Reciprocity Update

Dear Members,

As you may know, the State Bar has been studying the issue of reciprocal licensing between states. As your elected representatives, the Board of Bar Commissioners is sensitive to members’ ideas and concerns and works to be as responsive as possible. Because the membership remains significantly divided over the issue of reciprocity, the Board neither endorsed nor opposed the proposed reciprocity rule published in the April 18, 2005 Bar Bulletin. A neutral position on the divisive issue of reciprocal licensing seemed the most prudent response the BBC could make at this time. I offer the following letter of explanation which was recently sent on behalf of the BBC to the Supreme Court.

Sincerely,

Charles J. Vigil
President
State Bar of New Mexico

continued on page 6

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Writs of Certiorari
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Special Insert:
New Mexico and The West: Facing Our Water Reality
The University of New Mexico School of Law Second Annual Water Policy Seminar
Today’s malpractice insurance marketplace can be tough to navigate.

*Let us help light the way.*

Our relationships with many highly rated professional liability providers can enable us to quickly find coverage that suits your individual needs.

You’ll also have access to a variety of other insurance products, such as business owners coverage and surety, fidelity, and court bonds.

Most importantly, you’ll always be able to speak to a knowledgable, experienced agent that truly cares about you and your professional insurance needs.

Give us a call...

*We’re sure you’ll find it illuminating!*

800-950-0551
www.danielshead.com
Collaborative Divorce Training
The Albuquerque Convention Center
401 Second Street NW, Albuquerque, NM 87102
May 6 and 7, 2005 - 8:30 am to 5:00 pm
13.8 General and 1.2 Ethics MCLE Credits

A Special Two-Day Beginning and Intermediate Collaborative Divorce Training

Collaborative Divorce is a creative and rewarding practice that utilizes cooperative strategies rather than adversarial techniques and litigation to resolve family disputes. The application of a multi-disciplinary team of professionals to include attorneys, child specialists, divorce coaches, and financial consultants increases the quality and integrity of the results. The multi-disciplinary team model is geared toward the use of analysis and reasoning to solve problems, generate options, and create a positive context for settlement. The course is tailored for beginning and intermediate level collaborative practitioners. Even professionals seeking advanced collaborative skill development will benefit from this training.

This course focuses on utilizing a team of professionals to transform family law disputes into a collaborative process. Participants will be given an overview of the development of collaborative law and the requisite paradigm shifts necessary to ensure successful resolution of family conflict. Because the underpinning of a multi-disciplinary model is “team building,” everyone will be trained together. The focus will be on the clients and how they navigate through the process with the assistance of team members. This is a “how to” course which concentrates on the process and the application of the process. Lectures focus on understanding how each professional employs his or her knowledge and skill to support the client’s participation in the process. Demonstrations illustrate step by step progress through the process based on real case examples.

Training Team:
Robert R. Bordett, Nora Kalb Bushfield, and Susan Boyan
Collaborative Law Training Associates, Inc., Atlanta, Georgia

REGISTRATION FEES:
☐ $239 Members of NM Collaborative Practice Group
☐ $259 Regular Fee
☐ $299 After Tuesday, May 3, 2005 ☐ $259 for both days
☐ Attorneys Only—Please add $15 if you wish to have your MCLE credits filed with the New Mexico MCLE Board

Name__________________________________________
Firm/Organization _____________________________________________
Address _________________________________________________
City/State/Zip ______________________________________________
Phone _________________ Fax ________________ E-mail ______________

Payment Options: ☐ Check ☐ Cash ☐ Purchase Order # ______________________ (Copy attached)

Make Checks Payable to: “Institute of Public Law—CLE” Sorry—No Credit Cards Accepted for this Program

Send registration form with payment to:
UNM School of Law, IPL-JEC,
1117 Stanford, NE • Albuquerque, NM 87131
Or Call (505) 277-1051 or Fax (505) 277-7064
For questions about the program content, please call Gretchen Walther, Esq. at (505) 889-8240

MCLE Credit Information - This course has been approved by the New Mexico MCLE Board for 13.8 General and 1.2 Ethics MCLE credits for each day of the program, based on a 50 minute hour. Attorneys will be provided with necessary forms to file for MCLE Credits in other states. A separate filing fee may be required.

Register Early! - Advance registration is recommended as space is limited for this seminar. If space and materials are available, paid registrations will be accepted at the door for a late fee of $20 in addition to the tuition amount above.

Cancellations & Refunds: We understand that your schedule may change at the last minute and prevent you from attending this seminar. A substitute may not attend for you, but if you find that you must cancel your registration, send us written cancellation by 5:00 pm, Tuesday, May 3, 2004, and we will issue you a refund, less $35 processing charge. Registrants failing to cancel and not attending the program will receive a set of course materials following the program.
## SEMINAR REGISTRATION FORM

### CLE PROGRAMS - State Bar Center

### APRIL

<table>
<thead>
<tr>
<th>22</th>
<th>Recreating Yourself in the Practice of Law: Professional and Ethical Considerations</th>
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<tr>
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<td><strong>Friday, April 22, 2005 • 10 a.m. - 3 p.m. [Lunch Provided]</strong></td>
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<tr>
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<td><strong>State Bar Center, Albuquerque • 1.2 Ethics, 2.0 Professionalism CLE Credits</strong></td>
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<td><strong>Co-Sponsor:</strong> UNM School of Law Office of Career and Student Services</td>
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<td>According to the first-ever, 10-year study of new lawyers, more than a third of them changed jobs within their first three years of practice. This half-day seminar will focus upon ways to find career satisfaction and inspiration in work life while also managing the stress of legal practice. The first session will feature Hindi Greenberg, president of Lawyers in Transition. Greenburg has been dubbed “The Ann Landers for lawyers” and is considered among the leading national experts on the topics of attorney career satisfaction and options. She is a 1974 top graduate of the University of California, Hastings College of the Law, a former clerk for a thirteen judge Superior Court in Northern California and a business litigator at a prestigious national law firm. For the past 20 years, she has been a frequent speaker for bar associations and law schools throughout the U.S. and Canada. She is the author of the best selling <em>The Lawyer’s Career Change Handbook</em> (HarperCollins), now in its second edition. Attendees will receive a complimentary copy of this publication. Greenburg’s professionalism presentation on stress management will be supplemented by a professionalism panel composed of former winners of the State Bar of New Mexico’s respected Quality of Life and Young Lawyer of the Year Awards. In the context of quality of life issues, this panel will discuss the attributes of a good law firm and other legal practice areas. Also included will be an ethics component on client and lawyer relations as presented by the director and assistant director of the UNM School of Law Office of Career and Student Services.</td>
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<td>□ Standard Price $99</td>
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<tr>
<th>28</th>
<th>Spanish For Legal Professionals</th>
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<tr>
<td></td>
<td><strong>Thursday, April 28, 2005 • 9 a.m. - 4:30 p.m. [Lunch Provided]</strong></td>
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<td><strong>State Bar Center, Albuquerque</strong></td>
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<td><strong>7.0 General CLE Credits</strong></td>
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<td><strong>Presenters:</strong> Bonifacio Contreras and Brad Leutwyler, Esq.</td>
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<td>This will not be a crash course in Spanish. However, in this seminar, you will learn how to communicate with Spanish speakers within the context of the legal setting. There are potential cultural, practical and linguistic challenges of dealing with Spanish speaking people. However, these challenges can be effectively handled, whether in the law office, interview room, trial court or elsewhere. This seminar will cover a broad mix of practical legal terminology, vocabulary and conversational skills, all of which are broken out in detail in a provided complimentary copy of the <em>Spanish-English Compendium of Law</em> by Contreras &amp; Leutwyler. Using this text, attendees will learn how to begin having meaningful, substantive interactions with Spanish speakers.</td>
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<td>□ Standard and Non-Attorney $169 □ Government and Paralegal $159</td>
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### FOUR WAYS TO REGISTER

| PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m. |
| (Please have credit card information ready) |
| FAX: (505) 797-6071, Open 24 hours |
| INTERNET: www.nmbar.org, click CLE, then area of interest |
| MAIL: CLE, PO Box 92860, Albuquerque, NM 87199 |

| Name __________________________ |
| NM Bar # _______________________ |
| Street _________________________ |
| City/State/Zip ________________ |
| Phone ___________ Fax __________ |
| Email ____________________________ |
| Program Title _______________ |
| Program Date ___________ |
| Program Location ___________ |
| Program Cost ________________ |
| □ Purchase Order (Must be attached to be registered) |
| □ Check enclosed $ ____________ |
| Make check payable to: CLE |
| □ VISA □ MC □ American Express □ Discover |
| Credit Card # ____________ |
| Exp. Date ________________ |
| Authorized Signature __________________________ |

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*Professionalism Tip*

With respect to opposing parties and their counsel:
I will clearly identify, for other counsel or parties, all changes that I have
made in all documents.

Meetings

April
19
Children’s Law Section Board of Directors, noon, Juvenile Justice Center

20
Natural Resources, Energy and Environmental Law Section Board of
Directors, noon, State Bar Center

22
Commercial Litigation Section Board of Directors, 3 p.m., State Bar Center

May
2
Attorney Support Group, 5:30 p.m.,
First United Methodist Church

4
Employment and Labor Law Section Board of Directors, noon, State Bar Center

4
Membership Services Committee, noon, via teleconference

4
Trial Practice Section Board of Directors, noon, State Bar Center

State Bar Workshops

April
18
Consumer Debt/Bankruptcy* & Family Law Workshop, 6 p.m., Roswell Chamber of
Commerce, Roswell

20
Living Wills (Advanced Health Care Directives) Workshop, 6 p.m., State Bar Center

27
Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces

27
Consumer Debt/Bankruptcy Workshop*, 6 p.m., State Bar Center

28
Lawyer Referral for the Elderly Workshop, 1:15 p.m., Meadowlark Senior
Center, Rio Rancho

28
Consumer Debt/Bankruptcy Workshop*, 5:30 p.m., Branigan Library, Las Cruces

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227; or visit the SBNM Web site, www.nmbar.org.
continued from cover

Dear Chief Justice Bosson:

The issue of reciprocal licensing between states for attorneys has been the subject of much study and discussion in recent years, both nationally and in New Mexico. This letter updates the Court on the issue as the Board of Bar Commissioners (BBC) has addressed it.

HISTORY
In 2000 the American Bar Association requested that state bars study the issue of multi-jurisdictional practice (MJP) and reciprocity. In response, the BBC appointed a State Bar MJP Task Force, which was instructed to study access by New Mexico attorneys to other bar memberships.

The BBC accepted the report and recommendations of the Task Force in October 2001 and submitted the report to the Court for consideration. The Court referred the report to the Board of Bar Examiners (BBE) and the Disciplinary Board (D-Board) for comment. The Court issued an order in March 2002 rejecting the proposal for reciprocal licensing in New Mexico.

The reciprocity discussion arose again in response to a recent State Bar membership survey and continued national attention. At its May 7, 2004 meeting, the BBC appointed a Reciprocity Committee to further study the matter. The Reciprocity Committee’s purpose was to develop the best possible reciprocity rule from which an open discussion of both the concept and rule could evolve. Committee members included representatives from the BBC, the BBE, the D-Board, the New Mexico Trial Lawyers Association, and interested New Mexico attorneys, as well as Justice Petra Jimenez Maes and Justice Patricio Serna. A copy of the draft rule is enclosed.

At its October 26, 2004 meeting, the BBC voted to seek input from all New Mexico local, voluntary and minority bar associations on this important issue. The draft rule was sent to each group with a request that comments be sent to the Committee and the BBC for consideration. Copies of the correspondence received from those bar associations are enclosed.

The BBC discussed the issue for more than two hours at its December 17, 2004 meeting. Because of the importance of the issue, the BBC decided to broaden the scope of input from members. Through a notice in the Bar Bulletin and an e-blast message sent to all members with an e-mail address on file with the State Bar, members were given a copy of the rule and were asked to convey their thoughts on the proposed rule to their BBC representatives.

In total, more than 200 responses were received from members who expressed strong interest on both sides of the issue. Copies of the correspondence received from the membership are also enclosed. Also, you should know that the governing boards of the Hispanic Bar Association and the Albuquerque Bar Association oppose the rule. The membership of the New Mexico Trial Lawyers Association also voted to oppose the rule.

RECIPROCAL LICENSING ISSUES
The concept of reciprocity, or reciprocal licensing, has developed into different admission scenarios in different states. As is evident by comments submitted on the issue, there is some confusion over the various types of licensing among members of the New Mexico Bar.

Some states allow for “mirror” reciprocity, which essentially means that lawyers from State A may be admitted to State B and vice versa, provided the admission rules for each state are substantially the same. In other words, “you let ours in and we’ll let yours in.” Colorado is a good example of a mirror state in that a reciprocal arrangement must be in place with the state from which a lawyer would like to be admitted before that lawyer may waive into Colorado.

Other states allow admission on motion, which does not have to be based on a shared arrangement between states. Texas is a good example of a motion state. Provided an attorney meets the requirements of the Texas rules on admission, he or she may “waive” into the Texas bar without taking the bar exam.

Still other states have specific arrangements with other states and this arrangement is referred to as comity. An example of comity exists with the arrangement between Idaho, Oregon and Washington where members from these states may apply for admission on motion to the others.

Another issue that confuses the reciprocity discussion is that of pro hac vice admission. While pro hac vice is completely separate and apart from reciprocity, members raised the issue as a concern when discussing reciprocity, especially with regard to Texas attorneys coming to New Mexico pro hac vice and soliciting clients. Also, after deliberating the issue, some questions remain regarding the type of reciprocity the draft New Mexico rule would permit. In any event, states that currently allow for reciprocal licensing are Alaska, Colorado, Connecticut, Georgia, Illinois, Iowa, Kentucky, Michigan, Mississippi, Missouri, New Hampshire, New York, Pennsylvania, Utah, Virginia, Washington, Wisconsin and Wyoming.

ARGUMENTS IN SUPPORT OF RECIPROCITY
The following synopsis is taken from members’ comments.

Reciprocity will open the doors for NM attorneys to gain access to other states and open up career options. Increased mobility through reciprocity benefits the public in that it makes legal services more readily available because lawyers will be less restricted in expanding to new markets. In addition, reciprocity offers distinct advantages for a working spouse who may move to a different state for a spouse’s employment.

If an attorney has graduated from an ABA-accredited law school, passed the required bar examinations in another state,
practiced for several years and is in good standing, there should be no reason not to allow the attorney to practice in another state. The bar exam is virtually the same in all states and if an attorney has passed it once and can demonstrate their professional competence, it seems appropriate that they should not have to take the bar exam again, as the core laws and procedures of most states are substantially similar.

Competition should be promoted, not barred, from experienced out-of-state attorneys. Reciprocity will improve the pool and quality of lawyers in this state and promote further diversity in New Mexico. It can only help the quality of legal services available to clients seeking assistance in New Mexico. Competent attorneys located in New Mexico will always have the advantage as determined by the Board of Bar Examiners, may upon motion based on reciprocity, be admitted to the practice of law in this jurisdiction without examination.

Reciprocity will enable NM lawyers to benefit from the expertise of many other capable lawyers having contact with the state, but licensed elsewhere. The nature of the multi-state portion of the bar exam supports the universality of the law practice, and a reciprocity rule supports this reality.

ARGUMENTS IN OPPOSITION TO RECIPROCITY
The following synopsis is taken from members’ comments.

There is no evidence that New Mexicans are currently unable to obtain adequate and competent lawyers from those currently admitted, and there does not seem to be a compelling reason to change the way attorneys are admitted to practice in New Mexico. In other words, “don’t fix it if it isn’t broken.”

Reciprocity circumvents the protections built into the current licensure requirements. New Mexico is better served by bar members who are sensitive to the multicultural traditions of New Mexicans. The sense of community, collegiality and professionalism will be lost to counsel from outside the state because they neither live nor work on a regular basis within the state.

The new reciprocity rule would encourage the acquisition of existing New Mexico firms by national firms that may adversely affect the practice of law in New Mexico and our ability to provide quality legal services to our clients. Personal injury lawyers/firms, solo and small firms will be hurt by the flood of lawyers coming from larger states such as Texas, New York and California. Reciprocity won’t protect the public in that attorneys will be able to represent the public without learning New Mexico law. There will be little or no professional accountability for out-of-state attorneys who violate New Mexico Rules of Professional Conduct.

More out-of-state lawyers will mean more deceptive advertising to entice clients away from lawyers who have earned the right to practice in New Mexico. Knowledge of the civil procedure and substantive law of a particular state, tested on the bar exam, is probably the biggest and best reason to require the bar exam. This is a very valuable practice and raises the standards of competency. Reciprocity would become a parallel to free-trade policies that seem to lower the common denominator to whatever competitive factors are highly relevant, such as worker pay, benefits and rights, environmental law, etc.

The pro hac vice rule, which allows attorneys from other jurisdictions to practice in New Mexico on a case-by-case basis with the assistance of local counsel, is sufficient for out-of-state counsel. Reciprocity will lessen the chances for New Mexico attorneys to act as local counsel.

CONCLUSION
Even in light of the issues outlined above, the fundamental issue is still whether reciprocity benefits or hurts the New Mexico Bar and the public. On this question, the membership of the State Bar is divided. Consequently, the BBC is not making a recommendation to the Supreme Court either in favor of or against the controversial issue of reciprocity.

Instead, the BBC decided to send this correspondence to the Court, along with a copy of the proposed rule and copies of the comments received by members. In addition, the BBC offers to conduct a membership poll on the question, along with an effort to educate members about this issue. The State Bar, of course, is available to assist in any fashion the Court deems appropriate.

Thank you for your attention to this important matter.

Sincerely,

Charles J. Vigil
President

PROPOSED NEW MEXICO SUPREME COURT RULE ON RECIPROCITY

1. An applicant who meets the requirements of this rule hereafter as determined by the Board of Bar Examiners, may upon motion based on reciprocity, be admitted to the practice of law in this jurisdiction without examination.

   a. Have been admitted to practice law in at least one jurisdiction which will admit New Mexico attorneys to its Bar without examination under provisions similar to this rule;
b. Have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed;

c. Hold a professional degree in law, J.D. or L.L.B. from a law school approved by the Council of the Section of the Legal Education and Admissions to the Bar of the American Bar Association at the time the applicant graduated;

d. Establish that the applicant is currently a member in good standing in all jurisdictions where admitted and an active member in the reciprocal jurisdiction;

e. Establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdiction; and

f. Establish that the applicant possesses the character and fitness to practice law in this jurisdiction pursuant to the rules currently governing admission to practice in the State of New Mexico whether by examination, motion or this rule.

2. For purposes of this Section, “practice of law” shall mean:
   a. private practice as a sole practitioner or for a law firm, legal services office, legal clinic or similar entity, provided such practice was subsequent to being admitted to the practice of law in the jurisdiction in which that practice occurred;

   b. practice as an attorney for a corporation, partnership, trust, individual, or other entity, provided such practice was subsequent to being admitted to the practice of law in the jurisdiction in which the practice occurred and involved the primary duties of furnishing legal counsel, drafting legal documents and pleadings, interpreting and giving advice regarding the law, or preparing, trying, or presenting cases before courts, executive departments, administrative bureaus, or agencies;

   c. practice as an attorney for the federal or a state or local government with the same primary duties as described in 2. b. above;

   d. employment as a judge, magistrate, referee, or similar official for the federal or a state or local government, state or federal agency or bar-related programs, provided that such employment is available only to licensed attorneys;

   e. full-time employment as a teacher of law at a law school approved by the American Bar Association, whether or not such law school is located in New Mexico; or

   f. any combination of the above.

3. Upon completion of the admission process, applicant shall be admitted upon motion by the Supreme Court of the State of New Mexico. The fee shall be determined by the Board of Bar Examiners. No fees are refundable.

4. Upon admission, the admittee shall immediately be subject to all rules of mandatory continuing legal education, professionalism, and the disciplinary rules of the Supreme Court of New Mexico and annual dues to be paid to the State Bar of New Mexico.
NOTICES

COURT NEWS

New Judgeships Created

Governor Richardson signed HB 901 creating eight new judgeships throughout the State of New Mexico April 7. The Courts will be created in the following communities:
1. Bernalillo County Metro Court
2. Bernalillo County Metro Court (Dedicated DWI docket)
3. Santa Fe County Magistrate Court
4. San Juan County Magistrate Court
5. Second Judicial District Court (Albuquerque)
6. Ninth Judicial District Court (Clovis/Portales)
7. Eleventh Judicial District Court (McKinley County/Gallup)
8. Sandoval County Magistrate Court
HB 901 includes $1.8 million for salaries, staff and basic equipment and furnishings for the new judgeships. This is part of the Governor’s “Year of the Judiciary” initiative. The eight new judgeships are effective July 1.

NM Supreme Court

Proposed Revisions to the Rules of Criminal Procedure for the District Court

The Supreme Court is considering proposed revisions to the Rules of Criminal Procedure for the District Courts. Attorneys who would like to comment on the proposed revisions should send written comments by April 29 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed amendments were printed in the April 11 (Vol. 44, No. 4) Bar Bulletin.

Judicial Performance Evaluation Commission

Upcoming Meeting

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers.

The commission’s next meeting will be from 8 a.m. to 5 p.m., April 21 and 22 at the Third Judicial District Court, 201 W. Picacho, Suite A, Las Cruces. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

Statewide Alimony Pilot Project

Available Online

The following documents are now available on the State Bar of New Mexico Web site, www.nmbar.org: The Pilot Project Alimony Guidelines and Commentary, Alimony Survey and the Final Report of 1994 Child Support Guidelines Review Commission. This information can also be linked to through the New Mexico Supreme Court Library Web site, www.fscll.org. These alimony guidelines are to be used for settlement purposes only and should not be cited as authority in court proceedings; there should be an initial review of the statutory factors to determine whether an award of alimony is appropriate and, only after it has been determined that alimony is appropriate, should the alimony guidelines be considered; the Commentaries to the Alimony Guidelines and the Final Report of the 1994 Child Support Guidelines Review Commission should be consulted as guides to usage; and some cases will not be appropriate for guidelines. Attorneys are encouraged to provide alimony surveys in each case involving alimony that is resolved by stipulated agreement or decision of the court.

Second Judicial District Court

Attorney Address Changes

Attorney names and addresses are entered into the Second Judicial District Court’s computerized case management system based on the Computer Automation Identification Number (CAID) issued by the State Bar of New Mexico. When submitting documents for filing to the court please use your CAID complete name and address to ensure notices and correspondence are sent to the correct attorney and address.

It is imperative that all parties’ counsel notify the court if they have a change of address. If attorneys have had an address change and have not notified the court, they are asked to do so at their earliest convenience.

Children’s Court Monthly Judges’ and Managers’ Meeting

The Second Judicial District Children’s Court will hold its monthly judges’ and managers’ meeting at noon, May 3 in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, Albuquerque. Children’s Court judges and managers of court-related agencies will meet to discuss ongoing concerns and projects. For a copy of the meeting agenda, call (505) 841-7644.

Destruction of Tapes

Pursuant to the Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy tapes filed with the court in the criminal cases filed for years 1981 to 1985 included, but not limited to, cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes, and wish to have duplicates made, should verify tape information with the Special Services Division, (505) 841-6717, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after April 22.

Family Court Open Meetings

Second Judicial District Family Court judges will hold open meetings to discuss ongoing concerns and projects at noon on the first business Monday of each month in the Conference Center located on the third floor of the Bernalillo County Courthouse. The next regular meeting will be held on May 2. Contact Sandra Partida, (505) 841-7531, for more information or to have an item placed on the agenda.

Fax Filing

Following are the procedures for fax filing with the Second Judicial District Court:
• Each pleading received by facsimile must have a cover sheet with the following information:
  Name of the sender
  The voice and facsimile telephone numbers of the sender
  An identification of the case
  The docket number and the number of pages transmitted
• All pleadings received by facsimile have a ten page limit, excluding the cover sheet
• All facsimiles must contain transmittal information (i.e. date and time)
• All facsimiles filing shall be received on the primary fax number: 841-6705. If this number is out of service, facsimiles will be received at (505) 841-7446. These are the courts’ only facsimile filing numbers.

Missing information or facsimiles received on fax machines other than the two numbers listed above will result in the facsimile being refused for filing.

Swearing-In Ceremony

Clay Campbell will be formally sworn in as a Second Judicial District Court Judge, Division XII, at 4 p.m., April 21 in Judge William Lang’s Courthouse, #338, of the Bernalillo County Courthouse, 400 Lomas Blvd. NW. A reception will follow the swearing-in ceremony at La Posada de Albuquerque.

Withdrawal as Counsel

The Second Judicial District Court requests that all counsel involved in cases follow local rules pertaining to withdrawal as counsel.

Pursuant to Local Rule 2-117 (Counsel of record; appearance; withdrawal):

C. Withdrawal of Counsel.

“All withdrawals in all cases shall be by court order upon motion and shall not be granted ex parte. In addition to the grounds for withdrawal, motions to withdraw shall set forth the dates and times of any hearings set, and the dates of any relevant Supreme Court deadlines (e.g., in criminal cases, the date the six-month rule expires). In addition, unless the court otherwise orders for good cause, motions to withdraw shall:

1.) be accompanied by an entry of appearance by substitute counsel or the client as a party pro se in which such substitute counsel or party pro se certifies that he or she is ready and able to proceed without delay; or

2.) set forth in the motion the client’s last know address and telephone numbers including work number, and acknowledge that the client has twenty (20) days in which to obtain counsel or be deemed appearing pro se.”

STATE BAR NEWS

Attorney Support Group Monthly Meeting

The next Attorney Support Group meeting will be held at 5:30 p.m., May 2 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month.

For more information, contact Bill Stratvert, (505) 242-6845.

Bankruptcy Law Section Sixth Annual Golf Outing and Annual Meeting

The State Bar Bankruptcy Law Section will host the sixth annual golf outing and annual meeting at 12:30 p.m., May 6 at Four Hills Country Club, Albuquerque. The cost of $65 includes: a round of golf and cart and hors d’oeuvres. A cash bar will also be available.

Non-golfing section members are encouraged to attend the reception following the tournament at 5 p.m., also at the Four Hills Country Club, 911 Four Hills Rd. SE, Albuquerque. For more information, to submit an agenda item, or to register, contact Gerald Velarde, (505) 248-1828 or jerryvelarde@hotmail.com. Reservations must be made by May 2. Participants must provide their own golf clubs.

Board of Bar Commissioners Meeting Summary

The Board of Bar Commissioners met on April 7 at the State Bar Center in Albuquerque. Action taken at the meeting follows:

• Approved the Jan. 28, 2005, meeting minutes as submitted;
• Tabled two requests to send a representative to the Jackrabbit Bar Meeting in June and the Hispanic National Bar Meeting in October in order for staff to research costs;
• Denied requests to fund scholarships for the NCBP Annual Meeting and the ABA’s Environmental Law Minority Fellowship Program; the Finance Committee will discuss setting up a special line item for these types of requests during the 2006 budgeting cycle;
• Received an update on financing for the building improvements and equipment upgrades to the State Bar Center;
• Approved fee waivers of the 2005 bar dues for those who met the criteria;
• Denied request to refund 2005 dues for two attorneys who paid active dues but went inactive because of MCLE noncompliance; the Bylaws/Policies Committee will develop a policy for the Board’s consideration;
• Accepted the February 2005 financials and executive summary;
• Reviewed the accounts receivable aging report and approved a change to the A/R policy to not charge interest to governmental agencies;
• Reviewed the executive director’s travel reimbursements and credit card file;
• Accepted the Finance Committee report;
• Received reports from the following committees: Committee on Women and the Legal Profession, Public Legal Education Committee and Lawyers Assistance Committee;
• Received an update on ABA House Resolution 108 regarding mandatory malpractice insurance disclosure; the Lawyers Professional Liability Committee will draft two proposals for the Board’s consideration with pros and cons of each;
• Held an executive session at which a new contract was approved for the executive director;
• Reported that the draft reciprocity rule, comments, and information on the pro and con arguments were forwarded to the Supreme Court with the offer to conduct a referendum if requested by the Court; the Court thanked the Bar for drafting the rule and providing the information, but did not request a survey be conducted at this time;
• Denied the Children’s Law Section request for a bylaw amendment to allow for proxy voting;
• Received a report on the Personnel Committee meeting, which included comp time, flex time, prorating leave time for employees, and a deferred compensation policy proposal, which were tabled to the May meeting in order to research further;
• Received a report on the Bylaws/Policies Committee meeting and approved an amendment to Article II, Section 2.8, Law Student Members, to include language for ABA-accredited law school;
Paralegal Division
Brownbag CLE
Bring a lunch and join the Paralegal Division for their monthly CLE from noon to 1 p.m., May 11 at the State Bar Center. Registration begins at 11:30 a.m. and the cost is $16 for attorneys and $15 for paralegals, legal assistants and secretaries. The topic for this month’s CLE is “Rules Governing Paralegal Services: Changes in the New Mexico Supreme Court Rules,” presented by Leigh Anne Chavez, an attorney who is a paralegal studies instructor at TVI. For more information, contact Debi Shoemaker-Scott, (505) 243-1443.

Pro Hac Vice
The New Mexico Supreme Court has established a new rule for practice by non-admitted Lawyers before state courts (Pro Hac Vice). The new Rule 24-106 NMRA, effective for cases filed on or after Jan. 20, 2005. Attorneys authorized to practice law before the highest court of record in any state or territory wishing to enter an appearance, either in person or on court papers, in a New Mexico civil case should consult the new rule. This rule requires non-admitted lawyers to file a registration certificate with the State Bar of New Mexico, file an affidavit with the court and pay a nonrefundable fee of $250. Fees collected under this rule will be used to support legal services for the poor. For more information on the rule, a copy of the registration certificate and sample affidavit, go to www.nmbar.org. For questions about compliance with the rule, please contact Richard Spinello, Esq., Director of Public and Legal Services, State Bar of New Mexico, (505) 797-6050, (800) 876-6227, or rspinello@nmbar.org.

Public Lawyer Award
The State Bar Public Law Section will present its annual Public Lawyer of the Year Award to Paul Biderman at 4 p.m., May 2 at the State Capitol Rotunda in Santa Fe. A reception will follow. See the April 11 (Vol. 44, No. 14) Bar Bulletin for more information on Biderman.

New Mexico Supreme Court Chief Justice Richard C. Bosson, Attorney General Patricia Madrid and State Bar President Charles J. Vigil will speak at the event.

Technology Utilization Committee
WORD Up! Workshop
Increase your Microsoft Word skill with a free, one-hour workshop, “WORD Up!” from 5 to 6 p.m., April 21 at the State Bar Center, Albuquerque. Learn about organizing files, improving documents, using format, mail merge, symbols and shortcut keys. Paralegals, attorneys and support staff are all invited to attend this free event presented by the State Bar Technology Utilization Committee. The class is limited to 20 attendees. Reservations should be made to Mary Patrick, CLE Program Coordinator, (505) 797-6059. CLE credit will not be provided.

Young Lawyers Division
Luncheon Presentation
The Young Lawyers Division of the State Bar of New Mexico is sponsoring a luncheon presentation at noon, April 27 at the Bernalillo County Metropolitan Court’s Ceremonial Courtroom. The topic of the event is “Depositions: The How, the When and the Why.” John Samore and
Greg Chase will be the event’s speakers. Space is limited. Lunch will be provided to those who R.S.V.P. by April 22 to Román Romero, (505) 345-9616 or by e-mail, romanrromerolaw@yahoo.com.

**OTHER BARS**

**Albuquerque Bar Association**

**Bench and Bar Reception**

The Albuquerque Bar Association will host a Bench and Bar Reception to honor newly appointed judges from 5 to 7:30 p.m., April 20 at the Albuquerque Museum. This free event includes admittance to the El Alma de España (The Soul of Spain) exhibit. El Alma de España is a tribute to the 300th anniversary of the founding of the City of Albuquerque by the Spanish. Paintings from The Prado in Madrid and the Bellas Artes in Valencia will join other works lent by prestigious American institutions. This exhibition is devoted solely to Spanish Masters and consists of nearly 100 works, both paintings and sculpture, and highlights the range of art produced in Spain during the late 16th to early 19th centuries. This will be a wonderful venue to honor this year’s new judges.

**Law Day Luncheon**

The Law Day luncheon will be held on May 2 at the Hyatt Regency Hotel. Delano Lewis, former ambassador to South Africa and head of National Public Radio (NPR) will be the featured speaker. He will speak on “The Role of the American Lawyer in a Global Society.” Visit Albuquerque Bar Association’s Web site at abqbar.com for information or to register for Law Day. If your firm or organization is interested in being a co-sponsor, please contact Jeanne Adams, (505) 842-1151 or jadams@abqbar.com.

**Pictorial Directory**

Deadline for inclusion in the Albuquerque Bar Association’s Pictorial Directory is April 30. Contact Kim Jew Photography at (505) 255-6424 to schedule an appointment. To encourage participation, the directory is open to all attorneys.

**First Judicial District Bar Association**

**Monthly Lunch**

The First Judicial District Bar Association will host a panel of First Judicial District Judges at its monthly lunch meeting April 18 at the Hotel St. Francis in Santa Fe. For more information about membership or the lunch event, contact Dana Hardy, (505) 466-2548 or dhardy@simonsfirm.com.

**NM Women’s Bar Association**

**Mid-State Chapter Monthly Networking Luncheon**

The New Mexico Women’s Bar Association’s next networking lunch will be from noon to 1:30 p.m., May 11 at Conrad’s in the LaPosada Hotel, Albuquerque. Members and visitors are welcome. Advance reservations are required. Lunch prices range from $6 - $11, and payment is made directly to the restaurant. Anyone interested in attending this meeting should R.S.V.P. to Rendie R. Moore, martren@eb-b.com.

**OTHER NEWS**

**NM Guardianship Association**

**Guardianship and Conservatorship Forum**

The New Mexico Guardianship Association will be hosting a Guardianship and Conservatorship Forum from 1:30 to 5 p.m., April 29 at the Le Baron motel, 2120 Menaul NE, Albuquerque. The featured speaker for the forum is Peter Santini, National Guardianship Association president. There is no charge for the event and the public is welcome. Call (505) 883-4630 or e-mail sbennett@swcp.com to R.S.V.P. or for more information.

**UNM Law Library**

**Public Access Westlaw® Now Available**

The UNM Law Library now offers Westlaw® on its public access computers. This database offers state and federal cases and statutes, federal regulations and many authoritative secondary resources including West’s online citator, Keycite”. The database also contains a comprehensive collection of practice forms. A free introductory training for Bar members will be held at 11 a.m., May 7 in the Law Library. Call Barbara Lai, (505) 277-8473 to reserve a space. Seating is limited.

**Spring Semester Hours**

Hours through May 15:
- Mon. – Thurs. 8 a.m. to 11 p.m.
- Fri. 8 a.m. to 6 p.m.
- Sat. 9 a.m. to 6 p.m.
- Sun. noon to 11 p.m.

Reference:
- Mon. – Thurs. 9 a.m. to 9 p.m.
- Fri. 9 a.m. to 5 p.m.
- Sat. noon to 4 p.m.
- Sun. noon to 4 p.m.

Extended Exam Hours:
- May 1 9 a.m. to 10 p.m.
- May 7 8 a.m. to 10 p.m.
- May 8 9 a.m. to 10 p.m.
- May 14 8 a.m. to 10 p.m.

**UNM Women’s Law Caucus Award Ceremony**

The UNM Women’s Law Caucus will be honoring their 2005 “Justice Mary Walters Award” recipient, Randi McGinn, during an award ceremony at 6 p.m., April 20 at the UNM School of Law. McGinn is an attorney with the Albuquerque law firm of McGinn, Carpenter, Montoya & Love, PA. The award is given annually to a pioneering woman in the field of law. For more information contact Allison Michael, (505) 350-4597.
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<td>(800) 672-6253</td>
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<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>DaVinci Code of Scientific Evidence</td>
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<td>(800) 775-7654</td>
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<td><a href="http://www.cannonfinancial.com">www.cannonfinancial.com</a></td>
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<td>Omnipresent Marital Deduction - It May Not Be As Simple As You Think</td>
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<td>Personal Injury Case Evaluation and Intake - Make Your Accountant and</td>
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<td>Recreating Yourself in the Practice of Law: Professional and Ethical</td>
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<td>Complex Divorce Issues for the New Mexico Practitioner</td>
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<td>National Business</td>
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Programs have various sponsors; contact appropriate sponsor for more information.
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<td>Key Elements in Drafting Commercial Leases, Part 1</td>
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<td>(505) 797-6020, <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>27</td>
<td>Section 504 versus the IDEA</td>
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<td>(715) 833-3940, <a href="http://www.lorman.com">www.lorman.com</a></td>
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<td>Torts</td>
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<td>28</td>
<td>Fundamentals of Arbitration</td>
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<td>(800) 672-6253, trtclef.com</td>
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<td>28</td>
<td>Key Elements in Drafting Commercial Leases, Part 2</td>
<td>Albuquerque</td>
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<td>(505) 797-6020, <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>28</td>
<td>Spanish for Legal Professionals</td>
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<td>(505) 797-6020, <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>29</td>
<td>24th Annual Update on New Mexico Tort Law</td>
<td>Albuquerque</td>
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<td>(505) 243-6003, <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>Common Sense Ethics - Histories and Mysteries</td>
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<td>29</td>
<td>Criminal Procedures: Sentencing Decisions After Booker and Fanfan</td>
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<td>(800) 672-6253, trtclef.com</td>
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<td>29</td>
<td>Evidence and Hearsay in the New Mexico Courtroom</td>
<td>Albuquerque</td>
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<td>(715) 835-8525, <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>3</td>
<td>Asset Protection for the Elderly: Saving the Work of a Lifetime from Depletion</td>
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<td>3</td>
<td>Uninsured and Underinsured Motorist Law in New Mexico</td>
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<td>Bankruptcy in New Mexico</td>
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# WRITS OF CERTIORARI

**As Updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court  
PO Box 848 - Santa Fe, NM 87504-0848 - (505) 827-4860  
**Effective April 13, 2005**

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## Petitions for Writ of Certiorari Filed and Pending:

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<th>Petition filed</th>
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<td>29,171</td>
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## Certiorari Granted But Not Submitted:

(Submission = date of oral argument or briefs-only submission)

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WRITS OF CERTIORARI
AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT
Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

EFFECTIVE APRIL 13, 2005

CERTIORARI GRANTED AND SUBMITTED:
(Submission = date of oral argument or briefs-only submission)

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EDWARD L. CHÁVEZ, JUSTICE

{1} In this case, Appellant Caroline Roberts appeals the district court’s Order upholding Governor Bill Richardson’s decision to replace her on the New Mexico Public Accountancy Board (“Accountancy Board”).

We affirm the district court on this point because Appellant’s term on the Accountancy Board expired December 31, 2002, making Appellant a “holdover” appointee until her successor was duly appointed and qualified. See NMSA 1978, §61-28B-4(B) (2003).

Appellant also challenges the district court’s denial of her Motion for Order Compelling Clerk to Process Excusal, contending that her peremptory excusal was timely. We affirm the district court on this point because Appellant filed her peremptory election to excuse more than ten days after the filing of her complaint, the point at which Appellant was first notified of the judge assigned to hear her case.

Appellant’s Notice of Excusal of Judge Conway was Not Timely

{2} The procedure for a party plaintiff to file a peremptory excusal of a district court judge is governed by Rule 1-088.1 NMRA 2005. Subsection (B) provides in relevant part:

The peremptory election to excuse must be:

(1) signed by a party plaintiff or that party’s attorney and filed within ten (10) days after the latter of:

(a) the filing of the complaint; or
(b) mailing by the clerk of notice of assignment or reassignment of the case to a judge[.]

{3} Appellant filed her complaint on March 14, 2003, at which time the clerk stamped the summons with the name of Judge Susan Conway, indicating Judge Conway was the judge assigned to hear the case. Appellant filed her Notice of Excusal of Judge Conway on April 15, 2003. The Court Clerk refused to honor the Notice of Excusal and wrote at the bottom, “not processed, untimely.” On May 13, 2003, Appellant filed a Motion for Order Compelling Clerk to Process Excusal.

{4} In her motion and on appeal, Appellant claims the notice was timely because at the time she filed her Notice of Excusal, the Court Clerk had not mailed a notice of judge assignment as contemplated by Rule 1-088.1(B)(1). Appellant contends the rule provides that a plaintiff has until the filing of the complaint or mailing by the clerk of a notice of judge assignment in which to file a peremptory excusal of a judge. According to Appellant, because the Clerk had not mailed a notice of judge assignment at the time Appellant filed her Notice of Excusal, the Notice fulfilled the Rule 1-088.1(B)(1) time requirements, and it was not relevant that the Notice was filed more than ten days after filing the complaint. Appellant’s argument is without merit.

{5} “Rules of statutory construction are applied when construing rules of procedure adopted by the Supreme Court.” Walker v. Walton, 2003-NMSC-014, ¶ 8, 133 N.M. 766, 70 P.3d 756. The procedural rules must “be construed and administered to secure the just, speedy and inexpensive determination of every action.” Rule 1-001NMRA 2005. In interpreting procedural rules, courts are to give each word meaning, as the courts are presumed not to have used any surplus words in the rules. See State v. Doe, 90 N.M. 776, 777, 568 P.2d 612, 613 (Ct. App. 1977).

{6} The interpretation of Rule 1-088.1(B)(1) as argued by Appellant would render Rule 1-088.1 (B)(1)(a) (time of filing a complaint)
meaningless. Appellant conceded during oral argument there are no circumstances in which mailing a notice of judge assignment would precede the filing of a complaint. However, Appellant contends that to limit the ten-day rule from the time of filing the complaint would render Rule 1-088.1(B)(1)(b) (mailing by the clerk of notice of assignment) meaningless. We disagree. There are various circumstances that would require a court clerk to mail the parties a notice of judge assignment after a complaint has been filed. For example, the division to which the case was assigned could be vacant due to the resignation of a judge, or the case could be assigned to a pro tem judge who had not yet received an official appointment to the bench. Under such circumstances, the summons and/or complaint could not be stamped with the name of the judge to whom the case was assigned and the clerk would have to follow up with a notice of judge assignment. Rule 1-088.1(B)(1)(b) (mailing by the clerk of notice of assignment) would therefore not be meaningless.

Additionally, there was no need in this case for the Clerk to mail additional notice since the judge had been assigned to the case on March 14, 2003 (the day the complaint was filed), and the parties received notice of this assignment via the summons on that same date. To construe Rule 1-088.1(B) as requiring a clerk to mail notice of the assignment of a judge even when the summons and/or complaint are stamped with the name of the judge to whom the case is assigned would be neither speedy nor inexpensive. Such a construction would contravene the purpose of Rule 1-001. Because Appellant was notified that Judge Conway was assigned to hear the case at the time the complaint was filed, Appellant had ten days from the filing in which to exercise her statutory right to file a peremptory election to excuse Judge Conway. Having filed more than ten days later, Appellant did not file a timely notice.

We thank Appellant for bringing a possible ambiguity in Rule 1-088.1 to our attention. This issue will be submitted to the Committee overseeing the Rules of Civil Procedure for the District Courts so they may examine Rule 1-088.1 in light of the concerns expressed by Appellant. We request that the Committee make any recommendations it deems appropriate in light of this Opinion.

**Appellant was Not Improperly Removed from the Accountancy Board**

The Accountancy Board consists of seven members appointed by the Governor. NMSA 1978, § 61-28B-4(A) (2003). The terms are for three years and are to be staggered in such a manner that the terms of not more than three members expire on January 1 of each year. § 61-28B-4(B). The Governor may remove a member of the Accountancy Board for neglect of duty or other just cause. Id.

Appellant was appointed to the Accountancy Board by then-Governor Gary Johnson on January 24, 2002, to fill an unexpired term. In his appointment letter, Governor Johnson stated that Appellant’s appointment expired December 31, 2002. On October 10, 2002, Governor Johnson again wrote to Appellant notifying her that he was appointing her to the Accountancy Board for a three-year term to begin on December 31, 2002, notwithstanding the statutory language mandating that terms expire on January 1 of each year. See id. Governor Johnson left office on December 31, 2002.

Bill Richardson assumed the office of Governor on January 1, 2003. On January 28, 2003, Governor Richardson wrote to Appellant advising her that he was removing her from the Accountancy Board for “sufficient cause.” Appellant requested that Governor Richardson provide the specifics for her removal, which the Governor declined to do.

Governor Richardson contends that Governor Richardson could not remove her for just cause unless he specified the reasons giving rise to the just cause. Governor Richardson counters that he is not required to specify the basis for just cause and, in any event, as Appellant’s term expired January 1, 2003, he had authority to appoint Appellant’s successor to the Accountancy Board.

Appellant was a “holdover,” an appointee who continues her “tenure” in office beyond the official expiration of her “term.” Denish v. Johnson, 1996-NMSC-005, ¶ 24, 46-49, 121 N.M. 280, 910 P.2d 914. In Denish, then-Governor Bruce King filled two mid-term vacancies on the Board of Regents for the New Mexico Institute of Mining and Technology. Id. ¶¶ 1-5. Governor King attempted to grant both appointees five-year terms, even though each term was constitutionally required to expire earlier under that Board’s system of staggered terms. See id. ¶¶ 5-6, 41 (construing N.M. Const. art. XII, § 13 and N.M. Const. art. XX, § 5). We held that the Governor’s appointees could only serve for the remainder of time established for the unexpired terms. Id. ¶ 41.

Similarly, Appellant could serve on the Accountancy Board only for the remainder of the unexpired term to which she was appointed. Governor Johnson did not have authority to appoint Appellant to a term beyond December 31, 2002. Therefore, Governor Richardson had authority to appoint Appellant’s successor. Because we conclude that Appellant’s term had expired and that Governor Richardson had authority to appoint her successor, we do not need to determine whether a governor must specify the basis for a “just cause” removal of a board member.

**CONCLUSION**

Appellant’s Notice of Excusal was not valid because it was filed more than ten days after the filing of the complaint, the point at which she received notice of the judge assignment in this case. As Appellant’s term on the Accountancy Board had expired, Governor Richardson was lawfully entitled to appoint her successor. We therefore affirm the district court.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

RICHARD C. BOSSON, Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. Serna, Justice
PETRA JIMENEZ MAES, Justice
OPINION

IRA ROBINSON, Judge

{1} Appellants appeal the district court’s decision ordering arbitration. Appellants simultaneously filed a complaint in district court and filed a statement of claim for arbitration against Appellees. On appeal, Appellants contend that (1) the district court order compelling arbitration must be reversed because it failed to determine the existence of a pre-dispute arbitration agreement, and (2) the mere filing of a claim for arbitration does not waive their right to challenge arbitrability. We reverse and remand.

BACKGROUND

{2} The following is a summary of the allegations contained in the complaint of Mr. and Mrs. Alexander (Appellants). Appellants are retired and were dependent on their fixed income investment portfolio maintained with Calton & Associates (Appellees) to generate income. Between June 1995 and April 2000, the portfolio at issue was invested in high-quality corporate and municipal bonds.

{3} Without Appellants’ knowledge, Appellees opened a margin account, and from time-to-time, Stephen Murchison and Southwest Securities (Appellees) purchased bonds in the account on margin. Appellees were not authorized to use margins in Appellants’ account and never subsequently obtained Appellants’ agreement to the use of a margin account to purchase securities on credit.

{4} Beginning in or about April 2000, Stephen Murchison, an agent of Calton & Associates (Appellee), solicited Appellants’ consent to invest a portion of their portfolio’s assets in option securities. Appellants did not understand the options market and resisted the solicitation. After Appellees expressed they would not invest more than $15,000 in the options market and that they would pursue the option investment strategy for only a short time, Appellants relented.

{5} Beginning in April 2000, Appellees began to sell “put” options in Appellants’ account. These options subjected their account to a risk of loss of principal far in excess of $15,000. Without Appellants’ knowledge, Appellees used Appellants’ corporate and municipal bonds as collateral to buy the put options in the event the option holders exercised the options.

{6} Thereafter, in or about June 2000, Appellees, without Appellants’ consent, began increasing their use of margins extended by Southwest Securities to facilitate the option strategy. These additional options were written on highly volatile stocks. In January 2001, holders of these options exercised the options. The exercise of these options obligated Appellees to purchase the underlying securities in Appellants’ portfolio. As the market value of these margin bonds declined further, the account became subject to calls by Southwest Securities for additional collateral to secure the margin balance. Appellants’ portfolio lost almost all its value, declining from a balance over $514,000 in the summer of 2000 to approximately $75,000 by the spring of 2001.

{7} On April 23 and July 31, 2001, Appellants requested from Appellees confirmation of whether they had entered into a pre-dispute arbitration agreement. Appellees did not respond to either request. Based on the above, on July 30, 2001, Appellants filed a claim in district court against Appellees, alleging securities fraud and breach of fiduciary duty. On the same day, Appellants also filed a statement of claim for arbitration with the National Association of Securities Dealers (NASD). Appellants’ simultaneous filings were to protect them from the possibility of the expiration of the statute of limitations while they attempted to determine if a pre-dispute arbitration agreement existed. On March 8, 2002, Appellees moved for an order compelling arbitration, and the district court granted that motion without determining whether a pre-dispute arbitration agreement existed. On April 18, 2002, a pre-hearing conference was held before the NASD arbitration panel, where no issues on the merits were heard, and there have been no additional arbitration hearings. Appellants still do not know whether a pre-dispute arbitration agreement exists.

I. STANDARD OF REVIEW

{8} The appropriate standard of review for a district court’s grant of a motion to compel arbitration is de novo. Santa Fe Techs., Inc. v. Argus Networks, Inc., 2002-NMCA-030, ¶ 51, 131 N.M. 772, 42 P.3d 1221.

II. DISCUSSION
A. Whether an Enforceable Agreement to Arbitrate Exists

{9} Under the New Mexico Arbitration Act, NMSA 1978, §§ 44-7A-1 to -32 (1971, as amended through 2004), the district court is compelled to order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate. § 44-7A-8(a)(2). Furthermore, “[i]f the court finds that there is no enforceable agreement, it may not . . . order the parties to arbitrate.” § 44-7A-8(c). See also McMillan v. Allstate Indem. Co., 2004-NMSC-002, ¶ 8, 135 N.M. 17, 84 P.3d 65.

{10} In McMillan, two automobile insurance policyholders (insureds) challenged the validity of a clause in Allstate’s standard uninsured motorist (UM) insurance endorsement that provided for arbitration of UM claims only upon the consent of both Allstate and the insured. After Allstate disputed the extent of their respective claims, insureds each demanded arbitration. Allstate declined, choosing instead to litigate the underlying disputes in court. Insureds then brought actions against Allstate to compel arbitration.

{11} On appeal, our Supreme Court first considered whether there was an agreement to arbitrate. Id. ¶ 2. The Court held that “the UAA [Uniform Arbitration Act] provides no basis for concluding that the Legislature intended to compel arbitration where there was no agreement to arbitrate.” Id. ¶ 8. The Court reasoned that “[g]iven the UAA’s prohibition against compelling arbitration where there was no agreement to arbitrate, it would be inconsistent to hold that the public policy underlying the UAA requires binding arbitration of all UM claims. Where, as here, there was no agreement to arbitrate, the UAA neither compels parties to arbitrate, nor does it permit a court to grant a motion to compel arbitration.” Id. These principles apply similarly to this case.

{12} In this case, the district court did not determine if an agreement to arbitrate existed, nor did Appellees produce evidence of a pre-dispute arbitration agreement. After a brief hearing, the district court ordered the parties to arbitration without determining whether a pre-dispute arbitration agreement existed. As in McMillan, the district court may not compel arbitration absent an arbitration agreement. 2004-NMSC-002, ¶ 8.

B. Waiver

{13} Appellees contend that the existence of a pre-dispute agreement would be irrelevant because Appellants subsequently filed a claim with NASD for arbitration, thus waiving their right to object to arbitration. After considering Appellees’ contentions, we are not persuaded.

{14} We read New Mexico law to require more than a claim filing to waive one’s right to object or challenge arbitrability. In Eagle Laundry v. Fireman’s Fund Ins. Co., we first addressed the question of whether there was an agreement to arbitrate. 2002-NMCA-056, ¶ 18, 132 N.M. 276, 46 P.3d 1276. We added: “Even if a written agreement were required, Eagle waived its right to object to the absence of such an agreement by fully participating in the arbitration without objection.” Id. ¶ 16. Furthermore, this Court held that “by proceeding to arbitration after the trial court entered an order compelling arbitration without any appeal of the order, the parties ‘forfeited their ability to challenge not only the order itself, but also the loss of the opportunity to try their case to a jury.’” Id. (quoting Lyman v. Kern, 2000-NMCA-013, ¶ 17, 128 N.M. 582, 995 P.2d 504).

{15} Even though Section 44-7A-24(5) of the Uniform Arbitration Act deals with a hearing that has been completed on its merits, and in our case it has not, we can draw support for our holding from it. Section 44-7A-24(5) allows a party to request that a court vacate an award made in an arbitration proceeding if “there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 16(c) not later than the beginning of the arbitration hearing.” § 44-7A-24(5). Under this provision of the statute, a party may continue to argue that there is no agreement to arbitrate even after the arbitration is completed, so long as he preserves his objections before the hearing begins. Allowing a finding that a party has waived this argument based solely on a request for arbitration would be contrary to this provision of the Uniform Arbitration Act. We hold as a matter of law that a mere request for arbitration cannot by itself be sufficient to waive the right to contest arbitration and require proof of the existence of an arbitration agreement in court.

CONCLUSION

{16} We reverse the district court’s order and remand with instructions to the district court to hold a hearing to determine whether an arbitration agreement exists.

{17} IT IS SO ORDERED.

IRA ROBINSON, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE,
Chief Judge

CElia FOY CASTILLO, Judge
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-035

BEATRICE C. ROMERO and MICHAEL FERREE, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,
versus

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LORILLARD TOBACCO CO., LIGGETT GROUP, INC., and BROOKE GROUP, LTD., Defendants-Appellants.
No. 24,034 (filed Feb. 8, 2005)

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY
JAMES A. HALL, District Judge

GABRIELLE M. VALDEZ
EATON, MARTINEZ, HART & VALDEZ, P.C.
Albuquerque, New Mexico

ERIC R. BURRIS
BROWNSTEIN, HYATT & FARBER, P.C.
Albuquerque, New Mexico

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ANDREW R. MCGAAN
BARACK S. ECHOLS
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EDWIN L. FOUNTAIN
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for Appellant R.J. Reynolds Tobacco Co.

Opinion

JONATHAN B. SUTIN, JUDGE

{1} We have here first impression issues for New Mexico relating to certification of an indirect (consumer) purchaser antitrust (price-fixing) class action. Defendant cigarette manufacturers appeal from an order certifying a statewide class of all consumers who bought Defendants’ cigarettes during an approximate seven-year period.

{2} Plaintiffs allege Defendants violated the New Mexico Antitrust Act, NMSA 1978, §§ 57-1-1 to -17 (1979, as amended through 1987), by entering into a conspiracy to inflate their cigarette list price increases to wholesalers and distributors. Plaintiffs claim injury and damages from the pass-on of overcharges down the chain of distribution. We affirm, holding that under the requirements for class certification in Rule 1-023(B)(3) NMRA, the methodologies Plaintiffs presented to prove antitrust injury and damages are sufficient for class certification. Questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of
the controversy.

3 As Background (¶ 4-34 infra), we generally discuss: (1) the Antitrust Act; (2) New Mexico’s class certification rule, Rule 1-023; followed by (3) and (4) Plaintiffs’ and Defendants’ proofs and positions; and (5) the district court’s determinations and Defendants’ points on appeal. In our Discussion, we: (1) set out our general approach to Rule 1-023 (¶ 35-39); (2) identify the standard of review (¶ 40); then, (3) we discuss Rule 1-023(B)(3)’s predominance standards for injury and damages; and (4) the superiority (manageability) standard (¶ 41-55); following which, (5) we analyze the cases supporting certification using classwide injury and damages through generalized proof (¶ 56-67); (6) we analyze the cases supporting denial of certification because of the need to prove individual injury and individualized damages (¶ 68-77); and (7) we analyze the Antitrust Act’s “damages actually sustained” language (¶ 78-83). We close the opinion with a summary and the result (¶ 84-98).

BACKGROUND

1. The Antitrust Act: Indirect-Purchaser Standing and Elements of Claim

4 In Illinois Brick Co. v. Illinois, 431 U.S. 720, 728-29 (1977), the United States Supreme Court held that indirect purchasers of a product from a manufacturer did not have standing to sue under the federal antitrust law for overcharges that were “passed on” to the indirect purchasers. The Court’s decision built on its previous ruling in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489 (1968), that antitrust defendants could not use the defense that overcharges were not absorbed by direct purchasers but were “passed on” to indirect purchasers, adopting the reasoning that to allow indirect purchaser lawsuits would unnecessarily complicate matters given “the economic uncertainties and complexities involved in proving pass-on.” Illinois Brick, 431 U.S. at 725 & n.3. In his dissenting opinion in Illinois Brick, Justice Brennan preferred to limit the Hanover Shoe rule to prohibiting the use of a pass-on defense, thus permitting indirect purchasers to prove overcharges. Illinois Brick, 431 U.S. at 753 (Brennan, J., dissenting).

5 In response to Illinois Brick, many states enacted provisions allowing indirect purchaser lawsuits under their antitrust law. The viability of these state provisions was confirmed when the United States Supreme Court limited Illinois Brick to construing federal antitrust policy and not “defining the interrelationship between the federal and state antitrust laws.” California v. ARC Am. Corp., 490 U.S. 93, 103, 105 (1989). New Mexico’s indirect purchaser provision is contained in Section 57-1-3(A) of the Antitrust Act.

6 Section 57-1-3(A) reads:

All contracts and agreements in violation of Section 57-1-1 or 57-1-2 NMSA 1978 shall be void, and any person threatened with injury or injured in his business or property, directly or indirectly, by a violation of Section 57-1-1 or 57-1-2 NMSA 1978 may bring an action for appropriate injunctive relief, up to threefold the damages sustained and costs and reasonable attorneys’ fees. If the trier of fact finds that the facts so justify, damages may be awarded in an amount less than that requested, but not less than the damages actually sustained.

Commensurate with the grant of standing to indirect purchasers, the Antitrust Act allows defendants to assert as a defense that the plaintiffs “passed on all or any part of [an] overcharge . . . to another purchaser or seller in [the distribution] chain.” § 57-1-3(C).

7 To recover antitrust damages under federal law, a plaintiff must prove: (1) an antitrust violation; (2) that the violation caused damage to the plaintiff’s business or property, characterized in antitrust cases as “injury,” or “fact of damage,” or “impact,” hereinafter referred to as “injury”; and (3) the amount of damages sustained. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 & n.9 (1969) (distinguishing the injury element establishing causation, which requires proof of “some” damage from a conspiracy, from the damages element that measures the extent of damage); Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 & n.12 (5th Cir. 2003); Windham v. Am. Brands, Inc., 565 F.2d 59, 67 (4th Cir. 1977) (involving allegations by tobacco growers of tobacco company price-fixing). “Antitrust injury, causation, and damages all are necessary parts of the proof because ‘Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.’” Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1055 (8th Cir. 2000) (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 n.14 (1972)).

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. Gualala Med. Ctr., Inc., 1997-NMCA-012, ¶ 9, 123 N.M. 60, 933 P.2d 859. 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. See Ren v. Philip Morris Inc., No. 00-004035-CZ, 2002 WL 1839983, slip op. at *2 (Mich. Cir. Ct. June 11, 2002) (involving state antitrust allegations by consumers against manufacturers); Keating v. Philip Morris, Inc., 417 N.W.2d 132, 137 (Minn. Ct. App. 1987) (involving state antitrust allegations by retailers against tobacco manufacturers).

2. Class Certification Rule

8 Under Rule 1-023(A), to be certified as a class, New Mexico plaintiffs must satisfy the prerequisites commonly referred to as numerosity, commonality, typicality, and adequacy. These prerequisites are not at issue in this appeal. The district court may only certify a class action for the recovery of damages if plaintiffs establish and the court finds these further prerequisites exist:

[T]he questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(d) the difficulties likely to be encountered in the management of a class action.

Rule 1-023(B)(3); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614-16 (1997).

9 These Rule 1-023(B)(3) prerequisites are commonly referred to as the predominance and superiority requirements, see Amchem...
The district court granted summary judgment for the defendants on the issue of conspiracy to cigarettes. These actions were consolidated and transferred to the United States District Court for the Northern District of Georgia.

3. Plaintiffs’ Proof and Positions

{10} Plaintiffs allege a seven-year, Antitrust Act price-fixing conspiracy among Defendants who controlled over ninety percent of the United States market for cigarettes.1 The primary evidence for class certification consisted of affidavits of an economist, Robert E. McCormick, Ph.D., Professor and Scholar, Department of Economics, Clemson University, together with materials and data he relied on. Dr. McCormick estimated that approximately 292,500 New Mexicans were damaged by approximately $132.3 to $216.3 million for purchasing the products during the time involved in this action. Relying on publicly available sales and market data, information as to pricing practices within the cigarette industry, and certain economic theories and statistical models, Dr. McCormick’s view was that a conspiracy to raise prices would necessarily produce a common, classwide injury in the form of an embedded overcharge passed on through wholesalers, distributors, retailers, and jobbers to indirect purchasers.

{11} Dr. McCormick’s methodologies for determining classwide injury and damages included (1) a “benchmark price” analysis to determine the amount of overcharge, (2) a “tax incidence theory” to determine the amount of pass-on of overcharge to indirect purchasers, and (3) a “correlation analysis” to determine the fact of antitrust injury, that is, the facts of embedded overcharging and the pass-on of those overcharges to consumers. Dr. McCormick’s correlation analysis consisted of a statistical measurement of the average tendency of two sets of prices, the list price and the retail price, to move together over time.

{12} More particularly, Dr. McCormick analyzed the overall markets for cigarettes in the United States and in New Mexico, the market structure and distribution mechanism for cigarettes nationally and in New Mexico, manufacturer list prices nationally and in New Mexico, and retail scanner pricing data in New Mexico. As well, Dr. McCormick inquired into relevant supply and demand factors regarding cigarettes, and analyzed pricing policies of cigarette manufacturers nationally and analyzed certain economic literature. He further analyzed the rate of pass-on of manufacturer list prices to retail consumers and empirical retail data submitted by Defendants.

{13} In regard to classwide injury, Dr. McCormick concluded through his correlation analysis that Defendants’ list prices and corresponding retail prices moved together consistently. He further concluded that “no amount of shopping by any smoker in New Mexico could escape a conspiratorial overcharge.” According to Dr. McCormick’s analysis, ninety-eight percent of the retail prices of the brands sampled moved with the manufacturers’ prices, with a level of only five or less percent for error in the statistical conclusion. Thus, Plaintiffs assert, a conspiracy to raise prices will be felt by the consumer even if the retailer sells below its cost since, if the conspiratorial list price increase had not occurred, the retailer would have been selling below a lower list price.

{14} Based on Dr. McCormick’s analyses and opinions, Plaintiffs further argued below that once a price-fixing conspiracy is proven to have existed during the period alleged, every indirect purchaser of Defendants’ products during that period in New Mexico was injured because every one of them was deprived of access to a competitive market. According to Plaintiffs, deprivation of a competitive market is the real common issue, and the fact that some purchasers might have at one time paid less was not material. Purchasers do not make a one-time purchase, because, Plaintiffs argued, sooner or later, when enough packs are purchased, if this conspiracy is out there, the purchaser is going to be injured. Plaintiffs point out that Dr. McCormick had the benefit of extensive pricing data and economic analysis tools not available as late as the late 1980s. They contend that Dr. McCormick’s analyses satisfied their burden to show that common issues regarding antitrust injury predominated over individual issues regarding injury.

{15} Plaintiffs further contend that once they show widespread injury to the class on a classwide basis through common evidence, an estimate of aggregate damages is sufficient to carry Plaintiffs to certification even if they fail to transform their theories to real numbers. Plaintiffs argue that the concerns of complexity do not outweigh the importance of providing Plaintiffs an opportunity to try and prove damages resulting from the alleged conduct.

{16} More particularly, although nowhere specifically recited in Plaintiffs’ answer brief, in estimating aggregate damages, Dr. McCormick considered information that measured retail sales of cigarettes in New Mexico and overcharges at the manufacturer level adjusted by a rate of pass-on through the claim of distribution that takes into consideration the behavior of entities along that chain. Dr. McCormick used a “general formula” pursuant to which damages would be apportioned by multiplying the manufacturer’s sales by the overcharge percentage for direct purchasers, and then multiplying that product by the rate of pass-on of overcharge by retailers. Plaintiffs acknowledge that Dr. McCormick is estimating the amount of overcharge that was passed on to indirect purchasers. He arrived at a range of damages for indirect purchasers based on minimum overcharge and maximum overcharge amounts.

{17} After setting out his range of estimated damages, Dr. McCormick set out alternatives as to how he would apportion damages to individual class members. Again, not specifically discussed in Plaintiffs’ answer brief, one of Dr. McCormick’s alternatives was to award each class member with the damages to the average member of the class by dividing aggregate classwide damages by the number of class members. Another alternative was to collect smoking histories and behavior of individual class members during a claims process and, using the information in conjunction with per-pack overcharges already calculated, provide an estimate of actual

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1 Price-fixing conspiracy claims were the subject of several federal nationwide antitrust class actions filed by direct purchasers of cigarettes. These actions were consolidated and transferred to the United States District Court for the Northern District of Georgia. The district court granted summary judgment for the defendants on the issue of conspiracy to fix prices, and the Court of Appeals for the Eleventh Circuit affirmed. See Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1291 (11th Cir. 2003).
damages to each individual class member. While acknowledging that individualized damages to indirect purchasers are concededly difficult to show, Plaintiffs assert that Defendants should not be free to violate antitrust laws by raising difficulty and uncertainty of proof.

4. Defendants’ Proof and Positions

{18} In opposition to class certification, Defendants presented an affidavit of their economic expert, Dr. Edward A. Snyder, an economist and Dean of the University of Chicago Graduate School of Business, along with various retailers’ affidavits, one Plaintiff’s deposition, and other documentary evidence. Defendants’ evidence essentially consisted of details relating to the actual process of the distribution of cigarettes from Defendants to consumers, actual variations in retail pricing, and market and consumer behavior.

{19} During the alleged class period, Defendants sold about eighty different brands of cigarettes to about eight to twelve distributors and wholesalers in New Mexico who, in turn, sold to retailers. Retailers included convenience stores, cigarette outlets, mass merchandisers, supermarkets, grocery stores, drug stores, liquor stores, gas stations, and bars.

{20} Defendants did not set retail prices. Retailers independently determined their prices. Different retailers, and different types of retailers, pursued differing strategies with respect to cigarette pricing. For example, cigarette outlets generally offered lower prices than other retailers. Native American stores charged the lowest prices. Grocery stores typically charged higher prices than other retailers. In regard to strategies, some retailers used standardized pricing, while others varied their prices depending on location or local competition. Some retailers set their prices so that the prices ended in either “0” or “5,” and some ran cigarette promotions to build customer traffic.

{21} Consumers paid different prices for cigarettes depending upon, among other things, the brand, the retail outlet, and whether the purchaser avoided himself or herself of any discounts or promotions. At some time during the class period, many members quit smoking, started smoking, or changed which, how often, and where they bought cigarettes. As an example, Defendants show that during the class period one Plaintiff, Beatrice Romero, bought Marlboros, a Philip Morris premium brand, at a grocery store where she shopped, five years later she switched to Misty, a Brown & Williamson discount brand, which she purchased at a discount cigarette store, and later she started smoking mostly “Native” brand cigarettes, a very low-priced brand that she purchased at a Native American store. Mrs. Romero had no records showing her purchases or the prices she paid during the class period.

{22} According to Defendants, retail price data collected from a sample of twenty-five stores between 1996 and 2000 showed that retail cigarette prices for the same brand varied as much as seventy-five percent from one New Mexico retail outlet to another. Variations in pricing resulted from discounts and promotions effective at both the wholesale level and the retail level. Different wholesalers paid different prices due to manufacturers’ promotional and incentive programs and discounts for prompt payment and assistance in promoting a particular brand. These wholesalers then charged different prices to retailers. Retailers sometimes switched wholesalers in order to obtain better prices.

{23} Defendants argued below that there were a variety of discounts and promotions offered by particular manufacturers directly to retailers, which changed from time to time and lowered retail prices. These included: (1) “buy downs,” where a manufacturer paid a retailer directly to reduce the retail price for a particular brand or for particular brands; (2) display agreements in which a manufacturer paid retailers for product placement and display space, payments the retailers could use to lower prices; and (3) “buy some get some” promotions, such as buy one get one free, which lowered the per-pack price paid by the consumer. The multitude of retail discounts and promotions in effect at a given time resulted in price variations from one geographic area to another, from one store to another, and even within a single store among competing brands.

{24} Pursuant to Defendants’ expert, cigarette prices in some stores did not increase in the weeks following manufacturer list price increases, indicating that some retailers absorbed those increases, and that others passed on some or all of the increase to consumers. For example, during the class period for which data was available, the data showed that six weeks after each of ten list price increases over forty percent of retailers had not raised prices on one or more major brands, and further showed instances in which nearly all retailers did not pass on list price increases for at least one major cigarette brand for two months. Some retailers did not increase prices in order to keep prices under certain pre-set levels. Others raised or lowered prices for reasons unrelated to manufacturer list price increases. Some retailers did not always increase their prices when list prices went up, or, alternatively, did not increase their prices at the same time or in the same amounts.

{25} Defendants assert on appeal that this “empirical data” shows that retail prices “did not increase in the wake of increases in list prices in any common or predictable fashion,” stating that Dr. Snyder studied the “actual cigarette prices charged by New Mexico retailers to determine whether those prices uniformly increased following increases in list prices” and that “[t]he data incontrovertibly show[ed] that they did not.” (Emphasis omitted.) Defendants further find it significant that Dr. Snyder’s analysis “showed that over 40% of New Mexico cigarette retailers had not raised prices on one or more major brands fully six weeks after each list price increase had taken effect.”

{26} Defendants attack Dr. McCormick’s conclusion of classwide injury as insufficient, arguing that only methodologies that would prove specific injury to individual class members were appropriate. They specifically attack Dr. McCormick’s correlation analysis on the ground that it said nothing about the specific amounts of the movements of list price and retail price, and, further, that because correlation analysis is only capable of measuring the average tendency of list and retail prices to move together over time and does not measure the amount by which retail prices changed, the correlation analysis could not detect the numerous instances where retailers did not pass on all or portions of list price increases. Thus, according to Defendants, the correlation analysis failed to demonstrate that any particular consumer was injured from a higher retail price at any specific point in time, thereby failing to prove injury to individual class members.

{27} Defendants attack Dr. McCormick’s damages methodology and calculations on the ground they are merely an estimate or aver-
age that would result in class members receiving damages awards different from the damages they actually sustained. Defendants argue that Dr. McCormick failed to show how the aggregate classwide damages calculations could be reduced to an amount of damage actually suffered by any one consumer. Thus, Defendants argue, distribution of damages will result in class members recovering amounts different from the loss actually sustained.

{28} Defendants go on to assert that most defendants do not have records that would show their purchases or the prices paid. In support of this assertion, Defendants cite Dr. McCormick’s deposition testimony in which he acknowledged that “[i]t’s not likely that [in a claims process] there are going to be substantial records associated with who bought from whom[,] what[,] when.” He further acknowledged that cigarettes are “a consumable product usually purchased in small quantities on a repetitive basis where records are not usually kept by consumers.” In addition, in acknowledging a distinction between stock and airline ticket purchaser cases as opposed to cigarette purchaser cases, Dr. McCormick stated that “cigarettes are different from—it’s not a product where detailed records pairing buyer and seller are recorded in a systematic fashion.” Defendants note cases, which we discuss later in this opinion, that have rejected class certification for class members who generally do not have or keep documented proof of their purchases. Plaintiffs are silent in regard to the documented-proof concern, apparently considering it immaterial at the class certification stage.

5. The District Court’s Determinations and Defendants’ Points on Appeal

{29} During argument on the issue of class certification, the district court indicated that it was difficult not to think that wholesale prices did not affect retail prices: “It’s always been my view that in general terms, at least, wholesale prices affect resale prices.” Further, the court’s questions showed concerns about requiring individuals to bring individual lawsuits because such suits did not constitute a practical avenue for individuals to obtain relief, and because of the likelihood of inconsistent results. The court also indicated during argument that there was little reason not to certify the class to at least determine whether a price-fixing conspiracy existed.

{30} The district court certified the class, determining first that Plaintiffs met their burden under Rule 1-023(A) of establishing the core requirements of commonality, numerosity, typicality, and adequacy. The court then moved to the issues of predominance and superiority under subpart (B)(3), first determining that common issues predominated as to the issue of whether a price-fixing conspiracy existed, and then determining that Plaintiffs satisfied the other requirements of subpart (B)(3)—those that are at issue in this appeal, namely, that common issues regarding classwide antitrust injury and damages predominate over issues regarding individual injury and the calculation of individual damages.

{31} The court delivered its opinion orally from the bench following argument, and that opinion was placed verbatim in a written order. The court began its discussion with the forecast that it would “look at Rule 23 quite broadly to effectuate . . . legislative intent.” As to predominance on the issue of antitrust injury, virtually all the court stated was its conclusion that “the methodology that’s been proposed here meets what I view as the fairly low standard of plausibility.” The court also concluded that a plausible method had been presented for determination of aggregate damages, even though “[t]hat’s well below what must be proved at trial.” The court stated that, “once [injury] is shown, . . . New Mexico law will not require the amount of damages to be proven at this stage[,]” and, therefore, “the issue of the amount of damages need not be addressed here at this stage.” However, the court added that, “[a]ternatively, I would conclude . . . that if it is required that some reasonable method be addressed for purposes of the amount of damages, that has been established, and I base that on a fairly broad view of what our Courts will look for in terms of class certification.

{32} The court then moved to superiority, concluding: “there is no other method of adjudication that can reasonably be brought to address the issue of whether a conspiracy existed. It is simply impractical to believe that any individual smoker could raise this as a lawsuit and pursue it [through] to verdict.” In the court’s view, this was “consistent with the legislative intent in adopting a statutory scheme which permits indirect purchasers to pursue actions for violation of the Antitrust Act,” an Act through which, the court felt, the Legislature “expressed a strong desire to discourage behavior which violates the Act” and intended “to provide for recovery, a remedy, to persons who have been affected, either directly or indirectly.” The court believed that the appellate courts would interpret the Antitrust Act broadly to implement that legislative intent through Rule 1-023.

{33} The court closed its order by offering its views that “the class action mechanism really is the perfect mechanism to determine the existence of a conspiracy in this type of a situation,” and that it is a “terrific mechanism . . . for the Defendants . . . to rebut . . . the Plaintiff[s’] contention that there was a conspiracy and to have a final resolution that’s binding not just on one consumer, but on all members of the class.” When the district court decided the certification motion in this case, we had not yet let it be known that we consider findings and conclusions to be very beneficial for review of class action cases. See Brooks v. Norwest Corp., 2004-NMCA-134, ¶ 36, 136 N.M. 599, 103 P.3d 39, cert. denied, No. 28,870 (Dec. 7, 2004); Berry v. Fed. Kemper Life Assurance Co., 2004-NMCA-116, ¶ 19 n.1, 136 N.M. 454, 99 P.3d 1166, cert. denied, No. 28,850 (Sept. 17, 2004). We reiterate for future class certification cases that district courts should provide findings of fact and conclusions of law.

{34} Defendants raise three points of error on appeal, each of which focuses on the district court’s interpretation of the standards to use in application of the Rule 1-023(B)(3) requirements. First, Defendants contend that the certification standards the district court used in scrutinizing Plaintiffs’ methodologies were too lenient, and also that the court by-passed its duty to vigorously analyze Plaintiffs’ methodologies and failed to require any showing by Plaintiffs of how, through common proof, they would show individual injury and individualized damages at trial. Second, Defendants contend that the district court erred in not addressing damages or, alternatively, in accepting Plaintiffs’ theory of aggregating damages to the class as a whole despite the inability to determine actual damages for individual class members, thereby relieving class members of having to prove any actual damages. As part of this contention, Defendants assert that the court failed to require a damages methodology by which Plaintiffs would adhere to the Antitrust Act’s proof requirement of “damages actually sustained.” Third, Defendants contend that the district court erred in its interpretation and application of the superiority requirement by entirely ignoring manageability and approving the class solely because the court believed that individual lawsuits would be impractical.
DISCUSSION

1. General Approach to Rule 1-023

{35} Rule 1-023(B)(3) is essentially identical to its federal counterpart, Rule 23(b) of the Federal Rules of Civil Procedure. We may look to federal law for guidance in determining the appropriate legal standards to apply under these rules. See Benavidez v. Benavidez, 99 N.M. 535, 539, 660 P.2d 1017, 1021 (1983) (stating that it was appropriate for the district court to look to federal law construing Rule 1-060(B) NMRA); Eastham v. Pub. Employees Ret. Ass’n Bd., 89 N.M. 399, 402-03, 553 P.2d 679, 682-83 (1976) (relying on federal interpretations of Fed. R. Civ. P. 23); Ridley v. First Nat'l Bank in Albuquerque, 87 N.M. 184, 185-86, 531 P.2d 607, 608-09 (Ct. App. 1974) (same). Nonetheless, we must be analytically careful when looking at federal antitrust class action cases because they do not involve actions by indirect (consumer) purchasers. See Execu-Tech Bus. Sys., Inc. v. Appleton Papers Inc., 743 So. 2d 19, 22 (Fla. Dist. Ct. App. 1999) (stating that the presumption of injury in an anti-competitive market “should not arise in indirect purchaser cases due to the evidentiary complexities and uncertainties noted in Illinois Brick”); Ren, 2002 WL 1839983, at *5 (stating that “[t]he presumption engaged in by some courts regarding injury to direct purchasers is not available in an indirect purchaser case”).

{36} We enter into our analysis of the issues before us recognizing that class actions play a significant role in obtaining remedies for small claim holders against defendants who violate antitrust laws. See Amchem Prods., 521 U.S. at 617 (indicating that the class action process solves the problem of lack of incentive to seek redress for an antitrust violation by aggregating small potential recoveries into a matter worth pursuing, including an attorney’s labor). Rule 1-023 is a device to save court and party resources and promote litigation economy by litigating common questions of law and fact at one time. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 155, 161 (1982) (majority opinion and Burger, C.J., concurring and dissenting). The predominance and superiority requirements seek to assure avenues exist through which a class action can achieve economy and promote uniformity of decision. Amchem Prods., 521 U.S. at 615; see Fed. R. Civ. P. 23(b)(3) advisory comm. notes (concluding that the additional requirements sought to cover cases “in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results”). Rule 1-023 is a remedial procedural device, and we will interpret it liberally. See In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 504 (S.D.N.Y. 1996) [hereinafter In re NASDAQ]; In re Sugar Indus. Antitrust Litig., 73 F.R.D. 322, 357-58 (E.D. Pa. 1976) [hereinafter In re Sugar]. We also recognize that a dominant policy behind the class action procedure is the “vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.” Amchem Prods., 521 U.S. at 617 (internal quotation marks and citation omitted). Through class actions, injured persons with small claims are given an avenue to “overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” Id. (internal quotation marks and citation omitted).

{37} Yet we are aware that Rule 1-023 was not “intended to permit a redress for all wrongs committed under the antitrust laws.” City of Philadelphia v. Am. Oil Co., 53 F.R.D. 45, 73 (D.N.J. 1971) (acknowledging the plaintiffs’ argument of class action superiority on the ground the defendants should not be permitted to profit by their conspiracy, and the unfortunate consequences of not certifying the class, but determining nevertheless that the basic requirement of manageability was not met). Furthermore, although Section 57-1-3(A) confers standing to New Mexico indirect purchasers to bring a civil action for damages, we see no indication that the Legislature intended the Antitrust Act to single out indirect purchasers for any different or more favorable class action treatment than was intended for other persons seeking relief from a violation of the Act. See Peridot, Inc. v. Kimberly-Clark Corp., No. MC 98-012686, 2000 WL 673933, at *2 (Minn. Dist. Ct. Feb. 7, 2000) (holding that state indirect purchaser provision makes “no special allowance for such suits to be brought as class actions—suits filed under the antitrust chapter as class actions still must meet all requirements for class certification”); Melnick v. Microsoft Corp., Nos. CV-99-709, CV-99-752, 2001 WL 1012261, at *6 n.7 (Me. Super. Ct. Aug. 24, 2001) (“The enactment of [Maine’s indirect purchaser statute] does not change the plaintiffs’ burden of proof on a motion for class certification.”); Derzon v. Appleton Papers, Inc., No. 96-CV-3678, 1998 WL 1031504, at *4 (Wis. Cir. Ct. July 7, 1998) (“[S]imply because Wisconsin sought to provide a remedy to indirect purchasers . . . does not signify that such a remedy is necessarily appropriate for a class action[.]”).

{38} While recognizing the useful purpose of Rule 1-023, we are mindful that courts must nevertheless conduct a rigorous analysis into whether the prerequisites of the rule are met before certifying a class. Gen. Tel. Co., 457 U.S. at 161; Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 301 (5th Cir. 2003); In re Cardizem CD Antitrust Litig., 200 F.R.D. 297, 303 (E.D. Mich. 2001) [hereinafter In re Cardizem]. The party seeking certification has the burden of showing that each prerequisite of Rule 1-023 is met. Amchem Prods., 521 U.S. at 614; Bell Atl. Corp., 339 F.3d at 301; Windham v. Am. Brands, Inc., 565 F.2d 59, 64 n.6 (4th Cir. 1977). The district court’s rigorous analysis often “involves considerations that are enmeshed in the factual and legal issues comprising the plaintiffs’ cause of action.” Cooper’s & Lybrand v. Livesey, 437 U.S. 463, 469 (1978) (internal quotation marks, citation, and emphasis omitted). Thus, the court may “probe behind the pleadings before coming to rest on the certification question.” Gen. Tel. Co., 457 U.S. at 160. In fact, we have held that “it is essential for the court to understand the substantive law, proof elements of, and defenses to the asserted cause of action to properly assess whether the certification criteria are met.” Brooks, 2004-NMCA-134, ¶ 31.

{39} A class may not be certified unless the district court is satisfied that the Rule 1-023(B)(3) requirements are actually satisfied; and the court may not simply presume conformance with Rule 1-023. See Gen. Tel. Co., 457 U.S. at 160; Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 677 (7th Cir. 2001) (rejecting the “across-the-board” rule jettisoned by Gen. Tel. Co.” and holding that district courts were required to find actual, not presumed, conformance with Rule 23(b)); Sample v. Monsanto Co., 218 F.R.D. 644, 650 (E.D. Mo. 2003) (rejecting the plaintiffs’ assertion of predominance of common issues as to injury based on expert testimony where the plaintiffs presumed classwide injury without any consideration whether a price-fixing conspiracy or markets “actually operated in . . . a manner so as to justify that presumption”); Execu-Tech Bus. Sys., 743 So. 2d at 22 (refusing in indirect purchaser cases to apply a presum-
tion of anti-competitive market injury). We have noted that the abundant literature regarding class action litigation “indicates that the courts have grown more cautious over the years about the class action vehicle.” Berry, 2004-NMCA-116, ¶ 34. Although the wisdom or form of class certification can be reconsidered after a class has been certified, see Rule 1-023(C)(1), courts should be careful not to postpone rigorous analysis into satisfaction of the prerequisites until after certification. See Berry, 2004-NMCA-116, ¶¶ 33-37.

2. Standard of Review

40] We review the grant of class certification for abuse of discretion as set out in Berry, 2004-NMCA-116, ¶¶ 25-26.

3. The Predominance Standards for Injury and Damages

41] “The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” Amchem Prods., 521 U.S. at 623. “Stated broadly, Plaintiffs’ burden under [Rule] 23(b)(3) is to establish that common or ‘generalized proof’ will predominate at trial with respect to the essential elements of their antitrust claim.” In re Polypropylene Carpet Antitrust Litig., 996 F. Supp. 18, 22 (N.D. Ga. 1997) (order) [hereinafter In re Polypropylene Carpet]. The validity of the methodologies that pass certification scrutiny will be determined when they are tested at trial. See In re NASDAQ, 169 F.R.D. at 521.

42] In the present case, no predominance issue exists as to whether Defendants violated the Antitrust Act. Defendants concede that, in price-fixing cases brought by indirect purchasers, the question whether there was a conspiracy is typically a common one. As to antitrust injury, “[t]o proceed as a class, Plaintiffs must show they plan to use common evidence that reveals impact as to each member of the proposed class without resorting to lengthy individualized examinations.” In re Polypropylene Carpet, 996 F. Supp. at 22. As to antitrust damages, Plaintiffs “must show they will compute damages through the use of common proof.” Id. at 29 (internal quotation marks and citation omitted).

43] It is not difficult to stage the debate on the overriding predominance issue in the present case. On one side is whether the methodologies advanced by Plaintiffs at the certification stage to prove injury and damages at trial must, as Defendants assert, be sufficient to establish at trial specific individual injury and individualized damages with respect to each class member. The other side is whether those methodologies need only, as Plaintiffs assert, constitute a “threshold showing” from which injury and damages can reasonably be inferred on a classwide basis, leaving for trial the sufficiency of those generalized methodologies to satisfy Plaintiffs’ burden of proof. Plaintiffs contend the burden does not include having to show a specific individual injury and a specific amount of individualized damages with respect to each individual class member.

44] In Plaintiffs’ view, their methodologies are “plausible,” “viable,” and “sound” methods for demonstrating classwide injury and damages. The substantive quality of the injury methodology that meets the threshold necessary for certification has been characterized in various ways, including “‘logically probative of a loss attributable’ to the alleged conspiracy.” In re Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 692 (N.D. Ga. 1991) [hereinafter In re Domestic Air] (quoting Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977)). Plaintiffs must “have demonstrated at least a ‘colorable method’ of proving [common injury] at trial.” In re Visa Check, 280 F.3d at 135 (internal quotation marks and citation omitted) (alteration in original). Damages methodologies have been held sufficient to meet the required threshold and permit class certification if they are “not so insubstantial and illusory as to amount to no method at all.” In re Potash Antitrust Litig., 159 F.R.D. 682, 697 (D. Minn. 1995) [hereinafter In re Potash]; In re Catfish Antitrust Litig., 826 F. Supp. 1019, 1042 (N.D. Miss. 1993) [hereinafter In re Catfish] (stating that “[t]he court’s role at the class certification stage in assessing the proposed methods of proving damages is quite limited,” namely, inquiring “whether or not the proposed methods are so insubstantial that they amount to no method at all”).

45] In Defendants’ view, the court applied too low a standard, i.e., a mere plausibility standard that falls below what courts require for certification of a class action and what amounts to no method at all. As we discuss more fully later in this opinion, courts disagree on whether a class can be certified based on a generalized methodology from which classwide injury may be inferred, as opposed to requiring the plaintiffs to show a common method to prove specific individual injury. Furthermore, differences exist in case law as to the predominance standard on the question of antitrust damages.

46] The difficult task of determining whether to certify a class stems not only from the different legal approaches taken in various courts as to how relaxed the predominance standards may be, but also in no small part from the use of economic experts. Drs. McCormick and Snyder submitted extensive affidavits with their analyses and supporting materials and data. These experts appear to be qualified and competent, and each, at least in part, based their opinions on some empirical data.

47] Dr. McCormick’s analyses and opinions lend themselves to the approach advanced by Plaintiffs that individualized proof of injury and damages is not required beyond the use of general methodologies from which common injury can reasonably be inferred and only aggregate damages need be proven at trial. Dr. Snyder’s analyses and opinions lend themselves to the approach advanced by Defendants that the real world facts regarding the cigarette industry, as opposed to economic theory based on no or insufficient real world facts, show that when injury and damages are seen on an individualized basis the results are varied and Dr. McCormick’s theories and methodologies cannot reasonably predict injury or an individual purchaser’s damages. Each expert attacks the other’s analyses and conclusions.

48] The complexity of the issues when economic theorists take over the subject matter has caused courts to avoid attempting to resolve the “familiar ‘battle of the experts’” at the class certification stage, particularly as to the issue of predominance as it relates to injury. In re Potash, 159 F.R.D. at 694, 697; In re Visa Check, 280 F.3d at 135 (holding a district court at the class certification stage “may not weigh conflicting expert evidence or engage in statistical dueling of experts” (internal quotation marks and citation omitted)). Rather, these cases hold that it is for the jury to determine whether Plaintiffs’ expert is correct in his assessment of injury, and all that Plaintiffs must present at the certification stage is a threshold showing that the proof at trial will be sufficiently generalized to make the class action approach worth the effort. In re Potash, 159 F.R.D. at 697; see also In re Catfish, 826 F. Supp. at 1042 (“Whether or not [the expert] is correct in his assessment of common impact/injury is for the trier of fact to decide at the proper time.”); In re Polypropylene Carpet, 996 F. Supp. at 22.
Despite the need in many cases to postpone critical analysis of an expert’s methodologies, in assessing whether the certification requirements are met and in fulfilling its rigorous-analysis duty, the district court “must undertake an analysis of the issues and the nature of required proof at trial to determine whether the matters in dispute and the nature of plaintiffs’ proofs are principally individual in nature or are susceptible of common proof equally applicable to all class members.” In re Cardizem, 200 F.R.D. at 303; In re Potash, 159 F.R.D. at 693 (stating the court must evaluate the substantive allegations of the complaint); In re Catfish, 826 F. Supp. at 1039 (concluding that the suitability for certification of an antitrust class action is a fact-sensitive process); Execu-Tech Bus. Sys., 743 So. 2d at 20-21 (stating the focus of the evidentiary hearing on predominance and manageability is “whether [plaintiffs] had developed or could develop a methodology to show through generalized, class-wide proof that the price fixing impacted each individual class member”); Nissan Motor Co. v. Fry, 27 S.W.3d 573, 592 (Tex. App. 2000) (understanding of the claims, defenses, relevant facts, and applicable substantive law is essential to the predominance inquiry).

There exist no bright lines to determine whether common questions predominate. In re Potash, 159 F.R.D. at 693. “There is no precise test governing the determination of whether common questions predominate over individual claims. Rather, a pragmatic assessment of the entire action and all of the issues is involved in making the determination.” Howe v. Microsoft Corp., 656 N.W.2d 285, 289 (N.D. 2003). Nevertheless, while rigorous factual analysis is necessary and can be critical to the predominance determination, there is more than a kernel of truth in the view that in some complex cases “[d]ecisions as to whether class action status should be allowed seem to rest, more than many other judicial determinations, on judicial philosophy, rather than on precedent or statutory language.” Id. at 288. It has been said that “[w]hen there is a question as to whether certification is appropriate, the Court should give the benefit of the doubt to approving the class.” In re Workers’ Comp., 130 F.R.D. 99, 103 (D. Minn. 1990).

4. The Superiority (Manageability) Standard

Rule 1-023(B)(3) requires class members to demonstrate that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” The rule sets out in four subparagraphs “[t]he matters pertinent to the finding that class action is superior to other methods of adjudication because it can be the most efficient, convenient, and fair method to resolve a controversy); In re Sugar, 73 F.R.D. at 358 (“It is manifest that the maintenance of class actions is superior to the institution of a multitude of individual lawsuits.”). But that general statement begs questions that are at the heart of the present case, namely, the extent, if any, to which the ultimate proof at trial must consist of evidence showing specific, individual injury and specific, individualized damages; whether factual development requires individual evidentiary adjudications for each of the class members due to significant, material factual differences; and whether management of the factual adjudications would be so extensive or difficult as to be intolerable or cause insurmountable problems in the management of the action. See In re NASDAQ, 169 F.R.D. at 528 (stating, in regard to manageability, that the court “foresees no insurmountable problems in the management of this lawsuit”). As we discuss later in this opinion, there exist cases, including price-fixing cases, in which such manageability concerns have been thought to overshadow the beneficial use of a class action to adjudicate small claims.

In addition to management concerns arising from injury and damages determinations, management of the action can pose significant problems if members of the class are not identifiable. See In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 617 (W.D. Wash. 2003) (order) (hereinafter In re Phenylpropanolamine) (“If the members of the class are not identifiable, [management] of the action may pose insurmountable problems.” (internal quotation marks and citation omitted)). Cases involving indirect consumer purchasers have been concerned about the absence of written proof of purchase and vagaries of memory. See id. at 617-18 & n.5 (discussing various cases addressing lack of documentary or physical proof of purchase).

Because the vast majority of putative class members are unlikely to possess proof of purchase, and given the purportedly immense size of this class, the individualized inquiries surrounding class identification would be prodigious and would defy the court’s ability to effectively and efficiently manage the litigation. Id. at 619-20; City of Philadelphia, 53 F.R.D. at 71-72 (determining potential class of consumers who “by and large . . . made cash purchases [of gasoline] at many different stations, at many different times, at many different prices,” where few, if any records would exist on which to base an award, to be unmanageable, in part, because “[i]t would be almost impossible . . . to compile a list of the members of this class”); see also Slas v. Edge Communications, Inc., 8 P.3d 182, 185 (Okla. Civ. App. 2000) (upholding finding that identification of class of prepaid calling card purchasers would be very difficult and class adjudication unduly burdensome where class size would be very substantial, defendant produced several different designs of calling cards, and purchasers generally discarded
cards after use). The use of sworn affidavits is not necessarily an appropriate substitute for an individualized hearing. See In re Phenylpropanolamine, 214 F.R.D. at 618-19; see also Sias, 8 P.3d at 186 (stating that the record failed to indicate that any class members could be identified through reasonable efforts since potential class members “likely do not possess any proof of their qualification as class members because the [calling] cards are intended to be discarded”).

{54} All said, the most important focus and most salient question to ask in terms of manageability should remain that based on the language of Rule 1-023(B)(3), namely, even with significant management concerns, is the class action superior to whatever other methods are available for the fair and efficient administration of the controversy? “Manageability problems are significant only if they create a situation that is less fair and efficient than other available techniques.” In re NASDAQ, 169 F.R.D. at 528 (quoting In re Sugar, 73 F.R.D. at 358). There appears to be no want of cases holding, as did the court in In re Caffeish, that “individual questions of damages are often encountered in antitrust actions, and they are rarely a barrier to certification.” 826 F. Supp. at 1043. In antitrust price-fixing cases, the general mindset, at least in the federal courts, appears to be that refusal to certify on the sole ground that the action is not manageable is disfavored and should be the exception rather than the rule. See, e.g., In re Visa Check, 280 F.3d at 140; In re Workers’ Comp., 130 F.R.D. at 110 (stating that “dismissal for management reasons is never favored”). But see In re Hotel Tel. Charges, 500 F.2d 86, 90, 92 (9th Cir. 1974) (“[T]he desirability of allowing small claimants a forum to recover for largescale antitrust violations does not eclipse the problem of unmanageability.”); Barreras Ruiz v. Am. Tobacco Co., 180 F.R.D. 194, 199 (D.P.R. 1998) (stating that although it is difficult to ignore the reality that a class action is the only viable remedy for the plaintiffs given the enormous burden of pursuing independent litigation, it is not a sufficient reason to “headlong plunge into an unmanageable and interminable litigation process”).

{55} The foregoing general discussion in Parts 3 (¶¶ 41-50) and 4 (¶¶ 51-54) of this opinion of predominance and superiority standards leads us into a more detailed discussion of the cases relied on by the parties to support their respective positions. The cases do not by any means provide a definitive path for resolution of the issues in the present case. We first discuss federal and state antitrust cases supporting certification based on proof of classwide injury and damages through generalized methodologies in Part 5 (¶¶ 56-67). We next discuss federal and state cases that do not support certification based on such proof and methodologies in Part 6 (¶¶ 68-77). Following these discussions, we address Defendants’ position that the Antitrust Act itself requires proof of each class member’s actual damages in Part 7 (¶¶ 78-83).

5. Cases Supporting Classwide Injury and Damages Through Generalized Proof

{56} For their methodologies to pass certification scrutiny, Plaintiffs rely for the most part on several often-cited federal direct purchaser cases favoring classwide proof under the Rule 23(b)(3) proof requirements. See, e.g., In re Cardizem, 200 F.R.D. at 321; In re NASDAQ, 169 F.R.D. at 520-24; In re Potash, 159 F.R.D. at 697. We discuss these three not insignificant, mainstay cases in order to see the rationales for Plaintiffs’ approach.

{57} In re Cardizem was an antitrust action by direct purchasers of the drug Cardizem CD from the drug manufacturers to recover higher, artificially inflated prices for the drug purchases. 200 F.R.D. at 300-01. The court’s analysis centered on the relationship between manufacturers and direct purchasers (wholesalers, chain pharmacies, food and drug stores, hospitals, clinics, long-term care facilities, mail order pharmacies, and governmental agencies) who could likely prove documented purchases. Id. at 300 n.1, 323, 326.

{58} The court in In re Cardizem determined that the formal, standardized, structured, established, and predictable criteria and framework involved in pricing, discounts, rebates, and individual negotiations supplied sufficient common evidence “to prove that all class members suffered at least some injury.” Id. at 318-20. As to quantum of damages, the court determined that the plaintiffs “proffered several reasonable damage methodologies for measuring class-wide damages on an aggregate basis and for calculating damages for individual class members.” Id. at 322. After a detailed analysis of the methodologies, the court appears to have been convinced that the plaintiffs’ experts could devise for use at trial a likely method to determine damages using actual market data as well as forecasts and models, and based on a “market [that is] in fact highly structured with prices set according to pre-set criteria enumerated in company pricing manuals.” Id. at 324-25.

{59} However, the court in In re Cardizem did not view the measure of damages in direct purchaser-antitrust overcharge cases to be actual harm, but, rather, “a surrogate—the full overcharge.” Id. at 316 (internal quotation marks and citation omitted). Further, the court did not require “an exactness on a direct purchaser’s overcharge damage award,” in terms of requiring direct purchasers to net out their damages by proving that part of the overcharge was passed on to consumers. Id. In re Cardizem also rejected the concern that an overcharge-damage theory might result in a windfall to the plaintiffs. Id. at 317. The court agreed with the view that in assigning a full right to recover to direct purchasers, Illinois Brick established a policy that “[t]he standard of individual net harm yields to a standard of net social harm in order to accommodate the limitations of the legal system.” In re Cardizem, 200 F.R.D. at 316 (quoting Roger D. Blair & William H. Page, “Speculative” Antitrust Damages, 70 Wash. L. Rev. 423, 434 (1995)). Finally, the court in In re Cardizem had no difficulty rejecting the defendants’ arguments that the class action was not a superior method to adjudicate the controversy. Id. at 325.

{60} In re NASDAQ was an action by individual buyers of securities and the State of Louisiana in its parens patriae capacity against market-makers, alleging an unlawful price-fixing scheme by the market-makers. 169 F.R.D. at 498-99. The court certified the class under Rule 23(b)(3) based on (1) the plaintiffs’ intention “to prove the effectiveness of Defendants’ conspiracy by using economic theory, academic studies, data sources, and statistical techniques—all designed to demonstrate that Nasdaq spreads were actually widened as a result of the conspiracy—that are common to the entire class”; and (2) methodologies by which the plaintiffs proposed “to prove the existence and measure of damages,” including comparing several different “spreads (and resulting revenues)” as to actual securities traded, and comparing profits from spreads, methodologies “widely accepted as means of measuring damages in antitrust cases.” In re NASDAQ, 169 F.R.D. at 520-21. Further, the court cited In re Potash in noting that it had judicial methods available to
resolve individual damages issues, and further noted that “[t]he courts have allowed the plaintiffs to establish the measure of damages at trial, and this measure is then applied to the individual transactions (typically in a second[,] bifurcated proceeding following trial on the common issues).” In re NASDAQ, 169 F.R.D. at 522. Aggregate damages of the class as a whole was thought to be “susceptible to determination in a single trial along with the issue of liability,” id. at 524, and the court determined that damages could be determined on a classwide, or aggregate basis, “where the computerized records of the particular industry, supplemented by claims forms, provide a means to distribute damages to injured class members in the amount of their respective damages.” Id. at 526. On the issue of superiority, the court foresaw “no insurmountable problems in the management of th[e] lawsuit.” Id. at 528.

{61} In re Potash involved an action by wholesaler direct purchasers for conspiracy to fix the wholesale price of potash. 159 F.R.D. at 687-88. In regard to injury, the court employed a presumption that price fixing impacts “all purchasers of a price-fixed product in a conspiratorially affected market” and ultimately determined that the clash of expert analyses and opinions on such impact was to be resolved at trial. Id. at 695-97. The plaintiffs, the court held, need only make “a threshold showing that what proof they will offer will be sufficiently generalized in nature that . . . the class action will provide a tremendous savings of time and effort.” Id. at 697 (internal quotation marks and citation omitted) (alteration in original).

{62} As to amount of damages, the court in In re Potash adopted what it called a “relaxed standard,” which was that “the Court’s inquiry [into predominance as to damages] is limited to whether or not the proposed methods are so insubstantial as to amount to no method at all.” Id. The court frankly stated that this “relaxed standard flow[ed] from the equitable notion that the wrongdoer should not be able to profit by insistence on an unattainable standard of proof.” Id. Although recognizing that, typically, the amount of damages in antitrust actions largely involves individualized questions, the court in In re Potash nevertheless determined that this did not preclude certification. Id. The plaintiffs’ expert’s opinion was based on three methods of computing overcharge that, according to the expert, permitted damages suffered by class members to be determined “with a substantial degree of precision, by means of a formula.” Id. In the court’s view, these methods were not “so insubstantial as to amount to no method at all.” Id. The court set out the “various judicial methods . . . available [to the court] to resolve individual damage issues without precluding class certification,” including among others, “appointing special masters or magistrates to preside over individual damage proceedings,” and “using the defendants’ transactional records to compute individual damages.” Id. at 698. In regard to manageability, the court held that the class action was “the most efficient and convenient method to resolve th[e] controversy.” Id. at 699.

{63} Plaintiffs also cite cases supporting the view that variations in damages amounts in antitrust actions will not defeat certification on predominance or superiority grounds once they show conspiracy and injury. This position is exemplified by the following language in In re Workers’ Compensation:

Individual questions of damages are often a problem encountered in an antitrust action and are rarely a barrier to certification. Separate mini-trials, a special master, later stratification of the class, or a magistrate may be available to resolve such issues. In this action[,] plaintiffs must demonstrate a conspiracy and its impact, not necessarily on an individual basis; those questions predominate over any secondary and individual questions of damages.

. . . .

. . . If the plaintiffs’ claims are substantiated, a question as to which the Court presently has no opinion, the class action mechanism is clearly the most efficient means of resolving the many claims which may be asserted. The Court is confident that stated classes or subclasses will make the case comfortably--if not easily--manageable. If the case were not handled as a class, thousands of small claims would be either brought or unjustly abandoned. The first possibility would be a flood of cases, the second would involve individual claims abandoned because of cost.

The Court is mindful that dismissal for management reasons is never favored. The vehicle of class action is meant to permit plaintiffs with small claims and little money to pursue a claim otherwise unavailable. A contrary rule would essentially preclude class treatment whenever separate issues had to be tried.

130 F.R.D. at 110 (internal quotation marks and citations omitted); see also In re Catfish, 826 F. Supp. at 1042-43 (stating relaxed standard of whether “the proposed methods are so insubstantial that they amount to no method at all,” and “it is generally recognized that some relaxation of the plaintiff’s burden of proving damages is tolerated once an antitrust violation and resulting damage s have been established”) and stating further that the determination of damages amounts, although individualized, are rarely a barrier to certification; In re Polypropylene Carpet, 996 F. Supp. at 29-30 (holding sufficient for class certification the plaintiffs’ intention to use such techniques as (1) multiplying “the amount of any price increase estimated by [a] regression analysis by the number of products purchased by the class members,” or (2) multiplying “the estimated price increase by the total dollar purchases made by the class members”).

{64} We also note several federal decisions Plaintiffs cite specifically in support of their position that class damages may be proven in the aggregate. See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Brown v. Pro Football, Inc., 146 F.R.D. 1 (D.D.C. 1992); In re Brand Name Prescription Drugs Antitrust Litig., Nos. 94 C897, MDL 997, 1994 WL 663590 (N.D. Ill. Nov. 18, 1994) (mem.); In re Alcoholic Beverages Litig., 95 F.R.D. 321 (E.D.N.Y. 1982). Plaintiffs also draw on Newberg on Class Actions, which contains an entire section devoted to “Proof and Distribution of Aggregate Class Damages,” see 3 Alba Conte & Herbert B. Newberg, Newberg on Class Actions, ch. 10 (4th ed. 2002), and whose overall disposition (based solely on federal case law) tends to be supportive of not precluding certification or trial if only aggregate damages is proven with a per-capita or average formula for distribution of the damages award. See, e.g., Newberg, supra, §§ 10:2 to 10:7, 10:12.

{65} Plaintiffs further rely on several state court Microsoft antitrust cases permitting class certification based on a showing of classwide injury and a lenient standard in regard to damages. See Coordination Proceedings Special Title Rule 1550(b) Microsoft I-V Cases,

{66} Plaintiffs also see two Tennessee cases as particularly important. They are Meighan v. U.S. Sprint Communications Co., 924 S.W.2d 632 (Tenn. 1996), and Sherwood v. Microsoft Corp., No. 99C-3562 (Cir. Ct. Tenn. Dec. 20, 2002) (mem. and order). Meighan is a trespass and taking action for damages for cables installed over land, in which the court states that trial courts may determine an aggregate amount for the class as a whole, and then either divide the award among class members, or allow each class member to individually prove his or her claim against the entire judgment. 924 S.W.2d at 635, 638. In certifying an antitrust class action, the court in Sherwood turned primarily to Tennessee law and Meighan and rejected A&M Supply Co. and Melnick which required individualized damages determinations. Sherwood, at 5-6, 18, 21.

{67} Plaintiffs assert, based on the foregoing cases, among others, that they needed only to come forward with their generalized threshold showings by which they intend to prove classwide injury and damages. It is Dr. McCormick’s theoretical analyses and aggregation of damages from which, according to Plaintiffs, it can be reasonably anticipated that common, classwide injury to most, threshold showings by which they intend to prove classwide injury and damages. It is Dr. McCormick’s theoretical analyses and aggregation of damages from which, according to Plaintiffs, it can be reasonably anticipated that common, classwide injury to most

6. Cases Supporting the Need to Prove Individual Injury and Individualized Damages Through Common Proof

{68} The generalized, and as the district court in the present case characterized it, “plausible,” methodology approach of Plaintiffs has not been adopted in several cases, some of which are quite similar to the present case. Several indirect tobacco purchaser, price-fixing cases fall in this group of cases. For example, in a cigarette retailer action in Minnesota and in cases parallel to the present case brought by consumer purchasers in Minnesota and Michigan in which the plaintiffs presented the same experts’ theories as those in the present case, the courts denied certification. See Ren v. Philip Morris Inc., No. 00-004035-CZ, 2002 WL 1839983, slip op. at *18 (Mich. Cir. Ct. June 11, 2002) (indirect purchaser); Ludke v. Philip Morris Cos., No. MC 00-1954, 2001 WL 1673791, at *4 (Minn. Dist. Ct. Nov. 21, 2001) (mem.) (indirect purchaser); Keating v. Philip Morris, Inc., 417 N.W.2d 132, 138 (Minn. Ct. App. 1987) (retailer). But see Smith v. Philip Morris Cos., No. 00-CV-26 (Kan. Dist. Ct. Nov. 15, 2001) (journal entry of decision) (certifying class of indirect purchasers of cigarettes, stating that a single price-fixing conspiracy “affects all of the proposed class members equally,” and that the plaintiffs were bound only to show that “damage was in

Ren was a price-fixing antitrust case brought by indirect consumer purchasers of cigarettes. In regard to antitrust injury, Ren determined that the indirect purchasers could not establish injury “through the use of the presumptions or inferences that might otherwise prevail in direct purchaser federal antitrust cases.” 2002 WL 1839983, at *5. Ren quoted with approval the following analysis in Melnick, in which the court determined that:

the presumption engaged in by some courts regarding injury to direct purchasers is not available in an indirect purchaser case:

Because indirect purchasers must demonstrate that any overcharges resulting from the illegal action of the defendants have been passed on to them, an entirely separate level of evidence and proof is injected into litigation of indirect purchaser claims. Proof of antitrust conspiracy may logically lead to a conclusion that the subject of the conspiracy, the retailers, have each been harmed. No such conclusion logically follows without specific proof tracing that overcharge on to consumers.

Melnick, 2001 WL 1012261, at *7 (internal quotation marks and citation omitted). The court in Ren nevertheless concluded that Dr. McCormick’s correlation analysis was “a method based on common proofs from which it could be concluded that there was class wide injury or impact” and that the plaintiffs thereby met their predominance burden as to injury. Ren, 2002 WL 1839983, at *11-12.

{70} On the other hand, in regard to damages, the court in Ren determined that Dr. McCormick’s mere aggregation of damages showing classwide damages, with no indication of “the quantum of damages to any one individual,” id. at *14, was insufficient to meet the plaintiffs’ predominance burden as to damages. Id. at *16. The court expressly rejected Dr. McCormick’s proposed aggregate class damages approach, finding it inadequate as a matter of law. Id. at *17.

{71} More particularly, the court in Ren held that Dr. McCormick’s proposal to simply divide estimated aggregate classwide damages among class members “amount[ed] to ‘no method’ at all since it necessarily permits an award of something other than actual damages.” Id. Without a method for proving each individual class member’s actual damages through a formula or other common proof, the plaintiffs failed to show that common issues would predominate. Id. at *16-17. The court found it unlikely that “any sort of ascertainment of individual damages can be made under some systematic or formulaic basis that avoids the necessity of individualized proofs regarding the brands of cigarettes purchased, and the particular retail prices paid,” id. at *16, and determined that, upon resolution of any common issues, the court would still “be faced with potentially an indefinite number of mini-trials to ascertain a class member’s actual damages,” and further determined that these considerations made a class action unmanageable. Id. at *17-18.

{72} In Ludke, the court determined that “it would be nearly impossible to determine what amount any particular consumer was damaged by the conspiracy or whether the particular consumer was damaged at all.” 2001 WL 1673791, at *3 (emphasis omitted).
In particular, the court in *Ludke* noted that because class members “do not generally keep receipts or any other proof of purchase . . . [and] may well not know how many cigarettes they consume,” certifying the class “would be an invitation for fraud.” *Id.* at *3. Further, *Ludke* quoted with approval the following from *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977):

> Thus in cases where the fact of injury and damage breaks down in what may be characterized as “virtually a mechanical task,” incapable of mathematical or formula calculation,” the existence of individualized claims for damages seems to offer no barrier to class certification on grounds of manageability. On the other hand, where the issue of damages and impact does not lend itself to such a mechanical calculation, but “requires separate mini-trial[s],” of an overwhelming large number of individual claims, courts have found that the “staggering problems of logistics” thus created “make the damage aspect of case predominant,” and render the case unmanageable as a class action.

*Ludke*, 2001 WL 1673791, at *2 (alteration in original). *Ludke* also turned to the denial of class certification to cigarette retailers in *Keating* stating: “Clearly, if the [*Keating*] Court found that an individualized claims process for a class composed of cigarette retailers would be daunting, an individualized claims process would be a nightmare to administer for the hundreds of thousands of claims likely to be generated by a class action composed of end-users of cigarettes.” *Ludke*, 2001 WL 1673791, at *4. The court in *Ludke* was troubled “not so much . . . by the calculation of aggregate damages, as . . . by the impossible task of dispersing these aggregate damages to individual claimants.” *Id.* at *3.

[73] *Keating* was a price-fixing antitrust case brought by cigarette retailers. 417 N.W.2d at 133-34. The court affirmed the denial of certification of a statewide class of cigarette retailers. *Id.* at 137-38. The court held that evidence of the distribution and pricing of cigarettes required proof of injury and damages on an individualized basis. *Id.* at 134, 137. More particularly, in discussing the wholesale cigarette market, the court was concerned that each retailer would have to establish the price paid on each purchase under circumstances of widespread wholesaler use of nonuniform, as well as non-cash discounts. *Id.* at 137. The court noted the trial court’s determination that “[a]ny determination of fact or amount of individual damage will require thousands of factual examinations done on a retailer by retailer basis, and a transaction by transaction basis. The class action would quickly degenerate into thousands and thousands of individual trials.” *Id.* (internal quotation marks omitted). The court determined that the trial court did not abuse its discretion in denying certification on both predominance and superiority (specifically, manageability) grounds. *Id.* at 136-38; see also *Windham*, 565 F.2d at 66 (involving tobacco growers’ claims of a price-fixing conspiracy by cigarette manufacturers, in which the court stated, “[w]hile an antitrust case may present a common question of injury, the issues of injury and damage remain the critical issues in such a case and are always strictly individualized”).

[74] State courts in pharmaceutical cases have arrived at similar results. In *Wood v. Abbott Laboratories*, No. 96-512561-CZ, 1997 WL 824019 (Mich. Cir. Ct. Sept. 11, 1997) (unpublished opinion and order), a pharmaceutical price-fixing case, the court denied certification to indirect consumer purchasers of drugs. Citing Michigan’s statute permitting an indirect purchaser to recover only actual damages, the court held that plaintiffs failed to “provide a method for calculating each class member’s actual damages and thus the calculation of injury and actual damages would require examination of the drugs each class member purchased . . . rendering the class unmanageable.” *Id.* at *2. As to the plaintiffs’ expert’s methodologies and opinion, and rejecting those theories that provided “at best . . . a method for calculating the existence of injury and damage on a class-wide basis,” the court continued:

> [the expert’s] theories do not provide a method for calculating each class member’s actual damages and thus the calculation of injury and actual damages would require examination of the drugs each class member purchased from which retailer, the discounts applicable to each retailer for each drug at the time of purchase, and other relevant factors, resulting in thousands of mini-trials and rendering the class unmanageable. For this reason, other jurisdictions to consider this issue have denied certification to the class of indirect purchasers of brand name prescription drugs.

*Id.* The court found “that individual questions of fact as to both injury and damages predominate over the one theory common to the class, that being the existence of the alleged conspiracy, and that these individual questions render the case unmanageable as a class action.” *Id.* at *3. Several other Abbot Laboratories state court cases have denied class certification. See *McCarte v. Abbott Labs., Inc.*, No. CV 91-050, at 7 (Ala. Cir. Ct. Apr. 9, 1993) (order) (determining individual questions in regard to each purchase of infant formula were varied fact questions that had to be answered separately to determine injury and damages); *Karofsky v. Abbott Labs.*, No. CV-95-1009, at 31 (Me. Super. Ct. Oct. 16, 1997) (decision and order) (denying class certification and concluding “that there are so many individual issues [of] retail pricing strategies, market forces, profit margins, geography, individual drugs, and circumstances of purchase, that the presentation of plaintiffs’ claims as a class action would simply be unmanageable”); *Kerr v. Abbott Labs.*, No. 96-002837, 1997 WL 314419, at *2, 4 (Minn. Dist. Ct. Feb. 19, 1997) (mem.) (“Tracing individualized transactions through the complex distribution network of the brand-name prescription drug industry would clearly cause individual questions of fact to predominate over questions common to the proposed class.”); *Fischenich v. Abbott Labs., Inc.*, MC 94-6868, at 8-9 (Minn. Dist. Ct. May 26, 1995) (order) (“It is also unlikely that proposed class members will have any records indicating where the formula was purchased, when it was purchased, and how much was purchased. This leads to the question of how damages will be verified unless defendants are given an opportunity to cross-examine the individual purchasers.”); see also *In re Methionine Antitrust Litig.*, 204 F.R.D. 161, 163 (N.D. Cal. 2001) (holding, in action involving state antitrust law, that the “amount of damage suffered by each class member will not be determined on a class-wide basis[,]” but that “[c]ourts have uniformly held . . . that the existence of such an individual question is not a sufficient reason for denying certification”).

[75] In the federal realm, *In re Phenytoin Antitrust Litig.*, 204 F.R.D. at 618. The court concluded that the likely lack of class member proof of purchases, as evidenced by the testimony of several named plaintiffs, made the case unmanageable. *Id.* at 619-20 & n.8. The court’s major concern was verification of purchase, stating:
Unlike cases involving substantial purchases for which proof of purchase would be readily available or prescription medication verifiable by medical and pharmacy records, the process of simply identifying who rightfully belongs within the proposed class would entail a host of mini-trials. . . . Because the vast majority of putative class members are unlikely to possess proof of purchase, and given the purportedly immense size of this class, the individualized inquiries surrounding class identification would be prodigious and would defy the court’s ability to effectively and efficiently manage the litigation.

Id. at 619-20. The court further noted that adopting an aggregate approach to damages “would not serve to lesson [sic] the manageability problems plaguing the proposed class” because the court still would face “the daunting task of determining who could claim those damages in the first place.” Id. at 620.

{76} Turning away from cigarette and drug-related cases, other significant federal decisions have similarly denied certification. In Bell Atlantic Corp. v. AT&T Corp., the plaintiffs sought to certify a class alleging antitrust (monopoly) violations and proposed to prove damages using a formula to calculate damages based on averages developed from national labor cost data. 339 F.3d 294, 304 (5th Cir. 2003). As to injury, the court stated that “where [injury] cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance.” Id. at 302. Further, in noting that the federal courts have “rejected claims where the plaintiff’s proposed method of calculating damages failed to reasonably approximate actual economic losses,” the court upheld the district court’s denial of certification, holding the plaintiffs’ averaging technique was not an “adequate approximation of any single class member’s damages, let alone a just and reasonable estimate of the damages of every class member.” Id. at 303, 304, 308.

{77} The court in Bell Atlantic Corp. was critical of the plaintiffs’ methodology, in that “[n]umerous factors that would have affected the amount of damages, if any, suffered by any given class member . . . [were] not accounted for in the proposed formula.” Id. at 304. The court indicated that “[c]lass treatment . . . may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is clearly inadequate.” Id. at 307; see also Sample v. Monsanto Co., 218 F.R.D. 644, 650-51 (E.D. Mo. 2003) (refusing to presume classwide impact without any consideration of whether the markets or the alleged conspiracy at issue actually operated in a manner to justify that presumption, and determining that accepting a generalized theory would be an improper dereliction of its duty to rigorously analyze the proposed class certification proofs against the record facts); Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 432-33 (W.D. Mo. 1973) (“[D]amages should not be based on speculation or a system of averaging. Rather, the compensation due each individual member of the class must necessarily reflect the damages actually suffered by that party.”); City of Philadelphia v. Am. Oil Co., 53 F.R.D. 45, 48-49, 72 (D.N.J. 1971) (stating, in connection with its concern about cash purchases of gasoline at many different stations, at many different times, and at many different prices, that, “no matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to distribute these sums to their rightful recipients, the class is unmanageable”); and see A&M Supply, 654 N.W.2d at 603 (a state court decision stating “a plaintiff’s burden is to articulate a method or formula by which a court could determine that the defendant’s conduct caused each member of the proposed class actual damages”).

7. The Antitrust Act’s “Damages Actually Sustained” Language

{78} Defendants assert that the Antitrust Act’s express use of the words “damages actually sustained” in Section 57-1-3(A) helps answer the dispute as to what must be shown at the class certification stage. After permitting indirect purchasers who are injured to sue for up to threefold “the damages sustained,” Section 57-1-3(A) permits the finder of fact, where the facts justify it, to award damages “in an amount less than that requested, but not less than the damages actually sustained.” § 57-1-3(A). Thus, the finder of fact can award damages above those “actually sustained,” but cannot drop below “damages actually sustained.” Id.

{79} Based on this language, Defendants argue that permitting an aggregate damages award at trial, with no proof of the individualized damages of class members, would be contrary to the clear wording of the statute. Defendants point to Ren, in which actual damages language in the state antitrust statute caused the court to reject a distribution of an aggregate award unless each class member received a damages award representing only his or her actual loss. See Ren, 2002 WL 1839983, at *2, 17 (construing a Michigan statute stating that a person injured directly or indirectly may bring an action for actual damages sustained in relation to whether the court could use a fluid recovery fund to avoid problems with ascertaining individual assessment of damages and denying resorting to a fluid recovery fund theory, and holding that “[i]t necessarily follows . . . that a defendant is only liable to a plaintiff for the actual damages sustained by that plaintiff as the result of a violation of the [Michigan statute]”).

{80} Plaintiffs, by brief footnote only, argue that the wording in Section 57-1-3(A) should be read only in the context that, while “exemplary” damages can be reduced if there exists evidence of lack of willfulness, such justification cannot also be used to reduce any damages actually sustained. Plaintiffs also argue that the Antitrust Act is meant to be a “‘full consideration’ statute, entitling the injured person to recovery of the full amount paid, which obviates the need to individually calculate the amount of overcharge in each transaction.”

{81} We doubt Section 57-1-3(A), enacted in substantially its present form in 1891, was worded with class certification predominance and superiority requirements in mind, or, more particularly, with any focus on whether an aggregate recovery would suffice instead of requiring each class member to prove his or her actual, individualized damages, in order to recover under the Antitrust Act. The phrase “damages actually sustained” appears to us to have been inserted in order to set a particular standard under Rule 1-023(B)(3) for class certification or for determining whether aggregate damages would be a proper award, and whether distribution of a lump sum award on a per-capita or average basis would be proper, in a class action. We
therefore determine that Defendants’ view of the Antitrust Act does not control the question whether, if a class is certified under Rule 1-023(B)(3), individualized damages need not be proven at trial.

{82} Defendants mingle with their Antitrust Act actual damages argument, namely, that an aggregate damages recovery would violate New Mexico’s enabling act, NMSA 1978, § 38-1-1(A) (1966). This section provides that rules of procedure promulgated by the New Mexico Supreme Court “shall not abridge, enlarge or modify the substantive rights of any litigant.” Id. Defendants argue that this act forbids what the district court did, namely, permit Plaintiffs to pursue an aggregate damages remedy when the Antitrust Act does not permit it. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 592 (1997) (stating that the court must be “mindful that Rule 23’s requirements must be interpreted in keeping with . . . the [federal] Rules Enabling Act[]”); Windham, 565 F.2d at 66 (stating that generalized classwide proof of damages would contravene the mandate of the Rules Enabling Act, 28 U.S.C. § 2072(b), that Rules of Civil Procedure “shall not abridge, enlarge or modify any substantive right” (internal quotation marks omitted)); see also Bell Atl. Corp., 339 F.3d at 302 (stating antitrust proof requirements cannot be “lessered by reason of being raised in the context of a class action”); Alabama v. Blue Bird Body Co., 573 F.2d 309, 327 (5th Cir. 1978) (recognizing that a class action procedure cannot “in any way alter the substantive proof required to prove up a claim for relief”). Plaintiffs’ response is that Rule 1-023 is a procedural rule and “[p]rocedural provisions do not ‘abridge, enlarge or modify the substantive rights of any litigant,’” relying on In re Daniel H., 2003-NMCA-063, ¶ 18, 133 N.M. 630, 68 P.3d 176.

{83} Rule 1-023 does not, as written, abridge a defendant’s substantive rights under the Antitrust Act. Defendants’ concern is the district court’s interpretation of Rule 1-023, not the mere existence of the rule. Defendants argue that by interpreting the rule to allow an award of aggregate and not individualized damages the court lessens and alters the substantive proof of actual damages sustained required under the Antitrust Act. We are unpersuaded. To the extent Section 57-1-3(A) requires the assessment of actual damages sustained by reason of a violation of the Antitrust Act, it does not necessarily follow that an aggregate award cannot consist of actual damages, or that the distribution made to each individual class member from a lump sum award consisting of actual damages must correspond to each class member’s actual loss.

SUMMARY AND RESULT

1. Summary of Positions

{84} That common issues predominate over individual issues as to antitrust conspiracy is not in question in this appeal. It is clear that the means for proving a conspiracy will be common to the class. See, e.g., Ren, 2002 WL 1839983, at *3 (determining that proof of whether manufacturers conspired to fix prices “will not differ between class members”).

{85} As to antitrust injury and amount of damages, the ends of the spectrum are plainly presented. Plaintiffs present generalized methodologies to prove classwide injury and damages. They present no common proof by which, at trial, they expect to prove the individual injury to and the individualized damages of each class member. The question is whether to open the class certification door under these circumstances. To do so, assuming Plaintiffs prove a price-fixing conspiracy, would allow each class member who purportedly is able to show a purchase of cigarettes during the class period to recover damages without Plaintiffs having to specifically prove the class member’s actual payment of an overcharge and without having to specifically prove the amount of each class member’s individual loss for which the member is entitled to damages.

{86} Plaintiffs’ injury-related evidence consists of methodologies from which, according to Plaintiffs, it can reasonably be inferred that a very high percentage of those purchasing cigarettes were necessarily injured by the overcharges. Plaintiffs’ damages-related evidence builds on their injury-related evidence but goes no further than estimating the aggregate damages, dividing that number by the number of class members, and distributing the lump sum under an averaging formula. There exists no indication in Plaintiffs’ brief that they intend any individual adjudications as to what overcharge any individual class member actually paid, or as to the particular amount any individual class member was actually damaged, even if that amount need only be reasonably estimated.

{87} The bottom line rationale for Plaintiffs is that the intent of the Legislature in enacting the indirect purchaser provision in the Antitrust Act together with the underlying remedial purpose of Rule 1-023 is that indirect consumer purchasers with small claims be able, through the class action procedure, to recover damages through classwide proof of injury and damages, without Plaintiffs having to prove each class member’s individual injury or individualized damages. To deny certification on either predominance or superiority grounds would effectively deny the class members, consisting of indirect consumer purchasers, access to the court for recovery of damages, leaving class members to fare for themselves in separate, independent, and uneconomical actions to establish small claims. Equally important, Plaintiffs contend that manufacturers who violate the Antitrust Act should not be permitted to escape liability through a rigid reading of Rule 1-023(B)(3). Thus, according to Plaintiffs, Defendants should be subject to a lump sum restitution award, to be divided under an averaging formula.

{88} Defendants contend Plaintiffs’ approach denudes Rule 1-023(B)(3) to the point that the predominance and superiority requirements of the rule are meaningless. They point out that the vast majority of prospective class members likely have no record of when or where they purchased cigarettes, what brands they purchased, or how much they paid for the cigarettes. They feel due caution requires a court to have a deep concern that the process can be fraught with poor memory or, worse, with fraud. They also argue that any overcharge must be ascertained and can only be ascertained by factual development of actual pricing from an individual manufacturer through an individual retailer on any given day or week. Defendants assert that neither the Antitrust Act, nor Rule 1-023(B)(3), requires or even contemplates class recovery without common proof predominating to establish each class member’s individual injury and the individualized damages of each class member. The question is whether to open the class certification door.

2 An antitrust treatise makes this sweeping comment in regard to lump sum judgments: “Interestingly, there has never been an antitrust class action in which a lump-sum judgment was entered following a trial of common issues holding a defendant liable for an aggregate amount to the entire class.” 2 Antitrust Adviser § 10.46, at 10-103 (Irving Scher, 4th ed. 1995).
and individualized damages. Defendants also assert that the manageability problems necessarily arising because individual injury and individualized damages must be proven should make it clear a class action is not a superior process for adjudication of the claims. The tensions between these views are not insignificant. A class action is permissible if, among other prerequisites, joinder is impracticable due to numerosity. See Rule 1-023(A)(1). A beneficial and primary purpose of the Rule 1-023 procedure is to address class members’ claims in one proceeding where joinder outside of the class action setting is impracticable. If a class action were unavailable, the many small claimants will not file an action, not have the funds to prosecute the action, or not benefit financially when costs are set against recovery. Yet a tension is created by the circumstance of the impracticability of individualized proof as to each of the thousands of class members’ injuries and losses. There no doubt also exist instances in which the class action process may not be superior because of severe manageability problems in regard to the adjudication of such claims. This case magnifies the tension between competing views about class recovery when proof of individualized damages is impracticable and, if required, can present substantial manageability problems. The tug between proof requirements is heightened by the many and varied decisions condemning, as well as condemning, aggregate or generalized proofs. Cases vary in context, facts, and philosophy. To a large extent, differences seem to reflect different attitudes as well as degrees of the fears of courts as to the “unmanageability and untested limits of class actions under the amended Rule 23.” Newberg, supra, § 10:5, at 484.

2. Result: Antitrust Injury

{90} In regard to antitrust injury, we hold that Plaintiffs have satisfied the predominance standard under Rule 1-023(B)(3). Plaintiffs have presented common, generalized, logically probative methodologies to prove antitrust injury to class members, methodologies that are at the very least superficially acceptable to meet the predominance threshold. We are in line with the thinking, for example, in Ren, where the court agreed that Dr. McCormick’s analyses relating to injury were sufficient for class certification purposes. See Ren, 2002 WL 1839983, at *2, 4-9. In Ren, the plaintiffs attempted to use common proof, specifically including economic theory and correlation analysis, to show injury. Id. at *6. The court determined that the correlation analysis which showed that the overcharge was passed on to the consumer ninety-six percent of the time was sufficient to show injury. Id. at *11-12. The court noted that at the class certification stage, the plaintiffs were not required to show that every single member of the class was injured where the plaintiffs could show widespread injury to the class. Id.

{91} In the present case, where Plaintiffs’ expert has shown through methodologies, including correlation analysis, that the overcharge, or at least some portion of it, was passed on to the consumer ninety-eight percent of the time, we conclude that the district court did not abuse its discretion in determining that Plaintiffs met their burden. This conclusion is in accord with the well-analyzed price-fixing cases and makes good sense when addressing injury in an anti-competitive market in which it is likely that a large number of consumers, such as people who purchase cigarettes on an ongoing basis, over time will be affected by price fixing. “As a rule of thumb, a price fixing antitrust conspiracy model is generally regarded as well suited for class treatment.” In re Catfish Antitrust Litig., 826 F. Supp. 1019, 1039 (N.D. Miss. 1993). Although the foregoing adage comes from a direct purchaser/price-fixing case, we think it adaptable as well, to indirect purchaser/price-fixing cases.

{92} Although a tie-leasing and not a price-fixing case, what the court in Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), stated in regard to injury is apropos:

There is absolutely no requirement that the loss be personal or unique to plaintiff, so long as the plaintiff has suffered loss in his business or property, for as we have noted, this second aspect of fact of damage is not concerned with any policy of limiting liability. Thus, when an antitrust violation impacts upon a class of persons who do have standing, there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual.

Id. at 454. In regard to a conspiracy resulting in “increase[ed] prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime,” the court in Bogosian further stated that “an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price.” Id. at 455.

{93} We caution, however, that it is one thing at the class certification stage to allow certification based on what appear to be logically probative general methodologies, and another thing to prove at trial that a high percentage of indirect purchasers were injured by their purchases of products in an anti-competitive market. Once past certification, Defendants will still be permitted to attack Plaintiffs’ methodologies at trial as to scientific reliability and as to sufficiency of proof of antitrust injury. Cf. Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1056-57 (8th Cir. 2000) (determining expert’s “model to construct a hypothetical market which was not grounded in the economic reality of the . . . market,” which “ignored inconvenient evidence,” and which failed to account for market events that were unrelated to any anti-competitive conduct, to lack sufficient foundation to prove damages, resulting in conclusions that were mere speculation, and to require reversal because admission of the opinion affected the defendants’ substantial rights). The following cautionary guideline highlights the point:

[T]he fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief. The holding is also a recognition that “impact” is a question unique to each particular plaintiff and one that must be proved with certainty. That does not mean of course that cases do not exist wherein this requirement of certainty cannot be established by some sort of classwide proof. But it does mean that cases do exist wherein generalized proof of impact would be improper.

Blue Bird Body Co., 573 F.2d at 327 (footnote omitted). Blue Bird Body Co. also noted the “great importance” the Fifth Circuit Court of Appeals placed “on the ‘impact’ element of an antitrust cause of action.” Id.

3. Result: Antitrust Damages and Manageability

{94} While issues relating to proof of purchase are ever-present in this case, we agree with what appears to have been the district
court’s view, namely, that certification in this case hinges on the sufficiency for certification of Plaintiffs’ classwide injury methodologies and not on Plaintiffs’ damages methodologies. If there exists classwide injury, it follows that class members who were injured suffered some damages. In our view, this logical step provides the common proof necessary to overcome Defendants’ predominance objections as to damages. See In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 523, 524 (S.D.N.Y. 1996) (indicating agreement with the view that “the predominance requirement of Rule 23(b)(3) is satisfied with respect to proof of injury, even though individualized inquiry may be necessary on the quantum of damages,” and further that individual damages questions are not a barrier to certification but are to be reserved “to be litigated in a subsequent set of proceedings”); In re Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 691-92 (N.D. Ga. 1991) (noting that once price fixing and injury have been established, a plaintiff “need only introduce evidence sufficient for a jury to estimate the amount of damages” through a “formulaic approach” to calculation of damages that permit(s) the calculation of a minimum overcharge applicable to all members of the class,” and determining that the plaintiffs’ methodologies that evidenced common injury also permitted formulaic calculation of damages). 3

Although fairly formidable, Defendants’ case law does not persuade us that in price-fixing cases we must ignore the methodological classwide injury umbrella that paves the way for a logically probative general methodology to prove damages. Nor do Defendants’ cases and arguments persuade us that, as a matter of law, an aggregate damages methodology with a certain amount of individualized proof cannot produce a fair result if, in fact, a price-fixing conspiracy has been proven. 3 The following language from Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946), has not yet gone out of style:

[T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances juries are allowed to act on probable and inferential as well as (upon) direct and positive proof. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.

Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

It seems obvious, though, that proof of damages will necessitate at the very least some acceptable proof of purchase of the product in question during the time in question, and may well necessitate more proof than that. Certainly, some minimum amount of individualized proof will be at the very least required for class members to receive any amount of damages. However, while manageability issues will likely arise under any proof of damages, we do not see problems of such an intolerable or insurmountable character to cause us to pause at this stage and prevent certification on manageability grounds. As several price-fixing cases have indicated, it must be the rare case where certification should be precluded where the predominance requirements have been satisfied.

It is not without significance that the district court in the present case obviously feels comfortable proceeding to the merits, leaving it with the court and the jury to wrestle with issues of claims and proof. Determination of manageability is usually left to the discretion of the district court. See Windham, 565 F.2d at 65; Link v. Mercedes-Benz of N. Am., Inc., 550 F.2d 860, 864 (3d Cir. 1977). As long as neither we nor the district court sees virtually insurmountable obstacles lying in wait as to such proof, we see no reason to hold that the district court abused its discretion in certifying the class over Defendants’ superiority objections and cases. See In re NASDAQ, 169 F.R.D. at 528-29 (stating that the court did not foresee any insurmountable problem in the management of the lawsuit; that “[c]ourts are generally loath to deny class certification based on speculative problems with case management”); and determining that class action treatment was superior to any other available method for the “fair” and “efficient” adjudication of the case; see also In re Catfish, 826 F. Supp. at 1043 (“The difficulties or challenges which may face the court in the damages phase of this litigation, should it proceed that far, are frail obstacles to certification when measured against the substantial benefits of judicial economy achieved by class treatment of the predominating, common issues.”).

We do not determine, nor do we intend to pre-determine, how the district court should procedurally handle the class or any divisions of the class, the management and processing and or adjudication of the claims of individual class members, and the proofs

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3 One antitrust treatise observes that “[t]he overwhelming majority of antitrust class actions fall under [Rule 23(b)(3)’s predominance requirements],” and that “[i]n antitrust cases, courts are more likely to consider the critical issue to be whether common liability issues predominate and to disregard individual damages (although not impact) questions.” 8 Julian von Kalinowski et al., Antitrust Laws and Trade Regulation §§ 166.03[3], at 166-44; 166.03[3][a][i], at 166-46 (2d ed. 2003).

4 In Newberg’s view, it is settled law that classwide proof of the measure of damages in price-fixing cases is proper, followed by a second stage of litigation to determine amounts of damages for each class member based on an aggregate damages verdict. See Newberg, supra, §§ 10:5, at 486-87; 10:6, at 488; 10:7 n.1, at 489.
of the elements of their antitrust claims. The court has numerous management tools at hand. See In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 141 (2d Cir. 2001). If the court has second thoughts on any issue, it can reconsider and either decertify or modify certification if the manageability of damages adjudication or distribution proves to be an intolerable burden on the judicial system or otherwise proves to create a situation that is less fair and efficient than other available techniques. See Link, 550 F.2d at 864; In re Sugar Indus. Antitrust Litig., 73 F.R.D. 322, 355, 358 (E.D. Pa. 1976); Hayna v. Arby’s, Inc., 425 N.E.2d 1174, 1184 (Ill. App. Ct. 1981) (stating that courts will allow certification anticipating that “as the case proceeds to trial on the merits, . . . evidence will be adduced to alleviate the difficulties perceived in the identification of class members, the computation of damages as well as the administration of those damages”); cf. In re Cardizem CD Antitrust Litig., 200 F.R.D. 297, 326 (E.D. Mich. 2001) (noting that the plaintiffs contended that purchase data was readily available to ascertain individual damage amounts, and that if complications in calculating damages become evident, the court could “alter or amend its class certification order before a decision [was] rendered on the merits”).

CONCLUSION

{99} The Antitrust Act allowance of indirect purchaser access to the court for recovery of damages and the remedial purposes underlying Rule 1-023 are advanced, not diminished, by allowing the price-fixing claims to proceed as a class action.

{100} We affirm the district court’s Rule 1-023 certification of a class.

{101} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE,
Chief Judge

A. JOSEPH ALARID, Judge
This seminar will be very fast paced and loaded with information on the latest cases important to a civil practice. Our goal is to summarize and analyze an entire year of appellate decisions in a lively one-day package. The past year was filled with significant New Mexico appellate decisions, important changes in the Uniform Jury Instructions, and major amendments to the Federal Rules. Don’t miss this great opportunity to cover the waterfront of those decisions important to your practice.

**Program Schedule**

**8:30 a.m.** Registration/Check-in

**9:00 a.m.** Developments in Tort Claims Against the Government  
Lori Bencoe, Esq.

**9:30 a.m.** Protecting the Client’s Assets: Special Needs Trusts  
Susan Tomita, Esq.

**10:15 a.m.** Legislative Update  
David Duhigg, Esq. & Peter Mallory, Esq.

**10:35 a.m.** Break

**10:45 a.m.** Claims Under Wrongful Death Act: Tactics and Strategy  
David Jaramillo, Esq.

**11:30 a.m.** Protecting Your Claim: Statutes of Limitation  
Loralee Hunt, Esq.

**12:00 noon** Quick Lunch (Provided)

**12:30 p.m.** Worker’s Compensation Round-up  
Robert L. Scott, Esq.

**1:00 p.m.** Important New Development in Insurance  
Maureen Sanders, Esq.

**1:55 p.m.** All You Should Know About Pending Appellate Cases  
Kathleen J. Love, Esq.

**2:20 p.m.** Break

**2:30 p.m.** Major Developments in Uniform Jury Instructions  
Hon. Linda Vanzi

**3:00 p.m.** Federal Court Decisions and the Federal Rules Amendments  
Jane Gagne, Esq.

**3:30 p.m.** Issues of Agency: Knowing When Liability is Vicarious  
David J. Stout, Esq.

**4:00 p.m.** And the Kitchen Sink: Other Significant Cases  
Daymon Ely, Esq.

**4:30 p.m.** Adjourn  
David J. Stout, Program Chair

**Seminar Registration**

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September
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**Domestic Violence**, Reed Sheppard, Domestic Violence Commissioner. Wednesday, 6:00 – 8:20pm (May 18 to July 27). 24 General Credits.

**Economic Development for Small Business**, Sara Berger. Tuesday, 4:00 – 7:00pm (June 7 to July 27). 28.8 General Credits.

**La Office Management for Community Based Practitioners**, Jane Rocha de Gandara. Tuesday, 6:00 – 8:20pm (May 18 to July 27). 24 General Credits.

To register, lawyers may contact Gloria Gomez: (505) 277-5265, gomez@law.unm.edu

Members of the UNM Clinical Law Program, Access to Justice Network may take the course for the $5.00 per credit. Members may attend the course NOT FOR CLE and pay $5.00 per session. For more information about the Access to Justice Network visit http://lawschool.unm.edu/Clinic/pro_bono/index.htm or call Associate Dean Antoinette Sedillo Lopez: 277-5265.

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Current Legalities And Realities Of The End-of-Life Debate

Wednesday, May 11, 2005
State Bar Center, Albuquerque
3.5 General and 1.0 Ethics CLE Credits

Co-Sponsor: Public and Legal Services Department, New Mexico State Bar Foundation

The legalities and realities involved in the Terri Schiavo case have once again stirred the debate over end-of-life issues. Right-to-life versus right-to-die? What is medically implied by persistent vegetative state, hospice and palliative care? What legal devices in New Mexico can families use for protection? Should a line be drawn between federalism and social policy? Does the federal government have any right to intervene in situations in which palliative care is necessary to sustain life? In this seminar, these complex issues and more will be discussed. Additionally, the Public and Legal Services Department (PLSD) of the New Mexico State Bar Foundation will provide a free Living Wills Workshop following this program in the lobby of the State Bar Center at which information will be available and refreshments served.

Schedule of Events

1:00 p.m. The Schiavo Case: An Historical Overview
Rob Schwartz, Esq.
Professor UNM School of Law

1:30 p.m. Ethics and the Evidentiary Basis for Palliative Care
Walter Forman, MD, CMD

2:20 p.m. End-of-Life Terminology and Physician Response
David A. Bennahum, MD - Professor, UNM School of Medicine

2:50 p.m. End-of-Life Issues and Family Care
Ellen Leitzer, Esq. - Co-Founder and Co-Director, Senior Citizens' Law Office
Uniform Health Care Decisions Act (UHCDA) Task Force Member

3:10 p.m. Break

3:25 p.m. Legal Devices and Protection
Debbie Armstrong, Cabinet Secretary, NM Aging & LTC Services Department
Hon. Meri Rudd, Bernalillo County Probate Judge and Uniform Health Care Decisions Act (UHCDA) Task Force Member

4:10 p.m. Federalism and Social Policy:
Drawing a line on the debate
Rob Schwartz, Esq.
Professor UNM School of Law
Jane Wishner, Esq., Southwest Women's Law Center
National Chair, Commission on Social Action of Reform Judaism

4:40 p.m. Q & A Discussion

5:00 p.m. Adjourn

5 - 6:30 p.m. Living Wills Workshop (Free)
Public and Legal Services Department

REGISTRATION

REGISTRATION - CURRENT LEGALITIES AND REALITIES OF THE END-OF-LIFE DEBATE

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Register Online at www.nmbar.org, click CLE, then area of interest
Spanish For Legal Professionals

Thursday, April 28, 2005 • 9 a.m. - 4:30 p.m.
State Bar Center, Albuquerque
7.0 General CLE Credits

Presenters: Bonifacio Contreras and Brad Leutwyler, Esq.

This will not be a crash course in Spanish. However, in this seminar, you will learn how to communicate with Spanish speakers within the context of the legal setting. There are potential cultural, practical and linguistic challenges of dealing with Spanish speaking people. However, these challenges can be effectively handled, whether in the law office, interview room, trial court or elsewhere. This seminar will cover a broad mix of practical legal terminology, vocabulary and conversational skills, all of which are broken out in detail in a provided complimentary copy of the Spanish-English Compendium of Law by Contreras & Leutwyler. Using this text, attendees will learn how to begin having meaningful, substantive interactions with Spanish speakers.

Schedule of Events
9:00 a.m. Introductory Remarks
9:20 a.m. General Language & Linguistics Concepts
9:50 a.m. Break
10:00 a.m. Common Legal Vocabulary, False Cognates and Pitfalls
10:50 a.m. Break
11:00 a.m. TCA (Total Command Approach) Methodology for Legal Professionals
Noon Lunch (provided at State Bar Center)
1:00 p.m. Using the Contreras-Leutwyler Dictionary
1:50 p.m. Break
2:00 p.m. Using the Contreras-Leutwyler Dictionary with Google™ & other sources
2:50 p.m. Break
3:00 p.m. Open Discussion, Q & A
4:30 p.m. Adjourn

REGISTRATION - SPANISH FOR LEGAL PROFESSIONALS
Thursday, April 28, 2005 • 9 a.m. - 4:30 p.m. • State Bar Center, Albuquerque
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Young Lawyers Division
“Ask-A-Lawyer” Call-In
Saturday, May 7, 2005

The Young Lawyers Division will host a Call-In Program in three cities on Saturday May 7, to provide legal information to the public. You do not have to be a young lawyer to participate in this program. We only ask that you be willing to volunteer your time!

Attorneys in all practice areas, including Spanish-speaking attorneys, are needed to handle calls.

LOCATIONS (Check off the LOCATION you want to sign up for)
- Albuquerque  9:00 am to 1:00 pm
- Farmington  9:00 am to 1:00 pm
- Las Cruces  9:00 am to 1:00 pm

AREAS OF LAW (Attorneys please indicate all areas of law for which you can answer callers’ questions)
- Bankruptcy
- Contracts
- Estate Planning
- Medical/Medicaid
- Tax Law
- Business Law
- Criminal Law
- Family Law
- Personal Injury/torts
- Workers’ Comp
- Civil (General)
- Civil Rights
- Elder Law
- Insurance Law
- Real Estate
- Employment/Labor Law
- Landlord/Tenant
- Social Security

NAME: _____________________________________ PHONE: _______________________

I have questions, please call me at: ____________________________________________

I have an attorney associate/friend/acquaintance that might be interested in participating. Call: __________________________(name); at ______________________(tel #)

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