

NORTH CAROLINA
NEW HANOVER COUNTY

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,
vs.

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

Defendants.

**PLAINTIFF'S MEMORANDUM IN RESPONSE TO
JUDGE TENILLE'S AUGUST 27, 2004 ORDER**

As the North Carolina Court of Appeals unambiguously made clear in *Hyde v. Abbott Labs., Inc.*, 123 N.C. App. 572, 473 S.E.2d 680 (1996), an indirect purchaser has standing to sue a manufacturer for violations of North Carolina's antitrust statute:

We believe that allowing indirect purchasers to sue for Chapter 75 violations will best advance the legislative intent that such violations be deterred, and that aggrieved consumers have a private cause of action to redress Chapter 75 violations. Accordingly, we hold that indirect purchasers have standing under N.C.G.S. § 75-16 to sue for Chapter 75 violations.

Hyde, 123 N.C. App. 583, 473 S.E.2d at 688.

Notwithstanding the clarity of this holding, Defendants herein moved to dismiss Plaintiff's complaint asserting that Plaintiff did not have standing to pursue this indirect purchaser antitrust

action. In their motion, Defendants attempted to navigate their way around the clear and unambiguous holding of *Hyde*. However, as Plaintiff demonstrated in her Memorandum of Law in Opposition to Defendants' Motion To Dismiss ("Pl. Mem."), Defendants' efforts to distinguish *Hyde* were unavailing. Quite simply, *Hyde* stands for the proposition that indirect purchasers, such as Plaintiff, have standing to sue under N.C.G.S. §75-16. Indeed, courts in North Carolina recognize this plain fact. *See* Pl. Mem. at 6-8.

The Court now has asked the parties to address the holding of *Associated General Contractors of California, Inc. v. California State Counsel of Carpenters*, 459 U.S. 519 (1983) as it may apply to the instant litigation. In particular, the Court has asked that the parties address the application of the factors enunciated in *Associated General Contractors* to the facts alleged in the complaint. Significantly, Defendants did not cite *Associated General Contractors* in support of their motion.

Plaintiffs contend that the holding of *Associated General Contractors* and the factors enumerated therein are inapposite to *Hyde*, and thus, that rationale should not apply to the issue in North Carolina as to whether Plaintiff has stated a viable, indirect purchaser, antitrust cause of action under N.C.G.S. §75-16. That notwithstanding, Plaintiff submits that application of those factors bolsters the conclusion that Plaintiff has standing to sue under N.C.G.S. §75-16.

In *Associated General Contractors*, plaintiff unions alleged that the defendant multi-employer trade association and some of its members coerced certain third-parties and some of the association's members to enter into business relationships with nonunion firms, affecting the trade of some unionized firms and restraining the business activities of the unions. 459 U.S. at 520-21. As a result, the plaintiff unions brought an action for treble damages under the federal antitrust laws,

specifically §4 of the Clayton Act. *Id.* Upon defendants' motion, the federal district court dismissed the complaint. The Court of Appeals later reversed. The defendants then petitioned the Supreme Court for review. The Supreme Court held that the plaintiff unions were not persons injured by reason of a violation of §4 of the Clayton Act. *Id.* at 545-46.

In so holding, the Supreme Court enumerated six factors relevant to its determination: (1) whether the complaint alleged a causal connection between the antitrust violation and the harm; (2) whether the complaint alleged an intent by defendants to harm the plaintiffs; (3) the nature of the plaintiffs' injury; (4) the character and relationship between the alleged antitrust violation and the plaintiffs' alleged injury; (5) the potential for duplicative recovery or complex apportionment of damages; and (6) the existence of more direct victims of the alleged conspiracy. 459 U.S. at 537-47.

In essence, though, the holding of the Supreme Court in *Associated General Contractors* turned on the Court's determination that the injury alleged by plaintiffs was indirect – i.e., that plaintiffs were indirectly injured by the alleged wrongful conduct as opposed to being directly injured and could not prove any identifiable injuries -- and that permitting recovery by plaintiffs would or could lead to duplicative recovery or difficulty in apportioning damages. Seen thusly, it becomes clear that the holding in *Associated General Contractors* does little more than reaffirm the Court's prior holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), that indirect purchasers who cannot prove direct damages – indirect victims of anti competitive behavior – do not have standing to bring suit for violations of federal antitrust law. However, the factors are helpful in understanding how Plaintiff in this matter, in fact, does have standing.

As Plaintiff in this case wrote in the Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Pls. Mem."), subsequent to *Illinois Brick*, the Supreme Court held in *California*

v. *ARC America Corp.*, 490 U.S. 93 (1989) that state courts may allow an indirect purchaser to sue under *state* antitrust laws. Pls. Mem. at 6.

Significantly, in *ARC America* the Supreme Court specifically stated that *Illinois Brick* and *Associated General Contractors* “were cases construing § 4 of the Clayton Act; **in none of those cases did the Court identify a federal policy against States imposing liability in addition to that imposed by federal law.**” *Arc America*, 490 U.S. at 105 (emphasis added). Accordingly, the Supreme Court held that *Illinois Brick* -- and, by implication, *Associated General Contractors* -- do not and therefore can not apply to determine the rights of indirect purchasers to sue under state antitrust law:

When viewed properly, *Illinois Brick* was a decision construing the federal antitrust laws, **not a decision defining the interrelationship between the federal and state antitrust laws.** The congressional purposes on which *Illinois Brick* was based provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law. The judgment of the Court of Appeals is therefore reversed.

ARC America, 490 U.S. at 105-06 (emphasis added).

Given this holding – that *Illinois Brick* and *Associated General Contractors* are cases regarding only the issue of whether indirect purchasers have standing under federal antitrust law and that these decisions do not define the “interrelationship between the federal and state antitrust laws” – Plaintiffs here submit that it would be erroneous to look to *Illinois Brick* or *Associated General Contractors* or any factors enumerated therein to determine the standing of Plaintiffs herein to bring suit under N.C.G.S. §75-16. Rather, as noted above, North Carolina specifically has granted standing to indirect purchasers to pursue antitrust suits under state law, and the state’s courts have affirmed this position through numerous holdings such as *Hyde*, which controls here.

Nevertheless, a quick glance at the factors enumerated in *Associated General Contractors* reveals that Plaintiff's standing to sue under N.C.G.S. §75-16 and the holding of *Hyde* is not undercut, but rather is strengthened by the rationale of these factors.

First, as in *Associated General Contractors*, here Plaintiff has alleged a causal connection between the antitrust violation and the harm to Plaintiff and the Class, that is that the artificial inflation and fixing of prices has directly impacted Plaintiff and numerous others through correlative price increases for all products contained the price fixed items. *See* Class Action Complaint for Damages ("CAC") ¶¶ 2, 38-39, 49-54.

Also, as in *Associated General Contractors*, Plaintiff here has alleged that Defendants intended to cause such harm. *See* CAC ¶38.

The next factor suggests an evaluation of the nature of the Plaintiff's injury. Specifically, the question is whether the alleged injury is "of the type that the antitrust statute was intended to forestall." 459 U.S. at 540. In *Associated General Contractors*, the Supreme Court held that plaintiff's injury was not of such a type because the injury complained of therein – generally weakening or restraining the business activities of certain union members – was not marketwide and was more properly addressed by collective bargaining and labor laws. Here by contrast, Plaintiff has alleged that the nature of her injury runs throughout the relevant market – the entirety of North Carolina purchasers of automotive tires. *See* CAC ¶34 (rubber chemicals used predominantly in manufacture of automotive tires); ¶31 (rubber processing chemical market is significant amount of commerce in United States and North Carolina). Moreover, the type of injury complained of – artificially raised prices – is exactly the type of injury that the antitrust laws are intended to protect against regardless of the level of distribution.

In footnote 33 to the decision in *Associated General Contractors*, the Supreme Court noted that some courts have applied the requirement that plaintiff must be in the “target area” of the antitrust conspiracy – i.e., “the area of the economy which is endangered by a breakdown of the competitive conditions in a particular industry.” 459 U.S. at 537 n.33. However, as the Supreme Court itself recognized, usage of this “target area” analysis can lead to “contradictory and inconsistent results.” *Id.* Thus, while the Court here has asked the parties to address a “target area” analysis to the facts at hand, heeding the Supreme Court’s warning, it is suggested that such an analysis is not appropriate. Yet, if one were to engage in such an analysis, given the amount of rubber chemicals purchased by and utilized by tire manufacturers in making automotive tires, *see* CAC ¶¶ 31-36, it would lead to the inexorable conclusion that the tire market is exactly the area of the economy which would be endangered by a breakdown of competitive conditions in the rubber chemicals industry.

While Defendants may argue Plaintiff here is not in the “target area” of the alleged price fixing scheme, their argument fails for several points. First, in applying the target-area concept, it should be recalled that it was developed primarily in cases involving exclusionary practices directed against competitors, not price fixing violations. *See Carnivale Bag Co., Inc. v. Slide-Rite Mfg. Corp.*, 395 F. Supp. 287, 293. Second, as the *Carnivale* court noted, it is clear that indirect purchasers’ injuries are not incidental and constitute a significant sector of the affected commerce concerned by anti-competitive practices:

The object of a price-fixing agreement such as the one alleged here **is not to exclude competitors. Rather, the object is to raise prices for the benefit of all ostensible competitors who participate in the agreement, and to inflict the overcharge on immediate purchasers and on their customers of the overcharge is passed on. Thus the**

'objects' of a price-fixing conspiracy, to use the language of Calderone, are immediate and subsequent purchasers, not the defendants' competitors. To apply the requirement of injury to 'competitive position' in a price-fixing conspiracy case would be plainly impracticable. **This is particularly so here where it is alleged that defendants hold 90% of the market for sliders. In a case such as this, virtually all of the purchasers** at each level in the manufacturing and distribution process **are affected equally by the overcharges.** Thus no one purchaser at a particular level sustains injury to its position relative to its competitors on the same level. If the GAF Corp. rule were applied in a price-fixing case such as this, not even an immediate purchaser would have standing if all such immediate purchasers were equally harmed. Ostensible competitors who were part of the conspiracy neither could nor would sue.

Id. (Emphasis added).

The similarity between *Carnivale* and the facts of this matter are exactly congruent as is the rationale behind allowing indirect purchasers standing to sue. The antitrust violations by Defendants directly affect Plaintiff in this matter regardless of their position on the distribution chain and is the **exact** type of injury the law is designed to redress.

The fourth factor looks at the directness or indirectness of the asserted injury.¹ While the Supreme Court in *Associated General Contractors* held that this factor weighed heavily against the plaintiff, that was because the plaintiff's case there was brought under federal antitrust law, which, pursuant to *Illinois Brick*, does not provide standing to indirect purchasers under federal antitrust law. Moreover, Plaintiff in that matter could prove no injury. However, as noted above, the *Hyde* case makes manifestly clear that in North Carolina, indirect purchasers have standing to sue under N.C.G.S. ¶75-16.

¹The sixth factor also essentially looks at whether the plaintiff is a direct or indirect victim of the alleged wrongful conduct. As such, Plaintiff will not reiterate the points made above, except to say that in an indirect purchaser context, there always will exist, as here, direct victims of the price-fixing conspiracy.

The fifth factor looks to the potential for duplicative recovery or the complexity of apportionment of damages. This factor was cited by the Supreme Court in *Illinois Brick* as a rationale for not granting standing to indirect purchasers to sue for antitrust injury under the federal antitrust laws. However, with its decision in *ARC America* the Supreme Court recognized that this consideration would not prevent states from granting standing to indirect purchasers to sue under state antitrust laws. Further, this factor has been shown by several other Federal Courts to be an illusory concern raised by Defendants in light of numerous procedural safeguards and therefore is of little consequence and thus does not undercut the well-established proposition of *Hyde* that indirect purchasers have standing to sue under N.C.G.S. §75-16.

It has been suggested by Defendants that somehow here it is too complex to apportion or ascertain Plaintiff and Class Members' damages because the rubber chemicals that Defendants manufactured are a component of the product that Plaintiff and Class Members have purchased. In essence, Defendants suggest that Plaintiff and Class members are "derivative" indirect purchasers. As Plaintiff addressed in her opposition to Defendants' motion to dismiss, this suggestion is without merit. *See* Pl. Mem. at 13-14. Indeed, relevant case law is clear that indirect purchasers of so-called "component" products have standing to sue under state antitrust laws. *See, e.g., Holder v. Archer Daniels Midland Co.*, 1998 WL 1469620 (D.C. Super.) 1999-1 Trade Cases P 72,442 (citing *Hyde* and holding that purchasers of products containing high fructose corn syrup and citric acid could sue the manufacturers of the citric acid and high fructose corn syrup for antitrust violations).

Defendants cite *Weaver v. Cabot Corp., et al.*, 03 CVS 04760 (N.C. Super. Ct., Buncombe County), for the proposition that North Carolina courts have recently followed their rationale that indirect purchasers of a part of a product can not maintain an suit under N.C.G.S. ¶75-16. Not only

is their reliance on this opinion improper, it is misplaced and wrong on several points. First, the in *Weaver*, did not appear to consider the string of cases following *Hyde* that have allowed indirect purchaser standing. This is evident by the Court's reliance on the single issue of damages calculation as the basis for dismissal of that suit. Had the *Weaver* court considered cases such as *Adams v. Aventis, S.A.*, Superior Court of North Carolina, Craven County, Business Court, Aug. 26, 2003 cited as 2003 WL 22015384 (N.C. Super.), *Bruggers v. Eastman Kodak Co.*, No. 97-CVS-11278, 2002 WL 31044228 (N.C. Super. March 17, 2002) (2000 NCBC 3); *Long v. Abbott Laboratories*, No. 97-CVS-8289, 1999 WL 33545517 (N.C. Super. July 30, 1999)(1999NCBC 10), it would have recognized that the issue of difficulty in apportioning damages is not a proper reason by itself to dismiss a case. Further, the *Weaver* court appeared not to have fully considered the statutory language change in N.C.G.S. §75-16 as another point of concern. However, this language of the statute deals with monopolies and not with price-fixing violations and was found to not be an impediment in the *Aventis* case.

The simple and undeniable fact is that Defendants Crompton Corporation and Bayer AG have pled or agreed to plead guilty and pay multi-million dollar fines for their participation in an international conspiracy to fix the prices of rubber chemicals both domestically and abroad. *See DOJ press releases and Pls. Supplemental Memorandum*. Accordingly, there is no longer a question in this litigation of whether Defendants engaged in the unlawful activity alleged in the Complaint. It is a fact – they have. As a result, the only question outstanding is: what is the measure of Plaintiff's and Class Members' damages? If, in contravention of the clear holding in *Hyde* it were held that Plaintiff does not have standing under N.C.G.S. §75-16, it would leave Plaintiff and Class members uncompensated for the harm they suffered and permit Defendants to escape civil liability

for the wrongful conduct in which they have engaged. This should not be permitted.

Dated: September 15, 2004

Respectfully Submitted,

LEA, RHINE & ROSBRUGH, P.L.L.C.

By:  _____

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served this document in the above-entitled action upon all other parties to this cause by:

Hand delivering a copy hereof to each said party or the attorney thereof.

Depositing a copy hereof, postage pre-paid, in the United States Mail, properly addressed to:

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This the 15th day of September, 2004.



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