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COMPETITION TORTS NEWS

Inside this issue:

No Safe Harbor: The Effect of the *Schrems* Decision on Cross-Border Discovery

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In an age of globalization, opportunities for cross-border business and trade continue to grow at a rapid pace, as does the likelihood of cross-border disputes and litigation for U.S. companies with foreign affiliates or subsidiaries across the world. And while U.S. businesses often have the ability to bring these disputes in a U.S. court, data privacy laws in the countries of our international trading partners often hamper the discovery process going forward.

In particular, U.S. corporations with affiliates in Europe face significant issues in bringing over data from their European counterparts in the course of litigation because of an inherent conflict between very broad discovery practices in the U.S. and strict protection of personal privacy as a fundamental human right in the EU. This tension has been heightened with the recent decision by the European Court of Justice ("ECJ") in the *Maximillian Schrems v. Data Protection Commissioner* case, which struck down the so-called "Safe Harbor Decision" as invalid. The Safe Harbor Decision provided a framework by which U.S.-based organizations could freely receive transfers of personal data from the EU without contravening the EU Data Privacy Directive. This article analyzes the *Schrems* decision in the context of the current EU data privacy laws and discusses the impact of the decision on data transfer in U.S. litigation going forward.

(Continued on page 4)

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FROM THE CO-CHAIRS . . .

Welcome to the *first* edition of the Competition Torts Newsletter (f/k/a the Business Torts and Civil RICO Newsletter). Our Committee has been active and we have a number of items to report.

First, we have big news to report: our Committee's name has changed. We are now known as the Competition Torts Committee, a name which we believe more accurately reflects our mission and membership. By changing our name, we hope to attract new members who seek information and guidance on a range of federal and state laws that may be used as adjuncts to, or in lieu of, traditional antitrust statutes. Although our name has changed, we will continue to provide resources and programming on "business torts and civil RICO" claims, defenses, and issues.

In celebration of our name change, we recorded a new "introduction to the committee" video; check it out here: https://youtu.be/helTFYONlsY.

Second, a big thanks to Angelo Russo, the editorial staff, and our authors for another fantastic newsletter. In this newsletter, you can read about the European Court of Justice's recent decision in *Schrems* and the ramifications it may have on cross-border discovery. You can also read a summary of one of our Committee's recent programs on indirect purchaser class actions and using consumer protection statutes to overcome *Illinois Brick* (the audio of the entire program is also available on the ABA Antitrust Section's website). This newsletter concludes with case summaries of new decisions in civil RICO cases.

Finally, the 64th Annual Antitrust Section Spring Meeting is just around the corner (April 5–8, 2016). Mark your calendars for the Welcome Reception on Wednesday, April 6th (from 5:00 to 6:00pm). The Committee's leadership will be hosting a table and this is a terrific opportunity to come by, sign up, and get more involved. We are also co-sponsoring two programs at the Spring Meeting: (1) Rules of Conflicts: Considerations for Antitrust Practitioners (Wednesday, April 6 from 8:30 to 10:30am); and (2) Private Jury Trial: Reality or Reality TV (Wednesday, April 6 from 9:00 to 10:30am).

We look forward to connecting with you at this year's Spring Meeting.

Matthew D. Kent

Nicholas G. Grimmer

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(Continued from page 1)

The Data Privacy Directive of 1995

Unlike in the U.S., privacy and protection of personal data in the European Union is codified as a basic human right.[3] The European Union Protection Directive ("EU Data Privacy Directive") was enacted in October of 1995 and governs, among other things, the flow of personal data outside of the EU.[4] The EU Data Privacy Directive was established in order to foster and promote data flow within the internal market on the one hand and protect individual privacy on the other.[5]

Whereas the U.S. notion of "personal information" may be limited to social security numbers and personal health information, personal data under interpretations of the EU Data Privacy Directive may include something as simple as an employee's e-mail address. The directive covers "personal data," which is broadly defined as "any information relating to an identified or identifiable natural person," which is one "who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity."[6] In practice, depending on each EU member state's interpretation and implementation of the EU Data Privacy Directive, this could mean that the directive covers information such as names, addresses, dates of birth, and national security numbers, and even information on employment, familial, sexual, health, political and religious attributes.[7]

With respect to data transfers to third countries, Article 25 of the EU Data Privacy Directive dictates that such transfers may take place only if the third country in question ensures an "adequate level of protection."[8] The United States has already been adjudged as a country that does not provide an adequate level of protection under the EU Directive based on the U.S.'s lack of national data privacy laws.[9] Article 26 thus provides a list of six derogations from Article 25 under which data transfer to a third country which does not ensure an adequate level of protection may nevertheless take place.[10] In the alternative, countries may also negotiate separate agreements to facilitate data transfer, as the U.S. and EU did in 2000 under the U.S.-EU Safe Harbor Agreement.

U.S.-EU Safe Harbor

The U.S.-EU Safe Harbor framework was established in 2000 to bridge the differences in approach to data protection by the U.S. and EU. Specifically, it allowed U.S. companies to freely transfer personal data from EU member states to an entity in the U.S. assuming that the U.S. company (1) adheres to a list of seven data protection principles that largely mirror the key elements of data protection set out in the EU Data Privacy Directive and (2) lists itself publicly on the safe harbor list maintained by the U.S. Department of Commerce.[11] In short, the Safe Harbor framework created a presumption of adequate data protection by any U.S. entity that adopted the seven Safe Harbor principles, thus allowing EU entities to transfer personal data to qualified U.S. entities without facing prosecution for violation of the EU Data Privacy Directive.

In the context of U.S. litigation, the Safe Harbor program provided a mechanism for U.S. counsel to review data transferred over from the EU in preparation for production. Specifically, data could be transferred to a Safe Harbor certified eDiscovery vendor for further processing, culling and review.[12] However, for the U.S. entity to make additional "onward transfers" to a third party, such as opposing counsel, it would have to ensure that the "third party subscribes to the Safe Harbor Privacy Principles or is subject to the Directive or another adequacy finding."[13] Practically speaking, it is unlikely that opposing counsel could or would subscribe to the principles, one of which would allow the owner of the personal data to essentially "opt out" of having his or her personal data used.[14] Rather, what is more

common is that prior to production, U.S. counsel would take steps to remove personal data from the set via redactions, anonymization, or exclusion, leaving a production set that ultimately meets the obligations of U.S. discovery while not violating the rights protected by the EU directives. Though this process for review and redaction does not necessarily need to be conducted within the U.S., the current costs and technology make review on the U.S. side of the pond much more favorable.

The *Schrems* Decision

On October 6, 2015, the ECJ found the Safe Harbor framework invalid in the case of *Schrems v. Data Protection Commissioner*. The decision stemmed from a complaint brought by Austrian national Maximillian Schrems to the Irish Data Commissioner, whereby Mr. Schrems requested that the Commissioner prohibit Facebook Ireland from transferring Mr. Schrems's personal data to the United States.[15] Mr. Schrems additionally contended that the data protection regime in force in the United States did not ensure adequate protection of his personal data, particularly in light of revelations made by Edward Snowden concerning activities of the NSA.[16] The Irish Data Commissioner rejected Mr. Schrems's complaint as unfounded, reasoning that the EU Commission had already found that the United States ensured an adequate level of protection in its Decision 2000/520 (the Safe Harbor decision).[17] Mr. Schrems brought the action before the Irish High Court. The Irish High Court determined that the case concerned the implementation of EU law, and therefore referred the questions posed in Mr. Schrems's complaint to the ECJ.[18]

In its non-appealable decision, the ECJ agreed that the Safe Harbor decision was invalid.[19] In particular, the ECJ pointed to the fact that in the U.S., national security, public interest, and law enforcement requirements generally prevail over the protection of personal data.[20] Moreover, it found that U.S. authorities have accessed EU personal data beyond what is "strictly necessary" and "proportionate" to the needs of national security.[21] Specifically, U.S. legislation authorizes, on a general basis, storage of all personal data of all the persons whose data is transferred from the EU to the U.S. without any differentiation, limitation or exception being made in light of the objectives pursued, and without providing an objective criterion for determining limits to the access and use of this data by public authorities.[22] Additionally, the ECJ pointed out that there existed no administrative or judicial means of redress for EU citizens in the U.S. whose personal data had been transferred and accessed.[23]

Effect on Data Discovery after *Schrems*: Data Transfer from EU Affiliates to U.S. Entity for Review

The impact of the *Schrems* decision is significant, not only because it invalidated the Safe Harbor program, but because of potential ripple effects that call into question other mechanisms of data transfer between the EU and U.S. While the European Commission and U.S. Department of Commerce recently announced that they have reached agreement on a new data transfer framework (the "EU-U.S. Privacy Shield") to replace the Safe Harbor program, the details of the program remain unclear, and no concrete guidance on implementation has been issued.[24]

Therefore, after *Schrems*, and until the details of the EU-U.S. Privacy Shield are fully drafted and vetted,[25] it is likely that any initial review of documents containing personal data of EU citizens will have to take place with vendors in Europe rather than in the U.S. As discussed above, the Safe Harbor program provided a quick and easy way for EU companies to transfer personal data to its U.S. affiliates (including to data vendors who self-certified) without the risk of facing prosecution for non-compliance with the EU Directive, thereby allowing the U.S. entity to freely receive and review its internal company documents. As the *Schrems* decision became effective immediately,[26] this is no longer a viable op-

tion. Data review in Europe for production in the U.S. will be costly and inefficient, driving the already high cost of discovery up even further.

Shortly after the *Schrems* decision came down, the Article 29 Working Party issued a statement, whereby it stated that it will continue to analyze the impact of the *Schrems* decision on other transfer tools, but that in the interim, Standard Contract Clauses ("SCCs" or "MCCs") and Binding Corporate Rules ("BCRs") can still be used.[27] Based on the reaction of certain data protection authorities of Member States, however, it is far from clear whether these mechanisms are still viable options to transfer personal data from the EU to the U.S.

The EU Commission has provided three types of Standard Contract that can be built into a data transfer agreement between a U.S. and EU entity.[28] If the clauses are used unmodified, they are not subject to approval by a national data protection authority and will be considered as sufficient safeguards to the protection of personal data. However, among the other requirements of a SCC, the data importer must certify that it has no reason to believe that legislation in his or her home country would prevent it from fulfilling the instructions received from the data exporter and its obligations under the contract to provide an adequate level of protection of privacy and fundamental rights and freedoms.[29] One Data Protection Authority ("DPA") in Schleswig-Holstein, Germany has already found that in light of the reasoning in the *Schrems* decision—in particular, the mass surveillance conducted by U.S. intelligence agencies—a data importer would not be able to fulfill this requirement.[30] The Schleswig-Holstein DPA has thus concluded that a data transfer on the basis of an SCC from Germany to the U.S. is no longer permitted. While the Schleswig-Holstein DPA is famous for being particularly strict in its protection of personal data,[31] it remains to be seen how other DPAs in EU Member States will react.

Multinational companies might also look to BCRs as an alternative for transatlantic data transfers. BCRs are designed to allow multinational companies to transfer personal data from the European Economic Area to the U.S. In order to ensure that BCRs provide adequate safeguards for the protection of personal data, an entity wishing to take advantage of BCRs must get its BCR approved by the relevant DPA.[32] This is a process that can take some time, and in practice, the use of BCRs remains relatively rare.[33] Moreover, in a position paper published by a conference of all German DPAs, it appears that the validity of BCRs is also being called into question as a proper means of personal data transfer, and suggests temporarily banning any new approvals of data transfers to the U.S. based on BCRs.[34]

Conclusion

The world of data transfer immediately after *Schrems* is muddled with uncertainty. The only thing that is clear is that U.S. litigants currently relying on the Safe Harbor framework for the transfer and review of personal data between the U.S. and EU must look to new solutions right away. This may be in the form of moving document reviews to European vendors at a higher cost. And while companies currently using BCRs and SCCs may continue to do so for the time being,[35] that may be a short-term solution until early 2016, when the DPAs plan to take a strict stance on enforcement.[36]

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[3] Council of Europe, European Court of Human Rights, *European Convention on Human Rights*, Art. 8; Nicole Boehler & Gretchen Ramos, *US/EU Data Protection Conflicts: Whither Safe Harbor?*, 56 No. 4 DRI for Def. 62 (2014) at 3; European Union, *Charter of Fundamental Rights of the European Union*, art. 8, Dec. 7, 2000, OJ L C 364/01.

[4] Commission Directive 95/46/EC, 1995 O.J. (L. 281) 31-50 ("EU Data Privacy Directive").
[5] *Id.*
[6] EU Data Privacy Directive, Art. 2.
[7] Kate Brimsted, *Global Litigator: Privacy Challenges in Obtaining Discovery from Europe*, ABA Journal of the Section of Litigation, Vol. .40 No. 3 (Spring 2014), at 4.
[8] EU Data Privacy Directive, Art. 25.
[9] Article 29 Working Party, Opinion 1/99 concerning the level of data protection in the United States and the ongoing discussions between the European Commission and the United States Government (Jan. 26, 1999), 5092/98/EN.
[10] These derogations generally do not apply in the context of data transfer for the purpose of U.S. discovery.
[11] U.S. Dep't of Commerce, *U.S.-EU Safe Harbor List*, https://safeharbor.export.gov/list.aspx.
[12] *See* Working Document 1/2009 on pre-trial discovery for cross-border civil litigation ("WP 158"), at 13 ("data may be transferred on the following grounds: (1) where the recipient of personal data is an entity established in the US that has subscribed to the Safe Harbor Scheme").
[13] U.S. Dep't of Commerce, *Safe Harbor Privacy Principles*, http://www.export.gov/safeharbor/eu/eg_main_018475.asp.
[14] *Id.*
[15] Case C-362/14, *Schrems v. Data Protection Commissioner*, Oct. 6, 2015, paras. 26-28, http://curia.europa.eu/juris/document/document.jsf?text=&docid=169195&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=977114 ("*Schrems*").
[16] *Id.* para. 28.
[17] *Id.* para. 29.
[18] *Id.* para. 34.
[19] The ECJ also held that the existence of a Commission decision finding that a third party country provides an adequate level of protection for the transfer of personal data (such as the Safe Harbor Decision, 2000/520/EC) cannot reduce the powers available to the national supervisory authority of each member state to examine whether the transfer of a person's personal data to a third country complies with the requirements laid down by the EU Data Privacy Directive.
[20] *Schrems*, para. 86, citing Decision 2000/520/EC, Annex I, para. 4.
[21] *Schrems* para. 93.
[22] *Id.*
[23] *Id.* para. 90.
[24] Alisa Chestler and Tracy Weir, *U.S.-EU Safe Harbor Agreement Reached: Introducing the EU-U.S. Privacy Shield* (Feb. 2, 2016), https://communications.bakerdonelson.com/25/394/february-2016/u.s.-eu-safe-harbor-agreement-reached--introducing-the-eu-u.s.-privacy-shield.asp?sid=68724a03-d7c6-446b-8070-d3dc6ee8c01f.
[25] After the announcement of the EU-U.S. Privacy Shield, the Article 29 Working Party issued a statement, expressing its continued concerns with the current U.S. privacy legal framework and its intention to thoroughly scrutinize whether the new framework can adequately meet the requirements set forth by European jurisprudence regarding transfers of personal data for intelligence activities. *See* Statement of the Article 29 Working Party (Feb. 3, 2016), http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/2016/20160203_statement_consequences_schrems_judgement_en.pdf.
[26] Statement of the Article 29 Working Party (Oct. 16, 2015) ("[T]ransfers that are still taking place under the Safe Harbour decision after the CJEU judgment are unlawful"), http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/2015/20151016_wp29_statement_on_schrems_judgement.pdf.
[27] *Id.* In its February 3, 2016 Statement, the Article 29 Working Party further confirmed that Standard Contract Clauses and Binding Corporate Rules can still be used for personal data transfers to the U.S., but that these transfer mechanisms will continue to be assessed along with the Privacy Shield. Statement of the Article 29 Working Party (Feb. 3, 2016), http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/2016/20160203_statement_consequences_schrems_judgement_en.pdf.
[28] EU Commission, *Model Contracts for the transfer of personal data to third countries*, http://ec.europa.eu/justice/data-protection/international-transfers/transfer/index_en.htm.
[29] Commission Decision 2010/87/EU, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:039:0005:0018:EN:PDF.
[30] Schleswig-Holstein Unabhaengiges Landeszentrum fuer Datenschutz (Schleswig-Holstein DPA), ULD Position Paper on the Judgment of the Court of Justice of the European Union of 6 October 2015, C-362/14 (Oct. 14, 2015), https://www.datenschutzzentrum.de/artikel/981-.html.
[31] Cecile Martin, *A German DPA Questions the Validity of the Use of Consent and Model Contractual Clauses to Transfer Personal Data to the U.S.* (Oct. 16, 2015), http://privacylaw.proskauer.com/2015/10/articles/european-union/a-german-dpa-questions-the-validity-of-the-use-of-consent-and-model-contractual-clauses-to-transfer-personal-data-to-the-u-s/.
[32] Hughes Hubbard & Reed LLP, *The Impact on U.S. Discovery of EU Data Protection and Discovery Blocking Statutes* (January 2013), at 7, http://www.hugheshubbard.com/Documents/Impact%20on%20U%20S%20%20Discovery%20of%20EU%20Data%20Protection%20and%20Discovery%20Blocking%20Statutes.pdf.

[33] *Id.*
[34] Christoph Ritzer et al., *German Data Protection Authorities Suspend BCR Approvals, Question Model Clause Transfers*, DATA PROTECTION REPORT (Oct. 26, 2016), http://www.dataprotectionreport.com/2015/10/german-data-protection-authorities-suspend-bcr-approvals-question-model-clause-transfers/. Original position paper (in German only) available at: http://www.datenschutz-berlin.de/attachments/1150/Positionspapier_DSK.pdf?1445863040.
[35] Schleswig-Holstein Unabhaengiges Landeszentrum fuer Datenschutz (Schleswig-Holstein DPA), ULD Position Paper on the Judgment of the Court of Justice of the European Union of 6 October 2015, C-362/14 (Oct. 14, 2015), https://www.datenschutzzentrum.de/artikel/981-.html.
[36] Statement of the Article 29 Working Party, Brussels, Oct. 16, 2015, http://ec.europa.eu/justice/data-protection/article-29/index_en.htm.

Multistate Indirect Purchaser Class Actions: Using Consumer Protection Statutes to Hurdle the *Illinois Brick* Wall

Rachel Adcox [1]

Thomas H. Burt [2]

Elizabeth C. Pritzker [3]

Anne M. Rodgers [4]

Brandon Boxbaum[5] reports on a December 15, 2015 panel discussion hosted by the Competition Torts Committee.

While direct purchaser plaintiffs may bring damages claims under the Sherman Act, indirect purchasers may only seek damages under the various state antitrust laws and often attach consumer protection and unjust enrichment claims, as well. As a defendant may face parallel claims from both indirect and direct purchasers, in a class action setting or otherwise, this can create significant complications affecting standing and trial procedures. The panel discussed and provided guidance on how best to address these complications.

Moderator Rachel Adcox began the panel by discussing two background issues that have a significant impact on multistate indirect purchaser class actions: the Supreme Court's decision in *Illinois Brick Co. v. Illinois*[6] and the Class Action Fairness Act of 2005 ("CAFA").[7]

In *Illinois Brick*, the Supreme Court effectively barred indirect purchasers from bringing antitrust claims under the federal Sherman Act.[8] This decision was based on three considerations. First was the precedent established in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[9] In *Hanover Shoe*, a defendant tried to use the concept of "pass-on" as a defense, essentially arguing that the direct purchaser plaintiffs did not have standing to bring their claim because any overcharge caused by anticompetitive conduct would have been passed on to the consumers in the subsequent stage of the supply chain. The Supreme Court ruled that this was not a viable defense. *Illinois Brick* presented the opposite side of the same coin—plaintiffs, as indirect purchasers, sought to use the "pass-on" concept *offensively*, and argued that they had been injured through the overcharge that was passed on to them by entities that purchased directly from the defendants. Thus, the Supreme Court was faced with two options: overrule *Hanover Shoe*, or prohibit an offensive pass-on claim and maintain consistency with precedent. The Court chose the latter route.

The second important factor in coming to the Supreme Court's decision was the necessity of a bright-line rule. Opening a court up to considering how overcharges were passed on to various purchasers in the ultimate supply chain would expose a generalist court to the "uncertainties and difficulties in analyzing price and output decisions in the real economic world."[10]

Third, the Court felt that allowing indirect purchasers to recover on a pass-on theory along with direct purchasers would open the door to duplicative recoveries. If direct and indirect purchasers filed separate suits, there was a risk that two separate courts could award damages to different parties for the same conduct.

Following the *Illinois Brick* decision, many states enacted "*Illinois Brick* Repealer" laws, which effectively overruled the Supreme Court's

decision at the state level. These laws eventually survived a federal pre-emption challenge at the Supreme Court. The effect of these laws meant that Indirect Purchasers could not seek damages under the federal Sherman Act, but could under the various laws of the states that had enacted *Illinois Brick* Repealers.

CAFA also plays an important role in indirect purchaser class actions. The legislation, passed in 2005, had the effect of moving most class actions to federal courts by changing the rules for federal diversity jurisdiction and removal. Pre-enactment, indirect purchaser actions were usually brought in multiple state courts because the requirements for diversity jurisdiction could not be met. The result was that issues of standing and class certification would be litigated separately in actions across the country, with parallel proceedings in federal courts for direct purchasers. Following CAFA's enactment, cases with both indirect and direct purchaser claims based on the same anti-competitive conduct could be litigated in a single federal court.

Ms. Adcox turned to Ms. Rodgers to discuss how courts would address standing issues for indirect purchaser suits bringing claims under state antitrust, consumer protection, and unjust enrichment claims prior to CAFA's enactment. Ms. Rodgers discussed an earlier case in which she was personally involved where plaintiffs attempted to sue for antitrust violations under a deceptive trade practices/consumer protection act.

That case was *Abbott Labs. v. Segura*, in which the Texas Attorney General ("Texas AG"), as *parens patriae*, originally brought an antitrust case alleging that manufacturers of infant formula had conspired to fix the wholesale price of formula and to monopolize the markets for both the formula itself and infant formula advertising.[11] Central to the claim was the argument that the marketing plan, which allegedly created an appearance that pediatricians endorsed particular brands of formula, was misleading because federal regulations of infant formula were so restrictive that the different brands were practically indistinguishable. The court found that consumers, as indirect purchasers, did not have standing to seek damages, and thus neither did the Texas AG (although the court did allow the Texas AG to maintain its claim for an injunction). Following that holding, a group of consumers intervened and brought a claim based on the same conduct, but under the auspices of the Texas Deceptive Trade Practices Act ("DTPA"), arguing the conduct was "unconscionable." The defendants moved for summary judgment, arguing that the intervenors had merely disguised antitrust claims as consumer protection claims and still lacked standing, and that even if they had stated a DTPA claim, that law had to be harmonized with the state antitrust law, under which indirect purchasers did not have standing. The trial court agreed, but the Texas appellate court reversed, and the case found its way to the Texas Supreme Court.

The state Supreme Court considered the holding in *Illinois Brick* and found that it applied to plaintiffs suing under consumer protection laws with allegations that were essentially antitrust claims, even assuming that damages for price-fixing were recoverable under the consumer protection laws. The court therefore held that indirect purchasers were foreclosed from recovering damages for antitrust violations under the guise of a consumer protection statute.

The opinion, however, was not unanimous, but instead was accompanied by two concurrences and a dissent. The first concurrence, written by current U.S. Senator Tom Cornyn, stated that it was unnecessary to determine whether the state's antitrust act had the effect of preventing antitrust-type claims under the DTPA because the plaintiffs could not state a claim for "unconscionable" conduct. The second concurrence went further and held that price-fixing and other antitrust claims could not be brought to court by indirect purchasers through the back door of the consumer protection laws. The dissent, contrari-

ly, urged that the antitrust act should not be an exclusive remedy, that privity was not required for indirect purchasers to bring DTPA claims, and that the intervenors had stated a claim.

Other state and federal courts addressing the intersection of antitrust and consumer protection laws have adopted the reasoning of one or another of the *Segura* opinions. Therefore, it is helpful for practitioners to consider the following questions:

- Has the state enacted an *Illinois Brick* Repealer; can indirect purchasers recover?
- Can plaintiffs bring antitrust-type claims under a state's consumer protection laws?
- If the viability of such claims is an open question, are there policy arguments to allow or prohibit bringing antitrust claims under the state's consumer protection laws?
- Can indirect purchasers bring consumer protection claims, assuming antitrust-type claims can be brought under the auspices of those laws?

Ms. Adcox then turned the conversation to Mr. Burt to speak about standing arguments post-CAFA. Mr. Burt explained that defendants' main argument on this point is that federal courts should apply the test set forth in the Supreme Court's decision in *Associated General Contractors of California v. California State Council of Carpenters* ("*AGC*") and find that indirect purchasers cannot establish standing.[12]

Of course, because indirect purchasers often bring claims under the laws of multiple states, the parties should brief this issue, and the court may need to subsequently decide it, on a state-by-state basis. In other words, some states will have clear guidance showing that they apply the *AGC* test, whereas others unequivocally do not, and some states are unclear. This means that the court will have to do an *Erie*[13] analysis and ask whether or not the state Supreme Court would apply *AGC* or look to some other standing test.

Mr. Burt urged plaintiffs to put this burden on the defendants, make them contest standing, and then challenge the defendants' assertions. No matter what, Mr. Burt stated, it is a good idea for plaintiffs to put together an argument about why they can pass *AGC* muster, as this is likely to be a harder test than any state-specific requirement. The best way to do this is through pleading, and indirect purchaser plaintiffs should use the several Northern District of California electronic component opinions as a roadmap to clearly plead their place in the distribution chain and specify how the product goes from the defendant to them. The closer the plaintiffs are to the defendant in the chain, and the closer the component at issue is to the actual product that consumers purchase, the easier it will be for the plaintiffs to establish standing. Lastly, Mr. Burt noted that a few states, such as Maine and Massachusetts, have tough procedural requirements that require the plaintiffs to plead that they have sent a demand letter to the state attorney general.

Ms. Pritzker then addressed the complications that arise during a trial in a post-CAFA world when there are both direct and indirect purchasers bringing various antitrust, consumer protection, and unjust enrichment claims. She noted that the idea of consolidating these trials is certainly an attractive one, especially for defendants and judges who wish to conserve resources and streamline the trial. But there are significant issues with taking this singular approach.

First, because of the Supreme Court's holdings in *Hanover Shoe*, there necessarily will be a difference in the viability of proving pass-on damages. For the claim by direct purchasers, plaintiffs must prove that they suffered a cognizable injury, and that the overcharge was not simply passed on to the indirect purchasers. This is in conflict with the indirect purchasers, who must affirmatively show such pass-on in order to prove they have suffered harm. Direct purchas-

ers may fear that a jury would only be sympathetic with the indirect purchasers, who receive the pass-on of the overcharge, despite the fact that direct purchasers are still entitled to full treble damages.

Second, because direct and indirect purchasers both are entitled to recover their full overcharge, the defendants will argue that they are being forced to pay duplicative damages, which was a central concern in the Supreme Court's *Illinois Brick* decision. This concern was addressed by U.S. District Judge Claudia Wilken of the Northern District of California in the *In re Static Random Access Memory (SRAM) Antitrust Litigation*.[14] That claim settled, however, so the issue was eventually mooted in that case.

Third, there may be an issue of direct and indirect purchasers suing under potentially conflicting laws. Generally, antitrust statutes between the various states and at the federal level can be harmonized, but state consumer protection statutes are different, and can predicate liability on different standards. Defendants may argue there is a risk of jury confusion.

Despite these problems, some courts in the Northern District of California have attempted to develop trial procedures to deal with these issues. The *SRAM* case, for instance, contemplated three options: (1) jointly trying the issue of a conspiracy's existence and liability, then separately trying impact and damages; (2) trying the issue of whether the alleged conspiracy violated the Sherman Act and, if so, then a second jury considering the indirect purchasers' state-law claims; (3) trying the direct purchaser case first, in its entirety, and then the indirect purchaser claims, with the potential for indirect purchasers to use collateral estoppel offensively. As noted, however, this case eventually settled before any of these methods could be tried and evaluated.

Another example is the *In re TFT-LCD (Flat Panel) Antitrust Litigation*.[15] In that case, indirect purchasers, direct purchasers, and defendants all submitted briefs proposing trial procedures, and the court found the direct purchasers' proposal to be the best. That proposal contemplated a joint trial on the issue of liability, with direct purchasers presenting evidence of price increases and damages. Next, the indirect purchasers would present evidence concerning their state-law claims and damages. The jury, clearly instructed on pass-on issues and the reason for the separate trial phases, would then be asked to make a finding of liability and damages for the indirect purchasers. As with *SRAM*, however, the *LCD* indirect purchaser case was completely settled before trial, so these proposed joint-trial mechanisms never became necessary. The direct purchaser class proceeded to trial against a single, non-settling defendant unhampered by the difficulties posed by a joint trial of indirect claims.

While joint-trial mechanisms have not yet been used or evaluated in actual practice, there is some guidance for practitioners facing similar issues of direct and indirect purchaser claims. There is a clear preference for judicial efficiency and adjudicating as many common issues as possible in one trial. However, as this may cause some of the issues discussed above, mechanisms are necessary to avoid prejudice to the parties. One potential mechanism is a set of clear jury instructions. Another is bifurcation of the trial, so that common issues of liability pertaining to the defendants' actions are tried all at once before separate trials for damages are conducted in front of separate juries.

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[6] 431 U.S. 720 (1977).
[7] Pub. L. No. 109-2, 119 Stat. 4.

[8] 15 U.S.C. §§ 1 et seq.
[9] 392 U.S. 481 (1968).
[10] *Illinois Brick*, 431 U.S. at 732.
[11] 907 S.W.2d 503 (Tex. 1995).
[12] 459 U.S. 519 (1983). The Courts of Appeals have adopted this test in their own forms, although the changes are always formal, not substantive. The basics of this balancing test require the court to consider: (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.
[13] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).
[14] Case No. 4:07-md-01819-CW (N.D. Cal.).
[15] Case No. 3:07-md-01827-SI (N.D. Cal.).

Case Notes

By Amy Starinieri Gilbert [1]

LACK OF STANDING

Third Circuit Dismisses RICO Claims due to Lack of Standing

The Knit With v. Knitting Fever, Inc., 625 F. App'x 27 (3d Cir. Sept. 2, 2015). The plaintiff, a retailer of specialty yarns and accessories, brought action against the defendant and other suppliers, alleging that they operated an enterprise engaged in a pattern of racketeering activity in violation of RICO with respect to the mislabeling of cashmere yarns. The plaintiff's claimed damages included (1) attorneys' fees payable to the plaintiff's principal, who also is an attorney, (2) the cost of investigating the allegations of mislabeling and recalling yarns, (3) the cost of replacement goods, (4) the harm to goodwill and reputation, and (5) the cost of and lost profits from the yarns at issue. In affirming the dismissal of the plaintiff's RICO claims, the Third Circuit affirmed the district court's holding that the plaintiff, as a retailer, did not have RICO standing. The Court found that the plaintiff's claimed damages either did not constitute concrete financial loss to business or property, or were not proximately caused by the defendants' predicate acts in furtherance of alleged scheme. The Third Circuit relied on the district court's reasoning, which had found that attorneys' fees were insufficient to confer RICO standing because "[o]therwise, [the plaintiff], in the absence of any other injury caused by Defendants' purported conspiracy, could obtain standing simply by initiating a lawsuit." The Third Circuit found the plaintiff's attempt to transform what effectively were *pro se* attorneys' fees into RICO injury to be "as novel as it is frivolous."

CONTINUITY

Eleventh Circuit Affirms Grant of Summary Judgment for Failure to Show Continuity

Daedalus Capital LLC v. Vinecombe, No. 14-15571, 2015 WL 5167820 (11th Cir. Sept. 4, 2015). Plaintiffs, an investment firm and a corporation in which the firm had invested, brought claims under RICO against the corporation's former CEO, other employees, and a related company, claiming they were unlawfully targeted and defrauded of their property by the defendants. The Eleventh Circuit affirmed the district court's grant of summary judgment in the defendants' favor because the plaintiffs failed to establish either "open-ended" or "close-ended continuity." The Court found that the plaintiffs could not show close-ended continuity because there was only one victim of the defendants' conduct—the corporation. Further, there was "only a single scheme with a discrete goal" connecting the predicate acts, which was the defendants' alleged scheme to divert business proceeds from the corporation to themselves. The plaintiffs also could not establish open-ended continuity because the alleged goal of the defendants' enterprise, the acquisition of an asset management project, had already been achieved. Additionally, the court found that there was no longer a working relationship between the defendants and the corporation, meaning there was no possibility of continuing adverse activity against the corporation.

CLASS CERTIFICATION

Second Circuit Denies Class Certification in Mail-Fraud Case

Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP, 806 F.3d 71 (2d Cir. Nov. 13, 2015). Plaintiffs, three health-benefit plans, brought suit under RICO, claiming that the defendant drug manufacturers engaged in a pattern of mail-fraud by failing to disclose the true risks of an antibiotic drug. The plaintiffs sought to certify a class of all health-benefit plans that had paid for the prescriptions, claiming injury on the theory that the prescriptions would not have been written if the defendants had not concealed the drug's safety risks. The Second Circuit affirmed the district court's denial of class certification, relying on its prior decision in *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121 (2d Cir.2010) ("*Zyprexa* "), which held that the individual decisions of prescribing physicians thwarted plaintiffs' effort to prove class-wide causation using generalized proof. The Second Circuit explained that, in the context of RICO claims, the element of predominance also requires the putative class to prove its theory of injury through generalized proof. Proving injury in RICO mail-fraud cases, however, typically depends on reliance on the defendant's misrepresentation in order to prove causation. Generalized proof is often insufficient because plaintiff's theory of injury requires individualized proof that each plaintiff or, in the case of third-party reliance, each third party, relied on the defendant's misrepresentation. The Court observed that the difficulty in proving such reliance using generalized proof makes it quite challenging—though not impossible—to certify a class in a RICO mail-fraud case.

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RICO Issue Index and Grid
for Cases Compiled for August 2015 through January 2016
(Federal Cases/Federal RICO)

CIVIL RICO ISSUE INDEX

A	Pleading
B	Venue and Jurisdiction
C	Constitutionality
D	Statute of Limitations
E	Discovery
F	Section 1962(a) Liability
G	Section 1962(b) Liability
H	Section 1962(c) Liability
I	Section 1962(d) Liability
J	Interstate Commerce
K	Enterprise
L	Person
M	Predicate Acts
N	Pattern of Racketeering Activity
O	Aiding and Abetting/Respondeat Superior
P	Standing and Injury
Q	Causation
R	Damages
S	Attorneys' Fees and Costs
T	Arbitration
U	Equitable Relief
V	Class Action
W	Trial
X	Miscellaneous (Other Issues and Defenses)
MD	Motion to Dismiss
SJ	Summary Judgment Motion
Gr	Granted
Den	Denied

CIVIL RICO ISSUE GRID

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	MD	SJ	Gr	Den
D.C. Circuit																												
E. Sav. Bank, FSB v. Papageorge, No. 14-7044, 2015 WL 5927052 (D.C. Cir. Oct. 9, 2015)	X							X						X											X		X	
First Circuit																												
Second Circuit																												
Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP, 806 F.3d 71 (2d Cir. Nov. 13, 2015)	X																X					X				X	X	X
Madison 92nd St. Assocs., LLC v. Courtyard Mgmt. Corp., 624 F. App'x 23 (2d Cir. Sept. 15, 2015)	X			X																					X		X	
Third Circuit																												
Reyes v. Netdeposit, LLC, 802 F.3d 469 (3d Cir. Sept. 2, 2015)	X																					X						
In re Avandia Mktg., Sales Practices & Prod. Liab. Litig., 804 F.3d 633 (3d Cir. Oct. 26, 2015)	X															X	X								X			X
The Knit With v. Knitting Fever, Inc., 625 F. App'x 27 (3d Cir. Sept. 2, 2015)	X							X	X		X					X									X	X	X	

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	MD	SJ	Gr	Den
Sarpolis v. Tereshko, No. 14-3291, 2015 WL 9653554 (3d Cir. Jan. 7, 2016)	X	X																							X		X	
Fourth Circuit																												
Fifth Circuit																												
Allstate Ins. Co. v. Plambeck, 802 F.3d 665 (5th Cir. Sept. 17, 2015)	X			X							X						X	X						X				
Torres v. S.G.E. Mgmt., L.L.C., 805 F.3d 145 (5th Cir. Oct. 16, 2015)	X																X					X						
Wolf v. Bank of Am. Nat'l Ass'n, No. 14-41227, 2016 WL 240681 (5th Cir. Jan. 20, 2016)	X																							X				
Sixth Circuit																												
Grubbs v. Sheakley Grp., Inc., 807 F.3d 785 (6th Cir. Dec. 7, 2015)	X							X	X					X											X		X	
Seventh Circuit																												
Bible v. United Student Aid Funds, Inc., 799 F.3d 633 (7th Cir.) *reh'g denied*, 807 F.3d 839 (7th Cir. Aug. 18, 2015)	X							X			X			X								X		X	X			X
Martinez v. United States, 803 F.3d 878 (7th Cir. Oct. 16, 2015)								X														X						
Eighth Circuit																												

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	MD	SJ	Gr	Den
Ninth Circuit																												
Uthe Tech. Corp. v. Aetrium, Inc., 808 F.3d 755 (9th Cir. Dec. 11, 2015)	X																	X								X	X	
Obeng-Amponsah v. Chase Home Fin., LLC, 624 F. App'x 459 (9th Cir. Aug. 20, 2015)	X													X											X		X	
Middleton v. Von Geldren, 616 F. App'x 256 (9th Cir. Sept. 4, 2015)	X							X	X				X											X	X		X	
Boisvert v. Lohan, 617 F. App'x 810 (9th Cir. Sept. 25, 2015)	X													X											X		X	
Aviva USA Corp. v. Vazirani, No. 13-16858, 2015 WL 7888718 (9th Cir. Dec. 4, 2015)	X													X											X		X	
Tenth Circuit																												
Gibbs-Squires v. Urban Settlement Servs., 623 F. App'x 917 (10th Cir. Aug. 17, 2015)	X	X																							X		X	
Muathe v. Fifth Third Bank, No. 15-3019, 2015 WL 5848361 (10th Cir. Oct. 8, 2015)	X																								X		X	

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	MD	SJ	Gr	Den
Eleventh Circuit																												
Daedalus Capital LLC v. Vinecombe, No. 14-15571, 2015 WL 5167820 (11th Cir. Sept. 4, 2015)	X													X												X	X	
Miccosukee Tribe of Indians of Florida v. Cypress, No. 14-12115, 2015 WL 9310571 (11th Cir. Dec. 23, 2015)	X										X														X		X	