

## Thoughts On Consolidating Federal And State Antitrust Cases

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U.S. federal courts are increasingly hearing federal- and state-based antitrust cases together. This trend, hastened by the Class Action Fairness Act of 2005, offers significant opportunities to litigants and courts alike. Consolidation can streamline the resolution of federal and state claims arising out of similar facts, and can promote judicial efficiency in an overburdened system. But these opportunities also jeopardize constitutional due process rights — unless judges carefully ensure that each case’s trial structure preserves them. In the pursuit of judicial efficiency, due process must remain paramount.

In the antitrust context, when federal district courts hear federal direct purchaser claims alongside state indirect purchaser claims, due process concerns arise. The potential conflict often centers around one legal theory: the pass-on defense. Under the federal Sherman Antitrust Act, cartels cannot defend themselves by arguing that price increases paid by direct purchasers were passed on to purchasers further down the distribution chain. State antitrust laws, however, often require indirect purchasers — the consumers — to establish that these same direct purchasers passed on their costs in order for consumers to recover damages.

Federal judges are increasingly presented with a paradox when considering direct and indirect purchaser claims under federal and state laws. If jurors are allowed to consider pass-on evidence for indirect purchaser state claims, it jeopardizes the due process right of the direct purchasers seeking federal recovery to be shielded from the pass-on defense. But if pass-on evidence is withheld from jurors, the indirect purchasers’ due process rights are damaged because they are not afforded an opportunity to present evidence essential to recover on their state claims.

There is no one-size-fits-all solution to protect plaintiffs’ due process rights in a consolidated litigation. Instead, the art of balancing constitutional rights with the interests of efficiency must be determined on an individual basis. Judges recently faced with this or similar issues have carefully fashioned trial structure to fit the facts of each case. These include:

1. Ordering separate trials for each purchaser class after a joint pretrial discovery process, see, e.g., in re TFT-LCD Antitrust Litig., No. M 07-1827 SI, 2012 U.S. Dist. LEXIS 48522, at \*1 (N.D. Cal. Apr. 20, 2012) (approving a separate trial for the direct action plaintiffs due to the difference in case progress between



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them and the class cases);

2. Phasing the trial between purchaser classes, see, e.g., *In re Static Random Access Memory Antitrust Litig.*, No. 07-md-018119 CW, (N.D. Cal. Dec. 16, 2010) (ordering a phased trial to first jointly establish the participants and length of the conspiracy and, if found, bifurcated trials for the direct and indirect purchaser classes regarding damages and state versus federal claims);

3. Conducting post-trial proceedings to adjust damages, see, e.g., *Morgan v. New York Life Insurance Co.*, 559 F.3d 425, 443 (6th Cir. 2009) (finding post-trial remittitur sufficient to address due process claims based on punitive damages); and

4. Continuing with a consolidated trial, see, e.g., *Proffit v. Abbott Labs*, No. 2:08-CV-151, 2008 U.S. Dist. LEXIS 72891, at \*2-\*3 (E.D. Tenn. Sept. 23, 2008) (finding that there was “no reason for selecting the one-year divisions and creating eleven lawsuits to litigate one conspiracy that involves one defendant and one drug”).

There is always a potential benefit to all antitrust litigants by streamlining the consideration of common evidence. See Robert E. Freitas, Jason S. Angell, Jessica N. Leal, *Joint Trial of Direct and Indirect Purchaser Claims*, 23 *Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal.* 77, 80 (2014). A single coordinated trial for common issues can resolve cases faster and at lower costs. Similarly, a consolidated post-trial proceeding may directly target any potential duplicative recovery.

However, a single trial across different cases can confuse jurors and prejudice the parties. Different cases frequently present different legal theories, evidentiary requirements, and recovery standards. Separate trials may avoid these pitfalls while providing the strongest protection of plaintiffs’ due process rights. But they do not provide any of the cost or judicial efficiency benefits of joint or quasi-joint trial structures.

Post-trial, bifurcated or phased proceedings can quell these concerns, especially regarding the pass-on defense, while also providing evidentiary and judicial economies offered in joint trials. See Emilio E. Varanini, *Exiting the Fun House of Mirrors: Clayworth v. Pfizer and the Handling of Pass-on in Post-Trial Allocation Proceedings in Federal and State Court*, 20 *Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal.* 28, 30-31 (2011).

As one commentator has explained, “Handling pass-on as a post-trial allocation issue also avoids jury confusion in having to wrestle with complex economic analyses of pass-on involving the specific facts of a case (even if pass-on itself is a simple concept) in order to make determinations that go neither to the culpability of defendants nor to the damages that they inflicted in the aggregate.” *Id.* Nevertheless, “refraining from straightforward confrontation of the potential for multiple recovery at trial may result in avoidable complications that can frustrate the attempt to avoid multiple recovery.” Freitas et al., *supra*, at 89. There are no easy solutions when it comes to antitrust trial consolidation.

This issue is coming to the forefront in the *in re Cathode Ray Tube Antitrust Litigation* (“CRT”), currently scheduled to begin trial in March 2015 in the Northern District of California. Direct and indirect purchasers have moved for separate trials, asserting that the issue of pass-on would jeopardize a fair trial for both classes if tried by the same jury. The indirect purchaser class asserts that bifurcation cannot alleviate the potential prejudice to both classes because the same jury would try both class’s claims. The motion is still pending. Along with similar decisions in other cases involving multiple levels of recovery, the CRT decision and the resulting trial — or trials — will clarify the appropriate balance of due process

and judicial efficiencies as this issue continues to play out in federal courthouses across the country.

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***Disclosure: Jason Murray's recent representations include corporate client recovery actions in In re TFT-LCD Antitrust Litigation and In re Cathode Ray Tube Antitrust Litigation. Rob McNary and Danielle Richards are counsel to corporate client plaintiffs the In re Cathode Ray Tube Antitrust Litigation.***

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