ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LW.11043.001
NYU School of Law
Spring 2019

Mondays, 4:10-6:00 pm
FH 318
Dale Collins
dale.collins@shearman.com
www.appliedantitrust.com

Week 6: The Private Cause of Action (Unit 4)

This week we will continue our examination of the private cause of action.

Constitutional and prudential standing limitations. Paragraphs 8-10 identify the parties in this litigation. We are going to use these paragraphs as the point of departure for discussing constitutional and prudential standing limitations.

The "case or controversy" requirement of Article III of the Constitution should be familiar to most of you. This is the source of the constitutional standing requirement.

Prudential standing is a judicial construct that limits the domain of persons that are entitled to invoke a private cause of action to those who Congress intended to protect. In antitrust law, this is commonly called "antitrust standing," and it includes the requirement that a plaintiff sustain "antitrust injury" (or be at least threatened with antitrust injury in an injunctive action) and be a "proper party" to bring the action. It also precludes indirect purchasers from bringing treble damage cases, although there are a few, rarely invoked exceptions. I suspect that you at least touched upon prudential standing (although you may not have used that term) as it is applied to antitrust causes of action in the survey course. If so, this will all be old news. If not, it is important to know.

The introduction in the required reading (pp. 73-84) will give you the basics on both constitutional and prudential standing limitations. The propositions that come out of the cases are important, so pay attention to the chart on page 84 in the reading and slides 41-47 in the class notes. The seminal cases themselves are complicated and confusing, so you only need to skim the summaries in the required reading (pp. 85-100 and 111-116). Read with somewhat more care *Salveson* (pp. 101-110) and *Plasma-Derivative Protein Therapies* (pp. 117-124), two recent cases that should help clarify the application of prudential standing in practice.

Trade and commerce. Paragraph 11 of the *Boyle* complaint alleges, among other things, that the business activities of the conspirators substantially affected interstate trade and commerce. We touched upon this earlier when we discussed subject matter jurisdiction. The federal power to regulate anticompetitive activity comes from the Commerce Clause of the U.S. Constitution. As a result, the restrictions that the Sherman Act reaches must involve trade or commerce. While once this was a severe limitation on the reach of the Sherman Act, under current Supreme Court jurisprudence almost all commercial activity is subject to federal regulation.

Class action allegations. Paragraphs 12 through 19 of the *Boyle* complaint contains allegations to predicate bringing the complaint as a representative or class action. You can skip this section for now. We will examine class actions in some detail in Weeks 8 and 9.

Violations alleged and effects. Paragraphs 20 through 25 of the *Boyle* complaint are straightforward and we are not going to spend any time on them. Here is a question for you to consider: If the essence of a Section 1 is the conspiracy (the agreement) and not the acts in furtherance of it, why did Boyle include Paragraph 22?

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 48-59), 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. 126-146) for Clayton Act § 5(a) and two opinions applying the doctrines in the *Microsoft* case.

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 60-66 should give you a good summary of the area and the required reading contains the statute and a quick application (pp. 148-156).

Jury trials, verdicts, and judgments. Read the materials (pp. 161-167) and the slides (67-68). We probably are not going to discuss these topics in class for lack of time.

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

Dale

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