

Indirect Purchaser Antitrust Claims on the Rise in New Mexico

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Federal antitrust statutes provide a cause of action for price-fixing allegations only to direct purchasers from the alleged wrongdoer. *See Illinois Brick v. Illinois*, 431 U.S. 720 (1977). Thus, if price fixing occurs among manufacturers of furniture, wholesalers can bring claims against the manufactures, but others in the chain of distribution, including consumers, may not. Several states, including New Mexico, have enacted so called "Illinois Brick repealer" statutes that provide standing to indirect purchasers. New Mexico's Antitrust Act (§ 57-1-1, *et seq.*) provides that anyone injured by a violation, "directly or indirectly," may recover damages under the act. In recent years, actions brought on behalf of New Mexico indirect purchasers have multiplied. In the late 1990's, a claim was filed on behalf of New Mexico consumer purchasers of brand name prescription drugs after the direct purchaser retailers' claims were rejected by a federal court in Illinois. The prescription drug case settled early, with the small proceeds of the settlement being paid to community-based healthcare facilities in New Mexico. Currently, claims are pending on behalf of consumers of computer software, vitamins, tobacco, polyester, and tires.

Some of the cases raised questions about what constitutes an indirect purchase. For example, the tire case was filed against the manufacturers of chemicals consumed in the tire making process. Thus, as a matter of fact, the consumers did not purchase the product that was supposedly subject to the alleged price fixing.

Other cases raise jurisdictional issues and/or call into question the reach of the New Mexico Antitrust Act. For example, defendants in the tire case have never conducted any business in the State of New Mexico. Similarly, there is no argument, as is present in the critical New Mexico Supreme Court case of *United Nuclear v. General Atomic*, that the industry's center of mass is located in New Mexico. Also, these circumstances will require the courts to evaluate how far into interstate commerce the New Mexico Act may reach. The conduct alleged to be illegal supposedly occurred outside of New Mexico, and the State's only connection to a relevant commercial activity is that some of the products found their way into New Mexico.

Other key issues in the cases relate to the fact that these cases are all pled as class actions. New Mexico's Rule 23 has yet to be interpreted by any appellate court, but answers are on their way. There are currently four class cases, including one indirect purchaser antitrust case (software), pending before the New Mexico Court of Appeals. The Court seems interested in the issue, as all four cases were brought before the Court at the Court's discretion to review class certification orders entered by trial courts.

If these complex cases survive challenges on the merits and relating to class certification, expect New Mexico courts to host more claims relating to more products in the future.