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APPLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

STACIE SOMERS, On Behalf of Herself and All Others Similarly Situated,

Plaintiff,

v.

APPLE INC.,

Defendant.

Case No. C 07-06507 JW
C 05-00037 JW

[REDACTED] DEFENDANT'S MEMORANDUM IN OPPOSITION TO MOTION FOR CLASS CERTIFICATION

Date: June 1, 2009
Time: 9:00 A.M.
Place: Courtroom 8, 4th floor

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INTRODUCTION

This motion to certify a class of [redacted] indirect purchasers who bought iPods in 50 different states over the last six years differs significantly from the direct purchasers' motion that the Court partially granted. The direct purchaser case challenged the prices of only a single seller, Apple. As an indirect purchaser, however, it is not enough for Somers to show that Apple's own prices included overcharges. She must also show that alleged overcharges were passed on to each alleged class member in the retail prices charged by [redacted] differently situated resellers spread across the country, over a six-year period. These resellers include large national retailers, small specialty stores, discount warehouses, and [redacted] on-line sites selling both new and used iPods. They each set their own prices. Their retail prices have varied by as much as $50 or more for the same model iPod, resulting in thousands of different prices on the 42 different iPod models sold during the alleged class period.

Somers' burden in this motion is to demonstrate that, despite this wide variety of resellers and prices (none of which was at issue in the direct purchasers' motion), proof of her own claim that she was overcharged on the three iPods she purchased in 2005 and 2006 from ebuyer.com and Target will similarly prove the claim of every other iPod purchaser from Alaska to Florida and every state in between from 2003 to the present. She has failed to carry this burden in numerous significant respects.

First, proof of whether [redacted] individuals bought their iPods as a result of coercion is an individual issue. Her only argument on this all-important point is that "market-level" coercion should be enough. She does not dispute that class treatment is inappropriate and unmanageable if the Court rules that "market-level" coercion is insufficient. Unlike the direct purchasers, Somers cannot fall back on a damages claim under section 2 of the Sherman Act. Indirect purchasers cannot seek damages under federal law, and the California Cartwright Act does not contain the equivalent of Sherman Act section 2.

Second, proof of whether Somers paid a supra-competitive price for any of her three iPods will not prove the same thing for any other purchaser. On the key point of whether this can be done with common proof, Somers has defaulted. She relies entirely on a woefully inadequate

declaration by an economist—the same economist whose opinion was recently rejected in another antitrust case for some of the same defects in his report here. *See Pioneer Valley Casket Co. v. Serv. Corp. Int'l*, No. H-05-3399, slip op. (S.D. Tex. Mar. 26, 2009) (Ex. 1).[1] The relevant portion of his declaration is so generic that it could have been submitted for almost any industry or type of antitrust claim. His declaration does not present any retail pricing data, much less attempt to show that the pricing variations by [redacted] resellers over a six-year period can be handled in any manageable way. Although he has not done any work yet on a damage model, he says that he plans to deal with all these variations using "averages." But, by definition, averages ignore the variations in the nature of resellers (*e.g.*, Best Buy v. Amazon.com); differences in the prices they charge; differences in the way they sell iPods (*e.g.*, separately or bundled with service plans or other products); and differences in the prices of iPods near the end of the model life and used iPods sold at negotiated or heavily discounted prices. As the *Pioneer Valley* court found, his purported use of "averages" is "meaningless." Ex. 1 at 13.

Third, plaintiff argues that individuals who bought iPods in the 49 other states may sue under California's indirect purchaser amendment to the Cartwright Act because it supposedly does not conflict with the laws of any other state. In fact, California is among a minority of states that permit indirect purchaser suits. Under conflicts of law and due process analyses, California law does not apply to purchases outside California, particularly not in states with conflicting laws.

Fourth, plaintiff ignores other individual issues relating to proof of impact or fact of damage. These issues were raised in the direct purchaser motion but not addressed in the Court's decision. To demonstrate impact or fact of damage—an essential element of antitrust liability—a tying plaintiff must demonstrate that she paid a net overcharge for the tying and tied products combined. By focusing exclusively on alleged overcharges for the **tied** product, plaintiff is trying to avoid the unavoidably individual nature of determining whether any undercharges on the **tying** product more than offset alleged overcharges. This analysis cannot be done on a class-wide basis. It depends not only on the amount of any undercharge on music but also on the relative size of

[1] All references to "Ex." are to the accompanying Declaration of Michael Scott.

music and iPod purchases by individual consumers. If under plaintiff's theory an iPod is **over**priced by $5 and music is **under**priced by five cents, anyone with one iPod and 100 songs will break even and suffer no impact or fact of damage. Plaintiff also ignores the individual nature of the preferred method of proving an overcharge on the alleged tied product, *i.e.*, the difference between its price and the price of the product that the consumer would have bought absent the tie.

Fifth, a class for injunctive relief is inappropriate because, unlike the direct purchasers, this plaintiff does not claim that injunctive relief is her primary goal. Indeed, now that the record companies have permitted Apple to provide all DRM-free music and Apple is doing so, she could not possibly make that claim.

Finally, plaintiff's request to certify her antitrust claims under the UCL and CLRA fail for all of these same reasons. And plaintiff does not seek certification of her non-disclosure claim under the UCL, presumably because she recognizes that that claim depends heavily on individual proof as to each consumer's understanding of interoperability and his or her intent in obtaining music or an iPod. Proof that Somers did not understand the scope of interoperability and for that reason bought a particular iPod would not prove the same thing as to any other consumer.

BACKGROUND

A. Plaintiff and the proposed class.

Plaintiff Somers is an attorney formerly employed by Milberg Weiss, the predecessor law firm to the direct purchaser plaintiffs' counsel of record. Ex. 2, 8:17-23, 9:9-11. She bought her first iPod in February 2005 for a friend from ebuyer.com, an on-line reseller. She paid $236.99 (plus $5.03 shipping). Ex. 3. At that time, the same model (Mini 4GB) cost $249 from the Apple store. Ex. 4.

She later bought two iPods from Target, one for herself and one as a gift for her mother. Ex. 2, 37:14-38:4, 43:4-8. She bought each iPod voluntarily, with no coercion. *Id*. at 38:13-23, 43:14-20. Her main purpose in buying her own iPod was to load her CDs onto it, and most of the files she has downloaded from the iTunes Store are free podcasts without DRM. *Id*. at 36:9-12,

122:9-11. Her future choice of a replacement player would depend in part on how much she liked another player and how long it would take to transfer her music. *Id*. at 104:1-105:6.

Somers seeks to represent a nationwide class of all persons who, beginning December 31, 2003, purchased an iPod "indirectly from Apple for their own use and not for resale." Somers, a California resident, seeks to apply California law to all indirect purchasers nationwide. She seeks to represent a damages class under the California Cartwright Act, Unfair Competition Law and Consumer Legal Remedies Act, and an injunctive relief class under these state laws and the federal Sherman Act. She does not dispute that, unlike direct purchasers, she lacks standing to seek any monetary relief under federal law. *See Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

B. Resellers.

Unlike direct purchasers who by definition purchased from Apple at prices set by Apple itself, the indirect purchasers obtained their iPods from [redacted] different resellers (*see* Dkt. 179 (C 05-00037 JW), ¶ 3), each of which set its own retail prices. The resellers include large electronics stores (*e.g.*, Best Buy, Circuit City, CompUSA), mid- to low-priced large retail stores (Target, Wal-Mart), discount warehouses (Costco, Sam's), specialty stores (Fry's), large on-line retailers (Amazon) and hundreds of smaller or specialty on-line outlets (PC Connection, J&R Computer). French Aff. Ex. 5. Some of the resellers purchased directly from Apple. Others purchased from intermediate wholesalers or distributors at a price independently determined by that seller. *See* French Aff. Ex. 7.

The prices charged by these numerous resellers varied significantly. Just looking at a snapshot of current prices, the prices on a single model vary by as much as $50 or more. Amazon.com, for example, lists 32 different resellers of the iPod Touch (32 GB), with prices from a low of $350 to well over $400. Ex. 13.[2]

This price disparity has existed throughout the class period and has varied over time. To cite three examples, in December 2006, advertised prices for an 80 GB iPod ranged from $329.99

[2] The price range on other models include: iPod Touch (8 GB): $212.94 to $229.99 (Exs. 5, 6); iPod Touch (32 GB): $369.99 to $399.99 (Exs. 7, 8); iPod Classic (120 GB): $219.97 to $249.99 (Exs. 9, 10); and iPod Nano (16 GB): $169.97 to $199.99 (Exs. 11, 12).

to $349. Ex. 14. On November 12, 2007, Amazon.com offered an iPod Nano (4GB) for $169.99, $30 less than the Apple store price. Ex. 15. Two days later, Amazon.com's price for the same model was $183.95, while CompUSA's price on that day was $160.99. Ex. 16. As noted, plaintiff bought her first iPod from a now-defunct online retailer in 2005 for $12 less than the Apple store price.

The price disparity also varies by model. Apple has introduced 42 different iPod models. French Aff. Ex. 2. Innovations over the years include color screens, photo display capability, video capability, accelerometers (to rotate the display), and wi-fi capability. Each new model has had its own price, and prices have varied significantly over the years. Apple's price for a 30GB iPod in 2005 was $299. Ex. 17. Apple now sells the 120GB iPod Classic for $249, with some resellers charging as low as $219.97. Ex. 18, 9. When Apple introduced a second generation iPod Mini in February 2005, it dropped the price of the 4GB Mini from $249 to $199. Exs. 4, 19. The new, third generation iPod Shuffle (4GB) costs $79 from the Apple Store. Ex. 20. The previous, second generation Shuffle (2GB), which originally sold for $69, is now available from PC Connection for $47.99. Exs. 21, 22.

Retail prices for iPods vary in other ways as well. Some retailers bundle iPods with other merchandise, effectively discounting the iPod price. Wal-Mart, for example, is offering a choice of various accessories with the purchase of an iPod Touch. Exs. 23, 24. Some retailers discount iPods by offering store gift cards with iPod purchases. Exs. 26, 27. Some retailers sell iPods through auctions and raffles, with (for example) the winning bidder paying $12.75 for an iPod Shuffle that Apple sells for $69. Ex. 28. Some auctions include pre-loaded, celebrity-autographed, new iPods. Ex. 29. Some iPods are purchased in bulk and then sold to companies who use the iPods as incentive awards for employees. Ex. 30. Duke University, for example, began giving iPods to incoming freshmen several years ago. Ex. 31.

As the wide variety of prices demonstrates, Apple does not dictate the retail price that resellers charge their customers. As an essential part of his "pass on" analysis, plaintiff's economist posits (French Aff. ¶ 28) that Apple requires resellers to adhere to Apple's "minimum advertised price." But the documents on which he relies show the opposite: "Apple does not

require retailers or resellers to charge specific prices." Ex. 32. Resellers sell to their customers "at prices determined solely by Reseller." French Aff. Ex. 7 (¶ 3.A), 8 (¶ 3.A). Resellers that purchase from wholesalers or distributors (rather than from Apple directly) do so "on terms decided between the Reseller and the Authorized Apple Wholesaler." *Id.* Ex. 7 (¶ 3.A).

Plaintiff's proposed class definition is broad enough also to include purchasers of used or refurbished iPods sold at significant discounts. Plaintiff's economist excluded them from his report (Ex. 33, 170:2-18), presumably because such iPods are available on websites like eBay and Overstock.com from innumerable sellers at an almost infinite number of prices. More than 10,000 iPods are currently listed on eBay. Ex. 34.

C. Somers' economist

Somers relies solely on the declaration of her economist, Gary French, to assert that impact and damages can be computed for [redacted] individuals on a common basis. Most of French's declaration is devoted to background information, matters not pertinent to this motion and matters that at deposition he admitted were overstated in his declaration.[3] On the critical question of whether impact and damages could be established by common proof, he spends only a few conclusory paragraphs at the end of his declaration. French Aff. ¶¶ 62-71. He asserts that "one approach" to determining impact on indirect purchasers is to calculate the overcharge to direct purchasers and then show that the overcharge was passed through to consumers. *Id.* ¶ 62. "Another approach," he says, is to "estimate the overcharge directly from iPod retail sales." *Id.*

Not only has French failed to do any work on either approach, he provides little explanation as to how either approach would work in this case. He offers no basis from which the Court could conclude that his analysis, if and when he ever does it, would produce the required common evidence to support class certification. Ex. 33, 6:10-23, 15:14-19. Indeed, he has never used his proposed analysis in any other case to calculate indirect purchaser injury or damages. *Id.*

[3] French admitted, for example, that contrary to the impression created in his declaration, he is not asserting that Apple has done anything anti-competitive. Ex. 33, 109:24-111:7. Indeed, French readily conceded that plaintiff's theory would remove incentives to develop competing DRM technologies. *Id.* at 129:13-130:4. And he questioned "why anybody would want to require [Apple] to use Microsoft [software] in the first place." *Id.* at 118:15-16.

at 6:24-7:13. Nor has he gathered, or even attempted to gather, the data that he says would be required to run the analysis he proposes. As to retail prices paid by indirect purchasers, he says only that it "appears" that he might be able to locate monthly average prices across all resellers by iPod model. *Id*. at 16:2-17:4. But he does not actually know if it exists.

Worse yet, even if individual transaction data is available, he plans to run his analysis using only monthly averages across all resellers, and not to evaluate whether any alleged overcharges occurred in individual transactions or to determine any pass-through at the level of particular resellers. *Id*. at 71:7-10. "I'm not going to do the pass-through analysis on an individual transaction basis." *Id.* at 21:4-6; 21:18-23.

ARGUMENT

Plaintiff bears the burden of demonstrating that class certification is proper. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). The Court must conduct a "rigorous analysis" of whether plaintiff has met that burden that includes "prob[ing] behind the pleadings." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160-61 (1982). Plaintiff must adduce evidence—and the Court must determine as a factual matter—that the manner in which the case "would actually be tried" satisfies Rule 23. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996); Fed. R. Civ. P. 23 advisory committee's note, 2003 Amendments ("A critical need is to determine how the case will be tried.").

A "district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met." *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006). Without resolving the merits, the Court should "consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case." *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 509 (9th Cir. 1992) (internal quotation marks omitted); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it.").

Plaintiff asserts (Mot. 4) that doubts should be resolved in favor of class certification. The Ninth Circuit, however, has not endorsed this notion, and other courts have rejected it. Indeed, as the Third Circuit recently held, district courts must "not suppress 'doubt' as to whether a Rule 23 requirement is met." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2008). Recent amendments to Rule 23 "reject tentative decisions on certification and encourage development of a record sufficient for informed analysis." *Id.* (citing Fed. R. Civ. P. 23 advisory committee's note, 2003 Amendments ("A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.")). Nor does any presumption exist in favor of class certification in antitrust cases. To the contrary, given their magnitude, antitrust class actions are prime opportunities for abuse. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

Nor is it sufficient for a plaintiff to offer only an expert's say-so that the proposed class meets Rule 23's requirements. Instead, the court must critically evaluate expert evidence to determine whether it actually supports class certification. "Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis." *In re Hydrogen Peroxide*, 552 F.3d at 323; *West v. Prudential Secs., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (a plaintiff may not "obtain class certification just by hiring a competent expert").

I. PLAINTIFF CONCEDES THAT NO CLASS-WIDE METHOD EXISTS TO PROVE WHETHER INDIVIDUAL CONSUMERS WERE COERCED TO BUY AN IPOD.

As in the direct purchaser case, plaintiff's principal claim is that Apple unlawfully tied the sale of iTunes Store content to the purchase of iPods. In the direct purchaser case, the Court has reserved ruling on whether the tying claim may be certified for class treatment pending its resolution of two issues raised in Apple's motion for judgment on the pleadings—*i.e.*, whether a tie may be found "where there is no requirement that the tying and tied products be purchased together" and, if so, whether "market-level" coercion is sufficient to establish such tie. Dkt. 196 (C 05-00037 JW), p. 7. Plaintiff here devotes much of her motion (pp. 8-14) to these issues but

adds nothing new of significance. Thus, rather than re-briefing the issue, Apple respectfully refers the Court to that briefing (Dkts. 200, 211 (C 05-00037 JW)).[4]

Most importantly for present purposes, plaintiff does not contest that, if "market-level" coercion is insufficient, her tying claim cannot properly be certified for class treatment. As previously demonstrated, the courts considering this issue have uniformly held that the need for individual proof defeats class certification where, as here, the alleged tie was not enforced through a uniform contractual or equivalent requirement that applied equally to all purchasers. Dkt. 182 (C 05-00037 JW), pp. 12-15. For this reason alone, class certification of plaintiff's tying claim should be denied.[5]

Even if the Court were to conclude that the tying claim could be certified in the direct purchaser case, class certification of plaintiff's claims in this case would still have to be denied for the additional reasons discussed below that are not present in the direct purchaser case.

II. PLAINTIFF HAS OFFERED NO CLASS-WIDE METHOD OF PROVING THAT INDIVIDUAL CONSUMERS SUFFERED IMPACT.

A. Plaintiff Must Demonstrate That Impact to Each Class Member Can Be Established by Common Proof.

"Proof of injury is an essential substantive element" of an antitrust claim. *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 233 (9th Cir. 1974); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) ("causal antitrust injury[] is an element of all antitrust suits"); *J.P. Morgan & Co. v. Super. Court*, 113 Cal. App. 4th 195 (2003) (injury is required in action

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[4] French acknowledged that, even under plaintiff's theory, whether an individual was "locked-in" would depend on the size of their non-obsolete DRM-protected iTS library, their willingness or ability to transfer music files by burning/ripping, and their income level. Ex. 33, 56:6-59:8, 152:10-153:2. He added: "if they thought that burning and ripping was a real option, then this cost of replacing their library would be moot." *Id.* at 59:23-25.

[5] Unlike the federal antitrust law at issue in the direct purchaser case, the California antitrust law plaintiff invokes in this case does not contain any prohibition against monopolizetion. Cal. Bus. & Prof. Code § 16720; *Bondi v. Jewels by Edwar, Ltd.*, 267 Cal. App. 2d 672, 678 (1968). Her claim for antitrust damages here thus rises or falls entirely on whether she has a viable tying claim. With no federal monopolization claim for damages, and no Cartwright Act equivalent, her antitrust claim for damages is limited to state law tying.

under Cartwright Act); *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) ("The analysis under California's antitrust law mirrors the analysis under federal law because the Cartwright Act . . . was modeled after the Sherman Act.").[6]

Contrary to plaintiff's assertion (Mot. 18), this is a matter not simply of calculating damages. The issue instead is whether consumers were injured at all—an essential element of antitrust liability. Injury (also referred to as impact or fact of damage) "must be proved with certainty." *Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 327 (5th Cir. 1978); *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 663 F.2d 253, 268 (D.C. Cir. 1981).

This requirement is not diminished in a class action. "[T]he fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief . . . . [E]ach plaintiff must still prove [that the antitrust violation] did in fact cause him injury." *Blue Bird*, 573 F.2d at 327; *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) (plaintiffs must present evidence "that each member of the class was in fact injured"). "[W]here fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003); *Blades v. Monsanto Co.*, 400 F.3d 562, 574 (8th Cir. 2005) (affirming denial of class certification where plaintiffs' expert "did not show that injury could be proven on a class-wide basis with common proof"). As the leading antitrust treatise recognizes:

> [T]he fact that some class members have not been damaged at all generally defeats certification, because the fact of injury, or "impact" must be established by common proof.

II P. Areeda, H. Hovenkamp & R. Blair, *Antitrust Law*, ¶ 331d, at 282 (2d ed. 2000).

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[6] Proof of injury is likewise an essential element of plaintiff's other state law claims. Cal. Bus. & Prof. Code § 17204 (UCL requires that plaintiff has suffered "injury in fact" and "has lost money or property as a result of such unfair competition"); *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 638 (2009) (holding that CLRA requires that plaintiff have suffered damage). Plaintiff relies on the same theory of injury—*i.e.*, an alleged overcharge—for each of her claims. Thus, the individual proof involved in establishing injury precludes class certification of all of her claims.

Proof of injury is especially problematic in indirect purchaser cases where, as here, the product is sold through [redacted] distributors at a myriad of retail prices. In addition to establishing the antitrust violation and that the defendant charged the direct purchasers a higher price, the indirect purchaser plaintiff must show that the direct purchaser passed on that overcharge. And the plaintiff must make that showing as to each alleged class member. "[T]o prove that each class member was actually injured by the antitrust conspiracy[,] plaintiff must prove that the 'overcharge' was passed on to each member and that the member absorbed the overcharge or was otherwise harmed by having to pay a higher price." *In re Methionine Antitrust Litig.*, 204 F.R.D. 161, 164 (N.D. Cal. 2001).[7]

Numerous cases have rejected class certification because the individual issues inherent in making such a showing preclude a finding that common issues predominate. As a survey of such cases concluded, "[t]he vast majority of trial courts that have rigorously applied the requirements for class treatment in actual indirect purchaser suits have refused to certify a class." William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification In The Shadow of Illinois Brick*, 67 Antitrust L.J. 1, 21-26 (1999).[8]

B. Plaintiff's Proposed Method of Proving Only Aggregate Injury and Damages Using Average Data is Impermissible.

As in those cases, plaintiff here has not come close to showing that injury can be proved on a common basis. She relies entirely on French, asserting that he has set forth an "economic

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[7] "Courts have recognized that proof of injury in fact in indirect purchaser suits can be problematic since, notwithstanding economic theory, it cannot be presumed that intermediaries will, in fact, always pass through antitrust overcharges or that price increases by middlemen to ultimate consumers might not be attributable to upstream overcharges…[P]roof that a middleman, in fact, did pass on an antitrust overcharge to the ultimate consumer-plaintiff can involve murky issues of fact…[R]eference to economic theory alone is insufficient to establish a pass on of an overcharge." *Ren v. Philip Morris, Inc.*, 2002 WL 1839983, at *5 (Mich. Cir. Ct. June 11, 2002).

[8] *See, e.g., Melnick v. Microsoft Corp.*, 2001 WL 1012261 (Me. Super. Ct. Aug. 24, 2001) (denying indirect purchaser class, and cataloguing similar cases). As additional examples, see *In re Brand Name Prescription Drugs Antitrust Litig.*, 1994 WL 663590 (N.D. Ill. Nov. 18, 1994); *A & M Supply Co. v. Microsoft Corp.*, 654 N.W.2d 572 (Mich. App. 2002); *Karofsky v. Abbott Labs.*, 1997 WL 34504652 (Me. Super. Ct. Oct. 16, 1997).

methodology" to demonstrate that all class members suffered injury. As noted (at 6-7), however, French does not assert that he can or will determine that each individual purchaser actually has been overcharged or, if so, by how much. Instead, he proposes to aggregate whatever data he might find available—including the wide range of disparate prices charged by [redacted] iPod resellers—and attempt to determine an average overcharge that he will then apply to all purchasers, without regard to the actual prices they paid and whether they included any overcharge. That exercise would be "meaningless" as a court concluded in denying class certification when French proposed proving lost profits on a class basis by averaging the purported class's lost profits. *Pioneer Valley,* slip. op. at 13, 28 ("French only calculated damages in the aggregate and *assumed* that all [class members] lost profits as a result of the alleged [antitrust violation] in some amount approaching the average.") (Ex. 1). As the court explained, averages do not show which plaintiffs were injured and which were not; nor do they determine the proper amount of damages to which any plaintiff may be entitled. *Id.*[9]

Other courts have similarly rejected this kind of aggregated approach. In *In Re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478 (N.D. Cal. 2008), Judge Alsup denied class certification for purchasers who bought from different suppliers at varying prices, holding that by using averaged data plaintiffs' expert had "evaded the very burden that he was supposed to shoulder—*i.e.*, that there is a common methodology to measure impact across *individual* products and *specific direct purchasers*." *Id.* at 493 (emphasis added). "Averaging masks the differences and by definition glides over what may be important differences." *Id.* at 494. Suppose one customer paid a $10 overcharge and another paid none. Only the overcharged customer has been injured and has any right to sue. But averaging makes it appear that both were overcharged by $5, resulting in one getting a windfall and the other being shortchanged. To prevent that result, a plaintiff seeking class certification must demonstrate that "differences between products and

[9] At deposition, French recalled another case in which his opinion was rejected but professed an inability to recall this rejection of his opinion just five months ago. Ex. 33, 104:1-24.

purchasers could be accounted for, not that individual differences could be ignored." *Id.* (emphasis omitted).[10]

At his deposition, French attempted to defend his use of averages by saying that it is "hard to imagine" that at least some portion of any overcharge was not passed through to every consumer. Ex. 33, 168:6-169:4. He speculated that, no matter what price a given reseller was charging (even if it was a sale or a loss leader price), that price would have been lower absent the challenged conduct because the price would be based on a lower "reference point." *Id.* But he offered no data to support that assertion, and he has not investigated whether it is true. Such unsupported theorizing is not a permissible basis for certifying a class. The First Circuit recently rejected a similar argument in reversing class certification in *In re New Motor Vehicles*. The plaintiffs' expert there argued that the retail price for automobiles would necessarily be affected by an increase in wholesale prices. The court ruled that "intuitive appeal" is not enough; it must be supported by actual proof. 522 F.3d at 29.[11]

Contrary to plaintiff's argument (Mot. 17), *Bruno v. Superior Court*, 127 Cal. App. 3d 120 (1981), does not relax the requirement under Rule 23 that a plaintiff must demonstrate a class-wide method of proving impact or injury. *Bruno* dealt with fluid recovery, which is not permitted in federal court under Rule 23 (*In re Hotel Tel. Charges*, 500 F.2d 86, 89-90 (9th Cir. 1974)) and which in any event is limited to distributing damages and not proof of impact. *See Bruno*, 127 Cal. App. 3d at 131 (even in fluid recovery, class certification requires that common methods exist for proving fact of injury for every proposed class member). Moreover, in discussing aggregate damages, *Bruno* relied (*id.* at 134 n.9) on a provision of California law that is expressly

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[10] S*ee also Bell Atl.*, 339 F.3d at 304-05 (rejecting plaintiffs' attempt to rely on nationwide averages); *Freeland v. AT & T Corp.*, 238 F.R.D. 130, 151 (S.D.N.Y. 2006) (denying class certification where plaintiffs' economist relied on average price increases); *Execu-Tech Bus. Sys. v. Appleton Papers*, No. 96-9639 CACE 05, slip op. at 3 (Fla. Cir. Ct. Dec. 16, 1997) ("It will not suffice for plaintiffs to come forward with a methodology that can merely show that the class on average—or the class as a whole—has suffered injury.").

[11] S*ee also A & M Supply*, 654 N.W.2d at 603 (reversing certification of indirect purchaser class where the plaintiffs' expert offered only "broad, nonspecific references" in support of his pass-on theory and "failed to bridge the gap between economic theory and the reality of economic damages").

limited to cases in which "there has been a determination that a defendant agreed to fix prices." Cal. Bus. & Prof. Code § 16760(d)). That provision has no application here.[12]

By itself, the need for individual proof of injury defeats the predominance required for class certification. If more were required, plaintiff has also not demonstrated any common method for proving amount of damages. The problem is not simply that plaintiff has failed to supply a "precise damage formula" (Mot. 18), but rather that French has not supplied any method at all. He disavows any intent to determine individual damages, states that he will try to prove only a purported average overcharge, and admits that he has not gathered the data and does not know whether he will be able to do even that. *Supra*, pp. 6-7. This failure of proof is further reason to deny class certification.[13]

C. Plaintiff's Proposed Proof Is Independently Insufficient Because French Has Not Shown That His Proposed Methods Will Work.

Even aside from his improper reliance on average data and aggregate injury, French's opinion is insufficient. To support class certification, a plaintiff's expert must do more than provide a general explanation of the available methods that he or she will use to show common impact and damages. Instead, the expert must "conduct [a] meaningful economic analysis" of proposed benchmarks to show that "a workable damage formula" exists. *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P.*, 247 F.R.D. 156, 177 (C.D. Cal. 2007); *Piggly*

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[12] *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341 (1987), also does not assist plaintiff. The court's ruling was also expressly limited to cases in which "a conspiracy to fix prices has been proven." *Id.* at 1350. Unlike in price-fixing cases, "[i]njury from . . . monopolization cannot be presumed" even under California law. *Rosack v. Volvo of Am. Corp.*, 131 Cal. App. 3d 741, 757 (1982).

[13] *Bell Atl.*, 339 F.3d at 307 (finding that individual issues concerning damages predominate over common issues: "plaintiffs' damages formula—a formula based on nationwide averages that makes no effort to adjust for the variegated nature of the businesses included in the classes—cannot reasonably approximate the actual damages suffered by the class members"); *Abrams v. Interco Inc.*, 719 F.2d 23, 31 (2d Cir. 1983) (certification denied where damages calculations "would be complicated by the scores of different products involved, varying local market conditions, fluctuations over time, and the difficulties of proving consumer purchasers [sic] after a lapse of five or ten years"); *Ren*, 2002 WL 1839983 (refusing to certify indirect purchaser class action under state law where a wide variety of damages formulae would have to be used).

Wiggly Clarksville, Inc. v. Interstate Brands Corp., 100 Fed. Appx. 296, 300 (5th Cir. 2004) (denying certification where plaintiffs did not prove that "a reliable formula for damages can be devised which will yield statistically significant results, that the data that would have to be plugged into such a formula can be assembled, that the relevant variables like negotiating skill can be quantified, and that all of this can be used to reliably measure antitrust damages for each of the many thousands of members of the proposed class").[14]

French has not done that, either here or in any indirect purchaser case. He has not actually employed any of the "feasible methods" (French Aff., p. 34) of class-wide proof he purports to describe. Ex. 33, 6:20-23. Thus, he has no basis to say that they will work here. He has done essentially no investigation into the facts regarding resales of iPods to consumers. The only data he presents relates to prices **Apple** charges its **direct** purchasers. He provides no data regarding the prices **resellers** charged to **indirect** purchasers. French Aff. ¶¶ 28-29.

Trying to finesse this failure, he theorizes that Apple's "minimum advertised prices" could be "common proof of impact on indirect purchasers." French Aff. ¶ 28. Plaintiff likewise asserts (Mot. 18) that Apple's supposed "use of price lists is strong evidence of common impact." But French admits that a threshold requirement for this theory is that the suggested retail prices must be binding on resellers, *i.e.*, that they must be the prices at which the resellers actually sell. And French knows full well that the prices in fact are not binding. The very evidence he cites shows that resellers determine their own prices—and it is indisputable that reseller prices vary by as much as $50 or more for the same iPod. *See supra*, pp. 4-6.[15]

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[14] *Am. Seed Co. v. Monsanto Co.*, 238 F.R.D. 394, 402 (D. Del. 2006) (denying class certification where plaintiff's expert did not independently analyze produced documents, did not interview any class members or distributors, and did not know if the data would support his theory, and thus had not "sufficiently grounded his theory of injury in the factual setting of the case to justify class certification"), *aff'd*, 271 Fed. Appx. 138 (3d Cir. 2008); *Butt v. Allegheny Pepsi-Cola Bottling Co.*, 116 F.R.D. 486, 492 (E.D. Va. 1987) (denying class certification where "Plaintiff's expert states, in very general terms, that statistical methods exist by which individual damages may be calculated, and plaintiff asserts that a workable formula can be developed").

[15] French admitted, with some understatement, that significant variation in prices either among resellers or over time could skew his analysis. Ex. 33, 19:18-20:2. But he has not done the requisite gathering of data and analysis even to know that such variation exists. *Id.* at 73:5-11.

The defects in French's approach are not limited to his lack of data and his failure to perform any of the work to date. As he admitted at deposition, the "econometric model" or regression analysis that he proposes to use (if the relevant data exist) to determine whether injury can be shown for all indirect purchasers faces serious obstacles that he does not know whether he will be able to overcome. (Actually, French has never done this type of analysis himself, so he is proposing that someone else in his consulting firm would do it. Ex. 33, 6:10-7:17.) Conceptually, he proposes to take average iPod prices for the time period before the alleged violation had any impact, and compare them with average iPod prices during the period of alleged impact. *Id*. at 157:16-22; 21:18-23. He recognizes that the prices will need to be adjusted for other variables that affected supply and demand (and thus prices) of iPods. French Aff. ¶ 67. Among the obstacles are the following:

First, French has not attempted to identify and define the necessary variables, much less actually construct a model that adequately accounts for all those variables. In *In re Graphics*, 253 F.R.D. at 495-96, Judge Alsup found plaintiffs' expert's regression analysis insufficient to support class certification for indirect purchasers because the expert had not identified all of the potentially relevant variables. Here, French has not even prepared a regression analysis, incomplete or otherwise.

Second, French admits that his proposed model will not be able to separate out the effects of events that happened simultaneously and continued for the same duration. So when Apple launched the iTunes Store and introduced a new, improved iPod model on the same day, French cannot separate the impact on demand for iPods of a new online source for purchasing music and a new iPod model from the impact, if any, from the use of Apple's proprietary DRM on music from its store. It is only the latter factor that plaintiff claims to be unlawful. Ex. 33, 77:7-78:14; Exs. 35, 36. Nor can his proposed regression analysis account for how much the demand for iPods has been affected by the widespread perception among consumers that iPods are "cool." Ex. 33, 124:13-125:7.

Third, French concedes that his model will not work without a minimum level of price changes either for the same model or among models during the relevant period. *Id.* at 68:11-

69:13. But he does not know how much price variation would be required, whether it exists, or whether his model will be a "bust." *Id.* at 69:1-13. And his model will not work if prices did not increase; and, as to whether he is planning to model whether prices should have been lower: "Heavens, no." *Id.* at 75:22-76:12.

Each of those defects makes his regression analysis invalid. As the *Pioneer Valley* court found, French "fails to explain how his proposed [method] will isolate the effects of Defendants' alleged conduct from other factors." Slip. op. at 28 (Ex. 1). But even if he were able to overcome those problems, he would still face the even greater problem of determining the point in time to use for his "before-during" analysis. He admits that he cannot use the April 2003 launch date of the iTunes Store because Apple had insufficient market power at that point even under plaintiff's theory and because iTunes Store content was not available to Windows users until October 2003. Ex. 33, 80:11-81:9, 171:2-8; Ex. 37. Beyond that admission, he was unable to specify the date or even the month that he will use in an effort to determine any impact or the amount of damages. He could not even describe how this all-important date could be determined other than to say it would be a "judgment call" depending on when a "really numerous" group of consumers or "lots of people" had big enough iTS libraries. Ex. 33, 47:20-49:19. As to the size of library sufficient to "lock-in" someone, he could not say anything more precise than "someplace between two and three and a thousand" songs. *Id.* at 57:18-58:2. He also acknowledged that picking the wrong date would distort his damage calculation. *Id.* at 85:10-86:1.[16]

This certify-it-now-and-figure-it-out-later approach is not a proper basis to certify a class, particularly not one of the magnitude plaintiff seeks here involving [redacted] consumers in 50 different states who purchased a variety of different iPod models at varying prices from [redacted] different resellers over a six-year period. The courts have repeatedly rejected class certification in far less complex cases where, as here, the proposed method to determine impact

[16] Similarly, his affidavit states that he could do a "during-after" analysis using the price of iPods after March 2009, when the record labels allowed Apple to begin selling music with DRM. French Aff. ¶ 66. But French admitted at deposition that "as far as I know, there is no after yet" because plaintiffs may contend that there are lingering effects of the alleged tie past that date. Ex. 33, 160:14-161:2.

and damages consists only of "general, untried economic theory," without any demonstration that "their proposed methods are workable with real world facts." *Melnick,* 2001 WL 1012261, at *16; *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 264 (2d Cir. 2001) (rejecting an expert's opinion without "the hard data upon which he relied" because "expert testimony rooted in hypothetical assumptions cannot substitute for actual market data").

> In recent years, many courts have exhibited greater willingness to test the viability of methodologies that experts propose to show class wide impact and injury using common proof, and are increasingly skeptical of plaintiffs' experts who offer only generalized and theoretical opinions that a particular methodology may serve this purpose without also submitting a functioning model that is tailored to market facts in the case at hand.

Ian Simmons, Alexander Okuliar & Nilam Sanghvi, *Without Presumptions: Rigorous Analysis in Class Certification Proceedings*, ANTITRUST, Summer 2007, at 65.

D. Plaintiff's Proposed Class Definition Creates Further Individual Issues and Ascertainability Problems.

To satisfy Rule 23, a "class definition should be 'precise, objective, and presently ascertainable.'" *Rodriguez v. Gates*, 2002 WL 1162675, at *8 (C.D. Cal. May 30, 2002). Plaintiff defines her proposed class as indirect purchasers "for their own use and not for resale." This definition is unclear as to whether it includes consumers who initially bought for their own use but then later sold their iPod through eBay, Amazon.com or any of the other options for selling used iPods. Including those consumers would create additional individual issues as to whether they passed on the alleged overcharge when reselling the iPod and thus suffered no injury (even under plaintiff's theory). This determination would require individual proof as to each sale and the price charged by each of thousands or possibly millions of different resellers.

It is also unclear whether the definition includes purchasers of used or refurbished iPods. Including them would create further individual issues, because the individual price each used iPod purchaser paid would have to be examined to determine whether it included any overcharge attributable to the alleged wrongful conduct.

Plaintiff's definition suffers from other ambiguities, such as whether it includes purchasers who bought the iPod to give as a gift and thus could not possibly have been coerced,

or companies that buy iPods to give as incentive awards to their employees, universities that buy them to give to incoming students, or other entities that buy them to give out as prizes.

III. A NATIONWIDE CLASS IS NOT PROPER BECAUSE CALIFORNIA LAW MAY NOT BE APPLIED NATIONWIDE.

This is another issue not presented in the consolidated direct purchaser cases. Plaintiff does not dispute that certifying a nationwide class under the laws of 50 different states would not satisfy Rule 23's predominance, superiority and manageability requirements. Tacitly conceding this point, she asks the Court to rule that California law may be applied to every indirect purchase in the country, no matter where it occurred. This request is groundless. Numerous courts have refused to apply a single state's law to such alleged classes.[17] Indeed, plaintiff cites no case—and we are aware of none—in which a court has certified a nationwide antitrust class of indirect purchasers under the law of a single state.

To apply California law to out-of-state purchasers, plaintiff must show that doing so is permitted under California's choice-of-law principles and the due process limitations announced in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). California's choice-of-law rules require the court to (1) examine whether the laws of the various jurisdictions materially differ; (2) if they differ, determine whether each jurisdiction has a legitimate interest in applying its law; (3) if each has a legitimate interest, then apply the law of the jurisdiction whose interest would be more impaired if its law were not applied. *See Abogados v. AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000). *Shutts* holds that a state may not apply its own law unless it has a "significant contact or significant aggregation of contacts to the claims asserted by ***each member*** of the plaintiff class, contacts creating state interests, in order to ensure that the choice of [its] law is not arbitrary or unfair." 472 U.S. at 821-22 (internal quotation marks omitted; emphasis added).

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[17] *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011 (N.D. Cal. 2007); *City of St. Paul v. FMC Corp.*, 1990 WL 265171 (D. Minn. Feb. 27, 1990); *In re K-Dur Antitrust Litig.*, 2008 WL 2660776 (D.N.J. Feb. 21, 2008); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260 (D. Mass. 2004).

A. California's Laws Differ Materially from Other States' Laws.

Material differences exist between California and other states regarding indirect purchaser suits, as the judges in this district have repeatedly held.[18] The "conflict looms large," as Judge Alsup found in rejecting nationwide application of California law to indirect purchaser antitrust claims. *In re Graphics*, 527 F. Supp. 2d at 1027. Unlike California, most states bar private antitrust suits by indirect purchasers altogether. Some of these states adhere to *Illinois Brick* (which bars indirect purchasers from suing). Some do not allow any private antitrust suits at all (whether direct or indirect). Some permit only *parens patriae* claims by attorneys general. And some simply have not enacted an antitrust statute. *See* Appendix A, p. 1.

Even among those states that permit private indirect purchaser antitrust actions, important differences exist. Some states do not permit indirect purchasers to recover treble damages or require more exacting levels of proof for treble damages. *Id.* At least one state requires a citizen to first give the attorney general the option of filing the lawsuit. *Id.* at 2. Some states offer simplified methods of proof for indirect purchasers not embodied in California's statutes. *Id.* at 7.

The differences between California's consumer protection statutes and those of other states are also striking. *Lantz v. Am. Honda Motor Co.*, 2007 WL 1424614, at *4 (N.D. Ill. May 14, 2007) ("State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules.") (internal quotation marks omitted). Several states do not allow indirect purchaser claims under their unfair competition statutes. Appendix A, p. 10. Other states do not allow class actions by private consumers asserting these types of claims, but instead vest that authority in their attorneys general. *Id.* Some states require proof of a fraudulent or deceptive act. *Id.* Another key difference is that the California UCL only affords equitable remedies, while other states, such as Massachusetts, afford compensatory damages and doubled or trebled damages where a

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[18] *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2009 WL 522903 (N.D. Cal. Mar. 3, 2009); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896 (N.D. Cal. 2008); *California v. Infineon Techs. AG*, 531 F. Supp. 2d 1124 (N.D. Cal. 2007); *In re Graphics*, 527 F. Supp. 2d at 1011.

defendant's conduct is found to be willful or knowing. *Id*.[19] There are also differences in statutes of limitations, notice requirements, and substantive proof requirements. *Id*. at 18-23.

B. The Interests of Non-California States Would Be More Impaired if California Law Applies to their Citizens.

Plaintiff asserts that these material differences should be ignored because California's interest in preventing Californians from harming consumers in other states supposedly can be served only by applying California law to every consumer in the country. In fact, California's interest in deterring wrongful conduct is fully served by applying California law to claims of California residents. That is particularly true because the alleged wrongful conduct here is already subject to a nationwide federal antitrust regime that permits full recovery to all direct purchasers (if plaintiff had a valid claim). Plaintiff identifies no reason why more is needed to satisfy California's deterrence interest.

Contrary to plaintiff's further argument, states that do not allow their residents to make antitrust claims for indirect purchasers have a legitimate interest in enforcing that policy. Those states have opted for the federal policy, articulated in *Illinois Brick*, that "antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." 431 U.S. at 735; *cf. Berghausen v. Microsoft Corp.*, 765 N.E.2d 592, 595-96 (Ind. App. 2002) (summarizing federal rationale and noting Indiana follows it). Applying California law nationwide would undermine this enforcement interest by permitting a much larger group of potential plaintiffs to compete with direct purchasers for recoverable damages or settlement dollars. These other states have a valid interest in not having claims by their own residents contribute to what those states view as an unwise, inefficient enforcement scheme.

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[19] Plaintiff cites *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022-23 (9th Cir. 1998), as supposedly holding that California law does not conflict with that of other states. Mot. 20. But *Hanlon* was addressing "products liability, breaches of express and implied warranties, and 'lemon laws,'" not the antitrust and unfair competition statutes at issue here. 150 F.3d at 1022.

Moreover, providing compensation comes at a cost, and states thus are entitled to strike their own balance between their residents' interest in compensation and the impact on the state's business climate from excessive litigation. That balance is implicated by any suit against companies doing business in their states, whether or not they are resident there. The impact is magnified by the availability of treble damages in antitrust cases, and claims (like the one here) for duplicative or six-fold damages if indirect purchasers are also permitted to sue. By prohibiting duplicative recovery, the state acts to ensure that companies are not unduly deterred from continuing to do business in the state. California is entitled to strike its own balance but not to override states that have struck a different balance. Indeed, California courts themselves have recognized the legitimate interest of each state in promoting and regulating economic activity within its borders. *See, e.g , Offshore Rental Co. v. Cont'l Oil Co.*, 22 Cal. 3d 157, 168 (1978) (recognizing a foreign state's "vital interest" in promoting investment and business activity within its borders "among investors incorporated both in [that state] and elsewhere"); *see also Arno v. Club Med Inc.*, 22 F.3d 1464, 1468 (9th Cir. 1994) (Guadeloupe had "an interest in encouraging local industry, and reliably defining the duties and scope of liability of an employer doing business within its borders") (citations omitted).[20]

Applying California law would also impair the interests of those states that provide greater remedies to their residents than would be available under California law. Of primary importance, California's Cartwright Act provides no right to sue for monopolization, but several other states that permit indirect purchaser suits allow such claims. Appendix A, p. 7. If plaintiff's claim had any merit (which Apple denies), certifying a nationwide class under California law would forfeit the right of residents of those states to sue under their own laws.

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[20] None of plaintiff's cases that applied California law to out-of-state residents involved the balance of interests at issue in indirect purchaser antitrust cases. *In re Pizza Time Theatre Sec. Litig.*, 112 F.R.D. 15 (N.D. Cal. 1986) and *In re Seagate Tech. Sec. Litig.*, 115 F.R.D. 264 (N.D. Cal. 1987), were securities fraud suits in which the court concluded the similarities between the laws at issue "vastly outweigh[ed] any differences" and that each state had an interest in allowing suit. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224 (2001), was a breach of contract and consumer fraud case in which the court treated the other states' laws as allowing recovery. Plaintiff's other cases were individual actions not involving any conflict in antitrust laws.

For these reasons, plaintiff's request for an unprecedented nationwide class of indirect purchasers is inappropriate.

IV. PLAINTIFF DOES NOT ARGUE THAT HER NON-DISCLOSURE FRAUD CLAIM CAN BE DETERMINED ON A CLASS-WIDE BASIS.

Plaintiff essentially makes two claims under California's Unfair Competition Law (UCL): a claim for non-disclosure based on the assertion that some consumers "reasonably believed" that iTunes Store content would play directly on any digital player, and a claim for "unlawful conduct" consisting of violating "state and federal laws against monopolization and tying." No class should be certified for those claims, for two reasons. First, plaintiff does not seek class certification for the non-disclosure claim, presumably because she recognizes it raises inherently individual issues that cannot properly be certified. *Quacchia v. DaimlerChrysler Corp.*, 122 Cal. App. 4th 1442 (2004) (affirming denial of class certification of non-disclosure claim under UCL); *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644 (1993) (same).[21] Second, the antitrust-based claims fail to satisfy Rule 23 for the reasons stated above.

V. PLAINTIFF IGNORES OTHER INDIVIDUAL ISSUES RAISED BY HER CLAIMS FOR DAMAGES.

In the direct purchaser case, Apple described two additional reasons why class certification is improper, both of which apply as much or more here. First, to try to avoid individualized inquiry as to impact and damages, plaintiff is impermissibly waiving the right of purported class members to pursue the preferred method of proving damages in a tying case—the difference between the price they paid for an iPod and the price of the competing player that they would have bought. *See* Dkt. 182 (C 05-00037 JW), pp. 19-22.

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[21] Like Somers, the direct purchasers also did not seek certification of a non-disclosure claim under the UCL, but instead sought certification of the UCL claim only to the extent it relied on the alleged antitrust violations. Thus, in its certification order in the direct purchaser case, the Court granted certification of the UCL claim only "to the extent" the direct purchasers sought certification of those claims on the basis that they incorporated by reference their monopolization claims. Apple understands the Court's order to mean that the direct purchaser class does not extend to any non-disclosure claim under the UCL.

For the same reason, plaintiff ignores the requirement that a tying plaintiff must prove a net overcharge for both the tying and tied products. It is insufficient to focus exclusively on an alleged overcharge for the tied product without determining whether the alleged overcharge was offset by a lower price for the tying product. *Id.* at 18-19.

The Court did not expressly address these issues in its order in the direct purchaser case. The Court stated that "questions of antitrust injury" are common to the class "especially if the injury alleged is that Apple uniformly charged consumers supracompetitive prices." Dkt. 196 (C 05-00037 JW), p. 8. But even assuming it could be shown by common proof that iPod prices were supracompetitive, that would not resolve the separate issue whether some consumers suffered no net overcharge—and thus no antitrust injury—because of a lower price on their iTunes Store purchases. Nor would it solve the problem that plaintiff is are waiving the right of some customers to claim damages based on the price of an alternative player, as those customers may well want to do if French's approach is a "bust" as he acknowledged it might be. These are important issues that can and should be addressed on this motion. Properly resolved, they preclude class certification.

VI. A CLASS FOR INJUNCTIVE RELIEF IS INAPPROPRIATE.

In the direct purchaser case, the Court permitted an injunctive relief class based on those plaintiffs' contention that their "first and foremost goal is to enjoin Apple from continuing to obstruct interoperability." Dkt. 165, p. 9; Dkt. 196, p. 11. Whether plaintiffs' assertion was accurate when their goal was to force Apple to stop using DRM, the assertion certainly cannot be true now that the record companies have permitted Apple to offer all DRM-free music, which it is now doing. Ex. 38. Accordingly, the indirect purchaser plaintiff does not make the same assertion and thus the premise for permitting an injunctive relief class in the direct purchaser case is no longer present.

Rather than withdrawing her claim for injunctive relief, Somers now claims (Mot. 7) that Apple should stop "charging customers for removal of DRM from iTunes downloads." Plaintiff misunderstands the process. Rather than removing DRM from the consumer's files, Apple provides another version of the file, without DRM and at a higher audio quality, for one-third the

price of the original item. In effect, plaintiff is asking the Court to order Apple to provide music free of charge, an extraordinary request for which she cites no authority. In any event, this plaintiff does not contend that this relief predominates over her request for treble damages for alleged overcharges for [redacted] iPods, as is required for a Rule 23(b)(2) class. *See Zinser*, 253 F.3d at 1195 ("Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive.").

CONCLUSION

For these reasons, class certification should be denied.

Dated: April 20, 2009

Respectfully submitted,

JONES DAY

By: /s/ Robert A. Mittelstaedt
Robert A. Mittelstaedt

APPENDIX A[1]

I. VARIATIONS IN STATE ANTITRUST LAWS

A. Plaintiff's Antitrust Claims Prohibited

	Indirect Purchaser Claims Prohibited Under Antitrust Statute	Private Indirect Purchaser Claims Prohibited	Private Claims for Treble Damages Prohibited or Require Greater Showing	Private Class Actions for Treble Damages Prohibited	Claims Limited to Intrastate Conduct
Alabama			Ala. Code § 6-5-60(a)		*Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc.*, 746 So.2d 966, 989-90 (Ala. 1999)
Alaska		Alaska Stat. § 45.50.577(i); *see also In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp.2d 896, 907 (N.D. Cal. 2008)	Alaska Stat. § 45.50.577(i); *see also In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp.2d 896, 907 (N.D. Cal. 2008)	Alaska Stat. § 45.50.577(i); *see also In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp.2d 896, 907 (N.D. Cal. 2008)	
Arizona			Ariz. Rev. Stat. Ann. § 44-1408(b) (requiring flagrant violation)		
Arkansas		Ark. Code Ann. §§ 4-75-212(b); 4-75-315	Ark. Code Ann. §§ 4-75-212(b); 4-75-315	Ark. Code Ann. §§ 4-75-212(b); 4-75-315	
Colorado	Exception for indirect purchaser governmental and public entities. *See Stifflear v. Bristol-Meyers Squibb Co.*, 931 P.2d 471, 475-76 (Colo. Ct. App. 1996); Colo. Rev. Stat. Ann. § 6-4-111	*Stifflear v. Bristol-Meyers Squibb Co.*, 931 P.2d 471, 475-76 (Colo. Ct. App. 1996); Colo. Rev. Stat. Ann. § 6-4-111	*See Stifflear v. Bristol-Meyers Squibb Co.*, 931 P.2d 471, 475-76 (Colo. Ct. App. 1996); Colo. Rev. Stat. Ann. § 6-4-111	*See Stifflear v. Bristol-Meyers Squibb Co.*, 931 P.2d 471, 475-76 (Colo. Ct. App. 1996); Colo. Rev. Stat. Ann. § 6-4-111	

[1] These charts demonstrate substantial differences among state antitrust and consumer protection statutes, but do not constitute an exhaustive analysis of the numerous variations that exist.

	Indirect Purchaser Claims Prohibited Under Antitrust Statute	Private Indirect Purchaser Claims Prohibited	Private Claims for Treble Damages Prohibited or Require Greater Showing	Private Class Actions for Treble Damages Prohibited	Claims Limited to Intrastate Conduct
Connecticut	*Vacco v. Microsoft Corp.*, 793 A.2d 1048, 1063-64 (Conn. 2002)	*Vacco v. Microsoft Corp.*, 793 A.2d 1048, 1063-64 (Conn. 2002)	*Vacco v. Microsoft Corp.*, 793 A.2d 1048, 1063-64 (Conn. 2002)	*Vacco v. Microsoft Corp.*, 793 A.2d 1048, 1063-64 (Conn. 2002)	
Delaware		Del. Code Ann. tit. 6, § 2108	Del. Code Ann. tit. 6, § 2108	Del. Code Ann. tit. 6, § 2108	
Florida	*Mack v. Bristol-Meyers Squibb Co.*, 673 So.2d 100, 103 (Fla. Dist. Ct. App. 1996)	*Mack v. Bristol-Meyers Squibb Co.*, 673 So.2d 100, 103 (Fla. Dist. Ct. App. 1996)	*Mack v. Bristol-Meyers Squibb Co.*, 673 So.2d 100, 103 (Fla. Dist. Ct. App. 1996)	*Mack v. Bristol-Meyers Squibb Co.*, 673 So.2d 100, 103 (Fla. Dist. Ct. App. 1996)	
Georgia	Has no civil antitrust statute of general applicability	Has no civil antitrust statute of general applicability	Has no civil antitrust statute of general applicability	Has no civil antitrust statute of general applicability	
Hawaii			Haw. Rev. Stat. §§ 480-3; 480-13(a)(1)	Haw. Rev. Stat. §§ 480-13.3 (representative private indirect purchasers must give notice to Attorney General, who must then decline to proceed parens patriae); 480-14(c) (permitting only parens patriae claims for treble damages)	
Idaho		Idaho Code Ann. § 48-108(2)(a)	Idaho Code Ann. § 48-108(2)(a)	Idaho Code Ann. § 48-108(2)(a)	
Illinois		Ill. Comp. Stat. § 10/7(2)	Ill. Comp. Stat. § 10/7(2)	Ill. Comp. Stat. § 10/7(2)	
Indiana	*Berghausen v. Microsoft Corp.*, 765 N.E.2d 592, 594 (Ind. Ct. App. 2002)	*Berghausen v. Microsoft Corp.*, 765 N.E.2d 592, 594 (Ind. Ct. App. 2002)	*Berghausen v. Microsoft Corp.*, 765 N.E.2d 592, 594 (Ind. Ct. App. 2002)	*Berghausen v. Microsoft Corp.*, 765 N.E.2d 592, 594 (Ind. Ct. App. 2002)	
Iowa			Iowa Code § 553.12 (3) (requiring willful or flagrant violation for treble damages)		

	Indirect Purchaser Claims Prohibited Under Antitrust Statute	Private Indirect Purchaser Claims Prohibited	Private Claims for Treble Damages Prohibited or Require Greater Showing	Private Class Actions for Treble Damages Prohibited	Claims Limited to Intrastate Conduct
Kansas			Kan. Stat. Ann. § 50-115		
Kentucky	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1146-1147 (N.D. Cal. 2007)	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1146-1147 (N.D. Cal. 2007)	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1146-1147 (N.D. Cal. 2007)	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1146-1147 (N.D. Cal. 2007)	*See In re Microsoft Corp. Antitrust Litig.*, 2003 WL 22070561, 2003-2 Trade Cases 74,138 (D. Md. 2003)
Louisiana	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1147-1148 (N.D. Cal. 2007)	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1147-1148 (N.D. Cal. 2007)	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1147-1148 (N.D. Cal. 2007)	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1147-1148 (N.D. Cal. 2007)	
Maryland	*Davidson v. Microsoft Corp.*, 792 A.2d 336, 339-42 (Md. Ct. Spec. App. 2002)	*Davidson v. Microsoft Corp.*, 792 A.2d 336, 339-42 (Md. Ct. Spec. App. 2002)	*Davidson v. Microsoft Corp.*, 792 A.2d 336, 339-42 (Md. Ct. Spec. App. 2002)	*Davidson v. Microsoft Corp.*, 792 A.2d 336, 339-42 (Md. Ct. Spec. App. 2002)	
Massachusetts	Mass. Gen. Laws Ann. ch. 93, § 12; *Boos v. Abbott Labs.*, 925 F.Supp. 49, 51 (D. Mass. 1996)	Mass. Gen. Laws Ann. ch. 93, § 12; *Boos v. Abbott Labs.*, 925 F.Supp. 49, 51 (D. Mass. 1996)	Mass. Gen. Laws Ann. ch. 93, § 12; *Boos v. Abbott Labs.*, 925 F.Supp. 49, 51 (D. Mass. 1996)	Mass. Gen. Laws Ann. ch. 93, § 12; *Boos v. Abbott Labs.*, 925 F.Supp. 49, 51 (D. Mass. 1996)	
Michigan			Mich. Comp. Laws § 445.778(2) (requiring flagrant violation for treble damages)		
Mississippi				Miss. Rule Civ. Proc. 20	
Missouri	*Duval v. Silvers, Asher, Sher & McLaren*, 998 S.W.2d 821, 825 (Mo. Ct. App. 1999)	*Duval v. Silvers, Asher, Sher & McLaren*, 998 S.W.2d 821, 825 (Mo. Ct. App. 1999)	*Duval v. Silvers, Asher, Sher & McLaren*, 998 S.W.2d 821, 825 (Mo. Ct. App. 1999)	*Duval v. Silvers, Asher, Sher & McLaren*, 998 S.W.2d 821, 825 (Mo. Ct. App. 1999)	

	Indirect Purchaser Claims Prohibited Under Antitrust Statute	Private Indirect Purchaser Claims Prohibited	Private Claims for Treble Damages Prohibited or Require Greater Showing	Private Class Actions for Treble Damages Prohibited	Claims Limited to Intrastate Conduct
Montana	*See In re TFT-LCD (Flat Panel) Antitrust Litig.*, __ F.Supp.2d __, 2009 WL 522903 at *5 (N.D. Cal. March 3, 2009)	*See In re TFT-LCD (Flat Panel) Antitrust Litig.*, __ F.Supp.2d __, 2009 WL 522903 at *5 (N.D. Cal. March 3, 2009)	*See In re TFT-LCD (Flat Panel) Antitrust Litig.*, __ F.Supp.2d __, 2009 WL 522903 at *5 (N.D. Cal. March 3, 2009)	*See In re TFT-LCD (Flat Panel) Antitrust Litig.*, __ F.Supp.2d __, 2009 WL 522903 at *5 (N.D. Cal. March 3, 2009)	
Nebraska			Neb. Rev. Stat. § 59-821		
New Hampshire	*Minuteman, LLC v. Microsoft Corp.*, 795 A.2d 833, 839-40 (N.H. 2002)	*Minuteman, LLC v. Microsoft Corp.*, 795 A.2d 833, 839-40 (N.H. 2002)	*Minuteman, LLC v. Microsoft Corp.*, 795 A.2d 833, 839-40 (N.H. 2002)	*Minuteman, LLC v. Microsoft Corp.*, 795 A.2d 833, 839-40 (N.H. 2002)	
New Jersey	*Sickles v. Cabot Corp.*, 877 A.2d 267, 273 (N.J. Super. Ct. App. Div. 2005)	*Sickles v. Cabot Corp.*, 877 A.2d 267, 273 (N.J. Super. Ct. App. Div. 2005)	*Sickles v. Cabot Corp.*, 877 A.2d 267, 273 (N.J. Super. Ct. App. Div. 2005)	*Sickles v. Cabot Corp.*, 877 A.2d 267, 273 (N.J. Super. Ct. App. Div. 2005)	
New York				*Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1014-18 (N.Y. 2007)	
North Dakota			N.D. Cent. Code § 51-08.1-08(2) (requiring flagrant violation for treble damages)		
Ohio	*Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 798 (Ohio 2005)	*Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 798 (Ohio 2005)	*Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 798 (Ohio 2005)	*Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 798 (Ohio 2005)	
Oklahoma	*Major v. Microsoft Corp.*, 60 P.3d 511, 513 (Okla. Civ. App. 2002)	*Major v. Microsoft Corp.*, 60 P.3d 511, 513 (Okla. Civ. App. 2002)	*Major v. Microsoft Corp.*, 60 P.3d 511, 513 (Okla. Civ. App. 2002)	*Major v. Microsoft Corp.*, 60 P.3d 511, 513 (Okla. Civ. App. 2002)	
Oregon		*See Daraee v. Microsoft Corp.*, 2000 WL 33187306 at *1 (Ore. Cir. Ct., June 27, 2000)	*See Daraee v. Microsoft Corp.*, 2000 WL 33187306 at *1 (Ore. Cir. Ct., June 27, 2000)	*See Daraee v. Microsoft Corp.*, 2000 WL 33187306 at *1 (Ore. Cir. Ct., June 27, 2000)	

	Indirect Purchaser Claims Prohibited Under Antitrust Statute	**Private Indirect Purchaser Claims Prohibited**	**Private Claims for Treble Damages Prohibited or Require Greater Showing**	**Private Class Actions for Treble Damages Prohibited**	**Claims Limited to Intrastate Conduct**
Pennsylvania	Has no civil antitrust statute of general applicability	Has no civil antitrust statute of general applicability	Has no civil antitrust statute of general applicability	Has no civil antitrust statute of general applicability	
Rhode Island		R.I. Gen. Laws § 6-36-12(b); *see also Siena v. Microsoft Corp.*, 2000 WL 1274001 (R.I. Super. Ct., Aug. 21, 2000), aff'd 796 A.2d 461 (R.I. 2002)	R.I. Gen. Laws § 6-36-12(b); *see also Siena v. Microsoft Corp.*, 2000 WL 1274001 (R.I. Super. Ct., Aug. 21, 2000), aff'd 796 A.2d 461 (R.I. 2002)	R.I. Gen. Laws § 6-36-12(b); *see also Siena v. Microsoft Corp.*, 2000 WL 1274001 (R.I. Super. Ct., Aug. 21, 2000), aff'd 796 A.2d 461 (R.I. 2002)	
South Carolina	*See In re Microsoft Corp. Antitrust Litig.*, 401 F.Supp.2d 461, 463-64 (D. Md. 2005)	*See In re Microsoft Corp. Antitrust Litig.*, 401 F.Supp.2d 461, 463-64 (D. Md. 2005)	*See In re Microsoft Corp. Antitrust Litig.*, 401 F.Supp.2d 461, 463-64 (D. Md. 2005)	*See In re Microsoft Corp. Antitrust Litig.*, 401 F.Supp.2d 461, 463-64 (D. Md. 2005)	
Tennessee			Tenn. Code Ann. § 47-25-106		
Texas	Tex. Bus. & Com. Code Ann. § 15.04; *Abbott Labs. v. Segura*, 907 S.W.2d 503, 505-07 (Tex. 1995)	Tex. Bus. & Com. Code Ann. § 15.04; *Abbott Labs. v. Segura*, 907 S.W.2d 503, 505-07 (Tex. 1995)	Tex. Bus. & Com. Code Ann. § 15.04; *Abbott Labs. v. Segura*, 907 S.W.2d 503, 505-07 (Tex. 1995)	Tex. Bus. & Com. Code Ann. § 15.04; *Abbott Labs. v. Segura*, 907 S.W.2d 503, 505-07 (Tex. 1995)	
Utah	Utah Code Ann. § 76-10-926; *see also Federal Trade Comm'n v. Mylan Labs., Inc.*, 99 F.Supp.2d 1, 9 (D.D.C. 1999)	Utah Code Ann. § 76-10-926; *see also Federal Trade Comm'n v. Mylan Labs., Inc.*, 99 F.Supp.2d 1, 9 (D.D.C. 1999)	Utah Code Ann. § 76-10-926; *see also Federal Trade Comm'n v. Mylan Labs., Inc.*, 99 F.Supp.2d 1, 9 (D.D.C. 1999)	Utah Code Ann. § 76-10-926; *see also Federal Trade Comm'n v. Mylan Labs., Inc.*, 99 F.Supp.2d 1, 9 (D.D.C. 1999)	
Virginia	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1150-1151 (N.D. Cal. 2007)	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1150-1151 (N.D. Cal. 2007)	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1150-1151 (N.D. Cal. 2007)	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1150-1151 (N.D. Cal. 2007)	

	Indirect Purchaser Claims Prohibited Under Antitrust Statute	Private Indirect Purchaser Claims Prohibited	Private Claims for Treble Damages Prohibited or Require Greater Showing	Private Class Actions for Treble Damages Prohibited	Claims Limited to Intrastate Conduct
Washington		*Blewett v. Abbott Labs*., 938 P.2d 842, 846 (Wash. Ct. App. 1997); *see also California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1151-1154 (N.D. Cal. 2007)	*Blewett v. Abbott Labs*., 938 P.2d 842, 846 (Wash. Ct. App. 1997); *see also California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1151-1154 (N.D. Cal. 2007)	*Blewett v. Abbott Labs*., 938 P.2d 842, 846 (Wash. Ct. App. 1997); *see also California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1151-1154 (N.D. Cal. 2007)	

B. States Which Provide Broader Rights or Remedies for Individuals Under State Antitrust Law

	Statutory Monopolization Claim	Simplified Proof of Damages	Minimum Damages Provision
Alabama	Ala. Code § 6-5-60		Ala. Code § 6-5-60 (providing for $500 and all actual damages)
Alaska	Alaska Stat. § 45.50.577(b) (parens patriae actions)	Alaska Stat. § 45.50.579	
Arizona	Ariz. Rev. Stat. Ann. §§ 14-403; 14-408		
Arkansas	Ark. Code Ann. § 4-75-315 (parens patriae actions)		
District of Columbia	D.C. Code §§ 28-4503; 28-4508	D.C. Code 28-4508(c)	
Hawaii	Haw. Rev. Stat. §§ 480-9; 480-13(a)(1).		
Idaho	Idaho Code Ann. § 48-105 (parens patriae actions)		
Illinois	Ill. Comp. Stat. § 10/7(2)		
Iowa	Iowa Code §§ 553.5; 553.12 (3)		
Kansas	Kan. Stat. Ann. §§ 50-132; 50-161		
Maine	Maine Rev. Stat. Ann. §§ 1102; 1104		
Michigan	Mich. Comp. Laws § 445.773; 445.778(2)		
Minnesota	Minn. Stat. Ann. §§ 325D.52; 325D.57		

	Statutory Monopolization Claim	Simplified Proof of Damages	Minimum Damages Provision
Nebraska	Neb. Rev. Stat §§ 59-1604; 59-1609		Neb. Rev. Stat § 59-1609 (reasonable damages if actual damages can't be ascertained)
Nevada	Nev. Rev. Stat. §§ 598A.060(e); 598A.210		
New Mexico	N.M. Stat. Ann. §§ 57-1-2; 57-1-3		N.M. Stat. Ann. § 57-1-3 (actual damages minimum)
New York	N.Y. Gen. Bus. Law §§ 340(1); 340(5)		
North Carolina	N.C. Gen. Stat. §§ 75-2.1; 75-16		
North Dakota	N.D. Cent. Code §§ 51-08.1-03; 51-08.1-03		
Oregon	Or. Rev. Stat. §§ 646.730; 646.775 (parens patriae actions)		
Rhode Island	R.I. Gen. Laws §§ 6-36-5; 6-36-12 (parens patriae actions		
South Dakota	S.D. Codified Laws §§ 37-1-3.2; 37-1-33		
Vermont	*Elkins v. Microsoft Corp.*, 817 A.2d 9 (Vt. 2002)		Vt. Stat. Ann. § 2465 (damages or full consideration)
Washington	Wash. Rev. Code §§ 19.86.040; 19.86.080; *see also California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1151-54 (N.D. Cal. 2007)		

	Statutory Monopolization Claim	Simplified Proof of Damages	Minimum Damages Provision
West Virginia	W. Va. Code §§ 47-18-4; 47-18-9; *see also California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1154-55 (N.D. Cal. 2007)		
Wisconsin	Wis. Stat. Ann. §§ 133.03; 133.18		

II. VARIATIONS IN STATE CONSUMER PROTECTION LAWS

A. Plaintiff's Claims Prohibited

	Indirect Purchaser Claims Prohibited Under Consumer Protection Statute	Private Indirect Purchaser Claims Prohibited	Private Claims for Treble Damages Prohibited or Require Greater Showing	Private Consumer-Protection Class Actions Prohibited
Alabama			Ala. Code § 8-19-10(a)(2)	Ala. Code § 8-19-10(f)
Alaska		Alaska Stat. § 45.50.577(i); *see also In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp.2d 896, 907 (N.D. Cal. 2008)	Alaska Stat. § 45.50.577(i); *see also In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp.2d 896, 907 (N.D. Cal. 2008)	Alaska Stat. § 45.50.577(i); *see also In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp.2d 896, 907 (N.D. Cal. 2008)
Arizona	Ariz. Rev. Stat. § 44-1522(C); *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 177-78 (D. Maine 2004) (deceptive practice required)	Ariz. Rev. Stat. § 44-1522(C); *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 177-78 (D. Maine 2004) (deceptive practice required)		
California			Cal. Bus. & Prof. Code § 17200 et seq. (no claim for damages, restitution only	
Colorado	Colo. Rev. Stat. § 6-1-105; *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 179-80 (D. Maine 2004) (deceptive practice required)	Colo. Rev. Stat. § 6-1-105; *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 179-80 (D. Maine 2004) (deceptive practice required)	Colo. Rev. Stat. § 6-1-113(2)(a) (bad faith conduct required)	

	Indirect Purchaser Claims Prohibited Under Consumer Protection Statute	**Private Indirect Purchaser Claims Prohibited**	**Private Claims for Treble Damages Prohibited or Require Greater Showing**	**Private Consumer-Protection Class Actions Prohibited**
Connecticut	*Vacco v. Microsoft Corp.*, 793 A.2d 1048, 1064-67 (Conn. 2002)	*Vacco v. Microsoft Corp.*, 793 A.2d 1048, 1064-67 (Conn. 2002)	*Vacco v. Microsoft Corp.*, 793 A.2d 1048, 1064-67 (Conn. 2002)	
Delaware	Del. Code. Ann. tit. 6, § 2513(a); *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 181-82 (D. Maine 2004) (deceptive practice required)	Del. Code. Ann. tit. 6, § 2513(a); *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 181-82 (D. Maine 2004) (deceptive practice required)		
Florida			*See Mack v. Bristol-Meyers Squibb Co.*, 673 So.2d 100, 103 (Fla. Dist. Ct. App. 1996; Fla. Stat. § 501.211(2)	
Hawaii			Haw. Rev. Stat. §§ 480-3; 480-13(a)(1).	Haw. Rev. Stat. §§ 480-13.3 (representative private indirect purchasers must give notice to Attorney General, who must then decline to proceed parens patriae); 480-14(c) (permitting only parens patriae claims for treble damages)

	Indirect Purchaser Claims Prohibited Under Consumer Protection Statute	**Private Indirect Purchaser Claims Prohibited**	**Private Claims for Treble Damages Prohibited or Require Greater Showing**	**Private Consumer-Protection Class Actions Prohibited**
Idaho	*State ex rel. Wasden v. Daicel Chem. Indus., Ltd.*, 141 Idaho 102, 108-09 (2005); *see also In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp.2d 896, 907 (N.D. Cal. 2008)	*State ex rel. Wasden v. Daicel Chem. Indus., Ltd.*, 141 Idaho 102, 108-09 (2005); *see also In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp.2d 896, 907 (N.D. Cal. 2008)	*State ex rel. Wasden v. Daicel Chem. Indus., Ltd.*, 141 Idaho 102, 108-09 (2005); *see also In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp.2d 896, 907 (N.D. Cal. 2008)	
Illinois	*Gaebler v. New Mexico Potash Corp.*, 676 N.E.2d 228, 230 (Ill. App. Ct. 1996)	*Gaebler v. New Mexico Potash Corp.*, 676 N.E.2d 228, 230 (Ill. App. Ct. 1996)	*Gaebler v. New Mexico Potash Corp.*, 676 N.E.2d 228, 230 (Ill. App. Ct. 1996)	
Iowa		Iowa Code § 714.16(7)	Iowa Code § 714.16(7)	Iowa Code § 714.16(7)
Kentucky	*See Arnold v. Microsoft Corp.*, 2001 WL 1835377 at *7 (Ky. Cir. Ct. 2000)	*See Arnold v. Microsoft Corp.*, 2001 WL 1835377 at *7 (Ky. Cir. Ct. 2000)	*See Arnold v. Microsoft Corp.*, 2001 WL 1835377 at *7 (Ky. Cir. Ct. 2000)	*See Arnold v. Microsoft Corp.*, 2001 WL 193765 at *6 (Ky. Cir. Ct. 2000)
Louisiana	*See Federal Trade Comm'n v. Mylan Labs., Inc.*, 99 F.Supp.2d 1, 9 (D.D.C. 1999)	*See Federal Trade Comm'n v. Mylan Labs., Inc.*, 99 F.Supp.2d 1, 9 (D.D.C. 1999)	*See Federal Trade Comm'n v. Mylan Labs., Inc.*, 99 F.Supp.2d 1, 9 (D.D.C. 1999)	La. Stat. Ann. § 51:1409
Maryland	*Davidson v. Microsoft Corp.*, 792 A.2d 336, 345 (Md. Ct. Spec. App. 2002)	*Davidson v. Microsoft Corp.*, 792 A.2d 336, 345 (Md. Ct. Spec. App. 2002)	*Davidson v. Microsoft Corp.*, 792 A.2d 336, 345 (Md. Ct. Spec. App. 2002)	
Massachusetts			Mass. Gen. Laws Ann. ch. 93, § 9(3) (willful or knowing violation required)	

	Indirect Purchaser Claims Prohibited Under Consumer Protection Statute	Private Indirect Purchaser Claims Prohibited	Private Claims for Treble Damages Prohibited or Require Greater Showing	Private Consumer-Protection Class Actions Prohibited
Michigan	Mich. Comp. Laws § 445.903(1); *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 189 (D. Maine 2004)	Mich. Comp. Laws § 445.903(1); *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 189 (D. Maine 2004)		
Minnesota	Minn. Stat. §§ 325D.43-48; 325F.69(1); *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 189-90 (D. Maine 2004) (deceptive practice required)	Minn. Stat. §§ 325D.43-48; 325F.69(1); *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 189-90 (D. Maine 2004) (deceptive practice required)		
Mississippi	*See In re Microsoft Corp. Antitrust Litig.*, 2003 WL 22070561 at n. 2, 2003-2 Trade Cases 74,138 (D. Md. 2003)	*See In re Microsoft Corp. Antitrust Litig.*, 2003 WL 22070561 at n. 2, 2003-2 Trade Cases 74,138 (D. Md. 2003)		Miss. Rule Civ. Proc. 20
Missouri	*See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 192 (D. Maine 2004)	*See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 192 (D. Maine 2004)	*See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 192 (D. Maine 2004)	
Montana				Mont. Code Ann. § 30-14-133(1)

	Indirect Purchaser Claims Prohibited Under Consumer Protection Statute	Private Indirect Purchaser Claims Prohibited	Private Claims for Treble Damages Prohibited or Require Greater Showing	Private Consumer-Protection Class Actions Prohibited
New Hampshire			N.H. Rev. Stat. Ann. § 358-A:10(I) (willful or knowing violation required)	
New Jersey	*See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 194-95 (D. Maine 2004)	*See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 194-95 (D. Maine 2004)	*See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 194-95 (D. Maine 2004)	
New York	N.Y. Gen. Bus. Laws § 349; *see also In re Automotive Refinishing Plaint Antitrust Litig.*, 515 F.Supp.2d 544 554-56, (E.D.Pa. 2007); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 177-78 (D. Maine 2004) (deceptive practice required)	N.Y. Gen. Bus. Laws § 349; *see also In re Automotive Refinishing Plaint Antitrust Litig.*, 515 F.Supp.2d 544 554-56, (E.D.Pa. 2007); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 177-78 (D. Maine 2004) (deceptive practice required)	N.Y. Gen. Bus. Law Art. 22-A § 349(h) (limit of $1000)	
North Dakota	N.D. Cent. Code § 51-15-02; *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 197-98 (D. Maine 2004) (deceptive practice required)	N.D. Cent. Code § 51-15-02; *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 197-98 (D. Maine 2004) (deceptive practice required)	N.D. Cent. Code § 51-15-09	

	Indirect Purchaser Claims Prohibited Under Consumer Protection Statute	**Private Indirect Purchaser Claims Prohibited**	**Private Claims for Treble Damages Prohibited or Require Greater Showing**	**Private Consumer-Protection Class Actions Prohibited**
Ohio	*Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 798 (Ohio 2005); *see also* Ohio Rev. Code. Ann. § 1345.02; *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 198-99 (D. Maine 2004)	*Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 798 (Ohio 2005); *see also* Ohio Rev. Code. Ann. § 1345.02; *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 198-99 (D. Maine 2004)	*Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 798 (Ohio 2005)	Ohio Rev. Code Ann. § 1345.09(B)
Oklahoma	*Major v. Microsoft Corp.*, 60 P.3d 511, 512-13 (Okla. Civ. App. 2002); *see also See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1149-50 (N.D. Cal. 2007)	*Major v. Microsoft Corp.*, 60 P.3d 511, 512-13 (Okla. Civ. App. 2002); *see also See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1149-50 (N.D. Cal. 2007)	*Major v. Microsoft Corp.*, 60 P.3d 511, 512-13 (Okla. Civ. App. 2002); *see also See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1149-50 (N.D. Cal. 2007)	
Pennsylvania	Pa. Stat. Ann. tit. 73, § 201-2; *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 200-201 (D. Maine 2004)	Pa. Stat. Ann. tit. 73, § 201-2; *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 200-201 (D. Maine 2004)		
Rhode Island	*ERI Max Entm't, Inc. v. Streisand*, 690 A.2d 1351, 1354 (R.I. 1997)	*ERI Max Entm't, Inc. v. Streisand*, 690 A.2d 1351, 1354 (R.I. 1997); *see also In re Graphics Processing Units Antitrust Litig.*, 527 F.Supp.2d 1011, 1030-31 (N.D. Cal. 2007)	*See In re Graphics Processing Units Antitrust Litig.*, 527 F.Supp.2d 1011, 1030-31 (N.D. Cal. 2007)	*See In re Graphics Processing Units Antitrust Litig.*, 527 F.Supp.2d 1011, 1030-31 (N.D. Cal. 2007)

	Indirect Purchaser Claims Prohibited Under Consumer Protection Statute	**Private Indirect Purchaser Claims Prohibited**	**Private Claims for Treble Damages Prohibited or Require Greater Showing**	**Private Consumer-Protection Class Actions Prohibited**
South Carolina	*Federal Trade Comm'n v. Mylan Labs., Inc.*, 63 F.Supp.2d 25, 50 (D.D.C. 1999)	*Federal Trade Comm'n v. Mylan Labs., Inc.*, 63 F.Supp.2d 25, 50 (D.D.C. 1999)	*Federal Trade Comm'n v. Mylan Labs., Inc.*, 63 F.Supp.2d 25, 50 (D.D.C. 1999)	
South Dakota	S.D. Codified Laws § 37-24-6; *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 202-03 (D. Maine 2004)	S.D. Codified Laws § 37-24-6; *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 202-03 (D. Maine 2004)		
Tennessee	*See Sherwood v. Microsoft Corp.*, 2003 WL 21780975 at *31-33, 2003-2 Trade Cases P 74,109 (Tenn. Ct. App. July 31, 2003)	*See Sherwood v. Microsoft Corp.*, 2003 WL 21780975 at *31-33, 2003-2 Trade Cases P 74,109 (Tenn. Ct. App. July 31, 2003)	Tenn. Code Ann. § 47-18-109(a)(3) (willful or knowing violation required)	Tenn. Code Ann. § 47-18-109(a)(1)
Texas	*Abbott Labs., Inc. v. Segura*, 907 S.W.2d 503, 505-06 (Tex. 1995)	*Abbott Labs., Inc. v. Segura*, 907 S.W.2d 503, 505-06 (Tex. 1995)	*Abbott Labs., Inc. v. Segura*, 907 S.W.2d 503, 505-06 (Tex. 1995)	
Virginia	Va. Code. Ann. § 59.1-200; *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 206-207 (D. Maine 2004)	Va. Code. Ann. § 59.1-200; *see also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F.Supp.2d 160, 206-207 (D. Maine 2004)	Va. Code Ann. Ch. 17 § 59.1-204A	*See, e.g., Pearsall v. Va. Racing Comm'n*, 494 S.E.2d 879, 883 (Va. App. 1998) (class permitted only when specifically authorized by statute)

	Indirect Purchaser Claims Prohibited Under Consumer Protection Statute	**Private Indirect Purchaser Claims Prohibited**	**Private Claims for Treble Damages Prohibited or Require Greater Showing**	**Private Consumer-Protection Class Actions Prohibited**
Washington		*See Blewett v. Abbott Labs.*, 938 P.2d 842, 846 (Wash. Ct. App. 1997); *California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1151-54 (N.D. Cal. 2007)	*See Blewett v. Abbott Labs.*, 938 P.2d 842, 846 (Wash. Ct. App. 1997); *California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1151-54 (N.D. Cal. 2007)	*See Blewett v. Abbott Labs.*, 938 P.2d 842, 846 (Wash. Ct. App. 1997); *California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1151-54 (N.D. Cal. 2007)
West Virginia	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1155 (N.D. Cal. 2007)	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1155 (N.D. Cal. 2007)	*See California v. Infineon Technologies AG*, 531 F.Supp.2d 1124, 1155 (N.D. Cal. 2007)	
Wisconsin			Wis. Stat. Ann. § 100.20(5) (double damages)	

C. Statutes of Limitations

	Statutory Limitations Period
Alabama	1 year from discovery; but not more than 4 years from transaction Ala. Code § 8-19-14
Alaska	2 years from discovery Al. Stat. § 45.50.53l(f)
Arizona	1 year *Richards v. Powercraft Homes, Inc.*, 678 P.2d 449, 450 (Ariz. 1984)
Arkansas	5 years from transaction Ark Code Ann. § 4-88-115
California	California Unfair Competition Law: 4 years from accrual of cause of action. Cal. Bus. & Prof. Code § 17208; California Consumers Legal Remedies Act: 3 years from accrual of cause of action. Cal. Bus. & Prof. Code § 1783
Colorado	3 years from discovery or 3 years from the date of the occurrence Colo. Rev. Stat. § 6-1-115
Connecticut	3 years from the date of the occurrence Conn. Gen. Stat. § 42-110g(f)
Delaware	3 years from the date the cause of action accrued Del. Code Ann. tit. 10, § 8106
District of Columbia	3 years D.C. Code § 12-301(8)
Florida	4 years from transaction or 2 years after last payment in a transaction, whichever is later Fl. Stat. Ann. § 501.207(5)
Georgia	2 years from discovery or 2 years after the end of a proceeding brought by the attorney general Ga. Code Ann. § 10-1-401
Idaho	2 years from the date the cause of action accrued Idaho Code § 48-619
Illinois	3 years from the date the cause of action accrued; period is suspended during the period that a proceeding by the attorney general is pending, plus 1 year after 815 ILCS 505/10a(e)
Iowa	5 years from the date the cause of action accrued Iowa Code § 614.1(4)
Kansas	3 years from transaction Kan. Stat. Ann. § 60-512
Kentucky	2 years from date of the violation or 1 year after termination of a proceeding by the attorney general Ky. Rev. Stat. Ann. § 367.220(5)
Louisiana	1 year from transaction La. Rev. Stat. § 51:1409(e)
Maryland	3 years from date of accrual Md. Cts. & Jud. Proc. Code Ann. § 5-101 (also ann. to § 13-408)

	Statutory Limitations Period
Mississippi	3 years from date of accrual Miss. Code Ann. § 15-1-49
Missouri	5 years from discovery *Albert v. Grant Thornton*, 735 F. Supp. 1443, 1447-48 (W.D. Mo. 1990); Mo. Rev. Stat. § 516.120 (for fraud, tolled until discovery)
Montana	2 years from discovery (for fraud) Mont. Code Ann. § 27-2-203
Nebraska	4 years from transaction Neb. Rev. Stat. § 87-303.10
Nevada	3 years Nev. Rev. Stat. § 11.190(3)(a)
New Hampshire	3 years N.H. Rev. Stat. Ann. § 358-A:3 IV-a
New Jersey	6 years N.J. Stat. Ann. § 2A:14-1; *Mirra v. Holland America Line*, 751 A.2d 138, 140 (N.J. Super. Ct. App. Div. 2000)
New York	The greater of either 6 years for actions based on fraud or 2 years from discovery of the fraud. N.Y. C.P.L.R. § 213(8)
North Carolina	4 years from transaction; period is suspended during the period that a proceeding by the attorney general is pending, plus 1 year after N.C. Gen. Stat. § 75-16.2
Ohio	2 years from transaction, or 1 year after the termination of a proceeding by the attorney general, whichever is later Oh. Rev. Code Ann. § 1345.10(C)
Oregon	1 year from discovery; period tolled during pendency of action by the attorney general Or. Rev. Stat. § 646.638(6)
Pennsylvania	6 years 42 Pa. Con. Stat. § 5527(b); *Gabriel v. O'Hara*, 534 A.2d 488, 495 (Pa. Super Ct. 1987)
South Carolina	3 years from transaction or discovery S.C. Code Ann. § 39-5-150
South Dakota	4 years from discovery S.D. Codified Laws § 37-24-33
Tennessee	1 year from discovery; but not more than 5 years from transaction Tenn. Code Ann. § 47-18-110
Texas	2 years from discovery; tolled for 180 days if defendant knowingly causes the delay in filing Tex. Bus. & Com. Code § 17.565
Utah	later of 2 years from transaction, or 1 year after conclusion of proceedings initiated by a public prosecutor. Utah Code Ann. § 13-11-19(8)
Vermont	6 years from the date the cause of action accrued Vt. Stat. Ann. tit. 12, § 511
Virginia	2 years from the date the cause of action accrued Va. Code Ann. § 59.1-204.1(A)

	Statutory Limitations Period
Washington	4 years from transaction; period tolled during the pendency of an action by the attorney general Wash. Rev. Code Ann. § 19.86.120
West Virginia	2 years from the date the cause of action accrued W.Va. Code § 55-2-12
Wyoming	1 year from discovery; but not more than 2 years from transaction, whichever occurs first Wyo. Stat. § 40-12-109

D. Varying Defenses

	Conduct Authorized or Permitted by Federal or State Law/Regulations	Conduct or transaction must occur primarily inside the state	Conduct must affect the people of the state	Claims based on providing a professional service	Bona Fide Error
Alabama			Ala. Code § 8-19-3(8)		
Arkansas	Ark. Code Ann. § 4-88-101				
California	*Cel-Tech Comm., Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 182 (1999)				
Colorado	Colo. Rev. Stat. § 6-l-106(l)(a)				
Connecticut		Conn. Gen. Stat. § 42-110a(4)			
District of Columbia					
Florida					Fla. Stat. Ann. § 501.207(4)
Georgia	Ga. Code Ann. § 10-1-396(1)		Ga. Code Ann. §§ 10-1-391, -392(a)(9)		
Illinois	Ill. Comp. Stat. Ann. 815 ILCS 505/10b(l)		Ill. Comp. Stat. Ann. 815 ILCS 505/l(f)		
Indiana	Ind. Code Ann. § 24-5-0.5-6(l)-(2)				
Massachusetts	Mass. Gen. Laws ch. 93A § 3	Mass. Gen. Laws ch. 93A, § 11			
Michigan	Mich Comp. Laws § 445.904(a)				Mich. Comp. Laws § 445.911 (6)
Missouri		Mo. Rev. Stat. § 407.020(1)	Mo. Rev. Stat. § 407.010(7)		Mo. Rev. Stat. § 407.100(6)
New York	N.Y. Gen. Bus. Law § 349(d)	N.Y. Gen. Bus. Law § 349(a)			
North Carolina				N.C. Gen. Stat. § 75-l.l(b)	
Oklahoma	Oka. Stat. tit. 15, § 754				

	Conduct Authorized or Permitted by Federal or State Law/Regulations	Conduct or transaction must occur primarily inside the state	Conduct must affect the people of the state	Claims based on providing a professional service	Bona Fide Error
Pennsylvania			Pa. Stat. Ann. tit. 73, § 201-2(3)		
Rhode Island	R.I. Gen. Laws § 6-13.1-4		R.I. Gen. Laws § 6-13.1-1(5)		
South Carolina	S.C. Code Ann. § 39-5-40(a)				
South Dakota	S.D. Codified Laws § 37-24-10		S.D. Codified Laws § 39-5-10(b)		
Tennessee	Tenn. Code Ann. § 47-18-111(a)(l)				
Texas	Tex. Bus. & Com. Code § 17.49(b)		Tex. Bus. & Com. Code § 17.45(6)	Tex. Bus. & Com. Code § 17.49(c)	Tex. Bus. & Com. Code § 17.506
Virginia	Va. Code Ann. § 59.1-199(A)				Va. Code Ann. § 59.1-207
Washington	Wash. Rev. Code Ann. § 19.86.170				
West Virginia			W.Va. Code § 46A-6-102(6)		

C. Varying Notice Requirements

State	Example
Alabama	Notice to defendant required at least 15 days prior to filing action. Ala. Code § 8-19-10(e).
California	California Unfair Competition Law: California Consumers Legal Remedies Act: notice to defendant required at least 30 days prior to filing action. Cal. Civ. Code § 1782(c).
Connecticut	Notice to attorney general required. Conn. Gen. Stat. Ann. § 42-110g(c).
Georgia	Notice to defendant required at least 30 days prior to the filing action, as well as notice to the administrator. Ga. Code Ann. § 10-l-399(b), (g).
Illinois	Notice to attorney general required. Ill. Comp. Stat. Ann. 815 ILCS 505/10a(d)
Indiana	Consumer must give supplier notice 6 months after discovery, 1 year after the transaction, at least 30 days prior to filing action; notice must state full nature of deceptive act and actual damages (Ind. Code Ann. § 24-5-0.5-5(a))
Kansas	Notice "shall be given to the attorney general, but failure to do so" is not a defense. Kan. Stat. Ann. § 50-634(g).
Louisiana	"Upon commencement of any action ... the plaintiff's attorney shall mail a copy of the petition to the attorney general" but failure to conform with this subsection does not effect any of plaintiffs rights thereunder. La. Rev. Stat. § 51:1409B.
Maine	Notice to defendant required at least 30 days prior to the filing of action. Me. Rev. Stat. Ann. tit. 5 §213(1-A)
Maryland	The consumer protection division shall attempt conciliation between the parties. Md. Code Ann. Com. Law § 13-402(a)(1).
Massachusetts	Notice to defendant required at least 30 days prior to the filing of action. Mass. Gen. Laws ch. 93A, § 9(3).
Michigan	Notice to attorney general required. Mich. Comp. Laws § 445.912(1).
Mississippi	"In any private action brought under this chapter, the plaintiff must have first made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the attorney general." Miss. Code Ann. § 75-24-15(2).
Missouri	Notice to attorney general required. Mo. Rev. Stat. § 407.025(7).
Oregon	Notice to attorney general required. Or. Rev. Stat. § 646.638(2).
Rhode Island	Notice to attorney general required. R.I. Gen. Laws § 6-13.1-5.2(c).
South Carolina	Notice to attorney general required. S.C. Code Ann. § 39-5-140(b).
Texas	Notice to defendant required at least 60 days prior to the filing action, unless requirement to do so would result in exceeding the limitations period or if the claim is a counterclaim to an existing suit; must be written notice stating the specific complaint and the amount of damages and fees to be sought. Tex. Bus. & Com. Code § 17.505(a), (b).