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The State Of Umbrella Damages Under Calif. Antitrust Law

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Several federal courts have held that damages caused when noncartel members raise prices in response to cartel behavior are not recoverable under the Sherman Act. [1] These courts reason that so-called "umbrella damages" are "unacceptably speculative and complex" because they require inquiry into whether nonconspirators' prices were caused by the cartel or other pricing considerations. Petroleum Products, 691 F.2d at 1340-41. Applying these principles, at least one court from the Northern District of California has also barred umbrella damages under state antitrust laws.[2]

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A recent competing opinion from the same district court, however, suggests that umbrella damages are back on the table for claims brought under state law. [3] In County of San Mateo v. CSL Ltd., the court found that umbrella damages are not inherently speculative, and held that they are recoverable under California's Cartwright Act. County of San Mateo thus raises important questions for those asserting or defending state law antitrust claims, and its implications merit careful consideration.

The Sherman Act and Umbrella Damages

In its landmark decision of Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977), the United States Supreme Court held that in most cases indirect purchases are barred from asserting claims under the Sherman Act. It reasoned that indirect purchaser actions create a risk of multiple liability and raise difficulties of proof in parsing out pricing decisions throughout the chain of distribution.

Some federal courts have since rejected umbrella damages theories as inconsistent with the Supreme Court's rationale in Illinois Brick. Umbrella damages are those claimed for supra-competitive prices charged by noncartel members who are able to set their own prices higher than they would have in a competitive market. Relying on Illinois Brick, the Ninth Circuit in Coordinated Pretrial reasoned that considerations which could affect pricing decisions of nonconspirators render the "obstacles to intelligent inquiry [in ascertaining umbrella damages] nearly insurmountable." [4]

State Indirect Purchaser Legislation

Many states, including California, have enacted Illinois Brick-repealer legislation providing indirect purchasers standing to sue for antitrust violations. These laws reject the Supreme Court's reasoning in

Illinois Brick and allow indirect purchasers — those that did not buy directly from cartel members — to assert claims for damages under state law. In the wake of the enactment of these Illinois Brick-repealer statutes, antitrust litigation often involves claims brought under both the Sherman Act for direct purchases and under state law for indirect purchases. One such statute — California's Cartwright Act — has been the subject of competing interpretation by California federal courts.

In re TFT-LCD (Flat Panel) Antitrust Litigation

In 2012, the Northern District of California followed Petroleum Products in construing the Cartwright Act and other states' antitrust laws consistent with federal law. It noted the absence of state law decisions expressly adopting umbrella theories, and reasoned that umbrella damages present unacceptably speculative and complex questions of proof in the context of a multilayered distribution chain. [5]

County of San Mateo v. CSL Ltd.

County of San Mateo involved allegations that certain manufacturers conspired to restrict the supply of pharmaceutical products derived from human blood plasma, thereby causing plaintiff and others to pay artificially high prices. Relying on Petroleum Products and In re TFT-LCD, the defendants moved for partial summary judgment on the county's umbrella damage claim.

The court denied the motion, reasoning that the Cartwright Act reflected the California Legislature's rejection of the reasoning underlying Illinois Brick and Petroleum Products. It noted, for example, that Illinois Brick "evoked an immediate legislative response," and it explained that "[w]ithin months of the decision, Assembly Bill No. 3222 was introduced to prevent Illinois Brick from having any effect on judicial interpretation of the Cartwright Act."[6]

The court pointed out that Section 16750(a) of the Cartwright Act allows any antitrust plaintiff to recover three times the "damages sustained," without limitation for how the injury or damages are to be quantified. Further, in contrast to federal law, California allows indirect purchasers in a multitiered distribution chain to sue and collect damages, such as overcharges, from antitrust defendants.

The court also reasoned that, while antitrust damages under California law cannot be premised on sheer guesswork or speculation, there was nothing inherently speculative about the calculations needed to estimate umbrella damages. In fact, "[i]f it would be too speculative as a matter of law to make this computation with respect to non-conspiring rivals, it would also be too speculative to make the same calculation in regards to cartel members." Further, difficulty alone "does not render Plaintiff's damages calculation fundamentally speculative," and "neither imprecision nor uncertainty pose a categorical bar to umbrella damages" because the evidentiary standard on damages inherently anticipates some degree of estimation.

The court rejected the defendants' arguments that no California state court had expressly approved umbrella damages, declining to assume umbrella damages are not allowed under California law "just because a California court has not addressed the issue."

Implications

County of San Mateo creates an interesting split within California's Northern District. On the surface, the decisions can arguably be reconciled based on their factual predicates. While TFT-LCD entailed price-fixing claims entailing a multitiered distribution system, County of San Mateo alleged that the

defendants conspired to restrict supply where market forces automatically increase prices once supply decreases.

Beyond the surface, however, the decisions stand in stark contrast. Fundamentally, the Cartwright Act and other Illinois Brick-repealer statutes are not governed by federal law. And in rejecting Illinois Brick, the California Legislature has already concluded that tracing overcharges through a multitiered distribution system chain is not necessarily unreasonably speculative and complex. Moreover, the calculation of umbrella damages arguably present complex damages calculations irrespective of whether the defendant engages in price-fixing through price agreements as in TFT-LCD or supply restraints as in County of San Mateo.

Time will tell when and how these decisions are ultimately reconciled. In the interim, these cases raise competing arguments for those seeking and opposing umbrella damages in actions asserting state law antitrust claims.

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[1] See., e.g., In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 691 F.2d 1335, 1340-1341 (9th Cir. 1982) ("Petroleum Products"). Other federal courts disagree. See, e.g., See In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1163, 1170 (3d Cir. 1993) (affirming award of "damages . . . predicated on amounts paid to a non-conspiring party"); In re Uranium Antitrust Litig., 552 F. Supp. 518, 523-26 (N.D. Ill. 1982) (denying defendant's motion for summary judgment on claims for overcharges paid by direct purchaser to non-defendant non-conspirator).

[2] In re TFT-LCD (Flat Panel) Antitrust Litig (AT&T Mobility LLC v. AU Optronics Corp., et al.), 2012 U.S. Dist. LEXIS 182374 (N.D. Cal. Dec. 26, 2012) ("In re TFT/LCD").

[3] County of San Mateo v. CSL, Ltd., 2014 U.S. Dist. LEXIS 116342 (N.D. Cal. Aug. 20, 2014).

[4] Petroleum Products, at 1341.

[5] In re TFT/LCD, at 64.

[6] Id., at *15, citing Clayworth v. Pfizer, Inc., 49 Cal. 4th 758 (Cal. 2010).
