ralph's Grocery Co.*, 2014 Cal. App. Unpub. LEXIS 4527 (June 23, 2014).

58 Cal. Civ. Code § 1749.60-1749.66.

59 *See Heller v. Ralph's Grocery Co* at *1.

60 *Id.* at *3-4.

61 *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011).

62 *Id.* at 317.

63 *Heller v. Ralph's Grocery Co.* at *9.

64 *Id.* at *11.

companies. However, it is important to note that the Court's opinion is in the context of a motion to dismiss and going forward the FTC will have to show evidence of substantial injury to consumers. Further, the Court makes clear that "this decision does *not* give the FTC a blank check to sustain a lawsuit against every business that has been hacked."[65] Even so, this decision emphasizes the FTC's role as a leading enforcement authority of data security practices and could set the stage for additional lawsuits and encourage further actions against companies.

65 2014 U.S. Dist. LEXIS 47622 at *11.

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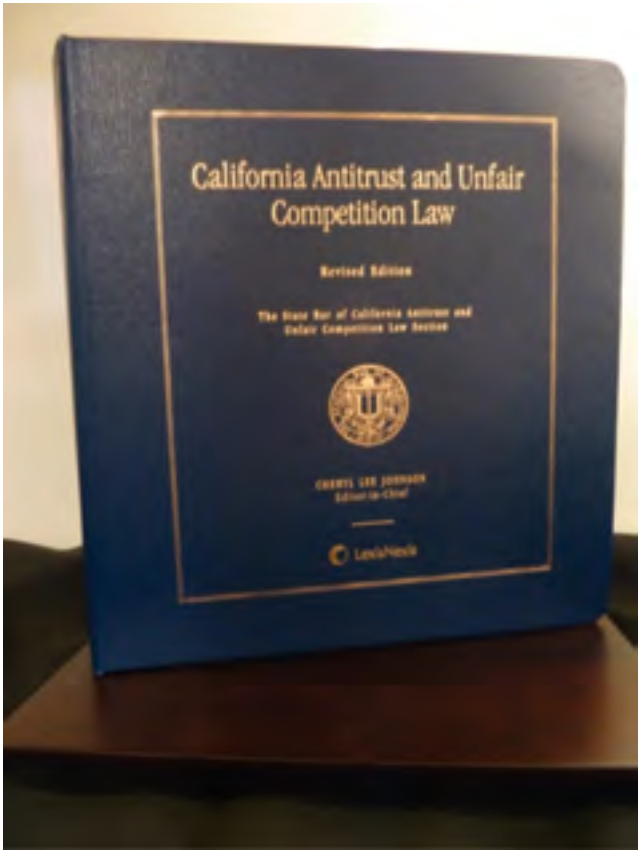

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