STATE OF NORTH CAROLINA

COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
02 CVS 4375

AULEY M. CROUCH, III, On behalf of himself and others similarly situated,

Plaintiff,

v.

CROMPTON CORPORATION, CROMPTON MANUFACTURING COMPANY, INC. formerly named in North Carolina as UNIROYAL CHEMICAL COMPANY, INC., UNIROYAL CHEMICAL COMPANY LIMITED, FLEXSYS NV, FLEXSYS AMERICA LIMITED PARTNERSHIP OF NORTH CAROLINA, BAYER AG, and BAYER CORPORATION,

Defendants.

DEFENDANTS' BRIEF IN RESPONSE TO THE COURT'S ORDER OF AUGUST 27, 2004
[OTHR]

Defendants submit this brief in response to the Court's Order of August 27, 2004 for briefing to address the application of the factors enumerated in *Associated General Contractors of California, Inc. v. California State Counsel of Carpenters*, 459 U.S. 519 (1983) ("*AGC*") and an analysis of the application of a "target area" factor to the facts alleged in this case.

INTRODUCTION

The analysis in *AGC* provides guidance that North Carolina courts should consider in deciding at what point an alleged injury is too remote to have occurred "by reason of any *act or thing done* by any other person . . . in violation of [the North Carolina antitrust statute]" as required by N.C.G.S. § 75-16. As the Supreme Court recognized in *AGC*, "[a]n antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but . . . [i]t is reasonable to assume that [the legislature] did not intend to allow every person

tangentially affected by an antitrust violation to maintain an action to recover." *AGC*, 459 U.S. at 534 (internal citations omitted). In typical indirect purchaser cases, the purchasers bought the allegedly price-fixed product from a party (or parties) other than the defendants, but were participants in the distribution chains of the price-fixed product. In contrast, derivative purchasers, like Crouch[1], are not in the distribution chain of the allegedly price-fixed product but are instead at the far end of one of many distribution chains of entirely different and derivative products made using those ingredients. The expansion of antitrust liability to such cases ignores the need to impose prudential limits on standing in order to bar cases involving attenuated and speculative harm in collateral markets. The factors enumerated in *AGC* and the "target area" test both support rejection of standing in this and other such cases.

ARGUMENT

In *AGC*, the Court enumerated several factors for use in assessing antitrust standing: (1) the causal connection between the claimed antitrust violation and the claimed injury to the plaintiff, and whether the defendant intended to injure that plaintiff, 459 U.S. at 537; (2) the nature of the alleged injury, *id.* at 540; (3) the directness or indirectness of the asserted injury, *id.* at 540; (4) the potential for duplicative recovery or complex apportionment of damages, *id.* at 543-44; and (5) the existence of more direct victims of the alleged violation, *id.* at 542. Application of those factors here confirms that Crouch lacks standing.[2] That same result applies

[1] As set forth in previous briefing, Plaintiff Auley Crouch ("Crouch") claims that Defendants fixed the prices at which they sold rubber-processing chemicals to tire companies, which used those chemicals to process rubber that they used to make tires, which were then sold to tire wholesalers, which sold the tires to tire retailers, which then sold the tires to consumers such as Crouch. (Am. Compl. ¶¶ 40-41). Crouch further claims that the alleged overcharges filtered through the various distribution chains and were ultimately, in some measure, felt by Crouch and the other putative members of the class when they purchased tires. (Am. Compl. ¶¶ 41, 55).

[2] Courts have noted that no single factor is decisive; rather a balance of all the factors is necessary. *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989); *see also Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, Case No. C 97-3259 FMS, 1997 WL 732498 *2 (N.D. Cal.).

under the "target area" test, which limits standing to those within the area of the economy targeted by the anti-competitive conduct.

I. CROUCH LACKS STANDING TO SUE UNDER ANY OF THE FACTORS ANNOUNCED IN *ASSOCIATED GENERAL CONTRACTORS.*

In *AGC*, a labor union ("Union"), on behalf of local unions and district councils, alleged that Associated General Contractors ("AGC"), a trade association of general contractors, coerced landowners, as well as competing general contractors and its own members, to give some of their business to non-union firms. *Id.* at 520-21. The Union claimed that AGC did so with the intent to injure contractors who signed collective bargaining agreements with the Union. *Id.* at 526. Thus, the Union claimed, AGC restrained the trade of the targeted contractors. *Id.* at 523 n.4.

The Court held that courts should evaluate proximate cause as an element of the standing analysis in considering whether to permit a plaintiff whose alleged injury is remote or indeterminate to sue for damages. *Id.* at 536. In fact, the Court concluded that the overarching inquiry of standing analysis should be an evaluation of "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id.* at 535.

The Court then dismissed the Union's claim holding that even though the Union alleged that AGC intended to harm it directly, the pleadings were insufficient to grant standing for the Union as a matter of law given "the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy." *Id.* at 545. The Court further noted that any possible injury was too indirect. *Id.* at 541 n.46.

The *AGC* factors provide guidance on the propriety of standing in cases such as this, which involve products used to make components (*i.e.*, processed rubber) that were processed

using chemicals allegedly sold at fixed prices by Defendants to third parties who then used those components to make a myriad of products (or sold them to third parties to be used in that fashion). Each of these products, in turn, has its own distribution chain with intermediate steps; some of these products, such as the tires in this case, eventually are sold to consumers in one of those many chains.[3]

A. Causal Connection and Intent to Harm

Crouch admits neither he nor any member of the purported class purchased rubber-processing chemicals directly from any of the Defendants; in fact, they did not purchase rubber-processing chemicals from anyone. This distinction is critical because Crouch is not an indirect purchaser of *Defendants' products*. Instead, Crouch, at most, *derivatively* purchased a product that is used or consumed in the production of the product he bought (tires)--even though he bought those tires from a seller (a tire retailer) that itself did not buy or use the allegedly price-fixed product.

This lack of privity also dooms any contention that any Defendant acted deliberately to harm consumers who never purchased Defendants' products. In fact, courts have refused to find intent under less tortured allegations. *See, e.g., Camden Co. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F.Supp.2d 245, 259 (2000) (noting that an allegation of recklessness is not tantamount to intent to harm); *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F.Supp.2d 882, 904 (2000) (failing to find intent despite plaintiffs' allegation that the defendant was aware of the harm). Because of the remoteness of any conceivable connection on these allegations, as

[3] Although the class allegations of paragraph 20 of the Amended Complaint refer to all persons who "purchased tires other than for resale," which on its face would encompass an array of specialty tires uniquely manufactured to different specifications (using different types and amounts of chemicals) and distributed for a variety of specific applications (i.e., for heavy equipment, bicycles, lawn equipment, strollers, etc.), Crouch's arguments, and this Brief, focus on tires bought for (or as original equipment on) automobiles and trucks purchased for household or commercial purposes.

well as the absence of any manufacturer-consumer relationship between Crouch and any of the Defendants, this factor weighs against antitrust standing under *AGC*.

B. The Nature of the Alleged Injury

The Court made clear in *AGC* that, in considering the nature of the alleged injury, courts should focus on whether a plaintiff's alleged injury is "of the type that the statute was intended to forestall." *AGC*, 459 U.S. at 540. Here, as explained in Defendants' prior briefs, Crouch's alleged injury is not of the type that the North Carolina statute was intended to prevent. *See* Defs.' Joint Mem. In Supp. of Defs.' Mot. Dismiss, at 7-11; Defs.' Joint Reply Mem. In Supp. of Defs' Mot. Dismiss, at 3.

In particular, N.C.G.S. § 75-16 applies only to injury that has occurred "by reason of any *act or thing done* by any other person . . . in violation of [the North Carolina antitrust statute.]" It is, therefore, different from even the broad "by reason of anything forbidden in the antitrust laws" language in Section 4 of the Clayton Act, 15 U.S.C. § 15. Whatever "act or thing" any Defendant is alleged to have "done" to the price of rubber-processing chemicals that may have affected the price of that product, it is clear that no Defendant did any "act or thing" to the price of tires because none of them makes tires or can control the price of tires.

Put another way, Crouch is neither a consumer nor a competitor in the alleged price-fixed market (rubber-processing chemicals) and, by virtue of the statutory language, cannot overcome a substantial presumption against standing. This fact was also relied upon by the Court in *AGC*, where the Court noted AGC "was neither a consumer nor a competitor in the market in which trade was restrained." *AGC*, 459 U.S. at 539; *see also Bhan v. NME Hosps., Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985) ("The requirement that the alleged injury be related to anti-competitive behavior requires, as a corollary, that the injured party be a participant in the same

market as the alleged malefactors"). While typical indirect purchasers *are* consumers in such markets, here that is *not* the case.

C. The Directness or Indirectness of the Injury

The Court in *AGC* also examined the directness of the Union's injury, both to prevent excessive and duplicative litigation and to avoid highly complicated damage calculations and speculative claims. *AGC*, 459 U.S. at 542-44. Here, third-party tire manufacturers purchased various types of rubber-processing chemicals, allegedly at an artificially high price, and used those chemicals to manufacture different brands, models and sizes of tires, including the tires that Crouch purchased. So, even assuming a collusive increase in a component of tires as small as rubber-processing chemicals, a tire manufacturer *may or may not* have passed on some or all of that infinitesimal cost increase to its tire distributor or to a vehicle manufacturer, who *may or may not* have passed on some of that increase to retailers of tires or vehicles. Finally, even if this hypothesized infinitesimal increase in the cost of tire manufacturing materials ultimately was passed along to tire or vehicle retailers, the additional few cents at stake *may or may not* have passed on to consumers who purchased tires and vehicles in an intensely competitive retail marketplace. *See Southhaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1087 (6th Cir. 1983) ("indirect injuries may render damages highly speculative or create situations of complexity that would foreclose an equitable determination and apportionment of damages"). Thus, this factor weighs heavily against antitrust standing.

D. The Potential for Duplicative Recovery or Complex Apportionment

Any decision to grant standing to Crouch and the proposed class clearly subjects Defendants to the risk of multiple liability. Direct purchasers of rubber-processing chemicals, who are more closely related to the claimed antitrust violation, have every incentive to pursue

claims. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 at 746 (1977). In fact, direct purchasers have filed a nationwide class action lawsuit in federal court, seeking to recover treble damages on the same claimed overcharge that Crouch seeks on behalf of the proposed class. *In re Rubber Chemicals Antitrust Litig.*, Master Docket No. C-03-1496 (N.D. Cal. (Judge Martin J. Jenkins)). In that lawsuit, by virtue of *Illinois Brick's* direct purchaser rule, those plaintiffs would be entitled to three times any overcharge they could prove with no ability by Defendants to assert that any such overcharges could be or were passed along. Yet, in this case, Crouch seeks recovery of at least a portion (and maybe even the entirety) of the same claimed overcharge. This is a classic example of the risk of multiple liability that the Supreme Court recognized in *Illinois Brick*, declaring itself "unwilling to 'open the door to duplicative recoveries' under § 4." *Illinois Brick*, 431 U.S. at 730 (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972)). Tire retailers could also make similar claims. Therefore, this factor weighs against standing in even more attenuated derivative purchaser suits such as this.

E. The Existence of More Direct Victims of the Alleged Conspiracy

There are clearly more directly injured persons with a motivation to sue over the allegations in this case. Indeed, as explained above, they already have sued. Allowing Crouch and the proposed class to "pile on" would add little, if anything, to the deterrence value of the antitrust laws. This case, therefore, presents the very concern that *AGC* observed when it contemplated "the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *AGC*, 459 U.S. at 542; *see also Serfecz v. Jewel Food Stores, Inc.*, Case No. 92 C 4171, 1994 WL 478576 * 9 (N.D. Ill) ("the mere existence of competitors or consumers in the

relevant market who *could* sue is considered a factor in favor of denying standing") (emphasis in original).

In sum, the Supreme Court's decision in *AGC* supports a conclusion that Crouch, as an indirect purchaser of a derivative product that incorporates the allegedly price-fixed product, lacks antitrust standing for purposes of the North Carolina antitrust statute.

II. CROUCH ALSO LACKS STANDING TO SUE UNDER ANY UNDERSTANDING OF THE "TARGET AREA" TEST

The Court has also asked that Defendants address the application of the "target area" approach to antitrust standing described in *AGC*. The "target area" test limits standing to "the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *AGC*, 459 U.S. at 537 n.33.

Crouch is not in the "area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Id.* When considered in the context of derivative purchaser suits such as the one brought by Crouch, the "target area" test dovetails with all of the factors expressed by *AGC* and with the Court's concern that the Union was "neither a consumer nor a competitor in the market in which trade was restrained." *Id.* at 539.

If standing is accorded to persons alleged to have "suffered economic damage by virtue of their relationship with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves" prudential standing concerns arise as the field of potential plaintiffs expands (both laterally to other products and horizontally to attenuated plaintiffs) to jeopardize recovery by those who *are* in the distribution chain for the price-fixed product, and are thereby able to allege more direct injury and a breakdown of conditions in a particular industry in which they *are* a participant. *Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295-96 (2nd Cir. 1971).

Here, of course, Crouch is not a downstream consumer of any product manufactured and sold by Defendants. He instead is many steps removed from the allegedly overpriced products (rubber-processing chemicals) which were used or consumed in the production of yet a different product (tires) and which then passed through several additional distribution steps before reaching Crouch. A decision to grant standing to plaintiffs such as Crouch, who have such a remote relationship to the challenged conduct, would open "the flood-gate to all, no matter how remote their interest or incidental their relationship" and sacrifice the exact restraint courts mean to impose in determining the "target area" of the alleged violation. *Id.* at 1296. Indeed, if there are thousands of products made with rubber-processing chemicals, there are thousands of lawsuits waiting to fill court dockets with attenuated claims that bear all of the problems reflected in the analysis of the factors above.

As previously discussed, the claimed injury necessary to invoke N.C.G.S. § 75-16 must have occurred "by reason of any *act or thing done* by another person . . . in violation of [the North Carolina antitrust statute]." Defendants did not do "any act or thing" to the price of tires because no Defendants manufacture tires. To allow standing here, the Court would have to reach beyond the "target area" affected by the alleged violation and expand standing to include those outside the distribution chain of the allegedly price fixed product who purchased a derivative product at the far end of an entirely different distribution chain.

Furthermore, granting standing to an indirect purchaser, like Crouch, who never purchased rubber-processing chemicals would make it impossible to draw a line limiting who can sue for allegedly wrongful pricing. Under this approach, a class of persons consisting of purchasers of freight-transported products might have a claim against rubber-processing chemical manufacturers by claiming that the freight company passed through an increase in the

costs of truck tires resulting from the alleged rubber-processing chemicals conspiracy. Or, more practically, moving laterally to different distribution chains, the court could be faced with serial lawsuits for consumers of any products made with processed rubber such as shoes, weather stripping, athletic equipment, rubber bands and many other products and parts of products. Thus, any effort at line drawing, short of denying standing to anyone who did not purchase the allegedly price-fixed product, necessarily makes it impossible to announce any principled method of drawing that line.

Such a rule, however, would not affect typical indirect purchaser standing because such plaintiffs have purchased the price-fixed product from someone other than the defendant. *See e.g., Hyde v. Abbott Labs., Inc.*, 123 N.C. App. 572, 473 S.E.2d 680 (1996).[4]

CONCLUSION

To allow standing in this case would ignore the prudential standing concerns outlined by the Supreme Court in *AGC* and expand the scope of standing to derivative purchasers not in the distribution chain of the allegedly price-fixed product. By following the guidance set forth in *AGC*, however, the Court can articulate a standard that denies standing to those whose claims are so remote as to be detrimental to the interests of direct and indirect purchasers of the alleged price-fixed product, the courts, and consumers who ultimately pay higher prices to finance such litigation.

[4] While Defendants do not concede that *Hyde* was correctly decided, the standard proposed here does not conflict with that set forth in *Hyde* for the reasons set forth in Defendants' prior briefs.

This the 15th day of September, 2004.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief in Response to the Court's Order of August 27, 2004 has been served by mailing a copy thereof, by first class mail, postage prepaid, to the parties to this action, addressed as follows:

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