ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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NYU School of Law
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Mondays, 4:10-6:00 pm
FH 316
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Week 7: The Private Right of Action (Unit 4)

This week we will continue our discussion of the private right of action and walking through the *Boyle* complaint.

Materials to review

Collateral estoppel. Paragraph 23 alleges that on June 29, 2005, the DOJ announced that IMI had agreed to plead guilty and pay a $29.2 million criminal fine for conspiring to fix the price of ready-mixed concrete in violation of the Sherman Act. What are two possible reasons for Boyle including Paragraph 23? One reason is undoubtedly offensive collateral estoppel. Collateral estoppel, perhaps better known today as *issue preclusion*, prevents a party from relitigating in a new litigation an issue of law or fact that had been decided against that party in a prior litigation. Say plaintiff A and defendant B were involved in a prior litigation in which an issue was decided against B. Later, A and B are involved in a new litigation (it does not matter who sues whom in the second litigation) involving a new claim in which the same issue is raised. Under collateral estoppel, A can assert that B is precluded from relitigating the issue in the new action and is stuck with the resolution of that issue in the prior litigation. This is called *defensive collateral estoppel.* But say that the new litigation involves plaintiff C—who was not a party to the prior litigation—and defendant B. Can C assert *offensive collateral estoppel* against B to preclude B from relitigating an issue—say, B's participation in a price-fixing conspiracy—that was decided against B in the prior case? First read the class notes (slides 45-56), which give a quick overview of the statutory and common law doctrines of offensive collateral estoppel used in antitrust cases. Then skim the reading materials (pp. 125-145) for Clayton Act § 5(a) and two opinions applying the doctrines in the *Microsoft* case.

New materials

Statute of limitations/tolling doctrines. We will use Paragraphs 26 through 29 as our point of departure to discuss the antitrust statute of limitations and two of the three major doctrines for tolling (suspending) the running of the statute of limitations period.[1] The Clayton Act imposes a four-year statute of limitations on private treble damage actions. Consistent with tradition, there is no statute of limitations for private injunctive actions, which instead use the equity doctrine of laches. While in theory laches is quite flexible, in practice courts tend to use four years as a cut-off point to make things consistent with the limitation on treble damage actions. The statute of limitations is subject to equitable tolling, the most important of which is the doctrine of fraudulent concealment. Section 5(i) of the Clayton Act also tolls the running of the statute of limitations during the pendency of a related government action plus one additional year. Slides 57-63 should give you a good summary of the area and the required reading contains the statute and a quick application (pp. 147-155).

Jury trials, damages, injunctive relief, declaratory relief, and post-judgment recovery. I have used Paragraphs 30 and 31 as an excuse to assign some readings on these topics. Along with Slides 64-80, read pages 157-211 of the reading materials. These materials are self-explanatory. The *Dow* materials in the *Urethane Antitrust Litigation* (pp. 168-82) in particular have a lot going on and are worth a careful read. Study the special verdict form (pp. 168-70) to see the way the court sets out the questions the jury must answer to reach a decision in a treble damages antitrust case.[2] The short Memorandum and Order

[1] The third tolling doctrine relates to class actions, which we will cover in Unit 5.

[2] The verdict form makes reference to the jury instructions. If you want to look at them, go to the Unit 4 web page and search for "Jury Instructions (Feb. 20, 2013)".

(pp. 172-80) addresses a number of topics, all of which merit a close read, but pay particular attention as to how the court amended the judgment to take into account earlier settlements by Dow's alleged co-conspirators. The *Animal Science Products* materials in the *Vitamin C Antitrust Litigation* gives you another look at a special verdict form in a treble damages action (pp. 193-99), and the Memorandum Decision and Order (pp. 200-06) shows you how the court considered the propriety of permanent injunctive relief. The Amended Judgment and Final Decree (pp. 207-09) shows you the final form of the order. The injunctive relief is simple: do not engage in price fixing in violation of Section 1 of the Sherman Act. Why did the issue an injunction to prohibit something that was unlawful in the first instance? Why did the plaintiffs want such an injunction? Finally, skim the materials on declaratory relief and post-judgment recovery (pp. 211-16).

Co-violator liability relationships and sharing agreements. We also use Paragraph 30 to talk about co-violator liability relationships and sharing agreements. These are some of the most interesting and important aspects of the private right of action for treble damages. Slides 81-91 are the best way to get into the subject and it is important to study these carefully. The *Infineon* case in the reading materials (pp. 218-24) is a quick read.

Attorneys' fees. Plaintiffs that prevail on claims under Section 4 and 16 of the Clayton Act are entitled to reasonable attorneys' fees payable by the defendant. This is a statutory exception to the so-called *American rule*, under which each litigant pays their own litigation costs. The contrary rule, known in the United States as the *English rule*, requires the losing party to pay the attorneys' fees of the prevailing party. In the United States, *fee-shifting statutes* such as the Clayton Act split the difference: the defendant always pays its own attorneys' fees, but also must pay the plaintiffs' attorneys' fees if the plaintiffs win. The purpose of a fee-shifting statute is to provide an additional incentive for a plaintiff to litigate by awarding it attorneys' fees if the plaintiff wins but not penalizing it by requiring it to pay the defendant's attorneys' fees if the plaintiff loses. I first would read the slides (Slides 92-95), which will tell you almost everything you need to know, and then read the *Masimo* case for a nice application (pp. 226-39).

This is about as far as I can reasonably hope to get. If you want to get ahead, keep reading.

Consolidation/transfer of venue/multidistrict litigation. In the usual case, the plaintiff gets to choose the forum in which its case will be tried (assuming venue is proper). In certain situations, however, judicial efficiency requires that the case be moved from the judge or even the court to which the case was originally assigned. I would read Slides 96-106 for a quick overview and then skim the materials for the statutes and some applications (pp. 241-300).

Consolidation under Rule 42(a) involves the reassignment of cases within the same district pertaining to the same set of underlying facts ("related cases") to the same judge. In this situation, the plaintiff retains its original choice of forum—the district court stays the same—but the judge is assigned rather randomly selected through the "wheel." Read Rule 42(a) for the law and Flash Memory for an application (pp. 241-43).

In other cases, it may be more efficient to try the case in another venue. Section 1404(a) of Title 28 (pp. 275-76) provides for the *transfer of venue* in such cases: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The usual case where a transfer of venue is appropriate is where the cause of arose, and the most important witnesses are located, in the jurisdiction of another district court. For example (but not in the materials), when the FTC sued in the District Court for the District of Columbia to block LabCorp's acquisition of Westcliff Medical Laboratories, a competitor clinical testing laboratory operating in Southern California, the parties successfully moved to transfer venue to the District Court for the Central District of California (Southern Division), which they presumably thought was a more favorable forum for them than the FTC's choice. (The merging parties did win in the LA forum.) A contrary result was reached in the DOJ's action to block the H&R Block/TaxACT deal, where the district court denied H&R Block's motion to transfer venue form the District of Columbia to Western District of Missouri (pp. 246-261). Feel free to do a quick read of the *H&R Block* decision. Valspar illustrates the operation of contractual form-selection clauses (pp. 262-73).

Multidistrict litigation. Finally, some allegedly wrongful activity can precipitate actions in a number of different forums. A nationwide price-fixing conspiracy could result in dozens of cases filed in district courts

around the county. Section 1407 provides a means to consolidate these various actions in the same district court for pretrial proceedings, including motions to dismiss, motions regarding discovery, motions for summary judgment, and motions for class certification. As the end of the pretrial proceedings, however, each case must be transferred back to its original court for trial. Read Section 1407 (pp. 275-76), but do not dwell on it. The Transfer Order in the *Fretted Musical Instruments Antitrust Litigation* (pp. 283-85) will tell you almost everything you need to know about Section 1407. The *Williams* order (pp. 86-93) gives some good contrast between Section 1404 and Section 1407 transfer orders, while the *LIBOR* Memorandum and Order (pp. 294-95) addresses some limitations on consolidation under Rule 42(a) for cases that have been transferred pursuant to Section 1407. Not all cases re consolidated. *Fresh Dairy Products* (pp. 296-98) gives an example of a case where an order to transfer was denied. Finally, the Conditional Remand Order in the *TFT-LCD (Flat Panel) Antitrust Litigation* (pp. 299-300) gives an example of an order in a Section 1407 case transferring the case back to the original court at the end of pretrial proceedings.

As always, send me an email if you have any questions.

Dale