



The Price Point

Newsletter of the ABA Section of Antitrust Law Pricing Conduct Committee

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We are pleased to bring you this issue of Pricing Conduct Committee's newsletter, which includes summaries of the great committee and Spring Meeting programs we have sponsored in the past few months and timely articles on pricing issues. Special thanks to Chris O'Connell, Adam Goodman and Dale Grimes for co-editing this Issue and to Bradley Pollina and Kate Wallace for providing our New & Noteworthy case summary on page 2.

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Call for Articles. The Price Point is seeking submissions for our next issue. Consistent with the Pricing Conduct Committee's focus, articles on resale price maintenance, predatory pricing, bundled pricing, price squeezes, or other pricing-related topics are welcome, as of course are articles on price discrimination and Robinson-Patman Act issues. Articles should be approximately 2,000 words in length, excluding notes. Submissions are due by September 15, 2013.

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AT&T Mobility v. AU Optronics Extends The California Cartwright Act's Expansive Geographical Scope

By: James Mulcahy

As all California antitrust lawyers know, California's principal antitrust statute is the Cartwright Act.¹ The Act "generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices."² And, as the California Supreme Court recently made clear, "[f]rom its inception, [the Act] has always been focused on the punishment of violators for the larger purpose of promoting free competition . . . The main purpose of the anti[trust] laws is to protect the public from monopolies and restraints of trade, and the individual right of action for treble damages is incidental and subordinate to that main purpose."³ Notably, the Act expressly provides a private cause of action for indirect purchasers of price-fixed goods.⁴

The Cartwright Act's Substantively Broad Scope and Effect

The California Supreme Court has repeatedly construed the Act's boundaries very broadly in scope and effect. For example, in 1985, the Court reiterated that:

The plain language of the [Cartwright] Act reveals that the statute is comprehensive in its attack on threats to competition, and thereby implies that its coverage extends to all economic combinations, regardless of the nature of the occupation of the combining parties and regardless of whether the occupation has a nonprofit, public service aspect.

The Act is broad in scope: "[it] is 'couched in . . . comprehensive language' and 'forbids

combinations . . . with respect to every type of business.'" The Act also reaches deep in proscribing anticompetitive conduct: it prohibits two or more persons "[t]o make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they . . . [a]gree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any . . . article or commodity, that its price *might in any manner* be affected." In so doing, the Act reaches beyond the Sherman Act⁵ to threats to competition in their incipiency – much like section 7 of the Clayton Act, which prohibits mergers that "*may . . . substantially . . . lessen competition, or . . . tend to create a monopoly*" (15 U.S.C. § 18, italics added) – and thereby goes beyond "clear-cut menaces to competition" in order to deal with "merely ephemeral possibilities."⁶

The Cartwright Act's Sweeping Geographic Scope

Historically, California courts have presumptively interpreted California's "police power" statutes – such as the Cartwright Act – to regulate "occurrences" which take place inside California only; provided, however, that out-of-state activity may fall within a given statute's ambit in circumscribed situations where such application can reasonably be inferred from the statute's legislative history, express language or enunciated purpose.⁷ The Cartwright Act, for example, has been applied to anticompetitive conduct that occurred outside California.⁸ It must be said, however, that even in those instances where the Act has been applied to extraterritorial conduct, such application generally has been limited to

¹ Cal. Bus. & Prof. Code §§ 16700-16770.

² *Pac. Gas & Elect. Co. v. County of Stanislaus*, 16 Cal. 4th 1143, 1147 (1997).

³ *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 783 (2010) (emphasis in original) (citations omitted).

⁴ *Union Carbide Corp. v. Superior Court*, 36 Cal.3d 15, 20 (1984) ("indirect purchasers are persons 'injured' by illegal overcharges passed on to them in the chain of distribution"). See also *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 782 (2010) ("[r]eviewing the legislative history behind [the enactment of the 1978 amendment to the Cartwright Act], we find indications that the [California] Legislature fully embraced the [*Illinois Brick Co. v. Illinois*, 431 U.S. 720, 748 (1977)] dissent. . . .").

⁵ 15 U.S.C. § 1 *et seq.*

⁶ *Cianci v. Superior Court*, 40 Cal. 3d 903, 917-18 (1985) (citations omitted; emphasis in original).

⁷ *J. P. Morgan & Co. v. Superior Court*, 113 Cal. App. 4th 195, 221 (2003); *Churchill Vill., LLC v. Gen. Elec. Co.*, 169 F. Supp. 2d 1119, 126 (N.D. Cal. 2000), *aff'd*, 361 F.3d 566 (9th Cir. 2004).

⁸ See, e.g., *RLH Indus., Inc. v. SBC Commc'ns, Inc.*, 133 Cal. App. 4th 1277, 1281-82, 1293 (2006).

injuries that have been suffered both within California and by California citizens or entities.⁹

It has been suggested (until now, perhaps) that California state courts have interpreted the Cartwright Act's extraterritorial geographic reach to be greater – *i.e.*, more broadly applied to injuries occurring outside California – than the more limited application of the Act when interpreted by federal courts:

For example, the California Court of Appeal, Sixth District has held as follows:

California's more favorable laws may properly apply to benefit non-resident plaintiffs when their home states have no identifiable interest in denying such persons full recovery.¹⁰

In contrast, in *In re Graphics Processing Units Antitrust Litigation*,¹¹ a federal trial court rejected the plaintiffs' attempt to create a nationwide class under the Act, because of conflicts between the Act and analogous laws in other states.¹²

If this proposition were true in the past, the Ninth Circuit opinion in *AT&T Mobility v. AU Optronics Corporation*¹³ may have changed that dynamic considerably. On February 14, 2013, the United States Court of Appeals for the Ninth Circuit interpreted the Cartwright Act's geographical scope and effect in sweeping and unprecedented fashion. In *AT&T Mobility*, the Ninth Circuit held that an

indirect purchaser of price-fixed goods lawfully can sue the supplier of those goods under the Cartwright Act without violating the supplier's constitutional due process rights, provided only that the plaintiff allege that more than a "*de minimus*" amount of the supplier's incipient pre-sale anticompetitive conduct took place in California, even though (a) the plaintiff and defendant are non-California residents; and (b) none of the plaintiffs ever made any purchases in California.¹⁴

AT&T Mobility LLC v. AU Optronics Corporation

Here are the alleged relevant facts:

- Plaintiffs are eight entities that re-sell mobile wireless handsets, which contain LCD Panels
- All Plaintiffs have their principal places of business outside California, except one
- All Plaintiffs re-sell their purchased handsets throughout the world, including California
- Defendants are 24 manufacturers and distributors of LCD panels
- Defendants' principal places of business are in Asia or the United States, including California
- Plaintiffs purchased handsets with Defendants' LCD panels – both directly and indirectly from Defendants
- All of Plaintiffs' purchases from Defendants took place throughout the world, ***but never in California***

⁹ See *Id.* at 1291 ("We conclude that the commerce clause . . . does not necessarily prohibit state antitrust and unfair competition law from reaching out-of-state anticompetitive practices injuring state residents"); *Younger v. Jensen*, 26 Cal 3d 397, 405 (1980) ("Neither the Sherman Act nor the federal prohibition of undue burdens on interstate commerce (U.S. Const., art. I, § 8, cl. 3) prevents those state laws from reaching transactions that have interstate aspects but significantly affect state interests.");

¹⁰ Citing *Wersheba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 243 (2001); see also, *Clothesrigger, Inc. v. GTE Co.*, 191 Cal. App. 3d 605 (1987).

¹¹ 527 F. Supp. 2d 1011 (N.D. Cal. 2007).

¹² Antitrust and Unfair Competition Law Section, The State Bar of California, *California State Antitrust and Unfair Competition Law*, Ch. 1, § 1.01[C] (Cheryl Lee Johnson, ed., Matthew Bender & Co., 2009).

¹³ 707 F.3d 1106 (9th Cir. 2013).

¹⁴ *Id.* at 1113.

- Plaintiffs paid sellers of handsets supra-competitive and artificially inflated prices
- Defendants horizontally conspired with each other – e.g., illegally obtained and shared prices pursuant to anticompetitive agreements – to globally fix the prices of their LCD panels at artificially elevated prices **through offices they maintained in California**
- Plaintiffs sued all Defendants in California under the Cartwright Act for damages resulting from all direct and indirect purchases from Defendants **outside of California**
- All Defendants moved to dismiss on the ground that Plaintiffs’ Cartwright Act claims violated Defendants’ constitutional right to due process

Question: Does the application of California’s antitrust law to Plaintiffs’ claims against Defendants based on purchases that occurred outside California violate the Fourteenth Amendment’s Due Process Clause?

Answer: No – the required “occurrence or transaction giving rise to the litigation” took place in California as a function of Defendants’ alleged underlying non-trivial incipient anticompetitive conduct leading to the sale of price-fixed goods outside California. As long as the in-state incipient anticompetitive conduct leading to a subsequent price-fixed sale elsewhere is more than *de minimus*, the application of the Cartwright Act to a plaintiff’s extraterritorial purchases is neither arbitrary nor fundamentally unfair.

In *AT&T Mobility*, eight entities that sell mobile wireless handsets and provide voice and data communications services sued 24

manufacturers and distributors of LCD panels, alleging violations of the Sherman Act,¹⁵ the Clayton Act,¹⁶ the Cartwright Act,¹⁷ California’s Unfair Competition Law (“UCL”)¹⁸ and, in the alternative, the competition laws of various other states. Defendants’ principal places of business were located in Asia and the United States, including California. Plaintiffs conducted their business operations throughout the world, including California.¹⁹

Only one of the Plaintiffs’ headquarters was located in California. Plaintiffs alleged that they purchased – both directly and indirectly – billions of dollars’ worth of mobile handsets containing Defendants’ LCD panels.²⁰ Plaintiffs also alleged that they paid supra-competitive and artificially inflated prices for the mobile handsets because Defendants conspired with each other in California to fix the prices of the LCD panels that were incorporated in the handsets. Plaintiffs, however, did not purchase a single handset within California; all of the handset purchases containing Defendants’ LCD panels took place outside of California.²¹

The District Court’s Rule 12(b)(6) Dismissal Order

Because Plaintiffs alleged that they had purchased price-fixed handsets in multiple states *other than* California, the United States District Court for the Northern District of California granted Defendants’ motion to dismiss the Cartwright Act claims against all Defendants. The district court held that the application of California’s Cartwright Act to Plaintiffs’ antitrust claims – which were predicated entirely upon the purchase of mobile handsets *outside* of California – violated Defendants’ constitutionally protected due process rights under the Fourteenth Amendment.²² In

¹⁵ 15 U.S.C. §§ 1-7.

¹⁶ 15 U.S.C. §§ 12-27; 29 U.S.C. 52-53.

¹⁷ Cal. Bus. & Prof. Code §§ 16700-16770.

¹⁸ Cal. Bus. & Prof. Code §§ 17200 *et seq.*

¹⁹ 707 F.3d at 1108.

²⁰ *Id.* The Cartwright Act permits indirect purchasers of price-fixed goods to assert a private cause of action, but many other state antitrust laws do not provide for indirect purchaser standing. Cal. Bus. & Prof. Code § 16750(a); *See also, Clayworth v. Pfizer, Inc.* 49 Cal. 4th 758, 782-83 (2010).

²¹ *See Id.*

²² 707 F.3d at 1109. There was no issue as to personal jurisdiction over Defendants. Rather, the district court concluded that the application of California’s antitrust law to claims involving the purchase of price-fixed goods outside of

dismissing the complaint, the district court made clear that, in its view, the location of the “transaction or occurrence” for the purpose of applying a given state’s substantive antitrust law was the state where the purchase was made by a given Plaintiff.

The district court, however, granted Plaintiffs leave to amend their complaint to specify each state in which each of the “purchases of price-fixed goods” were made by each Plaintiff.²³ This, of course, meant that each Plaintiff was required to segregate each individual transaction on a state-by-state basis, and thereafter assert individualized claims under each of the applicable state antitrust laws, depending upon the state where the sale occurred. In addition, Plaintiffs’ individualized state-by-state remedy would be predicated upon – and limited by – the vagaries of each of the different state’s applicable antitrust law. For example, only 25 states have enacted statutes – known as “*Illinois Brick*” or “indirect purchaser statutes” – which allow indirect purchasers to recover damages for violations of their antitrust laws, and many indirect purchaser statutes differ in form and remedy.²⁴ And, finally, no claim under the substantively comprehensive Cartwright Act by any Plaintiff would survive dismissal because no purchases were made in California.

Understandably, and no doubt with an appeal to the Ninth Circuit in mind, Plaintiffs’ amended complaint focused on the aggregation of Defendants’ underlying pre-sale contacts with California rather than the district court’s “place of purchase” requirement. Plaintiffs alleged that, although all of their direct and indirect purchases from Defendants admittedly were made outside of California, Defendants’ underlying pre-sale horizontal conspiratorial conduct occurred within California. The amended complaint included detailed factual allegations that “defendants engaged in and implemented their conspiracy in the U.S. through offices they maintained in California,” and that their unlawful agreements to fix the prices of LCD panels were entered into in California itself. Plaintiffs identified specific employees of each Defendant who illegally obtained and shared pricing information with their

co-conspirators while working in their California offices.²⁵

Defendants again moved to dismiss. In response, Plaintiffs argued that the district court’s “place of purchase” rule was incorrect, and that they should be allowed to pursue all of their state antitrust claims under California law because application of California law to Defendants’ underlying price-fixing conduct in California, which led to the subsequent out-of-state purchases, was consistent with principles of due process.²⁶ Again, however, and notwithstanding the allegations relating to defendants’ conspiratorial horizontal agreements and other conduct within California, the district court concluded that Plaintiffs’ Cartwright Act claims still were not constitutionally permissible – *i.e.*, the application of the antitrust laws of any state other than the state where the Plaintiffs purchased the allegedly price-fixed goods would violate Defendants’ rights to due process. According to the district court, “in a price fixing case, the relevant ‘occurrence or transaction’ is the plaintiff’s purchase of an allegedly price-fixed good.”²⁷

For these reasons, the district court dismissed Plaintiffs’ amended complaint, but nevertheless certified the dismissal order for immediate appeal under 28 U.S.C. § 1292(b). The Ninth Circuit granted permission to appeal, and then reversed and remanded.

The Ninth Circuit’s Opinion. The Ninth Circuit found that the application of California antitrust law to Plaintiffs’ claims did not violate Defendants’ constitutional due process rights because the alleged underlying conduct involved more than just the indirect purchase of price-fixed goods – it also involved non-trivial conspiratorial conduct that led to the sale of those goods. Thus, “[t]o the extent a defendant’s conspiratorial conduct is sufficiently connected to California, and is not ‘slight and casual,’ the application of California law to that conduct . . . does not violate that defendant’s rights under the *Due Process Clause*.”²⁸ Because the district court’s conclusion ignored the Defendants’ alleged pre-sale California unlawful conduct, the Ninth Circuit reversed the district court’s dismissal

California constitutes a violation of Defendants’ due process rights.

²³ *Id.*

²⁴ See ABA Section of Antitrust Law, *Antitrust Law Developments* at 650-653 (7th ed. 2012).

²⁵ 707 F.3d at 1109.

²⁶ See *Id.*

²⁷ *Id.*

²⁸ 707 F.3d at 1107. Not insignificantly, the Ninth Circuit’s decision also applies equally to claims under the UCL, Cal. Bus. & Prof. Code §§ 17200 et seq. 707 F.3d at 1107 n. 1.

order and remanded for further proceedings. In so doing, the Ninth Circuit explicitly rejected the so-called “place of purchase” rule, which in the Ninth Circuit’s view, “severely truncates the scope of anticompetitive conduct that the [Cartwright] Act proscribes.”²⁹

AT&T Mobility’s Implications Going Forward

The Ninth Circuit’s decision in *AT&T Mobility* represents a significant expansion in the geographic reach of the Cartwright Act. The Court has announced for the first time that a “place-of-purchase focus severely truncates the scope of anticompetitive conduct that the [Cartwright] Act proscribes.”³⁰ Instead, the proper focus of a “relevant transaction or occurrence” for purposes of a due process analysis resides in a much broader assessment of the scope of conduct within California that gives rise to liability under the Cartwright Act. Provided that the intra-state conduct – e.g. facts constituting the horizontal price-fixing conspiracy itself – is not “slight and casual,” plaintiffs may have Cartwright Act and UCL standing to sue defendants for the extraterritorial purchase of price-fixed goods.³¹

The *AT&T Mobility* decision holds that the Cartwright Act “can be lawfully applied without violating a defendant’s due process rights when more than a *de minimus* amount of that defendant’s alleged conspiratorial activity” originates in California, even though the sale of all price-fixed goods occurred elsewhere.³² Implicit in the Ninth Circuit’s opinion is the recognition that the threat to competition – which the Cartwright Act expressly forbids – occurred within California as a function of the Defendants’ alleged anticompetitive conspiratorial conduct.³³ The opinion suggests

that, in determining whether California’s competition laws apply, the court should go beyond a mere formulaic interpretation of due process rights: the relevant “occurrence or transaction” analysis must include the broad panoply of anticompetitive conduct within the state, including all conspiratorial conduct that is causatively related to the subsequent “event” which gives rise to liability under the Cartwright Act and the UCL.

California’s competition laws now apply to a party’s merely incipient – but just somewhat more than “slight or casual” – anticompetitive contacts within California which lead to unlawful transactions anywhere outside California. Plaintiffs now have standing to assert competition claims under the Cartwright Act without regard to “conflicts between the Act and analogous laws in other states.”³⁴ This obviates the practical conundrum presented by a requirement that a plaintiff parse out specific state-by-state price-fixed purchases with corresponding state-by-state antitrust law claims. And it is plausible to suggest that even non-California residents now may seek shelter under the umbrella of California’s Cartwright Act and UCL.³⁵ That represents a “green light” signal to competition lawyers who bring antitrust and unfair competition claims in California courts.

Cal. App. 3d 653, 666 (1974) (“We conclude that where the effect of the application of the Cartwright Act upon interstate commerce is to facilitate competition and not to place a restraint upon it, it is one which conforms with like policies of the federal government, and the state courts have jurisdiction over the subject matter of the action”); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 994 (9th Cir. 2000) (“California may apply its antitrust and unfair competition statutes consistent with the Commerce Clause”); *but cf. Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 384-85 (application of the Cartwright Act to interstate activities of professional football would impermissibly burden interstate commerce); *J.P. Morgan v. Superior Court*, 113 Cal. App. 4th 195 (2003) (putative class action plaintiffs located outside California had insufficient contacts with California to pursue Cartwright Act causes of action).

³⁴ See fn. 12, *supra*.

³⁵ It also may bear noting that recent California state court validation of the broad interpretation of California’s competition laws has not been limited only to its geographic reach. On January 23, 2013, the Supreme Court of California, in an unprecedented decision, announced that the four-year limitations period applicable to California UCL claims may be modified by the equitable continuous accrual doctrine, which provides that a “series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period.” *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal. 4th 1185, 1192, 1196 (2013).

²⁹ 707 F.3d at 1110. (“Put differently, the district court’s place of purchase rule represents a return to the ‘wooden’ and ‘now largely abandoned’ *lex loci delicti* doctrine – an approach the plurality explicitly rejected in [*Allstate Ins. Co. v. Hague*, 449 U.S. 302, 316 n. 22].” *Id.* at 1111-1112.).

³⁰ 707 F.3d at 1110.

³¹ 707 F.3d at 1107.

³² 707 F.3d at 1113.

³³ The Defendants in *AT&T Mobility* did not put forth any commerce clause arguments in favor of dismissal. The extraterritorial application of California’s Cartwright Act does necessarily still involve the U.S. Constitution’s Commerce Clause (U.S. Const. art I, § 8, cl. 3) and conflict of laws considerations. But those considerations previously have been addressed by California courts, with predictable results: rarely does the Cartwright Act unreasonably restrain interstate commerce; rather, its application to extraterritorial conduct is consistent with the goal of facilitating competition, not restricting it. See fn. 9, *supra*; *R.E. Spriggs Co. v. Adolph Coors Co.*, 37



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