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ANTITRUST LAW

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Court Bars Redundant State Court Action

Plaintiffs may not recast classic antitrust claims as Consumer Fraud Act claims

On June 30, the Superior Court of New Jersey, Law Division, Passaic County, decided *Island Mortgages of New Jersey v. 3M*, ___N.J. Super. ____, 2004 WL 2332135. In October, the court's opinion was approved for publication. *Island Mortgages* is the first published opinion addressing a plaintiff's ability to recast an antitrust claim as a New Jersey Consumer Fraud Act (CFA) claim. The court's rejection of the CFA claim establishes an important barrier against redundant state court class actions parroting the allegations of pending federal antitrust cases. In the process, the court's opinion also explicitly adopted the standing requirements of the federal "*Illinois Brick* doctrine," making it the first published New Jersey opinion to do so.

To understand the significance of *Island Mortgages*, some discussion of the typical litigation pattern in antitrust class actions is required. Antitrust claims are usually filed in federal district court because Section 4 of the federal Clayton Act, 15 U.S.C. §15(a), provides the surest remedy for antitrust violations of national scope, and exclusive jurisdiction over federal antitrust claims is vested in the federal courts. See, e.g, *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380 (1985).

If, however, the antitrust claim stated in the first filed action impresses the plaintiffs' class action bar as a potentially lucrative one, the first filed action will soon have competition from several, and sometimes dozens, of copycat complaints filed throughout the country. As evidence, the docket of the Federal Judicial Panel on Multidistrict Litigation (JPML) currently reflects forty-six antitrust, multidistrict class actions consolidated by the JPML. Each one of these forty-six JPML dockets consolidates many underlying, individual cases.

Not all of the copycat cases, however, will be filed in federal court. Some counsel will choose to file their version of the case in a state court. There are several potential reasons for this choice, some substantive and some strategic. One practical reason for the strategy may relate to counsel's effort to win a piece of the ultimate attorney fee pie. Consolidation of the multiple federal actions is inevitable and is followed by negotiations among the various plaintiffs' firms over the appointment of lead counsel.

Invariably, a small number of well financed firms will take over control of the consolidated matter and will eventually negotiate the largest shares of the fees, if there is a recovery. The smaller players will look for ways to earn a respectable share. A firm that launches a state court action, and has it survive the myriad of procedural attacks that follow (e.g., removal, dismissal, stay), may have to be reckoned with when settlement time arrives, and therefore will have some leverage to be "dealt in" by lead counsel in the consolidated federal actions.

A second, and more substantive reason why some of the copycat actions are filed in a state court is the so-called *Illinois Brick* doctrine. The doctrine gets its name from the United States Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), in which the Court confronted the issue of allocation of antitrust damages across the different levels of distribution in a vertical product distribution chain. In other words, if manufacturers A and B unlawfully fix the price of widgets, and distributor D buys the widgets at the artificially higher price and then sells them to consumer C, passing along some or all of the overcharge, to whom does the antitrust remedy belong?

Concluding that delving into the thorny issue of how much of the overcharge was passed along to ultimate

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consumers would ensnare the federal courts in hopelessly complex damage calculations, the *Illinois Brick* Court held that the entire antitrust remedy belongs to, and only to, "direct purchasers," i.e., those who purchased the affected product directly from the defendant(s). "Indirect purchasers," i.e., those who purchased the product further down the distribution chain, the Court held, have no standing under the Clayton Act.

Several states, including California but not New Jersey, reacted to the *Illinois Brick* decision by amending their state antitrust acts to include a so-called "*Illinois Brick* repealer"; that is, a statutory provision expressly granting standing to indirect purchasers. Despite the obvious potential for conflicting recoveries by direct and indirect purchasers, the United States Supreme Court has held that these *Illinois Brick* repealers are not pre-empted by the Clayton Act. *California v. ARC America Corp*., 490 U.S. 93 (1989).

Accordingly, plaintiffs' class action counsel, seeking to differentiate their cases from the first filed federal antitrust cases, often seek to bring an action in a state court on behalf of the class of indirect purchasers, while the direct purchasers' class action proceeds in federal court. Often, the same counsel prosecuting the federal direct purchaser class action in federal court will file an indirect purchaser action in one or more state courts in states with *Illinois Brick* repealers. Therefore, whenever a multidistrict federal antitrust class action arises, the courts of the states with *Illinois Brick* repealers, like California and Minnesota, are invariably hit with copycat actions.

To date, the New Jersey state courts have largely been spared this phenomenon for two principal reasons. First, while prior to *Island Mortgages* no published New Jersey state court opinion addressed the applicability of *Illinois Brick* to the New Jersey State Antitrust Act, N.J.S.A. 56:9-1 et seq., the absence of a statutory *Illinois Brick* repealer combined with the Antitrust Act's specific incorporation of federal precedent, N.J.S.A. 56:9-18, made adoption of *Illinois Brick* by the state courts highly likely. Secondly, the Appellate Division's holding in *Boardwalk Properties, Inc. v. BPHC Acquisition Inc*., 253 N.J. Super 515, 529-30 (App. Div. 1991), that there is no right to a jury trial on an Antitrust Act claim has rendered New Jersey state court an unattractive forum to most plaintiffs' lawyers.

With the option of a state Antitrust Act copycat action thus unappealing, some New Jersey class action counsel have turned to the CFA in search of an alternative vehicle for replicating and transforming a federal antitrust class action into a claim cognizable in state court. The *Island Mortgages* opinion rebuffs that attempt.

The background for the *Island Mortgages* case begins with the case of *LePage's Incorporated v. 3M*, filed in United States District Court for the Eastern District of Pennsylvania on June 11, 1997. LePage, a manufacturer of adhesive tape that competes with Scotch brand adhesive tape marketed by 3M, filed a federal antitrust action against 3M alleging that 3M's program of bundled rebates unlawfully restrained competition. On Oct. 13, 1999, the jury in the district court case returned a substantial verdict, which, after trebling, resulted in a judgment against 3M in excess of $68 million. This judgment was ultimately affirmed on appeal. *LePage's Inc. v. 3M*, 324 F.3d 141 (3rd Cir. 2003).

While the appeal in *LePage's* was pending, a class action raising the same allegations against 3M was brought in the United States District Court for the Eastern District of Pennsylvania on behalf of all "direct purchasers" of the affected adhesive tape. *Bradburn Parent/Teacher Store, Inc. v. 3M*, CA. No. 02-7676. It was not until 2003 that plaintiffs filed the *Island Mortgages* New Jersey state court case as a proposed class action on behalf of consumers, i.e., indirect purchasers of adhesive tape. Although predicated on the same alleged misconduct at issue in *LePage's* and *Bradburn*, the *Island Mortgages* plaintiffs attempted to cast their claim as one for violation of the CFA. The *Island Mortgages* plaintiffs rested their CFA claim on the legal theory that 3M's alleged monopolistic conduct was, by itself, an unconscionable commercial practice actionable under the CFA.

While acknowledging that the CFA should be "applied broadly in order to accomplish its remedial purpose," *Island Mortgages*, 2004 WL 2332135, at *2 (quoting *Lemelledo v. Beneficial Management Corp. of America*, 150 N.J. 255, 264 (1997)), the court nevertheless held that the sina qua non of an unconscionable commercial practice under the CFA is the "capacity to mislead." Id. (quoting *Fenwick v. Kay American Jeep, Inc*., 72 N.J. 372, 378 (1997)). The court rejected plaintiffs' theory that monopolistic conduct alone was actionable under the CFA, concluding that the absence of any allegation of deceit, fraud or misrepresentation was fatal to plaintiffs' CFA claim. Id. In other words, the *Island Mortgages* opinion stands for the proposition that traditional "antitrust" behavior, absent some element of deception, will not state a claim for relief under the CFA.

The *Island Mortgages* court also based its dismissal of the complaint on the alternative holding that plaintiffs, as indirect purchasers, lacked standing to pursue antitrust-type claims under the CFA. The court's reasoning in support of its alternate holding was in two parts. First, the court concluded that indirect purchasers would lack standing to pursue claims under the Antitrust Act. Id. at *4. This conclusion, the court reasoned, is dictated by N.J.S.A. 56:9-18, which provides that the Antitrust Act is to be construed in harmony with ruling judicial interpretations of the federal Clayton Act. Id. Therefore, because *Illinois Brick* deprives indirect customers of standing under the Clayton Act, the court held that standing must necessarily also be lacking under the Antitrust Act. Id. This holding was itself significant, representing the first published New Jersey case explicitly adopting *Illinois Brick*.

Having concluded that indirect purchasers would lack standing to bring Antitrust Act claims, the court held that purchasers did not have standing to frame the very same conduct as a CFA claim:

> This court finds that plaintiffs' attempt to bring suit under the CFA is in direct conflict with the

well-founded policies interpreting federal and New Jersey antitrust law. ... [A]llowing plaintiffs to move forward with their suit would undermine the standing requirements with the New Jersey Antitrust Act. It is basic in the construction of legislation that every effort should be made to harmonize the law relating to the same subject matter. Id. (quoting *State v. Green*, 67 N.J. 547, 554-55 (1973)).

The *Island Mortgages* opinion is an important and sensible barrier to redundant New Jersey state court litigation paralleling federal antitrust class actions. The court's rejection of efforts to recast classic antitrust claims as CFA claims appropriately limits the CFA to the types of deceptive practices it was designed to reach, while leaving antitrust violations to be scrutinized uniformly under the statutes specifically designed for that purpose. The court's alternative holding that the *Illinois Brick* doctrine must be applied to any antitrust-type claims brought under the CFA is also sound. The alternative would be to invite chaotic damages calculations, with direct purchasers seeking recoveries under the Antitrust Act while indirect purchasers pursue conflicting and inconsistent recoveries under the CFA. In short, judicial economy and the efficient management and disposition of antitrust class actions is well served by the *Island Mortgages* opinion and would be well served by its adoption by other and higher courts. ■

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