Indirect Purchaser Standing In Federal Court: Take 2

Law360, New York (October 12, 2009) -- In practice today, state law antitrust class action claims often are being brought by those that purchased the relevant product not as a stand-alone product, but as a component or ingredient within a separate, larger product. These “indirect purchasers” bring suit under state antitrust laws because federal law does not permit such suits.

Examples of recent indirect purchaser claims include claims based on purchases of automobile tires that were made with allegedly price-fixed rubber chemicals; of televisions that included allegedly price-fixed tubes; and of monitors that included allegedly price-fixed LCD flat panel displays.

In view of this context, we write with a different perspective on the proper antitrust analysis of these claims than that presented in the recent Law360 essay entitled Indirect Purchaser Standing In Federal Court (Aug. 28, 2009). We represent one of the defendants in the Dynamic Random Access Memory Antitrust Litigation (DRAM).

The DRAM litigation is another typical example of a modern indirect purchaser suit; numerous suits were filed by purchasers of computers, cell phones and other electronic products that contain an allegedly price-fixed semiconductor memory chip.

The essay asserted that the district court’s decision in DRAM — in which the court dismissed indirect purchaser claims after analyzing the proximate cause allegations — is a “notable exception” to a consistent pattern of judicial decision making with regards to state law “indirect purchaser” (described below) suits.

Although this is not the proper forum to debate the correctness of a particular decision, Law360 readers should know that there exists a very different view of the relevant law and policies.

Associated General Contractors and Illinois Brick
A plaintiff bringing suit under the federal antitrust laws must demonstrate “antitrust
standing,” a doctrine that embodies the notion, common to many areas of law, that a
plaintiff may not bring suit unless the alleged injury she has suffered was proximately
caused by the defendant’s alleged anti-competitive conduct.[2]

The test to determine whether a plaintiff has demonstrated antitrust standing is
grounded in the Supreme Court’s decision in Associated General Contractors v.
California State Council of Carpenters (AGC), 459 U.S. 519 (1983). In that case, the
court held that whether any federal antitrust plaintiff has standing to sue depends on a
balancing of five factors.[3]

The Supreme Court and other courts have further held that, although all the AGC
factors should be balanced, the first factor — whether a plaintiff has demonstrated
“antitrust injury” — is the most important.[4]

And the Ninth Circuit has held that, in order to adequately allege antitrust injury, the
plaintiff must have participated in the “same market” the defendant allegedly
restrained.[5]

Most state antitrust statutes are modeled after, and share a common purpose with,
federal law. Take California’s Cartwright Act — that state’s principal antitrust statute —
as an example.

Like federal antitrust law, the Cartwright Act contains a proximate cause requirement. It
is not surprising, then, that both the Ninth Circuit and the California courts have long
recognized standing requirements in Cartwright Act cases mirror those applicable under
federal law.[6]

There are, of course, differences between federal and state antitrust laws. One major
difference is that the Supreme Court held in Illinois Brick Co. v. Illinois,[7] that the
federal Clayton Act does not provide a damages cause of action for “indirect
purchasers” — those that purchase the relevant product not from the defendant, but
from some other party more remote from the alleged anti-competitive conduct.

The question in Illinois Brick was whether indirect purchasers, in contrast to direct ones,
could be “person[s] ... injured” within the meaning of the Clayton Act.

The court established a categorical bar against any Clayton Act indirect-purchaser
damages claim: an indirect purchaser is not a “person ... injured in his business or
property” within the meaning of the Clayton Act, and that act therefore does not create a
damages cause of action for indirect purchasers.[8]

Because the court established a categorical bar to indirect-purchaser causes of action, it
did “not address the [antitrust] standing issue, except to note ... that the question of
which persons have been injured by an illegal overcharge for purposes of [the Clayton
Act] is analytically distinct from the question of which persons have sustained injuries
too remote to give them standing to sue for damages.”[9] The latter question, as explained above, was answered in AGC.

The Effect of Illinois Brick “Repealers” on State Indirect-Purchaser Standing

Many states, including California, have “repealed” the Illinois Brick categorical bar against indirect-purchaser, allowing such suits to proceed under state law.

In particular, many states reacted to the decision in Illinois Brick by establishing, either by legislation or judicial decision, that their own antitrust laws do not construct a categorical bar against indirect-purchaser suits. California’s Cartwright Act, for example, was amended in 1978 by adding the italicized phrase:

"[An] 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.”[10]

Because these “repealer” amendments respond as a general matter to the holding in Illinois Brick, their only necessary and logical effect is to get rid of the categorical bar against indirect-purchaser suits. They have no effect on the separate question whether a plaintiff’s alleged injury was proximately caused by the defendant.

To be sure, the question of the proper standards for determining antitrust standing is in the end a question of state law.

Some state supreme courts, most notably Minnesota’s, have decided that the AGC factors do not apply.[11] Other state courts, such as Nebraska and Iowa, have held that AGC does apply despite their Illinois Brick “repealer” provisions.[12]

Most state supreme courts have not ruled on the matter. But there is good reason to believe that, under any state’s law, the better answer is that the AGC factors apply in indirect-purchaser cases.

To begin, it is implausible to argue — as some plaintiffs appear to have argued — that they have standing under state law simply by virtue of their indirect-purchaser status.[13] Even courts with extremely broad notions of standing reject that position.[14]

Several state supreme courts, relying on Illinois Brick, have held that the question of antitrust standing is separate from the categorical bar against indirect-purchaser suits announced in Illinois Brick. There is no reason for a state not to apply the AGC (or similar) factors in indirect purchaser suits, just as they would do in other types of antitrust disputes.

Indeed, consider what the effect on federal law would have been had Illinois Brick not barred indirect purchaser suits. Then, there would have been no categorical bar against
indirect-purchaser suits, but those suits — as with every other private action brought under federal antitrust law — would still be subject to AGC.[15]

If the effect of state law “repealer” provisions is to return the status quo to what it would have been had Illinois Brick not been decided, then there is no reason to believe that states too would not have applied normal proximate cause principles (like those announced in AGC) to separate out those plaintiffs close enough to the alleged injury from those too remote to sue.

A common objection to application of AGC — and especially its requirement that the plaintiff participate in the market that the defendant allegedly restrained[16] — is that it would lead to the same result as the Illinois Brick bar, albeit under a different doctrinal framework.

But that objection is misplaced. Neither the “same market” requirement nor any other AGC factor would prevent all indirect purchasers from bringing suit.

To take the most obvious example, under the “same market” test a plaintiff who purchases a product may be able to sue the manufacturer of that product for state law antitrust violations, regardless of whether that plaintiff purchased directly from the manufacturer or is a step removed from having done so, where the plaintiff participated in the market for the allegedly price-fixed product.

In the DRAM case, for example, claims by purchasers of DRAM itself were not dismissed; only claims by purchasers of computers and other products containing DRAM were challenged and dismissed.

Nor does the “same market” test limit standing to indirect purchasers who have purchased the product that the defendants sold.

State supreme courts (like Nebraska’s) that have adopted AGC have also found that an “indirect purchaser” who bought Microsoft software with a computer could sue because those plaintiffs participated directly in the allegedly restrained market.[17]

Thus, application of AGC in state indirect purchaser suits would not cut off all such suits. To the contrary, they would only draw the line where the line is drawn in every other type of antitrust suit — that is, between proper plaintiffs and those too remote to bring suit.

Moreover, suits like the indirect-purchaser DRAM action bear no resemblance to the suits that those who disagreed with the holding of Illinois Brick sought to preserve.

Illinois Brick was a case in which direct purchasers had “declined to sue their suppliers,”[18] and Justice Brennan’s dissent therefore argued that barring indirect-purchaser suits where the direct purchasers would not sue weakened the “effectiveness of the private treble-damages actions as a deterrent to antitrust violations.”[19]
Similarly, the brief of the Solicitor General in Illinois Brick — which argued in favor of allowing indirect-purchaser suits under federal law — emphasized that because “in many cases the direct purchasers may elect not to sue,” “the deterrence Congress sought to bring about through treble damages actions will not be achieved.”[20]

Obviously, when the direct purchasers have sued, there is no reason to believe that a “repealer” state like California would allow a suit by remote plaintiffs, such as those that did not participate in the allegedly restrained market.

In the DRAM litigation, for example, numerous direct purchasers have sued (individually and as a class), and the defendants have already paid over a billion dollars in settlements and criminal fines for the alleged antitrust activities.

The modern day indirect purchaser suit does not implicate the concerns about fair and efficient antitrust enforcement of those that disagreed with the holding in Illinois Brick.

To be sure, the question of whether the Cartwright Act and similar state laws authorizes indirect purchaser suits by those that do not satisfy the antitrust standing criteria set forth in AGC is important enough that the U.S. Court of Appeals for the Ninth Circuit accepted certification of the question in the DRAM matter.[21]

The Aug. 28 Law360 essay purported to state the relevant factors for resolving this important issue. Although we are not impartial on the question, the above is an effort to provide a more complete picture of the relevant considerations.

--By Kenneth R. O’Rourke (pictured), Mark S. Davies and Anton Metlitsky, O’Melveny & Myers LLP

Kenneth O’Rourke is a partner with O’Melveny & Myers LLP in the firm’s Los Angeles office. Mark Davies is a counsel with the firm in the Washington, D.C., office. Anton Metlitsky is an associate in the firm’s Washington office.

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[3] “(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 harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages.” Am. Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1054-55 (9th Cir. 1999) (citing AGC, 459 U.S. at 535)


[15] Justice Brennan in his Illinois Brick dissent “concede[d] that despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable,” 431 U.S. at 760, and later joined the AGC majority opinion.

[16] See Bhan v. NME Hospitals Inc., 772 F.2d 1467, 1470 (9th Cir. 1985).


[19] Id. at 764.


[21] 9th Cir. No. 08-16478.