Cathode Ray Tube Court Rules That "Price-Ladder" Damages Are Analytically Different From "Umbrella" Damages

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In *Cathode Ray Tube*, Judge Jon S. Tigar recently denied the defendants' effort to exclude evidence supporting the Direct Action Plaintiffs' (DAP) "price-ladder theory," an approach commonly used in price-fixing cases to prove damages across a range of products that were not the direct subject of an agreement to fix prices. *In re Cathode Ray Tube (CRT) Antitrust Litig*., No. C-07-5944 JST, 2016 WL 6246736 (N.D. Cal. Oct. 26, 2016).
The *CRT* DAPs claim that the defendants agreed to raise prices for 15-inch CRTs, and that the price increase had the effect of raising prices for Larger-Sized CRTs. The defendants argued that the DAPs should not be permitted to pursue damages based on their price-ladder theory for two reasons, both of which the court rejected.

First, the defendants argued that the DAPs were required to prove that the conspiracy had both the effect and purpose of fixing prices, but had no evidence that raising prices for Larger-Sized CRTs was the purpose of the agreements to raise prices for 15-inch CRTs. The court ruled that the defendants were wrong for two reasons. One, the Supreme Court has made clear that "a civil antitrust violation can be established by proof of *either* an unlawful purpose *or* an anticompetitive effect." *Id*. at *3 (citing *United States v. Gypsum*, 438 U.S. 422, 436 n.13 (1978) (emphasis added)). Two, whether there was an agreement to fix prices of Larger-Sized CRTs was a question for the jury, and, in any event, the DAPs could pursue a claim based on increased prices for Larger-Sized CRTs if agreements to fix prices of 15-inch CRTs "were a means by which [defendants] distorted the price of Larger-Sized CRTs." *Id*.

Second, the defendants argued that the DAPs should be prohibited from pursuing damages based on their price-ladder theory because any such damages are derivative of the conduct of reaching agreements on prices for 15-inch CRTs. The defendants analogized price-ladder damages to umbrella damages, and argued that the Ninth Circuit and other courts have rejected umbrella damages as "unacceptably speculative."

The court explained that umbrella damages are damages based on sales by a non-conspirator, on the theory that price-fixing among the conspirators affected market prices generally and, therefore, prices charged by non-conspirators. *Id*. at *4. After discussing the split in authority regarding the recoverability of umbrella damages, the court ruled that any concern that umbrella damages are remote, speculative, complex and potentially duplicative was irrelevant under the circumstances because the DAPs seek price-ladder damages from alleged conspirators, not non-conspirators. *Id*. at *5.

The court then provided its view that, in any event, Ninth Circuit law does not prohibit umbrella damages where the plaintiffs, like the DAPs, are only one step removed from the defendants in the distribution chain. *Id*. Judge Tigar pointed out that although in *Petroleum Products*, the Ninth Circuit "denied standing to sue for umbrella damages where the plaintiffs were several steps removed from the defendants in the distribution chain," it expressly stated that it was not ruling on "'whether, in a situation involving a single level of

distribution, a single class of direct purchasers from non-conspiring competitors of the defendants can assert claims for damages against price-fixing defendants under an umbrella theory.'" *Id*. (quoting *In re Coordinated Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1340 (9th Cir. 1982)). Judge Tigar then noted that prior to *Petroleum Products* some district courts in the Ninth Circuit had allowed plaintiffs to pursue umbrella damages, but since *Petroleum Products* some have not. *Id*.

The court focused on—and criticized—the decision in *Antoine L. Garabet, M.D., Inc. v. Autonomous Tech. Corp.*, 116 F. Supp. 2d 1159 (C.D. Cal. 2000), in which the court applied the *Associated General Contractors* five-part standing test to deny a plaintiff standing to seek umbrella damages. Judge Tigar disagreed with *Gabaret*'s view that independent pricing decisions of non-conspirators make any resulting injury and damages indirect and speculative, because successful cartels raise the market price for a price-fixed good and not just the price charged by the conspirators. *Id*. at *6. Judge Tigar also did not agree with *Gabaret*'s suggestion that umbrella damages implicate *Illinois Brick*'s concerns regarding pass-on and duplicative recovery for indirect purchasers. *Id*. at *7. Finally, he disagreed with *Gabaret* to the extent its ruling was based on the notion that claims for umbrella damages should be brought by the non-conspirator sellers, because those sellers were not harmed by—and, in fact, may have benefitted from—the artificial increase in market prices. *Id*.

The court issued several other rulings that plaintiffs and defendants in price-fixing cases should keep in mind as they develop evidence supporting their claims and defenses:

- DAPs must disclose, and the parties must meet and confer, the day before the DAPs seek to admit non-hearsay co-conspirator statements to tee up for the court rulings on their admissibility. *Id*. at *1-2.
- Defendants may present evidence of pro-competitive justifications for information exchanges to show they served a legitimate business purpose, but not for any other reason, subject to a Rule 403 objection at trial. *Id*. at *8-9.
- DAPs (and their experts) are allowed to argue that documents produced in discovery reflect only a portion of the alleged conspiratorial conduct, based on documents that say "destroy after reading." *Id*. at 9-10.
- DAPs are allowed to present evidence of the defendants' participation in trade organizations, as well as references to exchanges of production information among trade association members. *Id*. at *10.
- DAPs are not allowed to offer a defendant's interrogatory answer in which it admitted conspiring with another defendant because the response is inadmissible hearsay as to the other defendant. *Id*. at 10-11.