Hot Topics in Products Liability Law: Split in Authority Regarding the Indirect Purchaser Rule as a Bar to a Products Liability RICO Claim

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There is an emerging trend in products liability law whereby a plaintiff styles a case as a RICO claim, but at its core the gravamen of the dispute is an extension of a products liability action. In a recent installment of this blog on this topic, we introduced this hot topic in products liability law. This extension of that earlier post highlights some of the wildly inconsistent judicial decisions that have resulted on this topic, particularly around the indirect purchaser rule.

The Indirect Purchaser Rule. Under the indirect purchaser rule, a purchaser that is two or more steps removed from the alleged RICO violator lacks standing to bring a claim. For example, if Smith is overcharged for an item due to a RICO violation but then sells the item to Jones, Jones has no standing to bring a RICO claim even if the overcharge was passed along to him as a result of the defendant's violation. This is because under the RICO Act, indirect purchasers cannot sue upstream sellers. This is called the indirect-purchaser rule, it arises from *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), and it can be used by defendants to foreclose a plaintiffs' RICO claims. Although *Illinois Brick* was an antitrust case that developed this rule, case law has extended the rule to RICO claims. *See e.g., Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 616 (6th Cir. 2004) ("[I]ndirect purchasers lack standing under RICO and the antitrust laws to sue for overcharges passed on to them by middlemen."); *see also McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 855 (3d Cir. 1996) (holding that in RICO cases "the central and dispositive issue is whether plaintiffs are 'direct purchasers'"). The indirect purchaser rule seemingly forecloses many consumer RICO claims against product manufacturers, especially in the case of automobiles, for example, where state laws generally prohibit manufacturers' direct sales of automobiles. *Rickman v. BMW of N. Am.*, 2020 WL 3468250, at *9 n.9 (D.N.J. June 25, 2020). Other equipment and large products frequently are sold by intermediaries, thus also triggering the rule.

This does not apply, however, where a consumer purchases directly from a manufacturer. And even beyond that, eroding this important precedent more generally, several states have implemented so-called *"Illinois Brick* repealer statutes" that allow recovery by indirect purchasers under state law. *See e.g.*, N.H. Rev. Stat. Ann. § 356.11; Utah Code Ann. 76-10-3109(1)(a).

The split in authority. The fact that interpretations of RICO law are all over the map should not be surprising. *See e.g., United States v. Hutchinson*, 573 F.3d 1011, 1034 (10th Cir. 2009) (Gorsuch, J.) (explaining that the Tenth Circuit reads "RICO's requirements" differently than other Circuits, especially

on the enterprise element). But this is especially apparent in recent years regarding the indirect purchaser rule.

The U.S. Supreme Court has never addressed the issue of whether the indirect purchaser rule applies to RICO claims. In the absence of a clear ruling on this issue, something of a circuit split has developed, with courts reaching wildly divergent conclusions on this rule. *Compare Hu v. BMW of N. Am., LLC*, No. CV-18-4363, 2021 WL 346974, at *2 (D.N.J. Feb. 2, 2021) (cleaned up) (concluding that the indirect purchaser rule is an absolute bar to RICO claims) *with Gamboa v. Ford Motor Co*., No. 18-10106, 2020 WL 7047612, at *8 (E.D. Mich. Nov. 30, 2020) (allowing claim by indirect purchaser plaintiffs to proceed as a cognizable RICO injury arising from misleading claims made to purchasers of vehicles running defective emissions controls capable of defeating emissions tests given the way that the facts were pled).

The jurisdictions that have addressed this issue and concluded that the indirect purchaser rule applies in the RICO context include:

- **Third Circuit**: *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 855 (3d Cir. 1996) ("the precepts taught by *Illinois Brick and UtiliCorp* apply to RICO claims, thereby denying RICO standing to indirect victims.")
- **Sixth Circuit**: *Trollinger v. Tyson Foods, Inc*., 370 F.3d 602, 616 (6th Cir. 2004) ("indirect purchasers lack standing under RICO and the antitrust laws to sue for overcharges passed on to them by middlemen.")
- **Seventh Circuit.** *Carter v. Berger*, 777 F.2d 1173, 1177 (7th Cir. 1985) (holding that because the indirect purchaser rule promotes the enforcement of antitrust and RICO laws, it "therefore applies to RICO, too.").
- **In the Fifth Circuit**. *Harris Cnty., Tex. v. Eli Lilly & Co*., No. CV H-19-4994, 2020 WL 5803483, at *12 (S.D. Tex. Sept. 29, 2020) (declining "to follow the minority rule" and holding "that indirect purchasers lack standing under RICO").

But there is also enough authority going in the other direction to allow plaintiffs room for argument. Other circuits and some federal district courts have held that the indirect purchaser rule does not apply to federal RICO claims. Some district courts have reached this decision within circuits that have yet to provide guidance on the rule's application to federal RICO claims. For example, here is the authority sometimes deployed by the plaintiffs' bar to defeat dispositive motions attempting to rely on the indirect purchaser rule:

- **Fourth Circuit.** *Mid Atl. Telecom v. Long Distance Servs*., 18 F.3d 260, 263 (4th Cir. 1994) (*citing Brandenburg v. Seidel,* 859 F.2d 1179, 1185 (4th Cir. 1988), *abrogated on other grounds by Quackenbush v. Allstate Ins. Co*., 517 U.S. 706, 116 S. Ct. 1712 (1996)) (recognizing that the Fourth Circuit held that *Brandenbug* "did not... establish a rule that only injuries suffered by the immediate victim of a predicate act satisfied" the standing requirement of the RICO statute, and implying that to hold that an indirect purchaser has no RICO standing in a consumer fraud case would conflict with Fourth Circuit authority holding that even "indirect victims" have standing if their injuries were proximately caused by the predicate acts).
- **In the Tenth Circuit**. *In re: EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig*., 336 F. Supp. 3d 1256, 1325 (D. Kan. 2018) (declining to apply the indirect purchaser rule to a RICO claim in the absence of supporting Tenth Circuit authority and instead holding that RICO standing requires only a showing of proximate causation).
- **In the Eleventh Circuit.** *GolTV, Inc. v. Fox Sports Latin Am*., *Ltd.*, No. 16-24431-CIV, 2018 WL 1393790, at *19 (S.D. Fla. Jan. 26, 2018) (noting the parties' failure to cite to any Eleventh Circuit authority applying the indirect purchaser rule and holding that the Eleventh Circuit's standard for RICO standing is no more than proximate causation).
- **In the Eleventh Circuit.** *In re Zantac (Ranitidine) Prod. Liab. Litig.*, 546 F. Supp. 3d 1216, 1222 (S.D. Fla. 2021) (observing that "[t]he Eleventh Circuit has held that plaintiffs bringing RICO claims have

standing as long as they show that their injuries were proximately caused by the RICO violation") (*citing Corcel Corp. v. Ferguson Enterprises, Inc*., 551 F. App'x 571, 575 (11th Cir. 2014)).

Pleading an Exception. Even where the indirect purchaser rule could otherwise bar a RICO claim, looking at the way in which the facts are alleged and the parties are situated can lead to exceptions that present an end run around the indirect purchaser rule. Plaintiffs sometimes attempt to argue that even where the indirect purchaser rule applies to RICO claims, an exception exists where the "upstream manufacturer" defendant is a coconspirator who joins with the distributor defendants to perpetrate the alleged RICO violation. For example, in these cases such allegations about co-conspiracy defeated the application of the indirect purchaser rule:

- *Laumann v. Nat'l Hockey League*, 907 F.Supp.2d 465, 480–83 (S.D.N.Y. 2012) (holding that where the "middlemen are alleged to be co-conspirators," the first purchasers outside of the conspiracy have standing to sue).
- *Gamboa v. Ford Motor Co.*, No. 18-10106, 2020 WL 7047612, at *8 (E.D. Mich. 2020) (denying motion to dismiss where the "[c]omplaint alleges that Bosch GmbH joined with other members of its distribution network to defraud Plaintiffs").
- *Albers v. Mercedes-Benz USA, LLC,* No. CV 16-881, 2020 WL 1466359, at *7 (D.N.J. Mar. 25, 2020) (denying motion to dismiss based on indirect purchaser rule where plaintiffs alleged that Bosch GmbH "was a knowing participant in the RICO conspiracy").
- *Marrero-Rolon v. Autoridad de Energia Electrica de P.R.*, No. CIV. 15-1167, 2015 WL 5719801, at *9 (D.P.R. Sept. 29, 2015) (cleaned up) (denying motion to dismiss RICO claim based on Illinois Brick where plaintiffs had sufficiently alleged the defendant was a coconspirator in a RICO scheme to inflate fuel prices).

Conclusion. This split in authority in this crucial area impacts some of the most monumental products liability actions in the county, making this a hot topic in products liability law that we are watching closely. As more circuits are invited to weigh in on this issue, it will be telling to see whether a clear majority rule coalesces, or whether a circuit split intensifies inviting Supreme Court review. Whether product manufacturers can be held liable under RICO by indirect purchasers is a critical issue because of how wide it can open the door to product manufacturer liability.