

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 318
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Week 8: The Private Cause of Action (Unit 4 con't)/Antitrust Class Actions (Unit 5)

The Private Cause of Action

We will begin by quickly finishing Unit 4. I believe that we have attorneys' fees, consolidation/transfer of venue/multidistrict litigation, and multidistrict litigation remaining. Hopefully, all you will need to refresh your memory is a review of the Week 7 reading guidance.

Antitrust class actions

Antitrust class actions, along with DOJ criminal enforcement actions and DOJ/FTC merger review, are the most important proceedings in American antitrust law

We will start the unit with a discussion of the public policy behind class actions generally and antitrust class actions in particular. Class actions, which are a form of representative litigation, allow plaintiffs to sue on behalf of other similarly situated persons. The typical antitrust class action plaintiff is a direct purchaser suing alleged horizontal price-fixing conspirators on behalf of itself and other direct purchasers. One of the central motivating forces behind the class action is that it allows potential plaintiffs whose claims are individually too small to justify the expense of litigation to aggregate those claims into a single action and make the litigation economically feasible. I would start with the introduction to class actions in the reading materials (pp. 4-9) and then read the associated class notes (slides 3-9).

Next, I would read the Rule 23 of the Federal Rules of Civil Procedure (pp. 11-14). Rule 23 generally governs the conduct of class actions. While class actions were included in the original 1938 Federal Rules, they were poorly written and the technicalities of the rule all but eliminated it from practice (so don't expect to see antitrust class actions under the 1938 rule.) The rule was completely rewritten in 1966 with the purpose of making class actions a readily available instrument, especially in antitrust and civil rights cases (slides 10-12).

To be a class action, the class must be *certified* as such by the federal district court. Rule 23 imposes two explicit requirements on every federal class action:

1. The class must satisfy the four requirements of Rule 23(a):
 - a. Numerosity
 - b. Commonality
 - c. Typicality
 - d. Adequacy of representation
2. The class must fit into one of the three Rule 23(b) categories:
 - a. Rule 23(b)(1) class
 - i. Inconsistent adjudications establishing incompatible standards, or
 - ii. Adjudications that would be dispositive of the interests of similarly situated persons
 - b. Rule 23(b)(2) class for injunctive relief
 - c. Rule 23(b)(3) class for damages

All antitrust treble damages class actions (with or without a prayer for injunctive relief) have to fit into the Rule 23(b)(3) category, although purely injunctive relief actions can be Rule 23(b)(2) class actions.

In addition, many circuits impose a requirement of *ascertainability*, that is, the class must be defined with sufficiently precision so that an entity's inclusion or exclusion can be determined by reference to *objective criteria* using reasonable effort.

The Federal Rules of Civil Procedure were promulgated by the Supreme Court pursuant to the Rules Enabling Act. The Rules Enabling Act provides, among other things, that the rules promulgated under the act will not “not abridge, enlarge or modify any substantive right.” This restriction can play an important role in class actions, as it did in *Wal-Mart Stores, Inc. v. Dukes*. You should read the Rules Enabling Act and the accompanying notes (pp. 15-17).

Now go back and reread Rules 23(a) and the accompanying slides (slides 12-32). We will discuss the requirements a case must satisfy in order to be certified as a class action in the context of the *Processed Egg Products* litigation (pp. 19-79). I suspect that we will make it through only the Rule 23(a) requirements for class certification, so it will be sufficient if you read through page 13 of the opinion (p. 31 of the reading materials).

We will pick up in Week 9 with the rule 23(b) requirements.

Enjoy the rest of the break.

Dale