



Indirect Purchaser Claims Under the Michigan Antitrust Reform Act Should They Be Evaluated Under the AGC Test?

By Paul F. Novak

Since the United States Supreme Court's decision in *Illinois Brick Company v Illinois*,¹ state and federal courts have grappled with the differences in state and federal antitrust laws and their treatment of direct and indirect purchasers. A direct purchaser is typically identified as having purchased directly from a violator of the antitrust laws. For instance, if several manufacturers of computer parts conspire to fix prices at an elevated level, a retailer who purchases the price-fixed computer parts directly from one of the law-breaking manufacturers at supracompetitive prices is considered to be a direct purchaser and injured under federal antitrust law.

But what if that overcharged retailer passes the increased costs attributable to the antitrust violation to the consumer—the indirect purchaser—to whom it sells the overpriced parts? With some exceptions, under *Illinois Brick*, the consumer is not considered to

be injured under federal antitrust law since he or she is not a direct purchaser and may not bring a federal antitrust damage action. Under federal law, this is true even if it was the consumer—and not the direct purchaser—who bore the full brunt of the illegal overcharge attributable to a manufacturer's illegal price-fixing scheme.

In 1983, the United States Supreme Court decided *Associated General Contractors of California, Incorporated v California State Council of Carpenters*² (*AGC*) and further addressed the availability of damages actions under federal antitrust law and *Illinois Brick*, as well as which types of plaintiffs could sue for damages. More specifically, the Court evaluated who may sue under Section 4 of the Clayton Act³ and established a five-part test for determining when a plaintiff may be considered to be “injured in [their] business or property by reason of anything forbidden in the antitrust laws....”⁴

The five-part test set forth under *AGC* evaluates the following factors to determine who may bring a federal antitrust claim:

- (1) The causal connection between the violation and the harm, and whether the harm was intended;
- (2) The nature of injury and whether it was one Congress sought to redress;
- (3) The directness of the injury and whether damages are speculative;
- (4) The risk of duplicate recovery or complexity of apportioning damage; and
- (5) The existence of more direct victims.⁵

Three of the five factors relate, explicitly or implicitly, to the *directness* of the plaintiff's injury and continue the federal tradition established in *Illinois Brick* that, with limited exceptions, only direct purchasers may recover an overcharge attributable to illegal antitrust behavior. The third and fifth *AGC* factors explicitly incorporate the directness of the injury and the relationship between the purchaser and the lawbreaker. The fourth factor implicitly incorporates the directness of the relationship by suggesting that the threat of duplicate recovery and the complexity of damage apportionment between multiple levels of a distribution chain (i.e., between manufacturers, wholesalers, retailers, and consumers) weighs against giving standing to indirect purchasers under federal antitrust law. Thus, as a matter of federal antitrust law, indirect purchasers (typically consumers) who are injured as a result of illegal price-fixing are frequently not allowed to seek redress under *Illinois Brick* and *AGC*.

But what about standing to sue for damages under state antitrust law? Are indirect purchasers similarly out of luck if they are injured due to the illegal price-fixing conduct of antitrust lawbreakers? The Michigan legislature's reaction to the *AGC* decision was quick and unambiguous. The Supreme Court issued the *AGC* decision in February 1983. Nine months later, the state house introduced House Bill 4994, which became known as the Michigan Antitrust Reform Act (MARA). The text of the bill, as amended, unambiguously rejected the federal direct purchaser requirement of *Illinois Brick* and *AGC*. As enacted, the statute provided a cause of action for anyone "injured directly or indirectly in his business or property..."⁶

The text of the statute left no doubt as to whether the direct purchaser language in *Illinois Brick* and *AGC* was also required under state antitrust law. By expressly providing a cause of action to purchasers who were injured "directly or indirectly," it clearly was not required. The legislative analysis of HB 4994 was similarly unequivocal; the following passage depicted the problem with providing a cause of action only to direct purchasers:

Costs borne by a middleman as a result of anticompetitive activities are passed on to the consumer, even though the consumer does not buy directly from the violator. In the example cited above, a retailer forced to buy overpriced goods would protect

himself or herself by raising retail prices to provide the normal markup and could, in addition, win damages from the manufacturer in an antitrust action. It is only the ultimate purchaser who loses. Providing entitlement to damages to parties indirectly injured is simply just.⁷

The legislative analysis was similarly unequivocal that MARA would reject the reasoning behind, and depart from, the federal precedent established in *Illinois Brick* and *AGC*:

The bill would permit governmental agencies or individuals to bring actions if they are only *indirectly* injured or threatened with injury. This is at variance with federal law. Federal courts have ruled that only a party directly injured may bring an action for damages; so that, for example, if manufacturers fix wholesale prices it is the retailers who must pay those prices who can bring an action. The consumer who buys from the retailer is not considered to be directly injured and may not seek damages from the manufacturers.⁸

By enacting MARA, the Michigan legislature explicitly provided a cause of action to indirect purchasers and departed from the reasoning in *Illinois Brick* and *AGC*.⁹ As the text of the statute and the legislative analyses made clear, MARA was "at variance with federal law."

Why dredge up legislative history and passage of statutes that are now 30 years old? Because there is a nascent attempt among some antitrust practitioners to attack the Michigan legislature's explicit revival of indirect purchaser cases under the rubric of a "standing test" as set forth in *AGC*. This movement started in 2004 with a circuit court decision entitled *Stark v Visa USA, Incorporated*.¹⁰ In contrast to the language of MARA that conferred standing upon consumers who were damaged indirectly, the circuit court ruled in *Stark* that it did not. And what of the legislative analyses reports that MARA rejected the direct purchaser standing test of *Illinois Brick* and *AGC* and was indeed "at variance with federal law" on those issues? The circuit court ruled in *Stark* that the ban on indirect purchaser suits presented in *Illinois Brick*

FAST FACTS

The test for who may sue under federal antitrust law, set forth in *AGC*, followed the ruling in *Illinois Brick* that only direct purchasers may bring an antitrust claim.

Nine months after the United States Supreme Court issued its decision, the Michigan legislature's repudiation of *AGC* was unambiguous. The statute expressly gave a cause of action to parties who were injured *indirectly*.



was analytically distinct from federal rules governing standing as stated in *AGC* and, consequently, the standing analysis set forth in the latter would continue to apply even if Michigan's legislature had rejected the former.

The *Stark* decision rests on a razor-thin distinction between the “ban” on indirect purchaser suits as presented in *Illinois Brick* on the one hand and the standing test discouraging indirect purchaser suits as stated in *AGC* on the other. But that distinction has been eviscerated in a more recent Supreme Court opinion that further interpreted *AGC*. In *Lexmark International Incorporated v Static Control Components, Incorporated*,¹¹ the Supreme Court clarified that the test set forth in *AGC* was not a prudential standing test. Justice Scalia eschewed the “prudential standing” label which litigants attached to the *AGC* decision and stated that “we did not describe our analysis in that case on those terms.”¹² The Supreme Court clarified that *AGC* was not a standing case at all, but rather, an articulation of substantive federal antitrust law requirements. In so doing, the Court obliterated the rationale of the *Stark* decision, which relied on distinguishing *AGC* as a standing decision, not an extension of *Illinois Brick*'s outright ban on indirect purchaser suits under federal law.

The *Stark* decision has not typically been followed as a basis to dismiss an indirect purchaser action under Michigan antitrust law. Dozens of courts have similarly rejected the application of *AGC* as a basis for dismissing indirect purchaser antitrust suits.¹³

Since the issuance of the *Stark* ruling, however, two outlier courts have adopted its reasoning to deny indirect purchaser standing under MARA due to the purported standing test articulated in *AGC*.¹⁴ Now that the United States Supreme Court has clarified that the *AGC* decision wasn't a standing decision at all, a more straightforward repudiation of the *Stark* ruling is in order. Based on the simple text of the statute, the unambiguous timing of the state legislature's immediate rejection of *AGC* through enactment of a statutory response, and the legislative history indicating that, on this issue, MARA “is at variance with federal law,” it is clear that Michigan law authorizes indirect purchaser suits and rejects the reasoning of both *Illinois Brick* and *AGC*. To be certain, there are many aspects of state antitrust law that follow federal law or look to federal law for instruction. But the availability of antitrust relief for consumers who were injured indirectly under MARA is an aspect of state antitrust law where Michigan's legislature has decidedly departed from federal precedent. ■



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ENDNOTES

1. *Illinois Brick Co v Illinois*, 431 US 720; 97 S Ct 2061; 52 L Ed 2d 707 (1977).
2. *Associated Gen Contractors of California, Inc v California State Council of Carpenters*, 459 US 519; 103 S Ct 897; 74 L Ed 2d 723 (1983).
3. 15 USC 15.
4. *Associated Gen Contractors of California*, 459 US at 520.
5. See *In re Auto Parts Antitrust Litigation*, ___ F Supp 3d ___ (ED Mich, 2014).
6. MCL 445.778(2).
7. House Legislative Analysis, HB 4994, November 23, 1983.
8. *Id.*
9. In *California v ARC America Corp*, 490 US 93; 109 S Ct 1661; 104 L Ed 2d 86 (1989), the Supreme Court made clear that federal antitrust law did not preempt the ability of states to extend antitrust causes of action to indirect purchasers who were harmed by an antitrust violation.
10. *Stark v Visa USA, Inc*, unpublished opinion of the Third Circuit Court, issued July 23, 2004 (Docket No. 03-055030-CZ).
11. *Lexmark Int'l, Inc v Static Control Components, Inc*, ___ US ___; 134 S Ct 1377; 188 L Ed 2d 392 (2014).
12. *Id.* at 1386.
13. See, e.g., *In re Cathode Ray Tube Antitrust Litigation*, 738 F Supp 2d 1011, 1023-1024 (ND Cal, 2010); *In re Fresh & Process Potatoes Antitrust Litigation*, 834 F Supp 2d 1141, 1182 (D Idaho, 2011); *In re Processed Egg Prods Antitrust Litigation*, 851 F Supp 2d 867, 936 (ED Pa, 2012). For a more complete list of decisions rejecting *AGC* challenges to cases pled under MARA, contact the author.
14. See *In re DRAM Antitrust Litigation*, 516 F Supp 2d 1072, 1085-1096 (ND Cal, 2007); *In re Refrigerant Compressors Antitrust Litigation*, unpublished opinion and order of the U.S. District Court for the Eastern District of Michigan, issued April 9, 2013 (Docket No. 2:09-md-02042).