

ATM Fee Antitrust Case: Ill. Brick Is Still The Law

Law360, New York (July 30, 2012, 1:47 PM ET) -- The “Illinois Brick wall” will be a higher hurdle for many antitrust plaintiffs following the Ninth Circuit’s recent decision in *In re ATM Fee Antitrust Litigation*. The U.S. Supreme Court’s landmark antitrust standing ruling in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), held that indirect purchasers — those who were not the immediate victims of an antitrust violation but who instead claimed to have paid an overcharge passed on by the direct purchasers — could not bring suit under the Clayton Act.

Ever since *Illinois Brick* was decided, litigants have argued about the meaning of “direct” and “indirect” and the scope of exceptions to the rule. In *ATM Fee*, the Ninth Circuit declared that, in essence, direct means direct and that the exceptions to *Illinois Brick* must be narrowly construed.

Most significantly, the July 12 decision explained that the so-called “co-conspirator” exception to *Illinois Brick* applies only when the plaintiff paid the price illegally set by the co-conspirators — not a downstream price — even if the co-conspirators intended to and did affect downstream prices. The court further held that there is no general exception to *Illinois Brick* for situations in which the direct purchasers likely would not sue the antitrust offenders.

Case Background

ATM Fee was brought as a putative class action of ATM cardholders who alleged horizontal price-fixing of ATM “interchange fees.” An interchange fee is paid by an ATM card-issuing bank to an ATM owner when the issuer’s customer withdraws cash from the ATM owner’s machine. The plaintiffs claimed that interchange fees were “marked up” and charged to cardholders in the separate “foreign ATM fees” that banks charged their customers for using “foreign” ATMs. Interchange fees are established by the ATM network, in this case the Star Network. Foreign ATM fees are individually set by the card-issuing banks.

The defendants in *ATM Fee* were Star Network member banks that both issued ATM cards and owned ATM machines. Until 2001, Star was owned by its members. It was then acquired by Concord EFS Inc., and subsequently by First Data Corporation, both of which were also named as defendants. In addition to the bank defendants, participants in the Star Network included financial institutions that issued ATM cards but did not own ATM machines, as well as entities that owned ATMs but did not issue cards.

The plaintiffs appealed from a summary judgment decision in the Northern District of California holding that their claims were barred by Illinois Brick.

The ATM Fee Decision

The Ninth Circuit quickly dismissed the plaintiffs' argument that they qualified as direct purchasers under Illinois Brick. Because they did not pay the allegedly fixed interchange fee, but instead relied on a pass-through theory to show damages allegedly incorporated into the foreign ATM fees that they paid, the court held they were indirect purchasers within the meaning of Illinois Brick. Plaintiffs could therefore maintain their Sherman Act claims only if they qualified for one of Illinois Brick's exceptions.

The court identified three recognized exceptions in which standing exists for indirect purchasers under the Clayton Act: (1) the "cost-plus" exception, addressing situations in which the plaintiff has a preexisting cost-plus contract with the direct purchaser; (2) the "co-conspirator" exception, which applies when the plaintiff can show a price-fixing conspiracy between the original seller and the direct purchaser; and (3) the "ownership or control" exception, which applies when the direct purchaser either owns or controls the plaintiff purchaser, or is owned or controlled by the price-fixing seller. The court recognized that the Supreme Court has admonished against carving out further exceptions. *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199 (1990).

Because the ATM Fee plaintiffs did not attempt to show a cost-plus contract, the court moved on to the other two exceptions.

Co-Conspirator Exception

Relying on its earlier decision in *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208 (9th Cir. 1984), the court held that the co-conspirator exception applies only when the price that was fixed by the conspirators was the same end price paid by the plaintiff, so that the plaintiff's recovery does not depend on a pass-through theory of damages. Because the plaintiffs paid the foreign ATM fee, and not the bank interchange fee alleged to have been fixed, they could not qualify for this exception.

The court rejected the plaintiffs' argument that the foreign ATM fees they paid were "fixed" in the sense that the alleged conspiracy had the purpose and effect of fixing the foreign ATM fees. Pointing out that Illinois Brick had implicitly rejected this broad definition of price-fixing for standing purposes, the court concluded that the fixed price is the price directly set by the conspiracy, not a downstream price.

Plaintiffs also argued that they were entitled to sue because they "purchased directly from a price-fixing defendant," that is, from the bank defendants that had allegedly fixed an upstream cost. Plaintiffs interpreted some decisions, including those of the Third Circuit in *In re Linerboard Antitrust Litigation*, 305 F.3d 145 (3d Cir. 2002), and the Seventh Circuit in *Paper Systems Inc. v. Nippon Paper Industries Co.*, 281 F.3d 629 (7th Cir. 2002), as suggesting that the first purchaser outside an alleged antitrust conspiracy has standing to sue. But the Ninth Circuit declined to adopt this view, citing the Supreme Court's admonition in *UtiliCorp* that new exceptions to Illinois Brick are not appropriate.

The Ninth Circuit similarly declined to adopt an expansive interpretation of its own previous decision in *Freeman v. San Diego Association of Realtors*, 322 F.3d 1133 (9th Cir. 2003), as recognizing a broad “co-conspirator” exception that applies whenever the plaintiff purchases from an entity that has conspired in fixing the upstream price. “In the context of *Illinois Brick*,” the court held, “fixing an upstream cost [does] not equate to fixing the price paid by the plaintiffs.” *Freeman*, the court concluded, was properly understood as instead applying the “ownership or control” exception (discussed below).

Thus, as the court pointed out, the co-conspirator “exception” is not really an exception at all. Rather, it is merely an application of the ordinary rules of joint and several liability in antitrust cases. A purchaser that directly paid the price fixed by the conspiracy is entitled to sue all members of the conspiracy; a purchaser that paid a price allegedly affected by the price fixed by the conspiracy is barred by *Illinois Brick*.

Ownership or Control Exception

Finally, the court addressed the exception to *Illinois Brick* that applies when the direct purchaser is owned or controlled by the allegedly conspiring seller. As explained in the Ninth Circuit’s decision in *Royal Printing Co. v. Kimberly Clark Corp.*, 621 F.2d 323 (9th Cir. 1980), this exception exists because parental control of the direct purchaser by the conspiring seller would prevent private enforcement of the antitrust laws, as the parent would forbid its subsidiary from bringing suit. This exception has therefore at times been referred to as the “no realistic possibility of suit” exception. In *ATM Fee*, the Ninth Circuit confirmed that this description is a misnomer, as it suggests an exception that applies whenever it is unlikely that the direct purchaser would sue. The exception is actually much narrower.

Applying ordinary summary judgment standards, the court dismissed plaintiffs’ contention that the record showed a triable issue as to whether the bank defendants owned or controlled the Star Network, which had been independently owned and operated since 2001. (As to the period before Concord acquired Star, the court stated that, because the bank defendants did not control one another or conspire to fix foreign ATM fees, the concern that a controlling party might prohibit the direct purchaser from suing did not exist.)

The plaintiffs argued that, even if formal ownership and control were absent, they were entitled to sue because the direct purchasers — the bank defendants that paid the allegedly fixed interchange fees — were unlikely to sue the network. The plaintiffs relied on the Ninth Circuit’s statement in *Freeman* that “indirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation.”

But looking to the facts of *Freeman*, in which the co-conspiring realtor associations owned the direct purchaser, the court concluded that *Freeman* was merely an application of the *Royal Printing* ownership or control exception and did not create an independent, broader exception to *Illinois Brick* based on likelihood of direct purchaser suit. As the court explained, “*Freeman* outlines that, whether a realistic possibility of suit exists, depends on the existence of ownership or control between the direct purchaser and seller.”

Thus, where ownership or control cannot be established, the exception does not apply, regardless of whether there is a realistic possibility that the direct purchaser will sue. The Supreme Court recognized in *Illinois Brick* that at times the direct purchaser will choose not to sue its supplier but concluded that the negative implications of opening the floodgates to complex “pass through” suits by indirect purchasers outweighed any possible loss in private antitrust enforcement.

Several years later, in *UtiliCorp* — a decision issued after *Royal Printing* — the Supreme Court reconfirmed its view that “[t]he possibility of allowing an exception [to *Illinois Brick*], even in rather meritorious circumstances, would undermine the rule.” The Ninth Circuit’s holding in *ATM Fee* was consistent with this view.

Implications of the Decision

ATM Fee confirms that *Illinois Brick* is still very much the law, creating a solid wall against federal antitrust damages claims by indirect purchasers in all but the most limited situations. Nothing in the decision changes the rule that *Illinois Brick* does not preclude claims for purely injunctive relief; nor does the decision affect actions brought under the laws of states, such as California, that do not apply the *Illinois Brick* rule. But for damages actions brought under the Sherman and Clayton Acts, the Ninth Circuit has made clear that it will not expand standing for indirect purchasers.

More specifically, *ATM Fee* will have a significant impact on cases in which price fixing has occurred in an input market or at the top of a multilevel distribution chain and where relationships short of ownership and control exist among the sellers and direct purchasers. Indirect purchasers seeking to bring federal claims in the Ninth Circuit will lack recourse to a broad “co-conspirator” exception or an independent “realistic possibility of suit” argument and will need to fit within the cost-plus or ownership or control exceptions to maintain their claims.

Conclusion

The Ninth Circuit’s *ATM Fee* decision is an important analysis of the scope of exceptions to *Illinois Brick*’s standing rule. The court confirmed that these exceptions are narrow and that it will not carve out new or expanded exceptions. In an increasingly global economy in which multiple opportunities exist for antitrust violations at various levels of trade, the *Illinois Brick* doctrine will continue to be a significant factor limiting the translation of cartel behavior and other antitrust violations into nationwide Clayton Act damages suits by downstream and end-purchasers.

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