ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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Georgetown University Law Center
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Tuesdays, 5:45 pm - 7:45 pm
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Week 8: Antitrust Class Actions (Unit 5)

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).

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 23(b), which regulate what types of actions may be pursued as class actions. Rule 23(a) contains four requirements—numerosity, commonality, typicality, and adequacy of representation—each of which must be satisfied in every federal class action (slides 12-32). Rule 23(b) describes three types of class actions, and every federal class action must fit into one of these three categories (slides 33-51). 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.

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). This recent case reflects the modern antitrust class action caselaw, including the Supreme Court's *Comcast* case.[1] I suggest that you do an outline of each of the requirements for a class action and how the shell egg subclass satisfied them and

[1] Comcast Corp. v. Behrend, No. 11-864 (U.S. Mar. 27, 2012). If you have not read this case for another course, you should read it. You can find it in the Unit 5 supplemental materials. The rule of the case is simple (even if disputed by the minority): If the plaintiff relies solely on an expert economist to prove impact and damages, the expert's model depends on multiple theories of anticompetitive harm, the model produces a single result for impact and damages and does not identify the impact and damages resulting from each theory of harm separately, and the court rejects one or more of the underlying theories of anticompetitive harm as relevant to the case (whether because of substantive problems or because the theories are not amendable to class action treatment), then the expert's model cannot be used to support class certification because of the inability of the model to remove the effects of the rejected theories. The idea is that the economist's model has to fit the theory of the case and not count as an anticompetitive effect the influence of the defendant's conduct that is not in issue as an antitrust violation.

why the egg products subclass failed. This is an excellent opinion and worth careful study. We will spend most of the class and much of the next class on this opinion.

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 55-80), 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 81-82).

Enjoy the rest of the break. See you Tuesday.

Dale