

FOCUS

End-users gain right to bring suits for antitrust violations

Antitrust laws exist to protect consumers, both individuals and businesses, from anti-competitive business practices.

Such practices can suppress initiative and innovation, lead to higher prices for consumers, and stifle economic growth.

Until this year, individual consumers and many businesses in Oregon had no remedy against manufacturers and others in multi-level distribution chains who drove up the price of goods or services by colluding with competitors to set inflated prices, or who otherwise violated the antitrust laws.

The Oregon Legislature this year rectified this in a statute that becomes effective Jan. 1.

This statute can become a powerful tool for Oregon consumers, especially when used in class actions so that costs of litigation are shared with others seeking recovery. Many antitrust claims also permit injured consumers to seek three times actual damages plus an award of attorney fees for successful plaintiffs.

In a typical distribution system, a manufacturer sells his product to a distributor, who in turn sells the product to retailers, who sell to businesses or individual consumers.

In some concentrated industries, manufacturers have conspired with competitors to fix the prices of their products in order to maximize their profit margins. These artificially high prices are typically marked up further as they pass from the distributors to the retailer and finally to the individual or business who purchases the product for their own use.

It is usually this end user who bears the full brunt of the manufacturer's illegal conduct. Until now, these end users, who are known as "indirect purchasers" (because they do not purchase directly from the man-

GUEST COLUMNISTS

Mark Friel



Yoona Park

ufacturers), had no right of action under the Oregon antitrust laws even when they could prove that an illegal overcharge was passed on to them. Until now, the Oregon antitrust laws provided relief to only those who purchased directly from the offending manufacturer.

The new Oregon antitrust indirect purchaser statute is similar to those enacted in many other states, and is designed to provide relief where the federal antitrust laws do not. For example, in 2000, in a case involving vitamin manufacturers who controlled more than 80 percent of the world's vitamin market and conspired to fix prices for more than 10 years, consumers in Washington and California recovered roughly \$100 million in damages under their own indirect purchaser antitrust statutes.

Even though myriad products on grocery shelves are enriched with vitamins, and therefore the harm to Oregon consumers from the price-fixing behavior was significant, Oregonians recovered nothing in the settlement because there was no right of action for indirect purchasers under existing state law.

Pending now in courts across the country are numerous antitrust actions dealing with a variety of industries and products brought as class actions on behalf of indirect purchasers, but only on behalf of purchasers from states that currently have indirect purchaser statutes.

Many of these pending cases allege illegal price-fixing of products and services purchased every day by individuals and

businesses throughout Oregon: eggs and egg products; aftermarket auto lights; aftermarket oil, fuel and engine filters for cars; chocolate products; cathode ray tubes, and televisions and computer monitors containing CRTs; thin film transistor flat panel displays; SRAM computer memory; air cargo shipping services; and bulk Vitamin C and products containing Vitamin C.

Presently, no class claim has been filed for Oregon indirect purchasers of those products or services, but that could change when the new law becomes effective. For example, evidence indicates that prices for air cargo shipping were unlawfully inflated by a conspiracy among the air cargo airline companies. Shippers in Oregon who purchase such services through agents or freight forwarders will now have standing under Oregon law to sue the allegedly conspiring airline and recover their damages.

The new Oregon law comes at a time when the Obama administration has taken a tougher stance on antitrust violators and has stated that it intends to enforce federal antitrust laws with increased vigor. Such a stance reverses the policy of the previous administration, which often favored defendants in antitrust actions.

By allowing indirect purchasers who have been financially harmed by anti-competitive behavior to pursue claims against the manufacturers who conspired against them, the new Oregon statute complements the President's efforts to curtail violations of antitrust behavior in the marketplace.

MARK FRIEL is a shareholder of the Portland law firm Stoll Berne, specializing in securities, antitrust and complex litigation.

YOONA PARK is an associate attorney, also with Stoll Berne. Both authors can be reached at 503-227-1600 or at www.stollberne.com.