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Umbrella Liability: Has Its Time Come?

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Introduction

This Article addresses the case law dealing with the question of whether antitrust claims brought by so-called "umbrella plaintiffs" should be permissible. Such claimants purchase products or services from firms that are competing with but not members of, a cartel, or are competitors of a defendant accused of exclusionary conduct. As a matter of antitrust policy and sound economics, umbrella purchasers suffer actionable harm. This is because their suppliers are incentivized to raise their prices under cover of the cartel's or monopolist's umbrella, and thereby the umbrella purchasers are forced to pay an overcharge for the same products or services as claimants who buy directly from the wrongdoers.

Those supporting antitrust standing for umbrella plaintiffs argue that allowing such claims furthers the policy goals of antitrust: promoting competition; deterring anticompetitive behavior; compensating injured parties; and restoring market integrity. Those opposed to the concept contend that umbrella damages are unduly expansive of monetary accountability and highly speculative of a demonstrable cognitive nexus.

To date, the U.S. Supreme Court has not addressed the antitrust standing issue, but three circuits have upheld umbrella liability—the Third, Fifth, and Seventh. The Ninth Circuit has rejected umbrella liability in a multi-step distribution scheme but specified that it was not ruling whether such a claim is acceptable in a single-step distribution scheme. A Second Circuit panel appeared not to favor it, but did not rule on the issue. The concept is authorized in Canada and the EU.

United States

Section 4 of the Clayton Act and *Associated General Contractors*

Under Section 4 of the Clayton Act, treble damages may be sought by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[1] This broad provision reflects Congress's "expansive remedial purpose" in enacting it: to create a private enforcement mechanism that would deter violations, deprive violators of the fruits of their illegal actions, and provide ample compensation to victims of antitrust violations.[2]

In considering who should have standing to bring cases under the antitrust laws, the U.S. Supreme Court adopted five factors in 1983 in *Associated General Contractors of Cal. v. Cal. State Council of Carpenters*:[3] (1) The causal relationship between the violation and the claimed injury; (2) The nature of that injury and its relationship to the congressional purposes of the antitrust laws; (3) The "directness or indirectness" of the injury; (4) Whether the claim is speculative or otherwise raises difficulties of proof; and (5) Whether there are more direct victims of the alleged violations, thereby presenting the risk of duplicative recovery.

Umbrella Liability in the U.S. Lower Courts

In determining the standing of umbrella purchasers, lower courts in the U.S., particularly since the 1983 *AGC* decision, generally have applied the *AGC* factors, but with varying results, usually based on the facts of the case.

Third Circuit

In the first decision on umbrella liability by a circuit court, *Mid-West Paper Products Co. v. Continental Group Inc.,*[4] a 1979 case involving alleged price fixing among manufacturers of consumer bags, a divided Third Circuit denied standing to an umbrella purchaser. Applying the rationale underlying the then recent Supreme Court *Illinois Brick* decision, the panel majority declared that because costs varied and pricing decisions were based on different marketing strategies and elasticity of demand, "the outcome of any attempt to ascertain what price the defendants' competitors would have charged had there not been a conspiracy would at the very least be highly conjectural."[5] The majority added that the "causal link" between the plaintiff's injuries and the defendants' conduct was "tenuous," and "could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally-earned profits...."[6]

In 1993, the Third Circuit limited *Mid-West Paper* to its facts in *In re Lower Lake Erie Iron Ore Antitrust Litig.*[7] The court held that steel company umbrella plaintiffs who had purchased their products from non-conspirator suppliers had antitrust standing to sue cartel members, in part because "it was unquestionably the steel companies who bore the brunt of the increased costs attributed to the [conspiracy]."[8]

More recently, in 2016 in *In re Modafinil Antitrust Litig.,*[9] a reverse-payment case, the Third Circuit further limited the authority of *Mid-West Paper* on the ground that the harm caused by the anticompetitive conduct at issue in the 1979 case would have been speculative and would have transformed that case "into the sort of complex economic proceeding" that the *Illinois Brick* direct-purchaser rule was adopted in part to prevent.[10] The Third Circuit stated that the case before it differed because it involved alleged market exclusion by a claimed monopolist "that prevents a competitive market from forming at all. In such a scenario all market customers should have standing to sue . . . ."[11]

Fifth Circuit

In 1979, shortly after the Third Circuit originally had rejected the concept in *Mid-West Paper,* the Fifth Circuit approved an umbrella liability claim in *In re Beef Industries Antitrust Litig.*[12] The case involved a claim by beef suppliers that various retail chains had conspired to reduce the prices they paid for beef. A number of the suppliers sought damages for the prices paid to them by non-conspiring retailers. The Fifth Circuit ruled that the allegation that "the conspiracy depressed wholesale prices generally, and not simply the prices paid by members of the conspiracy," were sufficient to deny the motion for dismissal.

Seventh Circuit

In 2003, the Seventh Circuit allowed an umbrella liability claim to go forward in *U.S. Gypsum Co. v. Indiana Gas Co., Inc.,*[13] which involved defendants who had restricted output and elevated prices on gas pipelines. Writing for the panel, Judge Easterbrook stressed that a "cartel cuts output, which elevates price throughout the market; customers of fringe firms (sellers that have not joined the cartel) pay this higher price, and thus suffer antitrust injury, just like customers of the cartel members."[14] Judge Easterbrook also declared that *Illinois Brick* was not applicable to the umbrella plaintiffs' injury because there had been no pass-on of damages and, because the overcharge to the umbrella plaintiffs likely was the same as the overcharge to the direct purchasers, damage calculations would not be complex.[15]

Ninth Circuit

Relying substantially on the 1979 Third Circuit *Mid-West Paper* decision and *Illinois Brick,* and also pre-*AGC*, the Ninth Circuit denied standing to "umbrella claimants" in 1982 in *In re Petroleum Products* on the facts of the case.[16] The umbrella plaintiffs had purchased refined petroleum products from independent marketers who, in turn, had purchased their gasoline from non-conspiring competitors of the defendant refiners. The Ninth Circuit panel stressed that "[e]ven if plaintiffs were somehow able to prove that there was no pass-on and that the inflated prices in the non-conspirators' distribution chain were the independent result of an umbrella effect, the danger of double recovery condemned by *Illinois Brick* would remain."[17]

Significantly, the Ninth Circuit specifically limited its ruling to multi-level distribution schemes, declaring:

"We need not decide, however, whether, in a situation involving a single level of distribution, a single class of direct purchasers from non-conspiring competitors of the defendants can assert claims for damages against price-fixing defendants under an umbrella theory."[18]

While the Ninth Circuit has not again addressed an umbrella damages claim, district courts in the Ninth Circuit have done so, with divided views regarding the permissibility of umbrella liability.[19]

Second Circuit

Gelboim v. Bank of Am. Corp., a 2016 Second Court Decision [20] involved a price-fixing case brought by investors in financial instruments issued by financial institutions that allegedly colluded to depress the rate of return indexed to the London Interbrand Offered Rate ("LIBOR"). The Second Circuit panel did not rule on the standing of umbrella plaintiffs, who had sought damages from the defendants for trading losses in non-conspiring bank securities, but declared that ascertaining umbrella damages would be highly speculative in that particular case.[21] Relying on the warning against umbrella damage "overkill" made by the Third Circuit almost 40 years earlier in *Mid-West Paper,* the panel expressed fear that since the defendant banks controlled "only a small percentage" of a market consisting of "trillions of dollars' worth of financial transactions . . . this case may raise the very concern of damages disproportionate to wrongdoing noted in *Mid-West Paper.*"[22]

There have been a number of umbrella liability decisions by district courts in the Second Circuit since the 2016 *Gelboim* decision, mainly involving the financial services industry. While a few complaints have survived dismissal motions, standing has been denied in a majority of the cases on the basis of *Gelboim*.[23]

U.S. Commentary

Umbrella liability has been endorsed in the U.S. in the Areeda & Hovenkamp Treatise,[24] and has been addressed favorably in a number of academic articles.[25]

Canada

The Canadian Supreme Court addressed umbrella standing in 2019 in *Pioneer Corp v. Godfrey.*[26] The case involved manufacturers of optical disk drives (ODD) who conspired to raise the prices of ODDs and products that contain ODDs. Canada's highest court ruled that umbrella damages should be allowed because they are consistent with both the broad text and policy goals of the Canadian Competition Act. The Court ruled, however, that umbrella plaintiffs must establish a causal link between their injury and the antitrust wrongdoing.

The language of Section 36(1) of the Canadian Competition Act, as does Section 1 of the Sherman Act, allows "any person" to sue for recovery of damages caused by reason of a violation. Considering the relevant statutory language "read in its entire context and in its grammatical and ordinary sense," the Court determined that the "any person" phrase should be read broadly to include umbrella plaintiffs.[27] Since indirect purchasers may seek recovery under the Canadian Competition Act, the Court concluded there was no reason why umbrella plaintiffs should be excluded.[28] Additionally, according to the Court, allowing umbrella plaintiffs to recover damages they suffered as a result of the anticompetitive behavior helps fulfill the compensation goal of the Competition Act.[29]

The Canadian Supreme Court also reasoned that the conspirators in the case under consideration should have been aware that their actions would harm umbrella plaintiffs, because of the likelihood that non-conspiring suppliers would also raise their prices.[30] The Court cautioned, however: "Marshalling and presenting evidence" showing a causal link between loss and the anticompetitive conduct "represents a significant burden."[31]

European Union

The European Court of Justice (ECJ) approved umbrella liability in 2014 in its *Kone AG* decision.[32] The defendants were six elevator manufacturers that had agreed to divide up the markets for the installation and maintenance of elevators in four EU member states.[33] Allegedly, the object of the cartel was to ensure that prices were higher than would

have been achievable in a competitive market.[34]

The ECJ ruled that an umbrella purchaser from a non-cartel member could also file a claim when it could establish "a causal relationship between the harm and an agreement or practice prohibited under Article 101."[35]

The ECJ stressed that it could not be ruled out that a competing supplier "might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition," and that it is "one of the possible effects of the cartel that the members thereof cannot disregard."[36]

The defendants argued that umbrella damage risks in the case would be punitive. The ECJ responded that competition considerations "do not make the amount of loss that may be compensated by way of damages dependent on the profit achieved by the person whose misconduct caused that loss."[37]

Conclusion

As a matter of antitrust policy, umbrella plaintiffs should be authorized to recover damages because doing so is consistent with the antitrust policy of protecting competition, deterring bad behavior, and compensating injured parties. However, recovery should not be limitless. In order for umbrella plaintiffs to have standing, the anticompetitive conduct must have been the proximate cause of the price increase to the umbrella plaintiffs. Additionally, umbrella plaintiffs must be able to prove damages using the same techniques economic experts apply to other antitrust violations. In any event, the presence of a third party—the umbrella plaintiff's supplier—should not break the causal chain, nor should the potential size of recoverable damages factor into the decision.

Footnotes

1 15 U.S.C. § 15.

2 *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982); *see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 486 & n.10 (1977) (Section 4 of the Clayton Act was "designed primarily as a remedy").

3 459 U.S. 519, 534 (1983) ("*AGC*").

4 596 F.2d 573 (3d Cir. 1979).

5 *Id.* at 584.

6 *Id* at 586.

7 998 F.2d at 1168 (3d Cir. 1993), *cert. denied sub nom. Bessemer & Lake Erie R.R. Co. v. Wheeling-Pittsburgh Steel Corp.,* 510 U.S. 1091 (1994).

8 *Id.* at 1168.

9 837 F.3d 238 (3d Cir. 2016).

10 *Id.* at 264.

11 *Id.* at 265.

12 600 F.2d 1148 (5th Cir. 1979).

13 350 F.3d 623 (7th Cir. 2003).

14 *Id.* at 627.

15 *Id.* at 627-28.

16 *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.,* 691 F.2d 1335 (9th Cir. 1992).

17 *Id.* at 1340.

18 *Id.* at 1340.

19 Accepting umbrella liability claims: *In re Cathode Ray Tube (CRT) Antitrust Litig.,* 2016 WL 4572010, at *4-*7 (N.D. Cal. 2016); *In re Arizona Dairy Products Litig.* 627 F. Supp. 233 (D. Ariz 1985). Rejecting umbrella liability: *In re Online DVD Rental Antitrust Litig.,* 2009 WL 4572010, at *4-*7 (N.D. Cal. Dec. 1, 2009); *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.,* 116 F. Supp. 2d 1159, 1165-68 (C.D. Cal. 2000).

20 823 F.3d 759 (2d Cir. 2016).

21 *Id.* at 779-80.

22 *Id.* at 778-79.

23 Denying standing to umbrella purchasers: *In re Am. Express Anti-Steering Rules Antitrust Litig.,* 433 F. Supp. 3d 395, 408-14 (E.D.N.Y. 2020); *Sonterra Capital Master Fund, Ltd. v. Barclays Bank PLC,* 366 F. Supp. 3d 516, 545-48 (S.D.N.Y. 2017); *Sullivan v. Barclays PLC,* 2017 WL 685370, at *15-*20 (S.D.N.Y. Nov. 26, 2018); *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.,* 2018 WL 4830087, at *5-*6 (S.D.N.Y. Oct. 4, 2018); *In re Platinum & Palladium Antitrust Litig.,* 2017 WL 1169626, at *19-*25 (S.D.N.Y. Mar. 28, 2017); *In re Libor-Based Financial Instruments Antitrust Litig.,* 2016 WL 7378980, at *15-*23 (S.D.N.Y. Dec. 20, 2016). Hausfeld LLP represented plaintiffs in *In re Am. Express Anti-Steering Rules Antitrust Litig.*

Granting standing to umbrella purchasers: *In re Commodity Exchange, Inc.,* 213 F.Supp.3d 631, 656-59 (S.D.N.Y. 2016); *In re London Silver Fixing, Ltd Antitrust Litig.,* 213 F. Supp. 3d 530, 550-57 (S.D.N.Y. 2016).

24 P. Areeda & H. Hovenkamp, 2A *Antitrust Law* ¶347 (4th ed. 2019).

25 See, e.g., Sharon Foster, *Efficient Enforcer & the Financial Products Benchmark Manipulation Litigation,* 13 Ohio State Bus. L. Rev. 99, 133-39 (2019) (supporting umbrella liability as a permissible damages theory); Roger D. Blair & C.P. Durrance, *Umbrella Damages: Toward A Coherent Antitrust Policy* 36 Contemp. Econ. Pol'y 241, 247, 254 (April 2018); (umbrella damages should be allowed because it is consistent with all of the goals of U.S. antitrust law); William Page, *The Scope of Liability in Antitrust Violations,* 37 Stan. L. Rev. 1445, 1466-67 (1985) (so long as umbrella purchasers' damages are sufficiently causally related to an antitrust violation, they should have standing to bring suit). *See also* R. Inderst, F. Maier-Rigaud & U. Schwabe, *Umbrella Effects,* 10 J. Competition L. Econ. 739 (2014) (economic discussion supporting umbrella liability under EU antitrust law).

26 2019 SCC 42.

27 *Id.* at para. 61.

28 *Id.* at para. 64.

29 *Id.*

30 *Id.* at para. 72-73.

31 *Id.* at para. 77.

32 Case C-557/12, *Kone AG and others v. OBB-Infrastructur,* ECLI:EU: C 2014:1317(ECJ, June 5,2014).

33 *Id.* at para 5-6.

34 *Id.* at para 8,

35 *Id.* at para 22.

36 *Id.* at para 29-30.

37 *Id.* at para 35.

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