CPI's North America Column Presents:

Umbrella Liability: Has Its Time Come?

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Introduction

This Article addresses the case law and commentary dealing with the question of whether antitrust claims brought by so-called "umbrella plaintiffs" should be permissible. Such claimants purchase products or services from firms who compete with, but are not members of a cartel, or are competitors of a defendant accused of unlawful exclusionary conduct. As a matter of antitrust policy and sound economics, umbrella purchasers suffer actionable harm, because their suppliers are incentivized to raise their prices under cover of the cartel's or monopolist's umbrella, and thereby are forced to pay an overcharge for the same products or services as claimants who buy directly from the wrongdoers.

Those supporting antitrust standing for umbrella plaintiffs argue that allowing their claims to go forward furthers the policy goals of antitrust: promoting competition; deterring anticompetitive behavior; compensating injured parties; and restoring market integrity. Those opposed to the concept contend that such damages are unduly expansive of monetary accountability and highly speculative of a demonstrable cognitive nexus.

To date, the U.S. Supreme Court has not addressed the antitrust standing issue, but three circuits have upheld umbrella liability — the Third, Fifth, and Seventh. The Ninth Circuit has rejected umbrella liability in a multi-step distribution scheme but specified that it was not ruling as to the permissibility of such a claim in a single-step distribution scheme. A Second Circuit panel did not appear to favor the concept of umbrella plaintiff standing because of a concern that it risks leading to exorbitant damage recoveries, but the court did not rule on the issue. While no circuit has rejected the concept, to avoid overly inclusive liability the courts that have endorsed it have limited antitrust standing to those who can prove proximate causation. U.S. commentary has generally endorsed the concept, and it is permitted in Canada and the EU.

I. United States

A. Section 4 of the Clayton Act and *Associated General Contractors*

Under Section 4 of the Clayton Act, treble damages may be awarded to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[2] This broad provision reflects Congress's "expansive remedial purpose" in enacting Section 4: to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.[3]

In considering the scope of Section 4 of the Clayton Act and who should be afforded the protection of the antitrust laws, the U.S. Supreme Court adopted five factors in 1983 in *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*:[4]

(1) The causal relationship between the antitrust violation and the claimed injury;

(2) The nature of that injury and its relationship to the congressional purposes of the antitrust laws;

(3) The "directness or indirectness" of the injury;

(4) Whether the claim for damages is speculative or would otherwise present difficulties of proof; and

(5) Whether there are other, more direct victims of the alleged violations, thereby presenting the risk of duplicative recovery.

B. Umbrella Liability in the U.S. Lower Courts

i. Fifth and Seventh Circuits

In considering the standing of umbrella purchasers, lower courts in the U.S. have generally applied the *AGC* factors, but with varying results, usually based on the facts of the case.

More particularly, among the circuit courts, the Fifth and Seventh Circuits have granted standing to umbrella plaintiffs by denying motions to dismiss for failure to state a claim. Both concluded that denying standing to umbrella plaintiffs at the motion to dismiss stage would be improper if the factual allegations of the complaints supported standing.

Thus, in 1979 the Fifth Circuit approved an umbrella liability claim in *In re Beef Industries Antitrust Litig.*[5] The case involved a claim by beef suppliers that a number of retail chains had conspired to reduce the prices they paid for beef. A number of the suppliers sought damages for the prices paid to them by non-conspiring retailers. The Fifth Circuit allowed the claims to go forward, ruling that the allegation that "the conspiracy depressed wholesale prices generally, and not simply the prices paid by members of the conspiracy," were sufficient to deny the motion for dismissal.[6] The court noted that the injury allegedly suffered by the supplier umbrella plaintiffs satisfied the proximate cause requirement for standing.[7]

More recently, in 2003 the Seventh Circuit allowed an umbrella liability claim to go forward in *U.S. Gypsum Co. v. Indiana Gas Co., Inc.*,[8] which involved defendants who formed a joint venture that was used to restrict output and elevate prices on gas pipelines. Writing for the Panel, Judge Easterbrook stressed that a "cartel cuts output, which elevates price throughout the market; customers of fringe firms (sellers that have not joined the cartel) pay this higher price, and thus suffer antitrust injury, just like customers of the cartel members."[9]

Judge Easterbrook also declared that *Illinois Brick* was not applicable to the umbrella plaintiffs' injury because there had been no pass-on of damages and, because the overcharge to the umbrella plaintiffs likely was the same as the overcharge to the direct purchasers, damage calculations would not be complex.[10]

ii. Third and Ninth Circuits

While the Third and Ninth Circuits denied standing to umbrella plaintiffs in decisions issued prior to the Supreme Court's 1983 *AGC* decision, both courts have since sharply limited the reach of their rulings. Subsequent rulings however, clarified that umbrella standing is not barred as a matter of law in either circuit.

Thus, in 1979 in the first decision on umbrella liability by a circuit court, *Mid-West Paper Products Co. v. Continental Group Inc.,*[11] a case involving alleged price fixing among manufacturers of consumer bags, a divided Third Circuit denied standing to an umbrella purchaser. Applying the rationale underlying the then recent Supreme Court *Illinois Brick* decision, the panel Majority declared that because costs varied and pricing decisions were based on different marketing strategies and elasticity of demand, "the outcome of any attempt to ascertain what price the defendants' competitors would have charged had there not been a conspiracy would at the very least be highly conjectural."[12] The Majority added that on the facts of the case, the "causal link" between the plaintiff's injuries and the defendants' conduct was "tenuous," and "could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally-earned profits…."[13]

In 1993, the Third Circuit limited *Mid-West Paper* to its facts, and ruled in favor of umbrella plaintiffs in *In re Lower Lake Erie Iron Ore Antitrust Litig*.[14] The court held that steel companies who had made payments to non-conspirator suppliers had antitrust standing to sue cartel members, in part because "it was unquestionably the steel companies who bore the brunt of the increased costs attributed to the [conspiracy]."[15] Limiting the application of its *Mid-West Paper* holding fourteen years earlier, the Third Circuit ruled favorably for the umbrella purchasers. Applying the five *AGC* factors adopted after the *Mid-West Paper* decision, the court stressed that *Illinois Brick* concerns should be applied only to cases involving the passing-on of damages and overly complex claims.[16] Accordingly, the court announced, the facts of a particular case, applying the *AGC* factors, should determine the standing of umbrella plaintiffs.[17]

Most recently, in 2016 in *In re Modafinil Antitrust Litig.,*[18] a reverse-payment case*,* the Third Circuit further limited the authority of *Mid-West Paper* on the grounds that the value of any harm caused by the anticompetitive conduct at issue in the 1979 case would have been speculative and, as the court noted it had said in *Mid-West Paper,* would transform that case "into the sort of complex economic proceeding" that the *Illinois Brick* direct-purchaser rule was adopted in part to prevent.[19] Additionally, the Third Circuit stated that the case before it involved alleged market exclusion by a claimed monopolist "that prevents a competitive market from forming at all. In such a scenario all market customers should have standing to sue those engaged in the allegedly anticompetitive conduct because all suffer equally from the foreclosure of choice."[20] The court added that in *AGC* the Supreme Court emphasized that

a "central interest" of the Sherman Act was "protecting the economic freedom of participants in the relevant market."[21]

Relying substantially on the *Mid-West Paper* decision and *Illinois Brick*, and also pre-*AGC,* the Ninth Circuit denied standing to "umbrella claimants" in 1982 in *In re Petroleum Products* on the facts of the case.[22] The umbrella plaintiffs had purchased refined petroleum products from independent marketers who, in turn, had purchased their gasoline from non-conspiring competitors of the defendant refiners. The Ninth Circuit panel stressed that the umbrella liability claim actually was a rephrasing of a pass-on damages claim and was thus barred by the indirect-purchaser prohibition adopted in *Illinois Brick*. The court added that "[e]ven if plaintiffs were somehow able to prove that there was no pass-on and that the inflated prices in the non-conspirators' distribution chain were the independent result of an umbrella effect, the danger of double recovery condemned by *Illinois Brick* would remain."[23]

Second, again relying on *Illinois Brick*, the Ninth Circuit concluded that the umbrella claims were unacceptably speculative and complex. To ascertain the real impact of the price increase, the court would need to analyze the pricing decisions of all firms within the distribution chain, not just the plaintiffs' innocent suppliers. As a result, the court held "that under the facts of this case, application of an umbrella theory is unwarranted."[24]

Significantly, the Ninth Circuit specifically limited its ruling to multi-level distribution schemes. The court declared: "We need not decide, however, whether, in a situation involving a single level of distribution, a single class of direct purchasers from non-conspiring competitors of the defendants can assert claims for damages against price-fixing defendants under an umbrella theory."[25]

While the Ninth Circuit has not again addressed an umbrella damages claim, district courts in the Ninth Circuit have done so, with divided views regarding the permissibility of umbrella liability.

Thus, in 2000, in *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp*.,[26] a California district court granted summary judgment dismissing an umbrella liability suit filed by a group of eye surgeons. They had claimed injury resulting from increased prices charged by their supplier of visual correction equipment following the merger of two other suppliers who dominated that industry. First, the court ruled that there was no evidence that the surgeons' supplier actually had raised its prices.[27] Then, recognizing that the Ninth Circuit had left open the validity of umbrella liability claims in single-step distribution systems, the district court rejected the concept on the basis of the subsequently decided *AGC* decision and the earlier Third Circuit *Mid-West Paper* decision.[28] As to the *AGC* standing factors, the court stated that purchasers from the wrongdoers and competitors of the wrongdoers were superior plaintiffs, and concluded that the amount of overcharge to the umbrella plaintiffs was both speculative and complex.[29]

In 2009, in *In re Online DVD Rental Antitrust Litig.,*[30] another California district court specifically recognized the validity of umbrella liability claims, but nevertheless granted a motion to dismiss the complaint. This was because the complaint's allegations indicated that the umbrella plaintiffs' supplier had raised its prices "independently and unilaterally." Moreover, the supplier had done so long after the commencement of the alleged market allocation between the two alleged co-conspirators. According to the court, this broke any causal link between the wrongdoing and the umbrella plaintiffs' alleged injury.[31]

Other decisions by district courts in the Ninth Circuit have approved umbrella liability. The most significant was *In re Cathode Ray Tube (CRT) Antitrust Litig.*[32] There, the California district court recognized that umbrella liability claims were not prohibited in the Ninth Circuit because *Petroleum Products* specifically only applied to multi-level distribution systems.[33] The district court stressed that in most circumstances in cartel cases, third-party suppliers' price increases in the wake of a conspiracy involving other competitors are foreseeable: "It is a rare supplier that can set its prices without considering its' competitors prices." The court also specifically rejected the views that had previously been expressed in *Antoine L. Garabet, M.D.*, stressing in particular that *Illinois Brick* does not apply to umbrella liability cases because there is no duplication of damages, no passing-on, and damage calculations are not complex.[34] Finally, the court stressed that innocent suppliers are not superior plaintiffs because they are not harmed, but are benefited by the conspiracy.[35]

Likewise, in *In re Arizona Dairy Products Litig.,*[36] the Arizona district court ruled that the umbrella plaintiffs should have standing, subject to the following requirements:

> If plaintiffs can establish as a matter of fact (1) that they paid more for pipe purchased from non-defendant non-conspirators than would have been paid absent the alleged conspiracy, and (2) that American's alleged participation in an anticompetitive conspiracy was the cause of such over-payment, nothing in the law will preclude recovery from American. Plaintiffs' ability to prove such facts is for the jury to decide, not this court.[37]

iii. Second Circuit

Gelboim v. Bank of Am. Corp.[38] was a price-fixing case brought by investors in financial instruments issued by financial institutions who allegedly colluded to depress the rate of return indexed to the London Interbrand Offered Rate ("LIBOR"). The complaint had been dismissed by the district court for failure to allege antitrust injury. The Second Circuit disagreed and remanded.[39] In doing so, the Second Circuit did not rule on the standing of umbrella plaintiffs, who had sought damages from the defendants for trading losses in non-conspiring bank securities. Nevertheless, Judge Jacobs, writing for the panel, did not appear to favor umbrella liability.

The Second Circuit adopted four "efficient enforcer" standing factors in *Gelboim*, which incorporated four of the five *AGC* standing factors: (1) the "directness or indirectness of the asserted injury," which requires evaluation of the "chain of causation" linking the asserted injury to the alleged wrongdoing; (2) the "existence of more direct victims of the alleged conspiracy"; (3) the extent to which the claim is "highly speculative"; and (4) the importance of avoiding "either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other."[40]

While the Second Circuit panel declared that ascertaining umbrella damages would be highly speculative in that particular case,[41] it emphasized specific concern with respect to its first "efficient enforcer" factor, the directness or indirectness of the umbrella plaintiffs' injury. Relying on the warning against umbrella damage "overkill" made by the Third Circuit almost 40 years earlier in *Mid-West Paper,* the Second Circuit panel expressed fear that since the defendant banks controlled "only a small percentage" of a market consisting of "trillions of dollars' worth of financial transactions . . . this case may raise the very concern of damages disproportionate to wrongdoing noted in *Mid-West Paper."* Indeed, the panel emphasized, if the umbrella plaintiffs' allegations were proved at trial, it would "bankrupt 16 of the world's most important financial institutions."[42]

There have been a number of umbrella liability decisions by district courts in the Second Circuit since the 2016 *Gelboim* decision, which mainly have involved multi-district litigation in the financial services industry. While a few complaints have survived dismissal motions, standing has been denied in a majority of the cases on the basis the *Gelboim* "efficient enforcer" standards.[43]

C. U.S. Commentary

Umbrella liability has been endorsed in the U.S. in the Areeda & Hovenkamp Treatise, and has been addressed favorably in a number of academic articles, the two most significant of which are summarized below.

i. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*[44]

The Areeda & Hovenkamp Treatise (hereinafter the "Treatise) stresses in a separate section that, although Section 4 of the Clayton Act provides that "Any person" injured by a violation of the antitrust laws may recover treble damages, the courts properly have set limits on who may recover based on the concept of proximate cause and policy considerations. However, the Treatise notes in that section, recovery should be allowed to umbrella plaintiffs purchasing the "self-same products" the defendants sold in the same geographic market at the same prices. The Treatise also stresses that courts need to be sensitive to the danger of speculation with respect to damages and overly extensive liability.

The Treatise contends that umbrella plaintiffs suffer antitrust injury because of the higher prices they pay as a result of the anticompetitive behavior at issue. Unless they are able to

recover from the wrongdoing defendants, they have no recourse for recovery of artificially inflated prices.

The Treatise stresses that *Illinois Brick* is inapplicable to umbrella liability cases because there is no pass-on of damages to umbrella plaintiffs. Additionally, because umbrella plaintiffs suffer the same overcharge as direct purchasers, there should be no struggle with damage calculations.

However, the Treatise advocates for two factual limiting factors: (1) the anticompetitive conduct must have been the proximate cause of the price increase to the umbrella plaintiffs, and (2) umbrella plaintiffs must be able to prove damages by reason of said price inflation. The proximate cause prong should mirror proximate cause in torts. The presence of an intervening party — the umbrella plaintiffs' suppliers — should not break the causal chain.

ii. Roger D. Blair & Christine Piette Durrance, *Umbrella Damages: Toward A Coherent Antitrust Policy*[45]

The authors of this 2018 article (hereinafter "Blair"), which has been cited favorably in the Areeda & Hovenkamp treatise, stress that umbrella damages should be allowed because it is consistent with all of the goals of US antitrust law. Blair states that granting standing to umbrella purchasers will allow all buyers market-wide to be compensated for any overcharges caused by the unlawful conduct that they have experienced.[46] Blair concludes that this is consistent with the remedial aspect of Section 4 of the Clayton Act, and should enhance the deterrence of anticompetitive behavior. Addressing cartels, Blair reasons as follows:

> the economically rational behavior of the nonconspirators is to raise price under the umbrella created by the cartel. Second, the resulting harm suffered by the umbrella plaintiffs is a foreseeable and economically logical consequence of the cartel's pricing decisions. A profit-maximizing nonconspirator responds to the higher cartel price as it would to any other price increase. It is induced to raise its price and expand its output. Customers of the nonconspirators are overcharged as a direct consequence of the cartel behavior. . . . and should still sue the conspirators—not the nonconspirators—for damages.[47]

Blair disagrees with the fears expressed by some judges that umbrella damages are speculative because this concern should be successfully overcome by a well-supported expert report. Blair expounds:

> In summary, the judicial concerns with admitting umbrella plaintiffs reflect a belief that the umbrella plaintiffs will be able to prove neither the fact of antitrust injury nor the amount of antitrust damages with reasonable certainty. These concerns, however, are unfounded and undermine the efficacy of antitrust policy. The economic logic of the umbrella plaintiff's claims is not

> controversial and the econometric methods for estimating those damages have long been accepted by the courts.
>
> The Third Circuit and Ninth Circuit [contrary] precedents were established some 35 years ago. Since then, economic analysis has come to dominate antitrust cases. In addition, econometric methodology has advanced substantially. What may have appeared to be speculative or conjectural then should be considered far more reliable now.[48]

Blair concludes that umbrella plaintiffs should have standing to sue because "damage claims for umbrella plaintiffs are not duplicative, do not require complex apportionment, and are not conjectural. . . . Granting standing to umbrella plaintiffs aligns with the goals of antitrust policy by promoting and protecting competition, and further deters illegal price-fixing behavior."[49]

iii. William Page, *The Scope of Liability in Antitrust Violations*

In *Gelboim* the Second Circuit referred only to one academic article, Professor William Page's 1985 article, *The Scope of Liability in Antitrust Violations,*[50] as putting forth an authoritative view of umbrella liability.[51] Professor Page however asserted that the 1979 Third Circuit *Mid-West Paper*, decision, "the leading case denying recovery to purchasers in these instances seriously misconceived the economics of the issue in suggesting that there is no necessary causal relationship between the cartel's price increase and the nonconspiring firm."[52]

Page was of the view that, so long as umbrella purchasers' damages are sufficiently causally related to an antitrust violation, they should have standing to bring suit, adding that their damages are not duplicative of those of purchasers from the wrongdoers, are not speculative because they can be readily ascertained through traditional techniques, nor should such damages be considered "ruinous." He explained that the economic forces resulting from the actions of the wrongdoers do harm the umbrella plaintiffs, and since they suffer an overcharge resulting from the wrongdoing, they should be entitled to recover.[53]

II. Canada

The Canadian Supreme Court addressed umbrella standing in 2019 in *Pioneer Corp v. Godfrey*.[54] The case involved manufacturers of optical disk drives ("ODD") who conspired to raise the prices of ODDs and products that use ODDs such as computers. Canada's highest court ruled that umbrella damages should be allowed because they are consistent with both the broad text and policy goals of the Canada Competition Act. The Court ruled, however, that umbrella plaintiffs must establish a causal link between their injury and the antitrust wrongdoing.

The language of Section 36(1) of the Canadian Competition Act, as does Section 1 of the Sherman Act, allows "any person" to sue for recovery of damages caused by reason of a

violation. The Canadian Supreme Court declared that the question of whether umbrella purchasers have a cause of action is a matter of statutory interpretation. Considering the relevant statutory language "read in its entire context and in its grammatical and ordinary sense," the Court determined that the "any person" phrase should be read broadly to include umbrella plaintiffs.[55] Since indirect purchasers may seek recovery under the Canadian Competition Act, the Court concluded there was no reason why umbrella plaintiffs should be excluded.[56]

The Supreme Court considered its ruling to be consistent with the policy goals of the Competition Act: (1) To "maintain and encourage competition in Canada" with a view to providing consumers with "competitive prices and product choices," (2) to deter bad behavior, and (3) to compensate damaged parties.[57] The Court believed that the increase in liability would lead to deterrence and encourage competition in Canada while protecting consumers.[58] Additionally, according to the Court, allowing umbrella plaintiffs to recover damages they suffered as a result of the anticompetitive behavior helps fulfill the compensation goal of the Competition Act.[59]

The Supreme Court also reasoned that the conspirators in the case under consideration should have been aware that their actions would harm umbrella plaintiffs, because of the likelihood that non-conspiring suppliers would also raise their prices. Specifically, for the wrongdoers to profit from their anticompetitive behavior, the market-wide price for ODDs had to increase: the intended results "are not indeterminate, but predetermined."[60]

The Supreme Court set out a three-part test to prove a causal link between the wrongdoing and umbrella purchasers' loss or damage, asking whether: (1) the defendants engaged in anticompetitive behavior, (2) the umbrella purchasers suffered a "loss or damage," and (3) the loss or damage was a "result of such behavior."[61] This could be a difficult task, the Court cautioned. "Marshalling and presenting evidence" showing a causal link between loss and the anticompetitive conduct "represents a significant burden."[62]

III. European Union

The European Court of Justice ("ECJ") approved umbrella liability in 2014 in its *Kone AG* decision.[63] The defendants were six elevator manufacturers that agreed to divide up the markets for the installation and maintenance of elevators in four EU member states.[64] Allegedly, the object of the cartel was to ensure that prices were higher than would have been achievable in a competitive market.[65]

The cartel apparently only achieved success in two-thirds of their bids, the other one-third of the bids being won by competing non-conspirators with whom the umbrella plaintiff did business allegedly at a higher price than they would have paid but for the existence of the cartel.[66] Therefore, the question before the ECJ was whether Article 101 of the European

Treaty, the counterpart to Section 1 of the Sherman Act, allows damages to be recovered from cartel members for losses "caused by a person not party to the cartel who, benefitting from the protection of the increased market rises, raise his own prices for his products more than he would have done without the cartel (umbrella pricing)."[67]

The ECJ ruled that an umbrella purchaser may bring such a claim when there is "a causal relationship between the harm and an agreement or practice prohibited under Article 101."[68] The ECJ explained:

> The right of any individual to claim compensation for such a loss actually strengthens the working of the European competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union.[69]

As to foreseeability, the ECJ declared that it could not be ruled out that a competing supplier "might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition," and that it is "one of the possible effects of the cartel that the members thereof cannot disregard."[70]

The ECJ explained the need for a causal chain, i.e. that the standing of an umbrella plaintiff depended upon the factual circumstances of the case, and whether the conduct of the non-conspiring supplier "could not be ignored by the members of the cartel. It is for the referring court to determine whether those conditions are satisfied."[71]

The defendants argued that umbrella damage risks in the case would be punitive.

The ECJ responded that competition considerations "do not make the amount of loss that may be compensated by way of damages dependent on the profit achieved by the person whose misconduct caused that loss."[72]

IV. Analysis

Although the Supreme Court has not considered the standing of umbrella plaintiffs, as discussed above, three circuits that have ruled on the antitrust standing of such plaintiffs — The Third, Fifth, and Seventh — have determined that they should proceed with their claims if their injuries are plausibly alleged to have been proximately caused by defendants' antitrust violations. The Ninth Circuit has not yet determined whether umbrella plaintiffs have antitrust standing in single-step distribution systems. The academic commentary in the U.S. supports umbrella liability standing, including the authors of the leading Treatise. Of interest, Canada and the EU have permitted umbrella plaintiffs to go forward with their claims.

The reasoning generally has been that antitrust violators, whether they are members of a cartel or a defendant with market power, increase their prices to supracompetitive levels,

which creates a price umbrella under which other sellers can safely raise their prices as well. This is foreseeable as a matter of elementary economics, and usually presumed by the wrongdoers as necessary for their anticompetitive scheme to be successful. As a result, all customers market wide are injured whether or not they transact business directly with the market manipulators.

A customer of suppliers who have raised their prices unilaterally in response to the defendants' price increases is injured the same way as is a customer who buys from the cartel members. It has been "injured in its business or property" by the antitrust violation, as required by Section 4 of the Clayton Act, and should have a right to the claim that Congress has created to redress such injury. But there are no parties other than the direct wrongdoers from whom that customer can seek recovery for its injury, because its supplier has not violated the antitrust laws.

Of course, the umbrella plaintiff should have standing only if it can allege a reasonably close connection between the antitrust violation and the harm it has suffered. As emphasized by Areeda & Hovenkamp, umbrella claims should have the same requirements of "proximate causation and proof of damages governing private plaintiffs generally."[73] And Judge Easterbrook has pointed out that a "cartel cuts output, which elevates price throughout the market; customers of fringe firms (sellers that have not joined the cartel) pay this higher price, and thus suffer antitrust injury, just like customers of the cartel members."[74]

Accordingly, the antitrust standing of an umbrella plaintiff, as with other antitrust plaintiffs, should be determined on a case by case basis pursuant to the five factors announced by the U.S. Supreme Court in 1983 in *AGC*.[75]

As to the first *AGC* factor, the causal relationship between the violation and the plaintiff's injury as just described, there is a direct causal relationship between the higher prices paid by both customers of the wrongdoers and customers of their innocent competitors. Indeed, Professor Blair, in his influential umbrella liability commentary, referred to basic economic assumptions that other sellers will follow price increases by antitrust violators.[76] In fact, why would wrongdoers raise their prices unless they believe competitors will follow? Otherwise their scheme will not succeed, and they will lose market share to their competitors.[77]

The second *AGC* factor addresses the nature of the plaintiff's injury and its relationship to the congressional purposes of the antitrust laws. As already noted, the injury to umbrella purchasers — overcharges — is the result of the same anticompetitive conduct that injures purchasers from the wrongdoers. As to Congressional antitrust policy, as most recently stated by the Supreme Court in *Apple Inc. v. Pepper,* "the text of §4 broadly affords injured parties a right to sue under the antitrust laws."[78]

The third *AGC* factor considers the "directness or indirectness" of the plaintiff's injury. The injury to umbrella plaintiffs is not derivative of the injury to purchasers from the defendants.

It is a separate harm that occurs alongside those of purchasers from the wrongdoers at the first level in the chain of causation.

The fourth *AGC* factor is whether the claim for damages is speculative or would otherwise present difficulties of proof. Areeda & Hovenkamp have responded that "[d]amages for the umbrella plaintiff are based on the same excess over the price that would have prevailed in the absence of the illegal activity, which is the same calculation that must be made in suits by purchasers from" the defendants.

Nevertheless, some district courts have indicated concern that complicating factors such as elasticity of demand, decreases in production, and increases in production costs make the injury to umbrella plaintiffs speculative and complex.[79] But economic experts deal with such extraneous factors regularly, isolating other factors that may have influenced price changes in order to ascertain the hypothetical price that otherwise would have existed in the "but for" market absent the violation.[80] As pointed out by the court in *County of Mateo v. CSL Ltd.*: "If it would be too speculative as a matter of law to make this computation with respect to non-conspiring rivals, it would also be too speculative to make the same calculation with regards to cartel members."[81]

The final *AGC* factor asks whether there are other, more direct victims of the alleged violations, which presents the risk of duplicative recovery. However, here are only two other potentially directly harmed plaintiffs in addition to umbrella plaintiffs: third-party sellers and customers of the wrongdoers. Third-party sellers, as previously discussed, are benefitted, not harmed, by the price umbrella that the wrongdoers' conduct created. Predictably, they follow the wrongdoers' price increases.[82] And customers of the wrongdoers have a separate cause of action from that of the umbrella plaintiffs, who seek damages alongside those of the purchasers from the wrongdoers. The umbrella plaintiffs' damages are neither derivative nor duplicative of those sought by the customers of the wrongdoers.

Separate and apart from the *AGC* factors, some courts have indicated concerns that umbrella damages can result in "overkill," or in the words of one decision, "could vastly extend the potential scope of antitrust liability and could allow recovery for damages disproportionate to wrongdoing."[83]

But this concern that damage awards should not be "ruinous" ignores a recent Supreme Court warning in *Lexmark Int'l v. Static Control Components, Inc.,*[84] that a statutory right should not be denied by a court unless the injury is not of the kind Congress intended to redress, or the injury is too removed from the violation as a matter of proximate cause. Here, Congress has made the relevant policy judgment in establishing a broad cause of action for injured parties under Section 4 of the Clayton Act, and just last year the Supreme Court has supported that policy decision in its *Apple* decision. Moreover, "disproportionate damages" is not one of the *AGC* standing factors. Finally, the "disproportionate injury" concept disregards

the important redress policy that imposes liability for the full costs of a wrongdoers' harms even when it exceeds the intended harm or profit to the wrongdoer.

Conclusion

In sum, umbrella plaintiffs should be authorized to recover damages because doing so is consistent with the antitrust policy of protecting competition, deterring bad behavior, and compensating injured parties. However, recovery should not be limitless. In order for umbrella plaintiffs to have standing, the anticompetitive conduct must have been the proximate cause of the price increase to the umbrella plaintiffs. Additionally, umbrella plaintiffs must be able to prove damages using the same techniques economic experts apply to other antitrust violations. In any event, the presence of a third party — the umbrella plaintiff's supplier — does not break the causal chain.

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[2] 15 U.S.C. § 15.

[3] *Blue Shield of Va. v. McCready,* 457 U.S. 465, 472 (1982); see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 & n.10 (1977) (Section 4 of the Clayton Act was "designed primarily as a remedy").

[4] 459 U.S. 519, 534 (1983) ("*AGC*").

[5] 600 F.2d 1148 (5th Cir. 1979).

[6] *Id.* at 1166-67 n. 24.

[7] *Id.*

[8] 350 F.3d 623 (7th Cir. 2003).

[9] *Id.* at 627.

[10] *Id.* at 627-28.

[11] 596 F.2d 573 (3d Cir. 1979).

[12] *Id.* at 584.

[13] *Id* at 586.

[14] 998 F.2d at 1168 (3d Cir. 1993), *cert. denied sub nom. Bessemer & Lake Erie R.R. Co. v. Wheeling-Pittsburgh Steel Corp.*, 510 U.S. 1091 (1994).

[15] *Id.* at 1168.

[16] *Id.* at 1167-68.

[17] *Id.* at 1168-69.

[18] 837 F.3d 238 (3d Cir. 2016).

[19] *Id.* at 264.

[20] *Id.* at 265.

[21] *Id.* In 2018, the Third Circuit ruled in *In re Processed Egg Products Antitrust Litig.,* 881 F.3d 262, 274-76 (3d Cir. 2018), that purchasers of egg products had standing to seek damages from their allegedly co-conspiring suppliers for all of their purchases, regardless of whether the egg products contained conspirator eggs or non-conspirator eggs. The court distinguished *Mid-West Paper* on the ground there that the plaintiffs there had not dealt with alleged conspirators.

[22] *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.,* 691 F.2d 1335 (9th Cir. 1992).

[23] *Id.* at 1340.

[24] *Id. at 1340-41.*

[25] *Id.* at 1340.

[26] 116 F. Supp. 2d 1159 (C.D. Cal. 2000).

[27] *Id.* at 1165.

[28] *Id.* at 1167-68.

[29] *Id.* at 1168-69.

[30] 2009 WL 4572010, at *4 (N.D. Cal. Dec. 1, 2009).

[31] *Id.* at *6-*7.

[32] 2016 WL 6246736 (N.D. Cal. Oct. 26, 2016).

[33] *Id.* at *5.

[34] *Id.* at *7.

[35] *Id.*

[36] 627 F. Supp. 233 (D. Ariz. 1985).

[37] *Id.* at 236. There are three other pre- *Petroleum Products* Ninth Circuit district court decisions allowing standing to umbrella plaintiffs: *State of Washington v. American Pipe and Construction Co.,* 280 F. Supp. 802 (W.D.Wash.1968): *Wall Products Co. v. National Gypsum Co.,* 357 F. Supp. 832, 840 (N.D. Cal.1973); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 530 F. Supp. 36, 40 (W.D. Wash. 1981).

[38] 823 F.3d 759 (2d Cir. 2016).

[39] *Id.* at 775-77.

[40] *Id.* at 777-79. Antitrust injury was considered as a separate, preliminary issue. *Id.* at 772-77.

[41] *Id.* at 779-80.

[42] *Id.* at 778-79.

[43] Denying standing to umbrella purchasers: *In re Am. Express Anti-Steering Rules Antitrust Litig.,* 433 F. Supp. 3d 395, 408-14 (E.D.N.Y. 2020); *Sonterra Capital Master Fund, Ltd. V. Barclays Bank PLC,* 366 F. Supp. 3d 516, 545-48 (S.D.N.Y. 2017); *Sullivan v. Barclays PLC,* 2017 WL 685370, at *15-*20 (S.D.N.Y. Nov. 26, 2018); *FrontPoint Asian Event Driven Fund, L.P. v. Citibank, N.A.,* 2018 WL 4830087, at *5-*6 (S.D.N.Y. Oct. 4, 2018); *In re Platinum & Palladium Antitrust Litig., 2017,* 2017 WL 1169626, at *19-*25 (S.D.N.Y. Mar. 28, 2017); *In re Libor-Based Financial Instruments Antitrust Litig.,* at *15-*23 (S.D.N.Y. Nov. 20, 2016). Hausfeld LLP represented plaintiffs in *In re Am. Express Anti-Steering Rules Antitrust Litig.* Granting standing to umbrella purchasers: *In re Commodity Exchange, Inc.,* 213 F.Supp.3d 631, 656-59 (S.D.N.Y. 2016); *In re London Silver Fixing, Ltd Antitrust Litig.,* 213 F. Supp. 3d 530, 550-57 (S.D.N.Y. 2016).

[44] Vol. 2A ¶347 (4th ed. 2019).

[45] 36 CONTEMP. ECON. POL'Y 241 (April 2018).

[46] *Id.* 249-50.

[47] *Id.* 247.

[48] *Id.* 244.

[49] *Id.* 254.

[50] 37 Stan. L. Rev. 1445, 1467 (1985).

[51] *Gelboim,* 823 F.3d at 778.

[52] 37 Stan. L. Rev. at 1466-67.

[53] *Id.* at 1466-67, 1490-92. There are few other academic articles discussing umbrella liability in depth. See Sharon Foster, *Efficient Enforcer & the Financial Products Benchmark Manipulation Litigation,* 13 Ohio State Bus. L. Rev. 99, 133-39 (2019); R. Inderst, F. Maier-Rigaud & U. Schwabe, *Umbrella Effects,* 10 J. Competition L. Econ. 739 (2014) (economic discussion relating to EU antitrust law).

[54] 2019 SCC 42.

[55] *Id.* at para. 61.

[56] *Id.* at para. 64.

[57] *Id*. at para. 65-67.

[58] *Id.* at para. 65-68.

[59] *Id.*

[60] *Id.* at para. 72-73.

[61] *Id.* at para. 74-76.

[62] *Id.* at para. 77.

[63] Case C-557/12, *Kone AG and others v. OBB-Infrastructur*, ECLI:EU: C 2014:1317(ECJ, June 5,2014).

[64] *Id.* at para 5-6.

[65] *Id.* at para 8,

[66] *Id.* at para 9-10.

[67] *Id.* at para 17.

[68] *Id.* at para 22.

[69] *Id.* at para 23.

[70] *Id.* at para 29-30.

[71] *Id.* at para 34.

[72] *Id.* at para 35.

[73] Vol. 2A ¶347 (4th ed. 2019).

[74] *Gypsum Co. v. Indiana Gas Co., Inc.,* 350 F.3d 623, 627 (7th Cir. 2003).

[75] 459 U.S. 519, 534 (1983) ("*AGC*").

[76] Blair, Note 45 *supra*, at 245, 248-50.

[77] See *In re Cathode Ray tube (CRT) Antitrust Litig.,* 2016 WL 6246736, at *6-*7 & n.8 (N.D. Cal. Oct. 26, 2016).

[78] 139 S. Ct. 1544, 1522 (2019).

[79] See, e.g. *Mid-West Paper Products Co. v. Continental Group Inc.,* 596 F.2d 573, 584 (3d Cir. 1979); *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1170 (C.D. Cal.2000).

[80] See *Blair,* note 45 *supra,* at 247, 250-52.

[81] 116 F. Supp. 2d 1159, 1170 (C.D. Cal. 2000).

[82] See *In re.Cathode Ray Tube (CRT) Antitrust Litig.,* 2016 WL 6246736, at *7 (N.D. Cal. 2016).

[83] *Gelboim v. Bank of Am. Corp.,*823 F.3d 759, 778-79 (2d Cir. 2016). See also *Mid-West Paper Prods. Co. v. Cont'l Grp., Inc.,* 596 F.2d 573, 587 (3d Cir. 1979); *Sonterra Cap. Master Fund Ltd. v. Credit SuisseGrp. AG,* 277 F. Supp.3d 521, 565-66 (S.D.N.Y. 2017).

[84] 572 U.S. 118, 125-37 (2014).