DUE PROCESS LIMITATIONS ON INDIRECT PURCHASER CLAIMS UNDER THE CARTWRIGHT ACT: TOWARD A NEW STANDARD?

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I. Introduction

In the last twelve months, out of the some 15,000 appeals filed in the United States Court of Appeals for the Ninth Circuit, there were exactly 30 petitions for permission to appeal under 28 U.S.C. § 1292(b).[1] Only seven were granted.

One of these petitions should be of keen interest to antitrust litigators. It raises the following question: in a private antitrust action brought by indirect purchasers of price-fixed goods, to satisfy the Due Process Clause, what level of contact must plaintiffs' claims have with the state whose *Illinois Brick* repealer statute is invoked? Must plaintiffs allege that a price-fixed product was purchased in the state? Is it sufficient that acts in furtherance of the conspiracy to fix prices are alleged to have taken place in the state? If so, what quantity or type of conduct is sufficient?

The mere fact of certification, and the Ninth Circuit's rare grant of permission to appeal, all but ensures that the court will issue important new guidance about the due process limits on the extraterritorial application of the Cartwright Act and similar state laws.

In re TFT-LCD (Flat Panel) Antitrust Litig.

The case in which the issue arose, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, should be familiar to antitrust lawyers. *TFT-LCD* already has generated several important published opinions on a range of cutting-edge issues, including whether leniency applicants must help class plaintiffs in civil discovery to avail the detrebling provisions of ACPERA,[2] an antitrust grand jury's ability to subpoena foreign documents produced in domestic civil antitrust litigation,[3] and new exceptions to the jurisdiction-stripping provisions of the

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1 Section 1292(b) provides that a district court may certify an interlocutory decision for appeal if it (1) involves a controlling question of law; (2) there is a substantial ground for difference of opinion on the issue; and (3) an immediate appeal from the order may materially advance the termination of the litigation. 28 U.S.C. § 1292(b).

2 Judge Susan Illston denied the direct purchaser class's motion to compel an unidentified leniency applicant to identify itself in accordance with ACPERA or forfeit its right to seek the detrebling benefits of the statute. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 618 F. Supp. 2d 1194 (N.D. Cal. 2009). The district court found no authority in the statute or interpretive case law for the proposition that an amnesty applicant is required to identify itself and cooperate with plaintiffs in civil litigation. *Id.* at 1195. The court concluded that the statute "suggests that the court's assessment of an applicant's cooperation occurs at the time of imposing judgment or otherwise determining liability and damages." *Id.* at 1196.

3 After tagalong civil suits were consolidated before Judge Illston in the Northern District, the same judge presiding over the parallel criminal proceedings, civil plaintiffs successfully compelled the defendants – foreign manufacturers of thin-film transistor, liquid crystal display panels and products – to produce nonprivileged foreign documents. After the materials were produced in the civil case, the DOJ used grand jury subpoenas to obtain the foreign materials from the corporate law firms in possession of the documents.

Foreign Trade Antitrust Improvements Act ("FTAIA") in spite of *Empagran* and progeny.[4]

Just after the DOJ's criminal investigation of LCD price fixing became public in late 2006, 20 separate class actions were filed in five different judicial districts, all of them alleging "a conspiracy to fix the price of thin film transistor-liquid crystal display (TFT-

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Lacking clear on point guidance, Judge Illston followed Special Master Fern Smith's recommendation and quashed the subpoenas, stating it was "more prudent to quash the subpoenas and allow DOJ to raise these issues on appeal." *In re Grand Jury Subpoenas,* 627 F.3d 1143, 1144 (9th Cir. 2010) *cert. denied*, 131 S. Ct. 3061 (U.S. 2011), and *cert. denied*, 131 S. Ct. 3062 (U.S. 2011). In December of 2010, the Ninth Circuit reversed. In an opinion by Judge John Noonan, the three judge panel concluded that the subpoenas were enforceable. "By chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury." Id. at 1144. *See generally* Civil Procedure – Protective Orders – Ninth Circuit Holds That Grand Jury Can Subpoena Protected Foreign Documents – *In re Grand Jury Subpoenas (White & Case LLP)*, 124 HARV. L. REV. 2099 (2011).

4 *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, ___ F. Supp. 2d ___, No. M 07-1827 SI, C 10-1064 SI, 2011 WL 941285 (N.D. Cal. Mar. 16, 2011) (a.k.a., *"Dell v. Sharp."*). Plaintiffs Dell Inc. and Dell Products ("Dell"), one of the leading computer manufacturers in the U.S., filed an opt-out/direct action suit against the defendants in the criminal case, alleging that they violated Section 1 by fixing prices on TFT-LCD from 1996 to 2008. In pertinent part, Dell alleged that defendants and their co-conspirators controlled the market for TFT-LCD during the relevant period and that it was an intended target of the price-fixing conspiracy and that the conspiracy was carried out, in part, in the United States. *Id.* at *1. For example, Dell alleged that defendants and their co-conspirators met at Dell headquarters in Texas to agree upon price targets, ranges and output levels. *Id.* It alleged that from its Texas headquarters and other domestic locations, it negotiated with defendants and their coconspirators until an agreed-upon *worldwide* price was established for its purchases of TFT-LCD.

Defendants moved to dismiss under *Twombly/Iqbal* on the ground that the Court lacked subject matter jurisdiction over any foreign purchases by Dell of TFT-LCD because Dell did not satisfy the "domestic injury" exception to the FTAIA, 15 U.S.C. § 6a ("FTAIA"). The FTAIA sets forth the general rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." *Id.* The FTAIA "provides an exception to this general rule, making the Sherman Act applicable if foreign conduct '(1) "has a direct, substantial, and reasonably foreseeable effect on domestic commerce," and (2) "such effect gives rise to a [Sherman Act] claim."'" *Dell v. Sharp* at *4 (*citing In re DRAM Antitrust Litig.*, 546 F.3d 981, 985 (9th Cir. 2008) (quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A. ("Empagram I")*, 542 U.S. 155, 159 (2004) and 15 U.S.C. 6(a)). Defendants argued that Dell failed to satisfy *Twombly's* plausibility standard merely by alleging that U.S. and foreign prices were both impacted by the same alleged worldwide conspiracy or that both U.S. and foreign prices were a single worldwide price. *Id.* at *4.

Judge Illston distinguished the leading FTAIA cases, including *Empagran I, Empagran S.A. v. F. Hoffmann–LaRoche, Ltd. ("Empagran II")*, 417 F.3d 1267 (D.C.Cir.2005), *DRAM*, and *Sun Microsystems, Inc. v. Hynix Semiconductor Inc. ("Sun II")*, 534 F.Supp.2d 1101 (N.D.Cal.2007) to hold that Dell sufficiently pleaded domestic effects to avoid the FTAIA's jurisdictional bar. Unlike *Empagran I*, Dell is not a foreign company alleging injury "based on wholly foreign transactions and conduct." *Id.* at *6. Dell is a domestic company alleging a conspiracy involving both foreign and domestic conduct. *Id.* As a result, Judge Illston found, many of the comity/sovereignty concerns underpinning *Empagran's* result did not apply. Unlike *Empagran II*, in which, on remand, the plaintiffs relied upon an "arbitrage" theory to argue there was a causal link between the domestic effects of the conspiracy and the plaintiff's foreign injury, Dell alleged that defendants engaged in anticompetitive conduct both inside and outside U.S. borders. Id. By contrast, the "arbitrage theory" rejected by the D.C. Circuit in *Empagran II* was based upon the theory that "because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e., higher prices in the United States), the sellers could not have maintained their international price fixing arrangement and respondents would not have suffered their foreign injury." *Id.* at 4. The D.C. Circuit held that such a theory satisfied "but for" causation, but nevertheless failed to establish the requisite proximate causation, *i.e.*, that foreign overcharges caused the domestic overcharges.

LCD) panels, which are used in computer monitors, flat panel television sets, and other electronic devices."[5] Because 13 of the 20 federal cases were filed in the Northern District, and based upon its close proximity to the significant number of Asia-based defendants, the Panel on Multidistrict Litigation coordinated the proceedings before Judge Susan Illston in the Northern District.[6]

On March 28, 2010, the court certified two different classes of direct purchasers: (1) all persons or entities who directly purchased TFT-LCD *panels* from the defendants during the relevant period (January 1, 1999 to December 31, 2006); and (2) all persons who directly purchased TFT-LCD *products* containing a TFT-LCD panel from any of the defendants (*e.g.*, televisions, computer monitors or notebooks) during the same period.[7] The same day, the court certified two classes of indirect purchasers. The first was an injunctive relief class under Federal Rule of Civil Procedure 23(a) and 23(b)(2) comprised of "[a]ll persons and entities residing in the United States as of the date notice is first published, who indirectly purchased in the United States between January 1, 1999 and the present TFT-LCD panels incorporated in televisions, monitors and/or notebook computers, from one or more of the named defendants ... for their own use and not for resale."[8] The second class was a damages class pursuant to Federal Rule 23(a) and 23(b)(3) comprised of residents of 22 states and the District of Columbia who, "as residents of [those states], purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in [those states] *indirectly* from one or more of the named [d]efendants ... for their own use and not for resale."[9]

Despite these broad classes, as is typical in large antitrust cases involving substantial damages, the most important players are not the classmembers at all. They are the largest purchasers of TFT-LCD panels and products. Corporations such as Wal-Mart, Sony and AT&T filed their own individual actions rather than participate in the class, and are referred to as "opt outs" or as "direct action plaintiffs."

The individual class representatives purchased the covered products in each of the states whose laws were invoked. Absent class members by definition only include those who, as state residents, purchased LCD panels "in California," "in Wisconsin," or "in New Mexico," the other states whose laws were invoked. Where opt-outs purchased a product, however, is not always so clear. Defendants therefore moved to dismiss complaints filed by opt outs who did not specifically allege they indirectly purchased price-fixed products in those states.

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5 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 483 F. Supp. 2d 1353, 1354 (N.D. Cal. 2007).

6 The Panel decision also noted that it had been notified of 100 other related actions pending across multiple districts, which it would treat as "tag along" actions.

7 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 314-16 (March 28, 2010).

8 *In re TFT-LCD Antitrust Litig.*, 267 F.R.D. 583, 608 (N.D. Cal. 2010).

9 *Id.* at 608-613. The states are Arizona, California, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin and the District of Columbia.

AT&T Mobility ("AT&T"),[10] a leading provider of mobile wireless telecommunications services which also sells mobile handsets, one of the first opt-out plaintiffs in the case, filed its own direct action, styled *AT&T Mobility v. AU Optronics*, in October of 2009. AT&T alleged that during the conspiracy period, it purchased more than 300 million mobile wireless handsets for resale to its customers, for which it paid supracompetitive prices as a result of the defendants' global price-fixing conspiracy.[11] AT&T raised claims for both direct purchases of products, for which it sought treble damages and injunctive relief under Section 1 of the Sherman Act, and for indirect purchases (through original equipment manufacturers (OEMs)) for which it sought treble damages under California's Cartwright Act.[12] In the alternative, AT&T brought a third claim under California's Unfair Competition Law ("UCL"), Business & Professions Code §§ 17200, *et seq.*, as well as the antitrust, consumer protection, unfair trade and deceptive practices laws of twenty other states, the District of Columbia, and Puerto Rico.[13]

Defendants moved to dismiss on the ground that AT&T did not allege sufficient contacts between those states and AT&T's claims, so it lacked standing under constitutional and/or prudential standing principles,[14] and also failed to satisfy the Due Process Clause of the United States Constitution.[15] Defendants also argued that AT&T failed to allege that it actually bought the price-fixed products in California, or the other states whose laws AT&T sought to invoke, and could not satisfy *Twombly/Iqbal's* "facial plausibility" standard.[16]

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10 The actual plaintiff's were AT&T Mobility LLC, AT&T Corp., AT&T Services, Inc., Bellsouth Communications, Inc., Pacific Bell Telephone Company, AT&T Operations, Inc., AT&T Datacomm, Inc., and Southwestern Bell Telephone Company. AT& T Corp. is a provider of voice and data communications services, including traditional and long-distance phone service, internet access service, private enterprise network service and other telecommunications services. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, C 09-4997 SI, 2010 WL 2609434, at *2 (N.D. Cal. June 28, 2010).

11 *In re TFT-LCD,* 2010 WL 2609434, at *2.

12 *Id.* at *1. The Cartwright Act is codified at Cal. Bus. & Prof. Code §§ 16700, *et seq.*

13 The states are Arizona, California, the District of Columbia, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Wisconsin, and West Virginia.

14 Standing is both a constitutional and prudential requirement. The Supreme Court has indicated that constitutional standing, at a minimum, requires that plaintiff allege injury, causation and redressability. *See, e.g., Northeastern Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 663 (1993). The standing doctrine is attributed to Justice Brandeis's 1923 opinion in *Frothingham v. Mellon*, 262 U.S. 447 (1922), in which the Court first held that a citizen plaintiff, suing as a taxpayer, lacked standing to challenge expenditures under the Federal Maternity Act of 1921 under the Tenth Amendment. There are also judicially created principles of prudential standing, such as (1) the prohibition on third-party standing, (2) the prohibition against generalized grievances, and (3) the requirement that the plaintiff be within the zone of interests protected by the statute in question. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §§ 2.5.4-2.5.6 (Aspen 1997). More recently, in *Bond v. United States*, the Court held that citizens may in certain circumstances challenge federal enactments on Tenth Amendment grounds. 564 U. S. ____ (2011).

15 *In re TFT-LCD,* 2010 WL 2609434, at *2.

16 *Id* at *2.

II. The District Court Decision

On June 28, 2010, the Court granted the motion and dismissed plaintiff AT&T's indirect purchaser claims based upon its failure to specifically allege that it bought the products at issue in the states whose antitrust laws it invoked.[17] At the outset, the district court cited to leading Supreme Court precedents on the subject for the proposition that due process requires a "'significant contact or significant aggregation of contacts' between the plaintiff's claim and the state at issue," and indicated that the relevant "occurrence or transaction" – the focus of the contacts analysis – is the purchase of the price-fixed goods themselves.[18]

AT&T had argued that California had jurisdiction under the Cartwright Act because defendants did business in California, certain of the foreign TFT-LCD manufacturer defendants had offices and/or sales agents in California, and one of the AT&T plaintiffs was headquartered there.[19] Additionally, AT&T had argued that admissions contained in plea agreements in the parallel criminal proceeding against the same defendants stated that "acts in furtherance of th[e] conspiracy were carried out in the Northern District of California," and that the "acts in furtherance" were in fact sales of TFT-LCD in the district.[20] Despite the foreign defendants' purported admissions that they had sold price-fixed goods in the Northern District, the district court found such sales did not establish the requisite contacts "because those plea agreements do not state, nor have plaintiffs alleged, that any defendants sold products to any of the plaintiffs in California."[21]

Alternatively, AT&T had argued that there was a sufficient nexus between its state antitrust claims and the various state laws based upon its allegations that the AT&T entities conduct a substantial amount of business in each of the states.

The court rejected this argument as well:

> [T]he fact that plaintiffs have a presence in the various states does not establish a link between plaintiffs' antitrust claims and the states. Plaintiffs also argue that they expect that defendants will assert, as a defense, under the various state laws, that plaintiffs passed-on the alleged overcharges when AT&T sold the finished products to end consumers. Plaintiffs do not cite any authority for the proposition that Due Process can be satisfied by on [sic] the location of a plaintiff's resale of a product.[22]

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17 *Id.*

18 *Id.* at *2 (internal citation omitted) (*citing Allstate Ins. Co. v. Hague,* 449 U.S. 302, 308 (1981) and *Phillips Petroleum v. Shutts,* 472 U.S. 797, 821-22 (1985), respectively.)

19 *In re TFT-LCD,* 2010 WL 2609434, at *2.

20 *Id.* at *3 (citing Plea Agreement at 4, *United States v. LG Display* (Docket No. 14 in CR 08-803)).

21 *Id.*

22 *Id.* at *3.

Judge Illston adopted a bright-line standard for state antitrust jurisdiction: "in order to invoke the various state laws at issue, plaintiffs must be able to allege that 'the occurrence or transaction giving rise to the litigation'—plaintiffs' purchases of allegedly price-fixed goods—occurred in the various states."[23] In support of this standard, the district court cited to the Supreme Court's 1985 decision in *Allstate Insurance. Company. v. Hague*[24] and more recent Northern District antitrust cases citing that case.

AT&T filed an amended complaint, attempting to meet Judge Illston's standard through new allegations and charts purporting to detail the various states where AT&T bought price-fixed products. Meanwhile, however, AT&T maintained that its Cartwright Act claims were proper because defendants' "price-fixing conduct in California" created the necessary contacts to allow California to constitutionally apply its law to the claims.[25] Again, the foreign defendants moved to dismiss on the same due process and standing grounds. For a second time, on November 12, 2010, the district court granted the motion, relying upon the same reasoning supporting its original dismissal order.[26]

III. The Issue for Certification

In its certification briefing to the district court, AT&T's lawyers framed the question as follows:

> Whether the Court's Order of November 12, 2010, dismissing in part Plaintiff's Second Amended Complaint ["SAC"] and holding that Plaintiffs may not assert claims under California's Cartwright Act for indirect purchases of priced-fixed LCD panels outside of California, presents a controlling question of law for which there is a substantial ground for difference of opinion in light of the Supreme Court's decision in *Allstate Insurance Co. v. Hague,* 449 U.S. 302 (1981), and lower court decisions interpreting that decision.[27]

Although the defendants' motions to dimiss argued, alternatively, that AT&T lacked standing or that jurisdiction did not comport with due process, AT&T's certification motion framed the issue narrowly in terms of due process. Section 1292(b) provides that a district court may certify an interlocutory decision for appeal if it (1) involves a controlling question of law; (2) there is a substantial ground for difference of opinion on the issue; and (3) an immediate appeal from the order may materially advance the termination of the litigation. 28 U.S.C. § 1292(b).

AT&T argued that there is a controlling question because its answer would necessarily govern the scope of AT&T's claims under California law, even though it would not dispose

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23 *Id.* at *3.

24 *Allstate Ins. Co.*, 449 U.S. 302.

25 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, M 07-1827 SI, 2010 WL 4705518, at *2 (N.D. Cal. Nov. 12, 2010) *quoting* Opp'n 2, n.1.

26 *Id.* at *3.

27 Plaintiff's Memorandum of Points and Authorities in Support of Motion to Certify Under 1292(b) at 2.

of the sprawling antitrust MDL case.[28] AT&T argued there was substantial ground for difference of opinion over whether California antitrust law applies to indirect sales of price-fixed goods outside California because, traditionally, the only due process limitation upon the application of a state's forum law is whether the state in question has "a significant contact, or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair."[29]

Finally, AT&T argued that the appeal would materially advance its case because AT&T alleged that claims under the Cartwright Act involved all of its indirect purchases of price-fixed LCD panels during the conspiracy period. According to the court's order of dismissal, however, AT&T may pursue claims only for those indirect purchases that actually took place in particular states.

In its moving papers on certification, AT&T emphasized that the case concerned not just the broader, threshold issue of whether it could sue under one state's repealer statute for overcharges that it paid in a number of states, *i.e.*, the "legislative jurisdiction" of California's legislature, or, more specifically, whether the Cartwright Act reached purchases in states without repealer statutes, but that appellate review would narrow the number of factual and legal issues in the case. Further, AT&T noted how state laws may be in direct conflict with one another in some cases, making the adjudication of claims under multiple state repealer statutes cumbersome and difficult. For example, under the California Supreme Court's recent decision in *Clayworth v. Pfizer,* defendants may not assert a "pass-on" defense under the Cartwright Act, but may do so under other states' repealer statutes.[30]

On March 4, 2011 the district court granted AT&T's motion and certified the issue to the Ninth Circuit.[31] Yet, in certifying the issue, the district court, unlike AT&T in its briefing, did not mention the possibility that its dismissal of AT&T's indirect purchaser claims under the Cartwright Act might be at loggerheads with the Supreme Court's *Allstate* precedent. Rather, it framed the issue as "whether the application of California antitrust law to claims against defendants based upon purchases that occurred outside California would violate the Due Process Clause of the United States Constitution."[32] The district court also observed that the decision was important to the overall resolution of the MDL proceedings because other opt outs sought to recover for indirect purchases in other states based upon the Cartwright Act.[33]

On May 10, 2011, after the parties submitted further briefing to the Ninth Circuit (under seal) regarding the merits of its appeal, a two judge panel agreed to hear the appeal.[34]

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28 *Id.*

29 Plaintiff's Memorandum of Points and Authorities in Support of Motion to Certify Under 1292(b) at 5 (quoting *Allstate Ins. Co. v. Hague,* 449 U.S. 302 (1981)).

30 49 Cal. 4th 758, 786 (2010).

31 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, M 07-1827 SI, slip op. (N.D. Cal. March 4, 2011).

32 *Id.* at 1.

33 *Id.*

34 *AT&T Mobility v. AU Optronics Corporation,* No. 11-80070, slip op. (May 10, 2011). As Circuit Advisory Committee Note to Circuit Rule 27-1 makes clear, substantive motions that do not dispose of the appeal are ordinarily heard by two judges, in this instance Judges Pamela Ann Rymer and Consuelo M. Callahan.

IV. The Ninth Circuit Appeal

On appeal, the Ninth Circuit likely will have to address the difficult question of whether AT&T was required to split its indirect purchaser claims among the various states where price-fixed goods were bought, as opposed to simply pursuing all of its overcharges under a single state's antitrust law, such as the Cartwright Act. Given the centrality of state antitrust law to private antitrust claims, and to full and fair compensation of those injured by price fixing, the Ninth Circuit's resolution of this issue may represent a significant narrowing of federal jurisdiction over state indirect purchaser claims.

On the surface, at least, the appeal is about whether an indirect purchaser plaintiff will be required to demonstrate that it bought price-fixed goods in each of the states whose antitrust laws it invokes in its complaint, or, alternatively, whether it can simply seek to recover for all indirect overcharges it paid based upon the law of a single state in which it bought such goods. At its core, however, the appeal is about federalism—the balance of power between state and federal government to regulate anticompetitive behavior through legislation. It is axiomatic that the federal government is one of limited power, in theory, if not in practice.[35] Hence Congress may act only if there is an express or implied authority to do so in the Constitution.

States, by contrast, are endowed with broad inherent power, and may act unless the Constitution somehow prohibits the action.[36] This power is loosely referred to as the "police power," *i.e.*, the power to adopt any law that is not prohibited by the Constitution, sometimes described as the power to regulate "health, welfare, safety and morals."[37]

Because the states existed prior to the birth of the federal government, the Constitution does not purport to define the scope of their powers, other than in contradistinction to the federal government. This includes the enumeration of specific federal powers in Article I, such as the Commerce Clause, as well as more direct expressions of the balance of federal and state power, as in the Ninth and Tenth Amendments of the Bill of Rights.[38]

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35 *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 307 (1981) (Rehnquist, J., dissenting). As Justice Rehnquist noted in this famous dissent, "It is illuminating for purposes of reflection, if not for argument, to note that one of the greatest 'fictions' of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people."

36 CHEMERINSKY, *supra,* note 14 at 166.

37 BLACK'S LAW DICTIONARY 1276 (9th ed. 2009) ("The inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice. It is a fundamental power essential to government, and it cannot be surrendered by the legislature or irrevocably transferred away from government.")

38 U.S. CONST, amends IX and X. "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people." All of these powers, Professor Amar emphasizes, ultimately derive from the people, who, at a minimum, thereby reserve the right to alter or abolish government itself. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 122 (Yale Univ. Press 2000) ("The rights of 'the people' affirmed in the Ninth and Tenth Amendment may well mean more than the right to alter or abolish, but surely they mean at least this much at their core.")

Legislative jurisdiction is a term federal courts have used to describe the limits on states' inherent legislative power imposed by the Due Process Clause of the United States Constitution, or to analyze "the extraterritorial reach of a statute."[39] As one commentator notes, "questions of legislative jurisdiction arise primarily when a state seeks to apply its law to foreign conduct or actors." [40] Legislative jurisdiction should not be confused with personal jurisdiction, which Justice Scalia described, respectively, as "jurisdiction to prescribe" and "adjudicative jurisdiction." [41]

V. Illinois Brick and the Limits of Federal Antitrust Law

Since the Supreme Court announced the indirect purchaser doctrine in *Illinois Brick v. Illinois* more than 30 years ago, indirect purchasers have been dependent upon state antitrust law to recover for overcharges resulting from price fixing.

Illinois Brick cannot be understood without mentioning the cases that preceded it in which defendants sought to argue that direct purchaser plaintiffs did not suffer antitrust injury because they passed on overcharges. The Supreme Court first expressly rejected the pass-on defense in *Hanover Shoe, Inc. v. United Machinery Corp.*, holding that a defendant could only rely upon plaintiff's pass through of overcharges where the defendant meets the difficult burden of proving: (1) plaintiff "raised his price in response to, and in the amount of, the overcharge," (2) "his margin of profit and total sales had not thereafter declined," and (3) he "could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued."[42]

In this context, the Supreme Court decided *Illinois Brick*. First, the Court concluded that it would be unfair to permit indirect purchasers to maintain claims alongside direct purchasers for the same illegal overcharges, thereby exposing defendants to multiple liability: defendants would be 100% liable to the direct purchasers as a result of *Hanover Shoe,* and then liable to indirect purchasers as well. Moreover, apportioning damages among the multiple layers of purchasers in even the simplest distribution chain would place an unfair burden upon plaintiffs and the courts.[43]

The federal courts have recognized three narrow exceptions to the indirect purchaser rule. Under the "cost-plus" exception, a direct purchaser enters into a cost-plus pricing contract with an indirect purchaser before it begins paying the artificially –inflated price to the seller.[44] Under the ownership or control exception, the price-fixer owns or controls the direct purchaser, and therefore there is no risk that the direct purchaser will file a private

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39 *Adventure Communications Inc. v. Kentucky Register of Election Finance,* 191 F.3d 429, 435 (4th Cir. 1999) (quoting *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 813 (1993) (Scalia, J., dissenting)). *See generally* Willis L.M. Reese, *Legislative Jurisdiction,* 78 COLUM. L. REV. 1587, 1587 (1978).

40 Alex Ellenberg, *Due Process Limitations on Extraterritorial Tort Legislation,* 92 CORNELL L. REV. 549, 549-50 (2007).

41 *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 813-14 (1993) (Scalia, J., dissenting).

42 ANTITRUST LAW DEVELOPMENTS (SIXTH) VOLUME I at 829 (2007) (quoting *Hanover Shoe,* 392 U.S. 481 (1968)).

43 ANTITRUST LAW DEVELOPMENTS (SIXTH) VOLUME I at 731-32, 737.

44 *Id.* at 736.

action.[45] Courts have also recognized a third exception, the so-called co-conspirator exception, a subspecies of the ownership or control exceptions, where the intermediary is a co-conspirator, and therefore "the defendants and the middlemen are viewed as a single entity – the conspiracy – from which the plaintiff is a direct purchaser."[46]

These exceptions provide little comfort to indirect purchasers that have been injured by cartel conduct and have the damages to prove it. Leading authorities emphasize that the federal courts continue to vigorously apply the indirect purchaser doctrine, dismissing attempts by indirect purchasers to seek recovery under the Sherman Act.[47]

VI. What Is The Scope of State Legislative Jurisdiction to Enact *Illinois Brick* Repealer Statutes?

California is among the many states that have enacted *Illinois Brick* repealer statutes.[48] California's Cartwright Act has become a magnet for both individual and class indirect purchaser claims. Among other salient advantages for plaintiffs suing under California's antitrust law is the Supreme Court's recent decision holding that the Cartwright Act does not permit a "pass on" defense.[49]

However, neither *Illinois Brick* nor its progeny clearly resolved the extent to which a state could create a private right of action permitting recovery for overcharges incurred outside that state. Although the Supreme Court seemed to endorse the balance of federal and state power envisioned by *Illinois Brick* by holding in 1989 that the Sherman Act does not preempt state indirect purchaser statutes[50] – known as *Illinois Brick* repealer statutes – the scope of a state's legislative jurisdiction over indirect purchases certainly could be a great deal clearer. In theory, if an indirect purchaser could sue under the California law to recover for damages/overcharges that it suffered outside California, and for sales that took place outside California, the Cartwright Act, or another state's repealer statute, might be applied nationally, in a sense typically reserved for federal law.[51]

This very issue preoccupied Professor Herbert Hovencamp after *Illinois Brick* was decided, as reflected in his article *State Antitrust in the Federal Scheme*.[52] Hovencamp posited

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45 *See, e.g., Royal Printing Co. v. Kimberly Clark Corp.,* 621 F.2d 323, 326-27 (9th Cir. 1980).

46 ANTITRUST LAW DEVELOPMENTS (SIXTH), *supra*, note 42 (quoting *Technical Learning Collective, Inc. v. Daimler-Benz Aktiengesellschaft*, N-77-1443, 1980 WL 1943, at *9 (D. Md. Aug. 28, 1980).) *See also Howard Paper Sys. V. Nippon Paper Indus Co.*, 281 F.3d 629, 632-34 (7th Cir. 2002). *But* see Christopher T. Casamassima & Tammy A. Tsoumas, *The* Illinois Brick *Wall: Standing Tall*, 20 COMPETITION 1, 73-78 (Spring 2011) (questioning vitality of the "coconspirator" exception).

47 ANTITRUST LAW DEVELOPMENTS (SIXTH), *supra*, note 42 (citing *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 207 (1990); *Campos v. Ticketmaster,* 140 F.3d 1166, 1168-71 (8th Cir. 1998). *See also* ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS at 243-44 (2010) (citing *Howard Hess Dental Labs. v. Dentsply Int'l,* 602 F.3d 237 (3d Cir. 2010)).

48 Cal. Bus. & Prof. Code § 16750(a).

49 *See Clayworth v. Pfizer,* 49 Cal. 4th 758, 786 (2010).

50 *California v. ARC America Corp.*, 490 U.S. 93 (1989).

51 Herbert Hovenkamp, *State Antitrust in the Federal Scheme,* 58 IND. L.J. 375, 394 (1983) (*hereafter* "Hovencamp").

52 *Id.* at 390-91 & n.36.

that despite a dearth of antitrust case law on the issue at the time, "concepts of legislative jurisdiction can and ought to play a role in determining the outer limits of state antitrust law in a federal system."[53] Hovencamp thought that the question was "particularly important when the antitrust law of a particular state is broader in its scope of liability than federal antitrust law is, and when that broader liability is likely to drag within its net people whose contact with the state is minimal."[54] Because state antitrust law is broader than federal law in this respect, the scope of legislative jurisdiction has special significance.

VII. Allstate v. Hague: An Analytical Framework for Legislative Jurisdiction

Prior to *Allstate Insurance Company v. Hague,*[55] the Supreme Court did not have a clear analytical approach to legislative jurisdiction, relying sometimes on the Full Faith and Credit Clause, and other times on the Due Process Clause, to evaluate the proper scope of state law.[56]

In *Allstate,* respondent's late husband, Ralph Hague, had died after being struck by an automobile while riding as a passenger on a motorcycle in Pierce County, Wisconsin, immediately across the border from the town of Red Wing, Minnesota.[57] Neither the driver of the car nor the man driving the motorcycle, both of whom were Wisconsin residents, had insurance. But the decedent, who was also a Wisconsin resident, had insurance coverage for his three automobiles and an uninsured motorist policy with coverage limited to $15,000 per automobile.

After the accident, respondent moved to Minnesota, married a Minnesota resident and sued under Minnesota law for a declaration that the $15,000 uninsured motorist coverage on her husband's three vehicles could be "stacked" to provide total coverage of $45,000.[58] Interpreting Wisconsin law to disallow stacking, the district court concluded that Minnesota's choice of law rules required the application of Minnesota law permitting stacking.[59] The Minnesota Supreme Court affirmed *en banc.*

The issue presented to the Supreme Court was "whether the Minnesota Supreme Court's choice of its own substantive law in this case exceeded federal constitutional limitations."[60] Writing for the plurality, Justice Brennan observed, "[i]n deciding

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53 *Id.* at 392.

54 *Id.*

55 449 U.S. 302 (1981).

56 *See Order of Commercial Travelers v. Wolfe,* 331 U.S. 586 (1947) (holding Full Faith and Credit Clause of Article VI, section 1 required South Dakota court to apply Ohio law to determine terms of membership in private fraternal benefit society, because that was the state of organization); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (holding application of Texas statute prohibiting stipulations limiting time to sue to two years or less to insurance dispute centered in Mexico violated Due Process Clause).

57 449 U.S. 302, 305.

58 *Id.*

59 *Id.* at 306.

60 *Id.*at 307.

constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation."[61]

Justice Brennan began by noting that the Court had previously invalidated the application of forum state's law where there was no significant contact or significant aggregation of contacts creating state interests between the state and the parties and the occurrence or transaction. The leading precedents in which the Court had invalidated state choice of law decisions were *Home Insurance Company v. Dick*[62] and *John Hancock Mutual Life Insurance Company v. Yates*,[63] in which the application of the forum state's law depended upon a single insignificant contact.[64]

Justice Brennan's plurality opinion held that a state may apply its law where it has a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[65] Justice Brennan identified three contacts with the parties and occurrence giving rise to the litigation. Decedent had been a member of Minnesota's work force and had worked in Red Wing for fifteen years, which Justice Brennan thought implicated "the [s]tate of employment's [] police power responsibilities toward nonresident employees." He had commuted to work in Minnesota, which implicated Minnesota's interest in the safety and well-being of its workforce. And, although he was not killed during his commute, the termination of his status as a Minnesota worker by virtue of his death implicated the same state interest.[66] Together, these factors amounted to a "significant aggregation of contacts with the parties and the occurrence," thereby allowing Minnesota to constitutionally apply its law to the case.[67]

However, no single opinion commanded a majority. Justice Stevens, concurring in the result, wrote a separate opinion suggesting a two-part test for jurisdiction.[68] First, the court should consider whether the Full Faith and Credit Clause *requires* the application of one state's law in order to avoid interfering with state sovereignty.[69] Second, it must consider whether the Due Process Clause of the Fourteenth Amendment *prevents* the forum state from applying its own law, based upon "the litigants' interest in a fair adjudication of their rights."[70] Justice Stevens wrote that although he believed prior cases and commentators had blurred the two inquiries, the two constitutional provisions are designed to protect very different interests, and therefore demand separate analyses. The Full Faith and Credit Clause was "designed to transform the several States from independent sovereignties into

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61 *Id.* (citing *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179, 181-82 (1964)).

62 281 U.S. 387 (1930).

63 299 U.S. 178 (1936).

64 449 U.S. at 309.

65 *Id.* at 313-15.

66 *Id.* at 313-20.

67 *Id.*

68 *Id.* at 320 (Stevens, J. concurring).

69 *Id.* at 321.

70 *Id.* & nn.1-2.

a single, unified Nation" "by directing that a state, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty."[71] However, this respect does not require the forum state to apply foreign law every time another state has a valid interest in the case. For its part, due process presumes that a choice of law decision would violate the Due Process Clause if it were "totally arbitrary or unfair to either litigant."[72] The forum state's interest in fair and efficient administration is sufficient, in Justice Stevens's view, to attach a presumption of validity to a forum state's decision to apply its own law to a dispute over which it has jurisdiction.[73]

On the other hand, Justice Stevens cautioned that a forum state's interest in the operation of its judicial system would not be sufficient to justify the application of a rule of law that is "fundamentally unfair" to one of the litigants.[74] This could arise where, for example, the rule favored residents over nonresidents, if it represented a dramatic departure from the rule of most American jurisdictions, or if the rule were facially unfair.

Justice Stevens found none of these circumstances applied, and "stacking" was the rule in most states at the time Hague's policy was issued.[75] Although Justice Stevens disagreed with the Minnesota court's application of Minnesota law under traditional conflicts principles, because both the execution of the insurance contract and the accident giving rise to the litigation took place in Wisconsin, where all three involved individuals were residents, he agreed that the application of Minnesota law undermined national unity or Wisconsin's sovereignty.

Despite its purported centrality to the legislative jurisdiction analysis, the Ninth Circuit has cited *Allstate* on only seven occasions, not once in the antitrust context.

VIII. Phillips Petroleum Co. v. Shutts: Justice Brennan's "Significant Contacts" Standard Becomes Law

Four years later, the Supreme Court applied *Allstate* to strike down a state court's choice of law decision on legislative jurisdiction grounds. *Shutts*[76] is significant not only because it analyzes legislative jurisdiction under more complex (*i.e.*, typical) factual circumstances, but because Justice Rehnquist, writing for the majority, endorsed the standard set forth in Justice Brennan's plurality opinion, elevating it to binding precedent.

Petitioner Phillips Petroleum had its principal place of business in Oklahoma. During the 1970's, it had produced or bought natural gas from leased land in 11 different states.[77] Respondents consisted of a putative class of 28,000 royalty owners holding rights to the

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71 *Id.* at 322.

72 *Id.* at 326.

73 *Id.*

74 *Id.* at 324.

75 *Id.* at 327-28.

76 472 U.S. 797 (1985).

77 *Id.* at 799.

leases from which Phillips produced the gas. They resided in all 50 states, the District of Columbia, and several foreign countries.[78]

Under federal law, Phillips was required to obtain approval for any price increases from the Federal Energy Regulatory Commission ("FERC").[79] Under FERC regs, if the agency denied or limited the price increase, Phillips would have to refund to its customers the difference between the approved price and the higher price that it had charged, plus interest.[80] Although Phillips charged higher prices pending FERC review, it suspended any increase in royalties based on the fact that the difference between the charged price and the approved price might be subject to recoupment by its customers. It agreed to pay the higher royalty to owners on the condition that they provided a bond for the increase, plus interest, in case the price increase was not approved and a refund was due. Royalty owners received no royalty on the unapproved portion of the increases until FERC final approval was given. Phillips suspended royalties on the unapproved portion of the price three times, corresponding to its three proposed price increases in the mid-1970s.

In three written opinions, FERC finally approved all three price increases, so Phillips paid royalty owners the suspended royalties of $3.7 MM in 1976, $4.7 MM in 1977, and $2.9 MM in 1978. Phillips paid no interest, even though the majority noted that it had the use of the suspended royalty money for several years.

The Kansas court certified a class of 33,000 royalty owners who had their royalties suspended, with Shutts as the named plaintiff.[81]

The class obtained a judgment against Phillips in Kansas state court to recover interest on delayed royalty payments under the leases. The Kansas Supreme Court affirmed over Phillips' objections that the Due Process Clause prevented Kansas from adjudicating the claims of all respondents, and that the Due Process Clause and the Full Faith and Credit Clause prohibited the application of Kansas law to all of the transactions between petitioner and the class.[82]

The Kansas Supreme Court rejected on appeal Phillips' contention that Kansas law could not be applied to plaintiffs who had royalty arrangements having no connection to Kansas.[83] According to the Court, the law of the forum state controlled all claims absent "compelling reasons" for applying a different law.[84] Finding none, the Court was satisfied that the named plaintiffs desired to have the case decided under Kansas law. As a matter of equity, the Court affirmed the award of interest on the suspended royalties.

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78 *Id.*

79 *Id.*

80 *Id.* (citing 18 C.F.R. § 154.102).

81 *Id.* at 801.

82 *Id.*

83 *Id.* at 803.

84 *Id.*

Turning to the issue of personal jurisdiction first, the U.S. Supreme Court held that the class opt-out procedure followed by the Kansas court satisfied due process.[85] The Court rejected Phillips' claim that unless the out-of-state plaintiffs affirmatively consented, *i.e.*, opted in, the Kansas courts could not validly exercise jurisdiction. The majority emphasized that the traditional concerns that an out-of-state defendant would be forced to defend in a distant forum upon pain of default, hire counsel, and incur substantial expense, were not implicated here. Here, class plaintiffs "were not haled anywhere to defend themselves upon pain of default judgment."[86] The class procedures, which the Court noted are akin to a "quasi-administrative proceeding, conducted by the judge," were sufficient to ensure that absent out-of-state plaintiffs' interests were looked after.[87]

On the other hand, the U.S. Supreme Court held that Kansas's application of its own law to the out of state claims and royalty agreements violated the Due Process Clause. Writing for the majority, Justice Rehnquist noted that over 99% of the gas leases and some 97% of the plaintiffs "had no apparent connection to the state of Kansas except for [the] lawsuit."[88] For its part, Phillips had argued at the trial level that Kansas should either apply the laws of the states where the leases were located, or, alternatively at least apply Texas and Oklahoma law because so many of the leases came from those states.[89]

Before determining whether the application of Kansas law violated either Due Process or Full Faith and Credit, Rehnquist noted that the Court had to determine whether the forum state's law "conflicts in any material way with any other law which could apply."[90] If not, there could be no conflict and therefore no injury. Among other differences, Phillips noted that there was no recorded Oklahoma decision dealing with interest liability for suspended royalties, and, even assuming it followed Kansas, the interest rate applied would be much lower.[91] Phillips also noted that although Texas law recognizes interest liability for suspended royalties, Texas had never awarded any such interest above 6%, the Texas constitutional and statutory rate, whereas Kansas had awarded interest between 7% and 9% (according to Commission rates governing the three prices increases),and post-judgment interest of 15%.[92] More importantly, Texas law appeared to excuse interest liability once the gas company offers to take an indemnity from the royalty owner and pay him the suspended royalty while the price increase is still tentative, just as Phillips had done.[93]

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85 *Id.* at 812.

86 *Id.* at 809.

87 *Id.*

88 *Id.*

89 *Id.* at 815-16. Appendices to the Supreme Court opinion showed that of the leases affected by the 1976, 1977 and 1978 FERC opinions, respectively, 5,680 of 7,389, 5427 of 6109, and 5,132 of 6,232 were in Oklahoma and Texas. A total of 22 leases were in Kansas.

90 *Id.* at 816.

91 *Id.* at 817.

92 *Id.* at 802, 817 & n.7.

93 *Id.* at 817-18 (citing *Phillips Petroleum Co. v. Riverside Gas Compression Co.*, 409 F. Supp. 486, 495-96 (N.D. Tex. 1976)).

Justice Rehnquist accorded Justice Brennan's plurality standard in *Allstate* precedential weight by conceding that he and Justices Burger and Powell were "in substantial agreement with the principle," despite their dissent.[94] Applying this standard, Justice Rehnquist pointed out that Phillips owned property and conducted substantial business in Kansas – such that Kansas has an interest in regulating its conduct there.[95] Oil and gas was an important business to Kansas, and although only a few of the gas leases were located there, hundreds of the royalty holders were located in Kansas, and the state had a real interest in protecting their interests. However, Kansas did not have a "significant contact or significant aggregation of contacts" to the claims unrelated to the state, and the substantive conflict with other jurisdictions such as Texas rendered the application of Kansas law to every claim in the case arbitrary and unfair under *Allstate*.[96]

At the same time, Justice Rehnquist sought to incorporate the standard set forth in Justice Powell's *Allstate* dissent into the Brennan standard: "[w]hen considering fairness in this context, an important element is the expectations of the parties."[97] Namely, there was no reason to believe that when the leases outside of Kansas were executed, the parties had any idea that Kansas law would control their respective rights and obligations.[98] The majority rejected the Kansas Supreme Court's view that in a nationwide class action, so long as notice and adequate representation is satisfied, the law of the forum should apply absent a compelling reason otherwise, holding that the *Allstate* analysis applies with equal force to class actions.[99]

IX. Does Due Process Require that an Indirect Purchaser Plaintiff Bought Price-Fixed Goods In Each State Whose Repealer Statute He Invokes, Even If He Has Significant Contacts with that State?

Returning to the case at bar, although there may be reasonable disagreement as to whether AT&T has adequately factually alleged "significant" contacts with California under *Allstate*, there seems to be little support for the proposition that a plaintiff must purchase a price-fixed good in the state whose *Illinois Brick* repealer statute he or she seeks to invoke, even if jurisdiction otherwise exists.

In its briefing before the district court on certification of the issue to the Ninth Circuit, AT&T argued that although it did not specifically allege that it bought price-fixed TFT-LCD or products containing TFT-LCD in California, there was no due process problem because it alleged that substantial conduct in furtherance of the illegal price-fixing conspiracy took place in the state, defendants were present in California, and the conspiracy was intended to, and did, affect LCD panel and LCD product prices in California.

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94 *Id.* at 818-19.

95 *Id.* at 819.

96 *Id.* at 821-22.

97 *Id.* at 822 (citing *Allstate, supra*, 449 U.S. at 333 (Powell, J. dissenting)).

98 *Id.*

99 *Id.* at 823.

According to AT&T, Judge Illston's finding "that the *only* 'transaction or occurrence' that matters for purposes of the due process analysis is the purchase of the price-fixed good" represents a radical departure from *Allstate* and *Shutts*. This is not far off. Although Judge Illston's dismissal order did not use the word "only," it did state that "[i]n a price-fixing case, the relevant 'occurrence or transaction' is the plaintiff's purchase of an allegedly price-fixed good."[100]

The foreign defendants relied upon two recent Northern District precedents dismissing antitrust claims, on either standing or due process grounds, in which plaintiffs likewise failed to allege they bought the price-fixed products in those states. *Id.* at *2. They are *Pecover v. Electronic Arts, Inc.*,[101] and *In re Graphics Processing Units Antitrust Litig.*[102]

In *Pecover*, named plaintiffs purported to represent a nationwide class of purchasers of the video game "Madden NFL," produced by Electronic Arts (EA). They alleged that EA foreclosed competition through its exclusive licensing agreement with the NFL.[103] They alleged six causes of action: (1) violation of section 2 of the Sherman Act, (2) violation of the Cartwright Act, (3) violation of California Business & Professions Code Section 17200, California's Unfair Competition Law ("UCL"), (4) unjust enrichment, and in the event the court did not apply California law, (5) violation of various other state antitrust and restraint of trade laws, and (6) violation of various state consumer protection laws.

After denying defendants' motions to dismiss the Section 2 and Cartwright claims, the court dismissed plaintiff's claims under eighteen states on standing grounds because the named plaintiffs did not live in those states and did not allege they purchased the game in those states.[104] *Pecover* is inapposite, because it was decided narrowly on standing grounds and because it did not involve price fixing at all.

By contrast, *In re Graphics Processing Units Antitrust Litigation ("GPU")* involved price fixing allegations under section 1 of the Sherman Act, the Cartwright Act and other state antitrust laws.[105] Indirect purchasers purported to bring claims on behalf of a nationwide class under the Cartwright Act and the UCL.[106] The indirect purchaser plaintiff class alleged that defendants conspired to fix prices and coordinate the release of new similar products, and that they purchased defendants' GPUs indirectly through intermediaries. Some of them alleged that they purchased the graphics cards themselves and others alleged they bought computers containing defendants' products. *Id.* Defendants moved to strike all references to a nationwide class on the ground that extraterritorial application of California's antitrust law would violate the Due Process Clause. The district court cited *Shutts* for the proposition that "for a nationwide class to invoke the law of a particular state, the chosen state's law must both (1) not conflict with the law of another jurisdiction that

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100 *In re TFT-LCD (Flat Panel) Antitrust Litig., supra,* 2010 WL 2609434 at *2.

101 633 F. Supp. 2d 976, 984 (N.D. Cal. 2009)

102 527 F. Supp. 2d 1011, 1027-29 (N.D. Cal. 2007).

103 633 F. Supp. 2d at 978-79.

104 *Id.* at 984.

105 527 F. Supp. 2d at 1013.

106 527 F. Supp. 2d 1011, 1027.

has an interest in the case, and (2) have a significant contact or significant aggregation of contacts to claims asserted by each member of the plaintiff class to insure that the choice of the forum state's law is not arbitrary or unfair."[107]

The first statement is incorrect. *Shutts* never prohibited all conflict between the forum state and another state with any "interest" in the case. It merely held that, as a threshold matter, if there were no material conflict between state laws, there could be no injury in the forum state's choice of law determination, and therefore no due process violation.[108]

Recall that *Shutts,* as well as *Allstate,* recognized that the choice was not necessarily between the forum state's law and one or more other state's laws: "the plurality in *Allstate* noted that a particular set of facts giving rise to litigation could justify, constitutionally, the application of more than one jurisdiction's laws."[109] In some circumstances, the forum state might apply more than one state repealer statute. That is to say, the mere existence of a conflict between the forum state's repealer statute, and one or more other state's repealer statute(s), does not necessarily give rise to a due process problem.

The district court in *GPU* determined that the plaintiff class could not represent a national class of indirect purchasers under the Cartwright Act, because many of the 50 states had not adopted repealer statutes, and their residents had no right to sue for overcharges that were passed on to them.[110] In *In re TFT-LCD*, by contrast, AT&T is suing on its own behalf and not on behalf of absent class members from states lacking repealer statutes.

Defendants in *GPU* also argued that the named plaintiff failed to plead adequate contacts between the parties and the transaction or occurrence:

> [N]ot all plaintiffs [ ] alleged that they bought graphics cards in California, or that defendants produced graphics cards in California, or even that the alleged secret meetings between defendants representatives took place in California ... Plaintiffs reply, however, that the conduct in furtherance of the conspiracy took place in California. Nvidia is allegedly headquartered in California. ATI has at least some business operations here in California. Representatives from both companies attended meetings in California, or so it is alleged. It remains, however, that plaintiffs have never alleged the specific locations of any of the meetings between defendants. Moreover, [defendant] ATI is organized in Canada and has its headquarters there.[111]

The district court emphasized that, in the class context, even where substantial contacts have been pled, "district courts have declined to apply a single state's law to a nationwide

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107 *Id.*

108 *Shutts, supra,* 472 U.S. at 816 ("We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit.")

109 *Id.* at 818

110 527 F. Supp. 2d at 1027.

111 *Id.* at 1028.

antitrust class."[112] The case upon which *GPU* relied, *In re Refalen Antitrust Litigation,* involved class plaintiffs' attempt to apply Pennsylvania law to a nationwide antitrust class because the company producing the drug was headquartered in Pennsylvania and the product was sold and distributed from that state.[113]

GPU is distinguishable insofar as it never clearly held that an indirect purchaser must have bought the price-fixed good in the state or states whose *Illinois Brick* repealer statute he or she seeks to invoke. Moreover, unlike *TFT-LCD,* it involved an attempt by a national class of plaintiffs to use a single repealer statute to pursue claims and damages on behalf of individuals in states whose own statutes did not provide for such recovery.

X. Conclusion

The Ninth Circuit is now presented with the opportunity to clarify the limits that the Constitution places on a state's ability to apply its own antitrust laws to conduct that took place in another state. The holding of *Allstate* strongly suggests that the Constitution does not forbid California from applying its own antitrust laws to out-of-state sales of price-fixed goods where there are other significant contacts between California, the claims, and the parties. Still, the question remains whether on these facts AT&T has alleged a sufficient "aggregation of contacts" to allow California law to apply.

If AT&T were to prevail on appeal, the district court might still refuse to apply California law to all of its out-of-state indirect purchaser claims under a choice of law analysis. This appeal will only determine whether California law could constitutionally be applied to those claims. If, on the other hand, the Ninth Circuit finds against AT&T, the decision could make it substantially more difficult for indirect purchaser plaintiffs around the country to recover for purchases that take place in states without their own *Illinois Brick* repealer statutes. In any event, the Ninth Circuit's decision should provide some welcome guidance as to what type of contacts an indirect purchaser plaintiff must allege with a forum state in order to be able to recover under that state's antitrust laws.

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112 *Id.* at 1028 (citing *In re Refalen Antitrust Litig.*, 221 F.R.D. 260, 276-77 (D. Mass. 2004)).

113 *Id.*