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From *Walker Process* to *In re DDAVP*: Should Direct Purchasers Have Antitrust Standing in *Walker Process* Claims?

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In *In re: DDAVP Direct Purchaser Antitrust Litigation*, decided in 2006, the district court held that direct purchasers of a product from a monopolist which secured its monopoly by fraud on the Patent Office do not have standing to bring a *Walker Process* claim.[1] I examine the reasoning behind the decision and conclude that the court's holding is erroneous. Because direct purchasers can clearly be victims of a monopoly obtained by the enforcement of a fraudulently obtained patent, they should have standing to assert a *Walker Process* claim.

I. *WALKER PROCESS*

In *Walker Process*, the Supreme Court held that the enforcement of a patent procured by intentional fraud on the Patent and Trademark Office may violate the Sherman Act, provided that the other elements of a Sherman Act claim are present.[2] The Supreme Court reasoned that a patent "by its very nature" is an exception to the general rule against monopolies and that there is a public interest in ensuring that patent

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[1] *In re* DDAVP Direct Purchaser Antitrust Litigation (*In re* DDAVP), 2007-1 Trade Cas. ¶ 75,726, 2006 U.S. Dist. LEXIS 96201 (S.D.N.Y. November 2, 2006).

[2] Walker Process Equip., Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172, 176.

monopolies are not founded upon fraud or other inequitable conduct.[3] As such, proof that a patent owner has obtained its patent by knowingly and willfully defrauding the Patent and Trademark Office is enough to strip that patent owner of its exemption from the antitrust laws.[4] The Supreme Court thereby held that a suit for damages by a private plaintiff claiming violation of Section 2 of the Sherman Act was not barred by the general rule that only the United States may sue to cancel or annul a patent.[5]

The *Walker Process* holding does not define the scope of the class of private plaintiffs who have standing to bring a *Walker Process* claim, and courts have split on whether consumers have standing to do so. *In re: DDAVP Direct Purchaser Antitrust Litigation* is one of the recent decisions to address the issue.[6] The decision is currently on appeal to the United States Court of Appeals for the Second Circuit. The Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") were among the amici to file briefs urging reversal of the decision.[7]

II. *DDAVP*

In *DDAVP*, direct and indirect purchasers of DDAVP, an antidiuretic, filed separate class action complaints against Ferring, which developed and manufactured the drug, and Aventis, which marketed and sold the drug.[8] Plaintiffs alleged that defendants

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[3] *Id*. at 177.

[4] *Id.*

[5] *Id*. at 175.

[6] *See In re* DDAVP.

[7] Brief for the United States and Federal Trade Commission as Amici Curiae Supporting Plaintiffs-Appellants ("Gov't Brief"), *In re* DDAVP Direct Purchaser Antitrust Litigation, 2006 U.S. Dist. LEXIS 96201 (No. 06-5525).

[8] *See In re* DDAVP at *5.

"unlawfully maintained a monopoly in the relevant market" by: (1) obtaining the patent for DDAVP through fraud and inequitable conduct before the Patent and Trademark Office; (2) improperly listing the patent in the United States Food and Drug Administration's ("FDA") publication of approved *Reference Listed Drugs* (the "Orange Book"); (3) prosecuting a sham patent infringement litigation in order to delay FDA approval and market entry of generic DDAVP tablets; and (4) filing a sham citizen petition with the FDA in an effort to further delay final FDA approval of generic DDAVP tablets.[9] The gist of Plaintiffs' allegations was that, because of Defendants' fraudulent and/or inequitable conduct, the Defendants had obtained an illegal monopoly that "unreasonably restrained, suppressed and eliminated competition in the market for DDAVP and its generic equivalents."[10] Plaintiffs claimed that, as a result of the lack of competition, they had paid hundreds of millions of dollars more for DDAVP than if competing versions of DDAVP had been available.[11]

Defendants moved to dismiss on three bases: (1) that both direct and indirect purchaser plaintiffs lacked standing to assert the alleged antitrust violations; (2) that the indirect purchasers' state-law claims were preempted by federal patent law; and (3) that the state-law claims suffered from other defects, meriting dismissal.[12] I focus here on the standing issue for direct purchasers. Defendants argued that, because the direct purchasers were not competitors and neither defendant had threatened to enforce the patents against the direct purchasers, they lacked standing to assert a *Walker Process*

[9] *Id.* at *5 – 6.

[10] *Id.* at *6.

[11] *Id.*

[12] *Id.* at *8.

claim.[13]

The *DDAVP* court, Senior Judge Charles Brieant of the United States District Court for the Southern District of New York presiding (who has since passed away), agreed.[14] The court noted standing is a two-pronged analysis. The first prong requires the court to determine whether plaintiff suffered an antitrust injury.[15] If so, the second prong requires the court to determine whether any factors prevent the plaintiff from being an "efficient enforcer of the antitrust laws."[16] Citing *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters* ("*AGC*"),[17] the court listed six relevant factors: (1) the causal connection between the alleged antitrust violation and the harm to plaintiff; (2) the existence of an improper motive; (3) whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness of the connection between the injury and alleged restraint in the relevant market; (5) the speculative nature of the damages, and (6) the risk of duplicative recoveries or complex apportionment of damages.[18]

Having cited the relevant *AGC* factors, the *DDAVP* court failed to analyze their application to the facts. Instead, the court reflexively relied on two decisions concerning consumer standing in *Walker Process* claims: *Walgreen Co. v. Organon, Inc. (In re*

[13] *Id.* at *9.

[14] *Id.* at *17.

[15] *Id.* at *19.

[16] *Id.*

[17] Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters (*AGC*), 459 U.S. 519 (1983).

[18] *In re* DDAVP at *18.

Remeron Antitrust Litigation) ("Remeron")[19] and *In re Ciprofloxacin Hydrochloride Antitrust Litigation* ("*Cipro*")[20]—both holding that consumer plaintiffs have no antitrust standing to litigate a *Walker Process* claim. Relying on *Remeron* and *Cipro*, the *DDAVP* court reasoned that *Walker Process* standing was limited to competitors who were the subject of attempts to enforce the improperly obtained patents and did not extend to purchasers from a monopolist. The *DDAVP* court held that, because the direct purchaser plaintiffs failed to "adequately allege any set of facts that would amount to enforcement, attempted enforcement or threatened enforcement of defendant's patents vis-à-vis the plaintiff,"[21] they lacked antitrust standing to assert a *Walker Process* claim.[22]

III. *REMERON* AND *CIPRO* OFFER LITTLE SUPPORT FOR THE COURT'S CONCLUSION

Had the court fully analyzed *Remeron* and *Cipro*, it would have found that they did not provide any support for such a holding because: (1) the *Remeron* court's holding relied on an incorrect analysis of antitrust standing principles and (2) the *Cipro* court's reasoning is not applicable to *DDAVP*'s set of facts. The *Remeron* court held that: "Plaintiffs, as direct purchasers, neither produced [the patented drug] nor would have done so; moreover, Plaintiffs were not party to the initial patent infringement suits. Plaintiffs may not now claim standing to bring a *Walker Process* claim by donning the

[19]Walgreen Co. v. Organon, Inc. (*In re* Remeron Antitrust Litig.), 335 F. Supp. 2d 522 (D.N.J. 2004).

[20]*In re* Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514 (E.D.N.Y. 2005).

[21]*In re* DDAV*P* at *21, citing Indium Corp. of America v. Semi-Alloys, Inc., 566 F. Supp. 1344 (N.D.N.Y. 1983).

[22]*Id.*

cloak of a Clayton Act monopolization claim."[23] The *Remeron* court appeared to regard the direct victims of a fraud in obtaining a patent as limited to those who would compete in the market for the patented product in the absence of the patent.[24]

This puts antitrust standing analysis on its head. In almost every instance, the direct customers of a monopolist have standing. They are the ones required to pay artificially high prices created by the monopolist's wrongfully obtained ability to raise prices. *Walker Process* confers standing on competitors also because their ability to compete is constrained by the unlawfully obtained patent. Thus there are two direct classes of victims of a monopolist's actions: the customers forced to pay higher prices and the competitors precluded from competing.[25]

Walker Process claims are not fraud claims, as the *Remeron* court seemed to regard them. They are alleged antitrust violations. Given that "the harm is not the invalid patent, but the use of the invalid patent to establish a monopoly,"[26] a consumer directly harmed due to a monopoly maintained by the enforcement of a fraudulently obtained patent should have standing to assert a *Walker Process* claim.

In *Cipro*, the direct consumer plaintiffs' antitrust challenge was not based on a *Walker Process* claim, as the direct consumer plaintiffs did not allege that the patent was

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[23] *In re* Remeron Antitrust Litig. at 529.

[24] Molecular Diagnostics Labs v. Hoffman-La Roche, Inc., 402 F. Supp. 2d 276 (D.D.C. 2005) (holding that the *Remeron* court "appears to believe that, standing alone, the enforcement of the fraudulently procured patent is the relevant injury in a *Walker Process* claim, hence the court's assertion that a plaintiff must be an actual or potential competitor").

[25] A comparison with Section 1 price-fixing cases may be helpful. There, competitors of the conspirators generally do not have standing. In general, they are not injured. They benefit from the higher prices created by the conspiracy. But the customers of the price fixers still have standing; they are the ones required to pay higher prices.

[26] *Molecular Diagnostics*, 402 F. Supp. 2d at 280.

obtained by intentional fraud on the Patent and Trademark Office. Instead, their allegations were based on a settlement agreement of a patent dispute between defendants that they viewed as anticompetitive.[27] The indirect consumer plaintiffs' antitrust challenge did allege "*Walker Process*-type and sham litigation violations under state law."[28] But the *Cipro* court never got to that issue because it ruled their claims were preempted by federal patent law.[29] Therefore, *Cipro* provides no support for the *DDAVP* court's holding that the direct consumers in *DDAVP* lacked standing to assert a *Walker Process* claim.[30]

IV. THE *DDAVP* COURT INCORRECTLY DENIED DIRECT PURCHASERS STANDING TO ASSERT A *WALKER PROCESS* CLAIM

A competitor's standing to assert an antitrust claim simply does not preclude a direct customer's standing to do the same. The Supreme Court clearly recognized this in *Blue Shield of Virginia v. McCready.*[31] There, the Court held that the plaintiff purchaser of psychotherapy services from a psychologist had antitrust standing to seek treble damages for a conspiracy between a local healthcare provider and a group of psychiatrists to refuse reimbursement for such services unless they were provided by a psychiatrist. In that case, just like in *DDAVP*, there were two sets of direct victims: the psychologists who were boycotted by the healthcare provider and Ms. McCready who was not reimbursed for the cost of services she incurred.

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[27] *In re* Ciprofloxacin at 541.

[28] *Id.* at 542-543.

[29] *Id.*

[30] *See* Gov't Brief at 12.

[31] Blue Shield of Va. v. McCready, 457 U.S. 465, 478-479 (1982).

A more recent case that has held that direct customers have standing to assert a *Walker Process* claim is *In re Netflix Antitrust Litigation*.[32] There, a direct customer filed an antitrust class action against Netflix, an online DVD rental service. Plaintiffs alleged that Netflix fraudulently obtained a patent which it used to exclude competitors from the relevant market.[33] Plaintiffs claimed that, as a result, they were injured by the higher prices that Netflix was able to charge due to its monopoly.[34] Netflix moved to dismiss Plaintiffs' complaint, arguing, among other things, that consumers, "even when they are direct purchasers," do not have standing to assert *Walker Process* claims.[35] Finding Netflix's argument unpersuasive, the court held that, although *Walker Process* claims are "predicated on enforcement of a fraudulently-obtained patent, the harm still accrues directly to consumers. Competitors are excluded from the market allowing the patentee to create or maintain an unlawful monopoly. Accordingly, if plaintiffs can plead the other elements of their *Walker Process* claim, they have standing."[36]

Although *Netflix* was decided seven months after *DDAVP*, *McCready* had been decided long before. Yet, the *DDAVP* court made no mention of the *McCready* case and instead cited *AGC* as support for its contention that *Remeron* and *Cipro* "have the better side of the argument" over *Molecular Diagnostics* (which held that direct consumers do

[32] *In re* Netflix Antitrust Litig., 506 F.Supp.2d 308 (2007).

[33] *Id.* at 315.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 316 (finding that the *Netflix* Plaintiffs' *Walker Process* claim was dismissed, not for lack of standing, but because Plaintiffs did not plead a sufficient level of patent enforcement against Netflix's potential competitors).

have standing to assert a *Walker Process* claim[37]).[38] *AGC* does not lead to such a conclusion. All *AGC* held was that there are limitations on recovery under Section 4 of the Clayton Act; it permits recovery only for antitrust injury of the type that the "antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[39] Under *AGC*, for an injury to give rise to antitrust standing, the injury should "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[40] *AGC*, therefore, provides a limitation on Section 4 recovery, but that limitation does not bar the *DDAVP* direct purchasers' *Walker Process* claim because a direct purchaser's payment of inflated prices arising from the enforcement of a fraudulently obtained monopoly is the type of injury that the antitrust laws were intended to prevent.

Of course, causation will always be an element of a claim for damages under a *Walker Process* claim, just as it is under any Section 2 claim. As a result, a direct purchaser seeking damages would need to allege and prove, for example, that the defendant's enforcement of the fraudulently obtained patent against its competitors caused the purchaser's injury in the form of higher prices. The *DDAVP* complaint included such allegations.[41]

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[37] *Molecular Diagnostics* at 281.

[38] *DDAVP* at 17.

[39] *AGC* at 535.

[40] *Id.*

[41] Class Action Complaint at 3, *In re* DDAVP Direct Purchaser Antitrust Litigation (*In re* DDAVP), 2006 U.S. Dist. LEXIS 96201 (S.D.N.Y. 2006) (No. 05-2237).

V. CONCLUSION

Denying antitrust standing to direct consumers who raise *Walker Process* claims is contrary to any principled antitrust standing analysis. The DOJ and the Federal Trade Commission agree, and said so in an amicus brief recently filed in the appeal of the *DDAVP* decision. As they explained, "[i]f a seller unlawfully maintains a monopoly… by enforcing a fraudulently obtained patent . . . and that seller charges direct customers supracompetitive prices as a result, these customers suffer core antitrust injuries" and therefore have standing to assert an antitrust claim seeking damages.[42] Merely because plaintiffs are customers, not competitors, should not automatically preclude a finding that, under *Walker Process*, they have standing to assert a *Walker Process* claim against a defendant who fraudulently obtained a patent.

[42]Gov't Brief at 11.