ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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NYU School of Law
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FH 316

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Week 9: Antitrust Class Actions (Unit 5)

Last Monday, we began the unit on class actions. In the next class, we will pick up with our discussion of the Rule 23(a) requirements with typicality and adequacy of representation.

We will then turn to the Rule 23(b) requirements. Remember, in addition to satisfying each of the four Rule 23(a) requirements, every class action must satisfy the requirements of one of the three categories of Rule 23(b):

1. *Rule 23(b)(1) actions*, where the prosecution of separate actions by class members would create a risk of inconsistent adjudications that would impose incompatible requirements on the defendants or would be dispositive of the interests of class members in subsequent litigations or substantially impair their interests.
2. *Rule 23(b)(2) actions*, where the defendant has acted or refused to act on grounds generally applicable to the class, thereby making permanent injunctive or declaratory relief appropriate for the class as a whole. This type of class action was designed to accommodate cases with features of civil rights injunction actions.
3. *Rule 23(b)(3) actions*, where questions of law or fact common to class members 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. This type of class action was designed to accommodate cases with features of consumer antitrust treble damage actions.

We will focus on Rule 23(b)(3) class actions, which are by far the most prevalent form of antitrust class action. Rule 23(b)(3) contains two requirements: (1) questions of law or fact common to class members must predominate over any questions affecting only individual members ("predominance"), and (2) questions of law or fact common to class members predominate over any questions affecting only individual members ("superiority"). In antitrust cases, at least, it is rare for a putative class that satisfies the predominance requirement to be denied Rule 23(b)(3) certification for failing to satisfy the superiority requirement.

As we discussed on Monday in connection with the Rule 23(a) commonality requirement, a "common question" is one that can be proved using classwide proof, that is, proof that establishes a fact for one class member establishes the fact for all class members. So, for example, questions of fact regarding the existence, membership, and duration of an alleged conspiracy are common questions, while questions of whether a class member had constructive knowledge of a conspiracy and so cannot toll the statute of limitations through the doctrine of fraudulent concealment is an individual question.

Courts assess predominance by unpacking the elements of the plaintiffs' prima facie case (and, if necessary, any of the defendants' defenses). In antitrust class action, courts disaggregate the plaintiffs' prima facie case into three elements: (1) the violation, (2) "impact" (fact of injury/antitrust injury/proximate cause), and (3) amount of damages. The violation will almost always be provable by classwide proof, since whether the defendants violated the law depends on what the defendants did and not characteristics or conduct of the individual putative class members.[1] On the other hand, courts do not

[1] To be clear, "provable" does not mean that the fact in question, here, the violation, is proved. It just means that if in fact he defendants violated the antitrust laws—and they may not have—the fact of the violation could be proved using classwide proof.

deny Rule 23(b)(3) for a lack of predominance on the amount of damages where the class has shown that the violation and impact may be proved through classwide proof. Hence, in antitrust cases, all of the weight in the Rule 23(b)(3) class certification inquiry is whether predominance is provable through classwide proof. In practice, however, the plaintiffs usually also try to show that the amount of damages for each class member can be calculated using some formula—for example, the number of products purchased by the class member in the class period times the amount of the overcharge—so that while the question of damages remains technically individualized, there is little or no burden on the court in undertaking the individualized calculation.

As typical in antitrust cases, the class in *Processed Eggs* relied heavily on their economist to show that impact and damages can be proved at trial through a classwide method of proof. Read the class notes on expert testimony in class certification (slides 55-76), and then read the note in the reading materials on the use of expert evidence at trial (pp. 80-87).

Class actions certified under Rule 23(b)(1) and Rule 23(b)(2) are known as *mandatory classes*, because absent class members have no right to notice of the action and cannot "opt out" of the class as a matter of right, although courts in their discretion may order notice and provide an opt-out opportunity. By design, Rule 23(b)(1) and Rule 23(b)(2) class actions are confined to more homogeneous classes with essentially identical claims, where the historical requirement of adequacy of representation alone is deemed sufficient protection for absent class members to justify binding them to the class action judgment. By contrast, in Rule 23(b)(3) class actions absent class members *must* be given notice of the action and an opportunity to opt out of the class and thereby avoid the binding effect of any resulting settlement or judgment. A Rule 23(b)(3) class action allows a court to adjudicate common questions of law or facts where the claims of the class members are to some degree individualized. The mandatory notice and opt out features of a Rule 23(b)(3) class action are designed to provide supplemental protection for absent class members beyond adequacy of representation, and provide the justification for binding absent class members who do not opt out of the class to any resulting judgment in the action. Significantly, Rule 23(b)(3) notice must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." For an example of the form of class notice and the manner in which it should be disseminated, read the order in the *Blood Reagents Antitrust Litigation* (pp. 88-97) and the relevant section of the class notes (slides 77-78). Read this section carefully—chances are we are not going to have a great deal of time to discuss this in class.

In Week 10, we will finish off the bulk of the rest of class actions. If you want to read ahead, look at the materials in the *NYC Bus Tour* antitrust litigation settlement. Here are some of the major provisions of the settlement agreement:

1. The defendants do not admit that they are liable for any claims and deny any wrongdoing (p. 100, 101)
2. The definition of the settlement class is a matter of negotiation for the parties (see pp. 102-03)[2]
3. The defendant agreed to pay $19 million to the class (p. 101)
4. The payment was made for the release of claims asserted by the class against them (p. 101)
5. Class counsel has concluded that it is in the "best interests of the class" to enter into the settlement (p. 101)
6. The "Released Claims" include not only the claims asserted in the complaint but also any claims that could have been asserted against the defendants "that that arise out of, are based upon or are related to the allegations, transactions, facts (including allegations of anticompetitive conduct with respect to any acquisition of Defendants' hop-on, hop-off bus tours by Class Members during the Class Period), matters or occurrences, representations or omissions involved, set forth, or referred to in the First Amended Consolidated Class Action Complaint in the Action" (p. 106)

[2] Settlement classes arise in class actions were the class has not been certified by the court prior to the settlement. To bind the absent putative class members to the judgment, the class needs to be certified. The settling parties agree as part of the settlement negotiation to a class definition that they will propose to the court.

7. The settlement agreement provides for the parties to stipulate to the certification of a settlement class (p. 108), the creation of a settlement fund by the defendants (p. 111), and a plan of distribution of the settlement fund (p. 117)
8. A settlement agreement is just that: a *contract* between the parties. The payment by the defendant and the release by the class are subject to conditions precedent (p. 110, 115). Either the defendant or the class plaintiffs may terminate the agreement if the court rejects either the terms of the settlement or the distribution plan set forth in the settlement agreement (p. 122)
9. The parties to the settlement agreement agrees to submit to the exclusive jurisdiction of the United States District Court for the Southern District of New York (the forum for the class action litigation) for the purpose of any action arising out of the settlement agreement (p. 125).

We will pick up with a discussion of releases. In settlements, the benefit to the defendants comes from the releases. As we will see, the release in a settlement can cover not only the actual claims in the case to be settled but also any claims that arise out the same course of defendants' conduct. In addition to reading the language of the release (p. 106) but sure to review the slides on releases (slides 103-04).

See you Monday.

Dale

P.S. If you have not done so already, do not forget that I need to approve the wording of the question for your memorandum of law.