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In U.S., It's Getting Harder to Bring Consumer Antitrust Class Actions

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One of the inevitable facts of life in the U.S. after a government antitrust investigation becomes public – especially if it is a cartel investigation with an amnesty applicant or guilty pleas – is customer class actions. U.S. class action plaintiffs' lawyers frequently bring "follow-on" cases on behalf of purchasers of the affected products within days (or at least weeks) of public disclosure of a cartel or other antitrust investigation. It is often the case, however, that the immediate purchasers of the allegedly price-fixed products (or monopolized products, as the case may be) are major distributors or wholesalers of the products, not consumers. Under the U.S. Supreme Court decision in *Illinois Brick v. Illinois* (1977), these direct purchasers are the proper parties to assert damages claims for antitrust violations under federal law, even if they passed-on most of the alleged harmful effects from the challenged conduct to consumers. This federal rule, however, has generally not stopped class action lawyers from bringing claims on behalf of consumers against the defendants for violating antitrust laws. Rather, class action lawyers have frequently managed to do an "end run" around *Illinois Brick* by asserting *state law* claims against the defendants on behalf of affected consumers throughout the country. Many states have supported these "indirect purchaser" claims by passing legislation, or judicially interpreting state laws, so as to authorize them. Because of the involvement of plaintiffs and claims from numerous states, these state law class actions are still generally brought in federal court.

Recent U.S. federal judicial decisions, however, have now placed significant hurdles in front of these consumer antitrust plaintiffs in the form of stricter requirements for joining plaintiffs from multiple states together into a single class. In order to combine claims by multiple plaintiffs into a single class action, U.S. rules require a demonstration that "common" issues predominate among the claims – in other words, most factual and legal issues that need to be resolved are common to all claims asserted by proposed class members. In contrast to the direct purchasers – whose claims are all based on violations of federal law (i.e., the Sherman Act) – the indirect purchasers are asserting claims under the laws of as many as 50 states. To make matters worse, because of uncertainty concerning many state laws, indirect purchasers frequently assert claims under not only state antitrust laws but also under state consumer protection laws and even state common law (e.g., for "unjust enrichment"). The resulting hodge-podge of state law claims makes such cases highly vulnerable to arguments by defendants that common issues do not predominate over individual ones, thus making the class action (or at least a national class action) an inappropriate vehicle for resolving the dispute.

Several recent court decisions have followed this reasoning and refused to certify classes of

indirect purchasers challenging alleged price-fixing or monopolization. Perhaps the most serious shot across the bow of the plaintiffs' bar came in the form of the Third Circuit's decision this month in *Sullivan v. DB Investments* . In *Sullivan*, the class certification issue came up in the most favorable way it can for the plaintiffs – a motion by plaintiffs (diamond purchasers) for the court to approve a settlement agreed upon with the defendant (DeBeers). Prior to approving such a settlement, however, the U.S. judge must conclude that it is appropriate to certify the class, at least for the purposes of implementing and administrating the settlement. In *Sullivan*, several parties objected to the settlement, arguing that certifying a national class of indirect purchasers was inappropriate given the major differences in the claims and legal rights of the plaintiffs from different states. Although the district court approved the settlement, on appeal the Third Circuit agreed with the objectors and refused to certify the class, thus nullifying the settlement negotiated and agreed upon by the plaintiffs and DeBeers. The appeals court noted, among other things, that it appeared that plaintiffs residing in some states had much stronger claims than plaintiffs residing in other states, and therefore lumping all of these claims together in a single settlement that ignored these distinctions was improper.

This and similar decisions (last week a federal magistrate judge refused to certify an indirect purchaser class in the antitrust case against Intel) are a troubling sign for proponents of consumer class actions in the antitrust area. They arm defendants in cases where consumers have not purchased directly from the defendants with persuasive authority to oppose certification of indirect purchaser classes, and suggest that in many cases these class actions will not be permitted. This trend may result in some class action lawyers abandoning their efforts to certify national classes of indirect purchasers, and instead seeking to limit their classes to purchasers from a single state or groups of states with similar laws. These effects are almost certain to decrease the settlement value of these claims, make them less economical for plaintiffs' lawyers to bring, and also less manageable. These decisions therefore reinforce the preferential status of direct purchasers for enforcing the antitrust laws in U.S. courts.

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