Summary of Federal Courts Opining whether a State's Highest Court would Adopt or Reject *Associated General Contractors*

Prepared for the American Antitrust Institute's Second Annual Invitational Symposium on the Future of Private Antitrust Enforcement

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Federal courts opining on whether a state's highest court would adopt or reject *AGC*

COURT	***CITATION***	***RESULT***
California District Court	*In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F.Supp.2d 1072 (N.D. Cal. 2007).	Held that indirect plaintiffs proceeding under **14 state antitrust statutes, including California,** were required to meet the *AGC* standing test. In reaching this conclusion the court relied on either state court decisions applying *AGC* or harmonization provisions within the state antitrust statutes calling for the statutes to be construed in accordance with federal law. In applying *AGC* to the indirect plaintiffs' claims, the court found that standing was lacking.
California District Court	*In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 536 F.Supp.2d 1129 (N.D. Cal. 2008).	To determine plaintiffs' standing under the consumer protection statutes of **Nebraska, New York, and North Carolina**, the court analyzed whether those state courts had previously applied *AGC*. "Defendants are correct in observing that case law from both Nebraska and New York indicate that standing for claims under their state consumer protection statutes, where the claims are based on antitrust violations, should be assessed with reference to *AGC* factors. *See, e.g., Kanne v. Visa U.S.A. Inc.*, 723 N.W.2d 293, 301 (Neb. 2006)("the standing requirements for an antitrust

		claim under the Consumer Protection Act should be the same as for an antitrust claim under the Junkin Act.")(Nebraska); *State ex rel. Spitzer v. Daicel Chem. Indus., Ltd.*, 840 N.Y.S.2d 8 (N.Y.A.D. 1st Dept. 2007)(standing under Gen. Bus. Law § 349 lacking since indirect purchasers' claims were too remote)(New York). However, while defendants cite to *Crouch v. Crompton*, 2004 WL 2414027 at *3 (N.C. Super. Ct. 2004), to argue that the same proposition is true for North Carolina, the court does not find defendants' citation to be on point for any such proposition." *In re DRAM*, at 1142.
California District Court	*In re Graphics Processing Units Antitrust Litig.*, 540 F.Supp.2d (N.D. Cal. 2007).	On defendant's motion to dismiss, the court refused to hold the *AGC* standing test was the law in states whose courts and legislatures had not issued clear directive in that regard. The court did hold that applying the *AGC* test was appropriate to the **Nebraska** and **Iowa** claims because their Supreme Courts had endorsed *AGC* in *Kanne v. Visa USA, Inc.*, 723 N.W.2d 293, 302-03 (2006) and *Southward v. Visa USA, Inc.*, 734 N.W.2d 192, 199 (Iowa 2007), respectively. *In re GPU*, at 1097. The court refused to hold *AGC* applied to **California, Arizona, District of Columbia,**

		Maine, Michigan, or South Dakota because the "law was less clear cut" where the defendants' cited only to "those states' harmonization provisions and one decision from an intermediate appellate court of each state that had used the *AGC* test." *Id.* The court also refused to apply *AGC* to the **New Mexico** or **West Virginia** claims as no state court had ruled on whether *AGC* applied. *Id.*
California District Court	*In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, 2008 WL 3916309, ---F.Supp.2d--- (N.D. Cal. Aug. 25, 2008).	"The Court agrees with Judge Alsup [in his decision in *In re GPU*] that it is inappropriate to broadly apply the *AGC* test to plaintiffs' claims under the repealer states' laws in the absence of a clear directive from those states' legislatures or highest courts." *In re Flat Panel,* at *10.
Delaware District Court	*In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F.Supp.2d 404 (D. Del. 2007).	"[I]t is appropriate to apply the *AGC* factors if not directly, at least as a guide, in evaluating Class Plaintiffs' state law antitrust claims. Relying on *D.R. Ward Construction Co. v. Rohm & Haas Co.*, 470 F.Supp.2d 485 (E.D.Pa.2006), Class Plaintiffs contend that the *AGC* factors are inapplicable to state law claims, even where the applicable state law has a 'permissive' harmonization statute that allows federal courts to use federal law as a guide in interpreting them.

		However, the Court finds *D.R. Ward* to be inconsistent with the prevailing approach to this question by courts applying the laws of states that have rejected the *Illinois Brick* prohibition on indirect purchaser suits. . . . Reviewing the Complaint in the light most favorable to Class Plaintiffs as the Court must on a motion to dismiss, the Court concludes that Class Plaintiffs have sufficiently alleged antitrust injury at this juncture." *In re Intel Corp.*, at 408-09.
Maine District Court	*In re New Motor Vehicles Canadian Export Antitrust Litig.*, 235 F.R.D. 127 (D. Me. 2006).	While not directly opining on whether **Maine's** highest court would adopt *AGC*, in determining what indirect purchaser plaintiffs must show to establish impact or causation, the court looked to Maine lower court cases (after determining there were no controlling cases on point). In particular, the court noted that in *Knowles v. Visa U.S.A., Inc.*, No. CV-03-707, 2004 WL 2475284, at *3 (Me.Super.Ct. Oct. 20, 2004) a Maine superior court found that Maine would follow the factors set forth in *AGC*. *In re New Motor Vehicles*, at 132-34.
Massachusetts District Court	*Moniz v. Bayer Corp.*, 484 F.Supp.2d 228 (D. Mass. 2007).	The court rejected the defendants' contention that the plaintiffs lacked standing under *AGC* because defendants' reliance on *AGC*, a case

		interpreting the federal antitrust statute was inapposite. The court found standing because Massachusetts courts have recognized the standing of indirect purchasers to sue manufacturers in similar cases arising under Chapter 93A. *Moniz*, at 231.
Pennsylvania District Court	*D.R. Ward Const. Co. v. Rohm & Haas Co.*, 470 F.Supp.2d 485 (E.D. Pa. 2006).	Refusing to apply *AGC* on state law grounds. "[T]his Court predicts that the **Arizona** Supreme Court would apply its traditional standing approach, rather than an *AGC* analysis, to determine whether an indirect purchaser has standing to pursue a claim under the AAA." *D.R. Ward Const. Co.*, at 497. "This Court predicts that the Supreme Court of **Tennessee**, based upon the *Freeman* decision, would apply traditional standing requirements rather than the *AGC* analysis to determine whether the injuries suffered by an indirect purchaser are too remote to confer standing under the TTPA." *Id.* at 499. "This Court cannot conclude as a matter of law that the **Vermont** Supreme Court would adopt the *AGC* factors for determining standing under the VCFA . . . the Court rejects as flawed the rationale provided by the *Fucile* Court for

		applying the *AGC* antitrust standing analysis . . . Because this Court cannot determine as a matter of law that the Vermont Supreme Court would conduct an *AGC* analysis to determine standing under the VCFA, the Court applies traditional Vermont standing principles." *Id.* at 501-02.
9th Circuit Court of Appeals	*Johnson v. Pacific Lighting Land Co.*, 817 F.2d 601 (9th Cir. 1987).	While not directly applying *AGC* factors, the court does cite to *AGC*, as well as other federal cases, in order to determine whether an antitrust injury had occurred. "We have found no **Arizona** cases which address the question of antitrust injury posed here; therefore, we refer to federal court decisions in our analysis." *Johnson*, at 604.
9th Circuit Court of Appeals	*Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000).	While the Ninth Circuit acknowledged the limited role that federal law provides in furnishing precedent under the Cartwright Act and that distinctions exist between federal antitrust laws and **California's** Cartwright Act, the court still found that "[a]ntitrust standing is required under the Cartwright Act." *Knevelbaard Dairies*, at 987. The Ninth Circuit then proceeded to analyze the case within the framework of the *AGC* factors

Summary of State Court Application

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STATE	*State court address the application of AGC?*	*RESULT*
Alabama	No	
Alaska	No	
Arizona	Not clearly, *see Bunker's Glass Co. v. Pilkington PLC*, 75 P.3d 99 (Ariz. 2003).	Goal of harmonization with federal law "appears to be uniformity in the standard of conduct required, not necessarily in procedural matters such as who may bring an action for injuries caused by violations of the standard of conduct." *Bunker's Glass Co.*, at 103-05.
Arkansas	No	
California	Yes, *Intel x86 Microprocessors Cases*, (JCCP 4443), No. 45077 (Cal. Super. Ct. May 15, 2007).	Court refused to dismiss on *AGC* grounds claims brought by California consumers who purchased computers containing Intel microprocessors allegedly subject to an illegal overcharge.
Colorado	Not clearly, *see Dunlap v. Colorado Springs Cablevision, Inc*., 829 P.2d 1286 (Colo. 1992).	The court found it unnecessary to analyze the plaintiff's status in terms of the factors set forth in *AGC* given the Supreme Court's decision in *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979), which held that "[a] consumer whose money has been diminished by reason of an antitrust violation has been injured 'in his ... property' within the meaning of § 4 [of the Clayton Act]." *Dunlap*, at 1293 n.10.
Connecticut	Yes, *Roncari Dev. Co. v. GMG Enters., Inc*., 718 A.2d 1025 (Conn. Super. Ct. 1997); *Wyatt Energy, Inc. v. Motiva Enters., LLC*, No. X01CV020174090S, 2002 WL 31896707 (Conn. Super. Ct. Dec. 12, 2002); *Waterford Parkade, Inc. v. Picardi*, No. CV940539883S, 1996 WL 151849 (Conn. Super. Ct. Mar. 11, 1996).	"The defendants in the instant case would have this court rule that since the plaintiff had not yet entered the airport valet parking business by the time of their alleged conspiracy, combination and joint and concerted actions to prevent him from doing so, the plaintiff has not suffered the sort of competitive injury which the antitrust laws, state and federal, were designed to prevent. Employing the analysis used by the United States Supreme Court in *Associated General Contractors*, however, the defendants' claim must be rejected." *Roncari*, at 1034. The court applied the *AGC* factors to determine whether the plaintiff had standing to allege violations of the Connecticut Antitrust Act. *Wyatt Energy*, at *5-6.
Delaware	No	
District of Columbia	Yes, *Peterson v. Visa U.S.A., Inc.*, No. 03-8080, 2005 WL 1403761 (D.C. Apr. 22, 2005).	Applying *AGC* factors to determine whether plaintiff had standing under District of Columbia Antitrust Act. *Peterson*, at *5-6.
Florida	No	
Georgia	No	

Hawaii	No	
Idaho	No	
Illinois	No	
Indiana	No	
Iowa	Yes, *Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192 (Iowa 2007).	"To determine standing under our antitrust law, we will examine 'the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.' *Associated Gen. Contractors*, 459 U.S. at 535. In *Associated General Contractors*, the Court focused on five factors to guide its examination: (1) whether the claim alleges a causal connection between the antitrust violation and the plaintiff's alleged harm; (2) whether the plaintiff's alleged injury is of a type sought to be redressed by the antitrust laws; (3) the directness or indirectness of the asserted injury; (4) whether denying a remedy is likely to leave a significant antitrust violation undetected or unremedied; and (5) whether the damages claimed are highly speculative or abstract. *Id.* at 536-45, 103 S.Ct. at 908-12, 74 L.Ed.2d at 737-43. We think the district court properly applied these factors in deciding the plaintiffs had no standing under Iowa's competition law." *Southard*, at 198-99.
Kansas	Yes, *Wrobel v. Avery Dennison Corp.*, No. 05CV526, slip op. at 10 (Kansas Dist. Ct. Feb. 1, 2006).	"insufficient information" to apply the *AGC* test at the pleading stage
Kentucky	No	
Louisiana	No	
Maine	Yes, *Knowles v. Visa U.S.A., Inc.*, No. CV-03-707, 2004 WL 2475284 (Me. Oct. 20, 2004).	"*Associated General Contractors* has remained the template for determining standing under the federal antitrust laws for the past 20 years . . . It is probable that the Maine Law Court, if presented with this issue, would look to the *Associated General Contractors* factors in determining standing under Maine's antitrust laws and would apply those factors except to the extent that those factors cannot be reconciled with the legislature's adoption of the *Illinois Brick* repealer." *Knowles*, at 5.
Maryland	No	
Massachusetts	No	
Michigan	Yes, *Stark v. Visa U.S.A. Inc.*, No. 03-055030-CZ, 2004 WL 1879003 (Mich. Cir. Ct. July 23, 2004).	"[T]his Court agrees with Defendants that it does not necessarily follow that Michigan's repeal of the *Illinois Brick* rule also eliminated the *Associated General Contractors* standing requirements. The Supreme Court in *Illinois Brick* made clear that its decision addressed only whether there should be a bar on 'indirect purchaser'

		suits. It expressly 'd[id] not address the standing issue,' explaining that the 'indirect purchaser' question is 'analytically distinct from the question of which persons have sustained injuries to remote to give them standing to sue…' [W]hile Michigan appellate courts have not developed a test for determining when a plaintiff's injury is too remote to permit suit under MARA, the Act requires courts to give "due deference to interpretations given by the federal courts to comparable antitrust statutes…Moreover, the Court notes that courts in other states that have repealed the *Illinois Brick* rule have continued to apply antitrust standing requirements to dismiss the claims of plaintiffs who assert only derivative or remote injuries. *Stark*, at 4.
Minnesota	Yes, *Lorix v. Crompton Corp.*, 736 N.W.2d 619 (Minn. 2007).	The Minnesota Supreme Court refused to apply the *AGC* factors: "[W]e believe application of the *AGC* factors in Minnesota would contravene the plain language of the statute and in some cases thwart the intent of the legislature by barring indirect purchaser suits for the reasons articulated in *Illinois Brick*." *Lorix*, at 629.
Mississippi	No	
Missouri	Yes, *Duvall v. Silvers, Asher, Sher & McLaren, M.D.*'s, 998 S.W.2d 821 (Mo. Ct. App. 1999).	"Thus, in determining whether Duvall may recover for the injuries that he suffered because of the defendants' alleged restraint of trade, we must evaluate the relationship of the harm that Duvall averred with the defendants' wrongdoing that he alleged. *Associated General*, 459 U.S. at 535, 103 S.Ct. 897. In evaluating the harm to Duvall, we must consider the directness or indirectness of the asserted injury: If the harm to Duvall was only indirect, he does not have standing. *Id*. at 540-44, 103 S.Ct. 897." *Duvall*, at 825.
Montana	No	
Nebraska	*Kanne v. Visa U.S.A., Inc.*, 723 N.W.2d 293 (Neb. 2006).	The Supreme Court of Nebraska applied the *AGC* factors in determining that plaintiffs did not have antitrust standing. "None of the factors from [*AGC*] weigh in favor of concluding that appellants' claimed injury is the type intended to be protected by antitrust laws. We conclude that appellants lack standing under [*AGC*] to seek recovery for Visa and MasterCard's alleged violation of the Junkin Act." *Kanne*, at 298-99.
Nevada	No, *but see Pooler v. R.J. Reynolds Tobacco Co.*, No. CV00-02674, 2001 WL 403167 (Nev. Dist. Ct. 2001).	The Nevada District Court considered whether the NRS 598A.210 (Nevada's Unfair Trade Practice Act) which was amended in 1999 to specifically include indirect purchasers allowed plaintiff to maintain standing in case. The Nevada District Court denied the motion to dismiss.
New Hampshire	No	

New Jersey	No	
New Mexico	No, *but see Romero v. Phillip Morris, Inc.*, 109 P.3d 768 (N.M. Ct. App. 2005).	The New Mexico Court of Appeals briefly discussed standing issues with indirect purchasers and stated, "We interpret the Antitrust Act in harmony with federal antitrust laws when, as here, we have no New Mexico authority on point to guide us. *Griffin v. Guadalupe Med. Ctr., Inc.*, 933 P.2d 859 (N.M. App. 1997). We determine, and the parties do not disagree, that the same three elements, i.e., a violation, causing injury, resulting in damages, must be proven under the Antitrust Act." *Romero*, at 771.
New York	Yes, *Ho v. Visa U.S.A. Inc.*, No. 112316/00, 2004 WL 1118534 (N.Y. Sup. Ct. Apr. 21, 2004).	Applying the *AGC* factors to determine whether plaintiffs had antitrust standing under the Donnelly Act, New York's version of the Sherman Act. *Ho*, at *2-3.
North Carolina	Yes, *Teague v. Bayer AG*, No. 05CVS90, 2007 WL 2569668 (N.C. May 7, 2007); *Crouch v. Crompton Corp.*, Nos. 02CVS4375, 03CVS2514, 2004 WL 2414027 (N.C. Oct. 8, 2004).	The court granted Defendant's motion to dismiss on the grounds that the Plaintiff lacked standing after applying the modified set of *AGC* factors previously announced in *Crouch*. "[T]he Court must determine whether Plaintiff has standing to pursue this action, and therefore turns to the *AGC* factors as harmonized with North Carolina law in *Crouch*." *Teague*, at *8. In *Crouch*, the Court dismissed the claims based on a modified set of *AGC* factors. "Where a class action will provide no actual benefit or an insignificant benefit to class members, there exists a strong inference that the class claims are too remote or speculative to withstand scrutiny under the modified *AGC* factors. Sometimes, as here, the standing determination can be made early in the process and save significant resources. Other times the determination should await further discovery before decision. In either case, the five factors set out above should be applied and each case determined on its own facts. Applying the factors to the claims in *Crouch* and *Morris* results in dismissal." *Crouch*, at *28.
North Dakota	*Beckler v. Visa USA, Inc.*, No. 09-04-C-00030, 2004 WL 2475100 (N.D. Dist. Ct. Sept. 21, 2004).	"Plaintiffs' alleged injuries do not satisfy antitrust standing principles identified in *Associated General Contractors. See id." Beckler*, at *4.
Ohio	No	
Oklahoma	No	
Oregon	No	
Pennsylvania	No	
Rhode Island	Yes, *Siena v. Microsoft Corp.*, No. 00-1647, 2000	The court granted defendant's motion to dismiss plaintiffs' claims under the Rhode Island Antitrust Act

	WL 1274001 (R.I. Aug. 21, 2000).	noting that the state antitrust act explicitly required the court to construe the act "in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable, except where provisions of [the state act] are expressly contrary to applicable federal provisions as construed", *Siena*, at *1, but holding that the *AGC* case did not deal with the primary thrust of *Illinois Brick* in that "factually missing from [*AGC*] is any suggestion of illegal monopolistic profits passed on through a chain of distributors" and therefore the plaintiffs claims were barred by *Illinois Brick*, *id.* at *3.
South Carolina	No	
South Dakota	No	
Tennessee	Yes, *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512 (Tenn. 2005).	The Tennessee Supreme Court refused to apply *AGC* holding that indirect-purchasers of products containing price-fixed food additives had standing because their "statutes reflect a clear intent to protect and afford a remedy to ultimate consumers" and denying standing "would leave such victims of illegal activity with no redress, a result that hardly comports with notions of fair play." *Freeman Inds.*, at 520.
Texas	Yes, *Houston Mercantile Exch. Corp. v. Dailey Petroleum Servs. Corp*., No. B14-92-00818-CV, 1993 WL 322901 (Tex. App. Aug. 26, 1993).	"Thus, because appellee has immunity from the antitrust cause of action alleged by appellants, we need not address the other factors which determine antitrust standing. *See Associated Gen. Contractors, Inc. v. California State Counsel of Carpenters*, 459 U.S. 519, 529, 103 S.Ct. 897, 903 (1983)." *Houston Mercantile Exch. Corp.*, at *4 n.1.
Utah	No	
Vermont	Yes, *Fucile v. Visa U.S.A. Inc.*, No. S1560-03 CNC, 2004 WL 3030037 (Vt. Dec. 27, 2004); *see also Investors Corp. of Vermont v. Bayer AG*, No. S1011-04-CnC, at 3 (June 1, 2005)(applying the AGC analysis based on *Fucile* precedent).	In an unpublished opinion a lower court opined that the Vermont Supreme Court would draw upon *AGC* factors for guidance. "Although the Vermont Consumer Fraud Act has broader remedial purposes than federal statutes, the court nevertheless believes that the Vermont Supreme Court would also draw upon the standing factors in *Associated General Contractors* for guidance, at least to the extent that these factors are consistent with allowing 'indirect purchaser' standing." *Fucile*, at *3.
Virginia	No	
Washington	No	
West Virginia	No	
Wisconsin	Yes, *Szukalski v. Crompton Corp*., 726 N.W.2d 304 (Wis. Ct. App. 2006), *abrogated on other (pro-*	In *Szukalski* the appellate court held purchasers of tires made with price-fixed rubber chemicals alleged standing under *AGC*, finding that "our supreme court has directed us not to construe the standing requirement narrowly. While the injury alleged by [plaintiffs] was certainly

	plaintiff) grounds, *Meyers v. Bayer AG*, 735 N.W.2d 448 (Wis. 2007) (finding that the Wisconsin antitrust statute is not limited to intrastate conduct only).	indirect, we are satisfied that the injury alleged does meet the threshold standard of standing." *Szukalski*, at 308 n.6.
Wyoming	No	