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Indirect Purchasers May Recover Damages Arising from State Antitrust Law Violations

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Recent Cases

Indirect Purchasers May Recover Damages Arising From State Antitrust Law Violations

Recently, the United States Supreme Court allowed indirect purchasers to recover damages arising from state antitrust law violations. In ***California v. ARC America Corp.,*** 488 U.S. ____, 109 S. Ct. 1661 (1989), the Court held that section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1988), which limits federal antitrust recoveries under section 1 of the Sherman Act, 15 U.S.C. §§ 1-7 (1988), does not preempt state antitrust laws that permit indirect purchasers to recover damages. The Court held that state antitrust laws do not interfere with federal antitrust policy goals of avoiding unnecessarily complicated litigation, providing direct purchasers with incentives to bring private antitrust actions, and avoiding multiple liability of defendants.

Background

The states of Alabama, Arizona, California, and Minnesota ("States"), along with classes of all non-federal government entities within each state, brought suit in their respective federal courts seeking treble damages under section 4 of the Clayton Act. 15 U.S.C. § 15(a) (1988). The States alleged that various cement producers violated the Sherman Act and their respective state antitrust laws by engaging in a nationwide conspiracy to fix cement prices. The state antitrust laws allowed indirect purchasers to recover for overcharges passed on to them by direct purchasers. However, the States were not entitled to recover on their indirect purchaser claims under section 4 of the Clayton Act because the States were indirect purchasers.

The States' actions, as well as numerous similar actions, were transferred to the United States District Court for the District of Arizona for coordinated pretrial proceedings. The district court then certified the actions as class actions and established a number of plaintiff classes. Subsequently, the defendants settled with the classes and created a settlement fund in excess of $32 million. The settlements left distribution of the fund for later resolution, subject to approval by the district court. The States petitioned the district court for payment of their state indirect purchaser claims from the settlement fund. ARC America Corporation ("ARC") and other direct purchasers in the classes objected to the States' request.

District Court Holding

The United States District Court for the District of Arizona approved a distribution plan which did not include payment for state indirect purchaser claims. The court, relying on *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), held that state antitrust laws that permit indirect purchaser claims are preempted by federal antitrust laws.

In *Illinois Brick,* the State of Illinois sought damages under section 4 of the Clayton Act for price fixing violations of the Sherman Act. Section 4 of the Clayton Act provides in part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ." 15 U.S.C. § 15(a) (1988).

The State of Illinois was an indirect purchaser of concrete blocks in that it did not buy directly from the price-fixing defendants, but rather purchased products or contracted for construction into which prior purchasers had incorporated the concrete blocks. The *Illinois Brick* Court held that, subject to two exceptions, only overcharged direct purchasers were persons "injured in [their] business or property" within the meaning of section 4 of the Clayton Act. An indirect purchaser could recover under section 4 only if it had entered into a pre-existing cost-plus contract with a direct purchaser or if it owned or controlled the direct purchaser. The State of Illinois satisfied neither exception and, therefore, as an indirect purchaser, could not recover damages under federal antitrust law.

The claimants in *Illinois Brick* were indirect purchasers suing under federal antitrust law, whereas the claimants in the present case were indirect purchasers suing under state antitrust laws. The district court, however, held that the state antitrust laws obstruct the purposes and objectives of the federal antitrust laws that the Supreme Court identified in *Illinois Brick.* Therefore, the state antitrust laws were preempted by federal antitrust law.

Court of Appeals Affirms

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision. The court reasoned that if the state antitrust laws permitting indirect purchaser claims limited direct purchasers to suing only for the amount of any overcharge, then the state laws directly conflict with federal antitrust law. To the extent that the laws conflict, federal law preempts the state antitrust laws.

Also, if state laws permit both direct and indirect purchasers to sue for damages then the state laws obstruct the three policy goals outlined in *Illinois Brick* and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968): (1) avoiding unnecessarily complicated litigation, (2) providing direct purchasers with incentives to bring private antitrust actions, and (3) avoiding multiple liability of defendants.

United States Supreme Court: State Law Indirect Purchaser Claims Do Not Obstruct the Purposes of the Sherman and Clayton Acts

The United States Supreme Court addressed the issue of whether section 4 of the Clayton Act, which limits recovery under the Sherman Act to direct purchasers, preempts state antitrust laws which expressly allow indirect purchasers to recover damages for overcharges. The Court stated that federal law preempts state law (1) if the federal law expressly provides for preemption; (2) if Congress intended to preempt state law in a particular field; and (3) to the extent that the state law obstructs the objectives of the federal law. However, when Congress legislates in an area traditionally regulated by the states, the Court will presume that Congress did not intend to supersede the states' laws.

ARC did not claim that federal antitrust laws expressly preempt state antitrust laws which allow indirect purchasers to recover for damages, or that Congress impliedly preempted the area of antitrust law. Rather, ARC argued that the state antitrust laws are preempted because they obstruct the broad purposes of federal antitrust law.

The Court initially noted that states have traditionally regulated the field of antitrust law, and that Congress intended to supplement, not displace, state antitrust laws with federal antitrust laws. The Court pointed out that on previous occasions it had held that federal antitrust laws did not preempt state antitrust laws.

Furthermore, the Court determined that the court of appeals had misunderstood *Illinois Brick*. The *Illinois Brick* Court did not address whether and to what extent federal antitrust law preempts state antitrust law. Instead, the *Illinois Brick* Court merely interpreted section 4 of the Clayton Act to allow only direct purchaser claims under the federal antitrust laws.

The Court held that state indirect purchaser laws do not obstruct the three policy goals identified in *Illinois Brick* — avoiding unnecessarily complicated litigation, providing direct purchasers with incentives to bring private antitrust actions, and avoiding multiple liability of defendants. First, state indirect purchaser claims would not unnecessarily complicate federal antitrust proceedings. Most state indirect purchaser claims would be brought in state courts. Additionally, the federal courts may decline to hear the state indirect purchaser claims if the claims would complicate the federal antitrust proceedings. Therefore, the burden on the federal courts would be minimal.

Second, the indirect purchaser claims would not reduce the direct purchasers' incentives to bring antitrust actions by reducing the amount that direct purchasers could recover from a fund. In this case the parties established the settlement fund to dispose of all claims, regardless of whether they were state law claims or federal law claims, or whether they were brought by direct or indirect purchasers. "That direct purchasers may have to share with indirect purchasers is a function of the fact and form of settlement rather than the impermissible operation of state indirect purchaser statutes." 488 U.S. at ____, 109 S.Ct. at 1667.

Finally, the Court rejected ARC's argument that the federal antitrust laws preempt the state antitrust laws because the state claims might subject violators to multiple liability. The Court noted that state laws are not ordinarily preempted solely because they impose liability greater than that imposed under federal laws. Nor was there evidence that Congress intended to preempt state law to prevent defendants from being liable under both state and federal law.

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Subpoena Power Of Federal Home Loan Bank Board Extends To Records Of Bank Customer Where Neither Bank Nor Customer Is The Investigatory Target

In ***Sandsend Financial Consultants, Ltd. v. Federal Home Loan Bank Board,*** 878 F.2d 875 (5th Cir. 1989), the Fifth Circuit held that the Federal Home Loan Bank Board ("FHLBB") may subpoena a bank customer's records although neither the bank nor the customer is directly associated with the target of the FHLBB's legitimate law enforcement inquiry. The court determined that a subpoena may not be quashed where the subpoenaed records are relevant to the FHLBB's inquiry and the FHLBB substantially complies with the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 (1988).

Overview of the FHLBB

The FHLBB acts as the "operating head" of the Federal Savings and Loan Insurance Corporation ("FSLIC"). The FHLBB examines all FSLIC-insured establishments to guarantee that they function safely and comply with governing laws and regulations. To enable the FHLBB to accomplish its duties, Congress granted the FHLBB broad investigative authority. The FHLBB's investigative powers are specified in 12 U.S.C. §§ 1730(m)(1)-(3) (1988). Section 1730(m)(2) gives the FHLBB the power to garner "testimony under oath as to any matter in respect of the affairs or ownership of any such institution or affiliate thereof, and to issue subpoenas and subpoenas duces tecum. . . ."[11] 12 U.S.C. § 1730(m)(2).

The only judicial remedy for bank customers who oppose a FHLBB investigation is the Right to Financial Privacy Act ("the

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