

B.W.I., CALIFORNIA'S FAVORABLE CLASS ACTION JURISPRUDENCE, AND THEIR POST-CAFA APPLICATION

Francis O. Scarpulla and Qianwei Fu*

Introduction

In the post-*Illinois Brick*¹ era, consumers and business entities at the bottom of a chain of distribution were denied damage remedies under the federal antitrust laws. Along with several other states, California passed so-called *Illinois-Brick* repealer statutes, which permitted indirect purchasers to recover damages for violations of California's Cartwright Act. As an important component of antitrust enforcement, indirect-purchaser actions under the Cartwright Act provided an effective redress to the intended victims of anticompetitive conduct. California has a long-standing history of permitting indirect-purchaser antitrust class actions. The right to seek class-wide redress is more than a mere procedural device in California.² The state's strong policy favoring class actions has enabled the courts to adopt innovative class management methods as an effort to retain the availability of indirect-purchaser actions and to enforce California's antitrust laws. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* was one such seminal case.³

I. Before B.W.I.: Proof of Common Impact in Direct Purchasers Class Actions

B.W.I. Custom Kitchen was decided against the backdrop of the then well-established federal principle for an inference of impact upon all purchasers of a price-fixed product in a conspiratorially affected market.⁴ In antitrust conspiracy class actions, the major contested issue to class certification is whether common questions of law or fact predominate over individual class-member specific cases. The plaintiffs must demonstrate at the certification stage that each member of the proposed class suffered antitrust injury and damages as a result of the challenged conduct. The fact of injury, an element of a plaintiff's substantive cause of action, is separate and distinct from the issue of actual damages.⁵ In direct purchaser actions, courts have shown no hesitancy in ruling that when a conspiracy to fix prices has

* Mr. Scarpulla is a Partner at Zelle, Hofmann, Voelbel, Mason & Gette LLP in San Francisco (J.D., University of California, Hastings College of Law; B.A., University of California, Berkeley). ; Ms. Fu is an associate of Zelle Hofmann (J.D., University of California, Davis School of Law).

1 *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

2 *Klussman v. Cross Country Bank*, 134 Cal. App. 4th 1283, 1296 (2005); *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 161 & n.3.

3 *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341 (1987).

4 See, e.g., *Presidio Golf Club of San Francisco, Inc. v. National Linen Supply Corp.*, 1976 WL 1359 (N.D.Cal. Dec. 30, 1976).

5 See, e.g., *Paper Systems Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601, 615 (E.D. Wis. 2000) (holding that fact of injury is distinct from quantum of injury, and is often susceptible to common proof even if amount of damages is uncertain or must be individualized); *In re Screws Antitrust Litig.*, 91 F.R.D. 52, 56 (D. Mass. 1981) (holding that because fact of injury was a "distinct question" from quantum of injury, common proof could establish class-wide injury even though amount of damage to each plaintiff was uncertain).

been proven and a plaintiff establishes that he or she purchased the price-fixed goods or services, the jury may infer that plaintiff was damaged.⁶

Certification of direct-purchaser classes was routinely granted because the plaintiff can offer a method of showing an overcharge by generalized proof. In *Bogosian v Gulf Oil Corp.*, the Third Circuit emphasized that “proof of impact [may] be made on a common basis so long as the common proof adequately demonstrates some damage to each individual.”⁷ This case established the so-called “*Bogosian* shortcut” which favors a presumption of common impact on class members whenever economic reasoning provides a sensible link between the alleged unlawful conduct and common injury to individual class members.⁸

The *Bogosian* method has been almost exclusively applied to direct purchaser actions. However, in an indirect purchaser case, the problem of proof is intrinsically more complex because the damage model implicates multiple distribution levels. Moreover, when the price-fixed product has been transformed or incorporated into another product as it moved through the distribution chain, evidentiary issues can further complicate class certification.

Recognizing these differences, the opposing side often attempts to defeat the presumption’s application in indirect-purchaser cases. They will typically argue that individualized negotiations took place between defendants and their direct purchasers and sometimes between different levels of a distribution chain, which require scrutiny of each transaction for pass-through. This very argument was rejected in *B.W.I.*

II. *B.W.I.* Established the Presumption of Common Impact as the Standard of Proof for Fact of Injury under the Cartwright Act

B.W.I. Customer Kitchen established the standard of proof with respect to fact of injury under the Cartwright Act – by providing for a presumption of impact in an antitrust price-fixing case.⁹ Fact of injury, or impact, may be demonstrated on a class-wide basis if the common proof of conspiracy demonstrates at least some damage to the class.¹⁰

B.W.I. was an indirect-purchaser class action by one California business which purchased glass containers from a distributor who purchased them from the glass container manufacturers. Plaintiffs alleged that defendant manufacturers of glass containers had engaged in a conspiracy to set noncompetitive prices for the containers in violation of the Cartwright Act and the UCL.¹¹ The trial court denied plaintiffs’ motion for certification

6 *In re Sugar Industry Antitrust Litig.*, 73 ER.D. 322 , 347 (D.C. Pa. 1976); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977).

7 *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977).

8 Such common impact is presumed from the very existence of a price-fixing conspiracy among the class members’ suppliers. Such conspiracies only exist to raise prices; to the extent they are successful, at least some direct purchasers must have been injured, given that the seller may not defend by showing that direct purchaser passed on the overcharge. See *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481, 492-93 (1968) (rejecting “pass-on defense” in federal cases because there would be insurmountable difficulties in tracing the overcharge through chain of distribution).

9 *B.W.I. Custom Kitchen*, 191 Cal. App. 3d at 1352-53.

10 *Id.* at 1353.

11 *Id.* at 1345-46.

of a class comprised of California businesses that purchased empty glass containers and then resold the containers filled with food.¹²

The Court of Appeal, on a writ petition, reversed the trial court's denial of certification. The Court reasserted the right of indirect purchasers to bring a California state-court action even though federal antitrust law prohibited such claims.¹³ The Court reasoned that the state legislature, in recognizing the standing of indirect purchasers, had rejected *Hanover Shoe*¹⁴ and *Illinois Brick's* generalizations about the problems of indirect purchaser suits.¹⁵ That rejection implied that the courts were required to adopt innovative class management methods to allow indirect purchaser actions to proceed.¹⁶

The court noted that injury is often presumed in direct purchaser suits, even where the product is varied and the price is negotiated.¹⁷ The Court concluded that presumption should also apply to indirect-purchaser suits, thereby "eliminat[ing] the need for each class member to prove individual consequences of the defendants' actions to him or her."¹⁸ The Court noted that "in the vast majority of cases at least a portion of the illegal overcharge was passed on by the independent distributors to class members in the form of higher prices" and therefore proof of impact was sufficiently common.¹⁹ The Court further emphasized that, "[t]he effects of the price-fixing were not obscured by substantially altering or adding to the item received from the manufacturer. Therefore, a class should be able to show on a generalized basis that its members absorbed at least some portion of the alleged overcharges."²⁰

Responding to defendants' argument that plaintiff resellers might have passed along to their customers all the overcharge, the Court declined to decide whether the "pass-on" defense is available to preclude claims or limit damages in such case.²¹ The Court recognized that even if a plaintiff has passed on the entire overcharge, he or she "may have lost a percentage share of the market or otherwise suffered reduced sales."²²

12 *Id.* at 1345.

13 *Id.* at 1346-47.

14 *Hanover Shoe*, 392 U.S. 481.

15 *B.W.I. Custom Kitchen*, 191 Cal. App. 3d at 1346, 1352.

16 *Id.* at 1346-47, 1355.

17 *Id.* at 1350-51.

18 *Id.* at 1351.

19 *Id.* at 1353.

20 *Id.* at 1352.

21 *Id.* at 1353. The 1978 amendment to the Cartwright Act did not expressly address the question of whether defensive pass-on was relevant in actions brought under the Cartwright Act. California courts have declined to resolve this issue until recently in *Clayworth v. Pfizer, Inc.*, 165 Cal. App. 4th 209 (2008). In *Clayworth*, the First Appellate District held that a defendant in a Cartwright Act action can present evidence that it has no liability or that its damages are lessened because plaintiffs has passed on the alleged price overcharge and has either suffered no injury or has limited damages. *Id.*

22 *Id.*

B.W.I. reaffirmed and reinforced California’s strong public policy favoring class actions as a procedural device to enforce indirect purchasers’ substantive rights under the Cartwright Act. Courts have applied this principle to markets characterized by individually negotiated prices, varying profit margins, and intense competition, as well as to indirect purchasers who buy the product from intermediaries in a largely unaltered form.²³

Thirteen years after *B.W.I.* was decided, the California *Microsoft* case extended this impact presumption principle.²⁴ Therefore, indirect-purchaser plaintiffs in California need only advance a method for proving generalized damages on a class-wide basis “not so insubstantial that it amount[s] to no method at all.”²⁵ Additionally, the Cartwright Act expressly permits aggregate damage calculation and damages may be proved by statistical or sampling methods with a pro rata allocation of overcharges.²⁶ These are very attractive evidentiary advantages to an indirect-purchaser plaintiff with Cartwright Act claims.

III. Post-CAFA, Multi-State Class Actions in Federal Courts

The Class Action Fairness Act of 2005 (“CAFA”), the Republican-majority Congress’ euphemism for eliminating consumer class actions, is working—substantially every single post-CAFA indirect-purchaser consumer class action has been eviscerated by the federal courts—exactly what Congress intended to happen. Post-CAFA indirect-purchasers class action practice was changed in a number of significant ways. Expanding federal diversity jurisdiction to allow most significant class actions based on state laws to proceed in federal courts has resulted in a disaster for consumers. Plaintiffs can no longer freely benefit from state laws that tended to be more amenable to class plaintiffs in their quest to certify classes.²⁷ Nonetheless, when considering predominance under Federal Rule of Civil Procedure 23, federal courts must necessarily invoke state class-action jurisprudence to conduct multi-state, class-certification analysis. Unfortunately, most refuse to do so.

23 *B.W.I. Custom Kitchen*, 191 Cal. App. 3d. at 1351-53; *In re Cipro Cases I & II*, 121 Cal. App. 4th 402, 411 (2004) (noting “this [classwide injury] is ordinarily a permissible assumption in cases where consumers have purchased products in an anticompetitive market”); *Global Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 855 (2003) (holding “In the consumer context, at least a portion of the illegal overcharge by a manufacturer will presumably be passed on by the independent distributors to consumer class members in the form of higher prices”); *Rosack v. Volvo of America Corp.*, 131 Cal. App. 3d 741, 753 (1982) (reversing order denying certification of indirect purchaser class and adopting “dominant approach” of allowing “inference” of injury “when a conspiracy to fix prices has been established and plaintiffs have established that they purchased the affected goods or services”); *Hopkins v. De Beers Centenary AG*, No. CGC-04-432954, 2005 WL 1020868, at *4-5 (Cal. Super. Ct. Apr. 15, 2005) (certifying class of indirect purchasers, holding “[w]here, as here, Plaintiff alleges a market-wide restraint of trade, fact-of-injury is assumed for class certification purposes.”) (citations omitted); *Microsoft I-V Cases*, No. J.C.C.P. 4106, 2000-2 Trade Cas. ¶73,013, at 88,560 (Cal. Super. Ct. Aug. 29, 2000) (noting “[t]here is considerable authority for the proposition that in a case alleging price fixing the fact of injury may be determined on a classwide bases. Because price fixing is a per se violation of antitrust law, a presumption of harm arises from proof of such a violation.”) (internal citations omitted).

24 *Microsoft I-V Cases*, No. J.C.C.P. 4106, 2000-2 Trade Cas. ¶ 73,013, at 88,560 (Cal. Super. Ct. Aug. 29, 2000).

25 *Id.*

26 Cal. Bus. & Prof. Code § 16760(d); *Microsoft I-V Cases*, No. J.C.C.P. 4106, 2000-2 Trade Cas. ¶ 73,013 at 88,563-64 (Cal. Super. Ct. Aug. 29, 2000); *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 706, 714, 716 (1967).

27 See Craig C. Corbitt & Judith A. Zahid, *CAFA From A Plaintiff Lawyer’s Perspective*, BUSINESS LITIGATION COMMITTEE NEWSLETTER, Winter 2007.

As the Court in *In re Relafen Antitrust Litigation* held, “the Court must examine the end payer plaintiffs’ claims under governing state law. . . . state law defines the elements of the end payor plaintiffs’ claims and in turn, proves relevant to determining the demonstration of common injury necessary for certification.”²⁸ Moreover, for purposes of substantive issues such as burdens of proof and inferences, a federal court must rely on the substantive law in question when determining if the procedural requirements of Rule 23 are satisfied.²⁹

Again, most refuse to do so, opting in favor of applying federal law in such diversity cases to deny class certification³⁰ which may well evoke *Erie*’s fundamental essence.³¹ Given *Erie*’s mandate, it is difficult to understand how federal courts can disregard state law’s substantive application under state class action rules. But that is exactly what they are doing.

28 *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 276 (D. Mass. 2004).

29 Courts sitting in diversity are bound to follow state substantive law unless it conflicts with a Federal Rule. *Erie R.R. Company v. Tompkins*, 304 U.S. 64 (1938); *Walker v. Amco Steel Corp.*, 446 U.S. 740, 749-50 (1980); *U.S. ex. rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963 (9th Cir. 1999); *Computer Economics, Inc. v. Gartner Group, Inc.*, 50 F. Supp. 2d 980, 990 (S.D. Cal. 1999) (“[s]tate rules that define . . . presumptions, [or] burdens of proof . . . are so obviously substantive that their application in diversity actions is required.”) (citations omitted). Federal Rules are to be interpreted “with sensitivity to important state interests and regulatory policies.” *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 n.7 (1996).

30 See *In re Graphics Processing Units (GPU) Antitrust Litig.*, No. C-06-07417 WHA, MDL No. 1826 (N.D. Cal. July 18, 2008) (denying class certification motion by indirect purchasers).

31 See generally Daniel R. Karon, *Infusing State Class-Action Jurisprudence Into Federal, Multi-State, Class-Certification Analyses in A “CAFA-Nated” World*, 46 SANTA CLARA L. REV. 567 (2006).