ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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Georgetown University Law Center
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Week 10: Antitrust Class Actions (Unit 5)

Next Tuesday we will finish the unit on class actions. As we have already discussed, 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.

Next we will turn to class action settlements. Look at the materials in the *NYC Bus Tour* antitrust litigation settlement. Here are some of the major provisions of the settlement agreement with which you should be familiar:

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)[1]
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)

[1] 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).

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).

After finishing discussing the remaining major provisions of a settlement agreement, we will examine the steps necessary to obtain court approval of the settlement agreement. To be effective, settlement agreements in class actions must be approved by the court under a "fair, reasonable, and adequate" standard from the perspective of absent class members (FRCP 23(e)(2)). As a matter of practice, the burden of justifying the settlement to the court falls on class counsel, since the settlement almost always will be for much less than the class sought.[2]

The first step in this process is the plaintiffs' motion for preliminary approval of the settlement. Preliminary approval by the court of a settlement agreement triggers notice to class, which can be expensive. In considering preliminary approval, the court will examine both the negotiating process for the settlement (procedural fairness) and the settlement's substantive terms (substantive fairness). The Plaintiffs' Memorandum in Support of the Motion for Preliminary Approval of Settlement with Defendants (pp. 136-67) is a worthwhile read for the legal standard governing preliminary approval and to see how the plaintiffs make the case for both procedural fairness and substantive fairness. In their memorandum in support, the plaintiffs also have to provide a basis for the court to certify the settlement class. Settlements in class actions are often facilitated by mediators, which have the added benefit—as we see in *NYC Bus Tour*—that the mediator can submit a declaration on procedural fairness in support of preliminary approval (pp. 168-70). While some orders preliminarily approving the class action settlement go into some reasoned analysis, many are largely boilerplate like the one in *NYC Bus Tour* (pp. 171-76). Preliminary approval triggers notice to the class and invites interested class members, if they like, to submit written comments and objections to the proposed settlement or appear at a *fairness hearing* in court on the motion for final approval.[3] If there are objections, then if the court nonetheless approves the settlement (perhaps with modifications offered by the parties to meet the objections) the court's opinion on final settlement is likely to address the objections. Otherwise, as appears to be the case in *NYC Bus Tour*, the opinion/order is likely to be short and summary (pp. 177-85).[4] At the same time the court gave final approval to the settlement in NYC Bus Tour, it also approved the plan of distribution of the settlement funds to class members.

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[2] Typically, the most explicit statement by the plaintiffs of the amount of damages sustained by the class will be in a declaration by an economic expert in support of class certification addressing the class-wide proof impact and damages. In *NYC Bus Tour*, for example, the plaintiffs' economic expert estimated actual damages for the class of $29 million, which would be $87 million when trebled, yet the plaintiffs negotiated a settlement that provided a settlement fund of only $19 million.

[3] In a settlement class, class members in Rule 23(b)(3) classes will also be given the opportunity to opt out of the class. In cases where the settlement is negotiated after the class has been certified (so that the class members already had been given the right to opt out), the court has discretion whether to provide an additional opt-out opportunity or simply bind all class members that did not opt out the first time to the settlement judgment.

[4] If you are interested, the transcript of the fairness hearing in NYC Bus Tour is in the Unit 5 supplemental materials. Just search for "fairness hearing". It is just 17 pages long and worth a read.

In most if not all circuits, any objecting absent class member has a right as a matter of law to appeal the entry of a settlement over its objections without the need to formally intervene in the case. In *NYC Bus Tour*, there were no objectors and the order finally approving the settlement was not appealed.

Next, we will discuss how class counsel are compensated. If the case goes to trial and the class prevails, then the defendants will have to pay a reasonable attorneys' fee under the fee-shifting provisions of Section 4 and 16 of the Clayton Act that we considered in Unit 4. But trials on the merits in antitrust class actions are rare. Most antitrust class actions settle, so that the fee-shifting provisions do not apply. Instead, class counsel in settlements are compensated under the equitable *common fund doctrine* (slides 106-1). The method for awarding attorneys' fees under the common fund doctrine in settlement cases is different than the method under the Clayton Act's fee-shifting provisions in adjudicated cases in ways that may increase the incentives to settle antitrust class actions.

What do you think of Judge Carter's decision in *NYC Tour Bus* (pp. 238-39)? The common fund obtained by the class was $19 million and the court awarded one-third as attorneys' fees, which is not too unusual where the settlement fund is relatively small. Class counsel claimed a lodestar of $1,873,699 in fees (reasonable number of hours billed multiplied by a reasonable billing rate), or about 10% of the common fund, so the award reflects a multiplier of 3.3. The court also reimbursed counsel for the costs and expenses incurred in connection with the litigation of $863,629 and notice and administrative costs incurred of $1,069,158 to date (with perhaps more to come) also out of the common fund. This leaves on 53% of the common fund to be distributed to the class. On the other hand, only a fraction of the class actually submitted claims, which at $20 per ticket totaled $4,846,660. This left also $6 million in the common fund after all awards, counsel fees, and expenses had been paid. According to the settlement agreement, the residual would not revert to the defendants but rather be paid to the Antitrust Division of the Department of Justice or the New York State Attorney General's Office.

Judge Gleeson's fee award opinion in the *Interchange* settlement (pp. 240-256) presents another perspective on class counsel fees. Judge Gleeson's opinion deals with the interesting question of whether attorneys' fees should be awarded on a sliding scale, with lower percentage awards given for higher common fund recoveries, and is likely to be influential in further cases.

Class counsel often try to settle with one defendant relatively early in the case and then try to convince the court to approve a partial reimbursement of litigation expenses to help finance the continuing litigation. *Korean Ramen* is a good example (pp. 258-59).

We will end the unit with a discussion of the appointment of class counsel. A typical class action begins with multiple complaints essentially alleging much the same antitrust violation and purporting to represent much the same class (although there are often separate classes for direct and indirect purchasers). As we saw at the end of Unit 4, when these actions are filed in the same district, they can be consolidated for all purposes, including trial, under Rule 42(a); when the cases are filed in multiple district around the country, they can be consolidated for pretrial purposes, including class certification, in a single federal court before the same judge under 28 U.S.C. § 1407. Once the cases are consolidated, the next step in the process is to get some organization into them. Under Rule 23(g)(3), the court may appoint one or sometimes more attorneys as interim class counsel to act on behalf of the putative class—which may be somewhat undefined given differences in the class definitions in the various complaints—during the litigation proceedings (usually including discovery) up to the time when the court decides whether to certify the action as a class action. If the class is certified, interim class counsel (at least in antitrust cases) is almost always appointed to continue as class counsel. From the plaintiff-attorneys' economic perspective, the appointment of interim class counsel becomes critical, since that counsel will be able to allocate the distribution of work among the involved plaintiff-attorneys and hence determine how they will share in any award of attorneys' fees. Read the materials on the appointment of interim class counsel in the *Parking Heaters* case (pp. 291-301) as well as the note on magistrate judges (pp. 302-03).[5]

[5] If you want to read a very interesting class on conflicts in class actions, look at the *Rodriguez* case (pp. 261-89). There is already more than enough reading for this week, so I am not assigning it as required reading.

See you Tuesday.

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.

P.P.S. As I mentioned in the last class, it is time for another lunch. If we can get a group of critical mass together, we could do lunch either next Wednesday, Thursday, or Friday. Please let me know if you are interested.