ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LAW 1396
Georgetown University Law Center
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Week 10 (old Week 9): Antitrust Class Actions (Unit 4)

This week, we will continue our discussion of antitrust class actions, beginning with the requirements of Rule 23(b). 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 (a) create a risk of inconsistent adjudications that would impose incompatible requirements on the defendants or (b) be dispositive of the interests of class members in subsequent litigations or substantially impair their interests. These are rarely used in antitrust actions.
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. These occur in antitrust actions, often in cases challenging an organization's membership rules, but damages are not recoverable in Rule 23(b)(3) class 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 the features of consumer antitrust treble damage actions.

We will focus primarily 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) the class action must be superior to other means of adjudicating the controversy ("superiority"). In antitrust cases, it is rare for courts to deny class certification to a putative class for failing to satisfy the superiority requirement when the class satisfies the predominance requirement. *Bottom line*: Since it is relatively easy for a putative antitrust damages class action to satisfy the Rule 23(a) requirements and if predominance under Rule 23(b)(3) is found, courts rarely, if ever, deny certification for lack of superiority. Consequently, essentially all of the action in antitrust damages class actions is in whether predominance exists.

As we discussed last week in connection with the Rule 23(a) commonality requirement, a "common question" is an issue that can be resolved using *class-wide 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, the defendants' defenses). In antitrust class actions, 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 class-wide proof since whether the defendants violated the law depends on what the defendants did and not the characteristics or conduct of the individual putative class members.[1] On the other hand, courts historically have not denied Rule 23(b)(3) for lack of predominance on the amount of damages where the class has shown that the violation and impact may be proved through class-wide proof. Hence, in antitrust cases, most, if not all, of the action in the Rule 23(b)(3) class certification inquiry is whether impact is provable through class-wide proof. In practice, however, the plaintiffs usually also try to show

[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, the defendants violated the antitrust laws—and they may not have—the fact of the violation could be proved using class-wide proof.

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. Some courts, however, at least in the Third Circuit, have found predominance on damages when the plaintiffs show that they can prove aggregate damages (i.e., total damages caused by the violation) without any showing of how they will prove damages sustained by each individual class member.[2] Instead, these courts leave the allocation of individual damages to a post-trial court-approved plan of allocation among class members.

With this background, read the class notes on the Rule 23(b)(3) requirements (slides 54-92). Then, with some care, read the court's Rule 23(b)(3) analysis in the *Processed Egg Products* litigation (pp. 46-94). This opinion illustrates the types of evidence used in Rule 23(b)(3) class actions in the class certification proceeding.

Next, read the class notes on the Class Action Fairness Act (CAFA) (slides 93-95). We will not discuss CAFA in class, but you should know that it exists.

In *Wal-Mart*, the Supreme Court emphasized that courts can only certify class actions on a *record*, that is, there must be a factual basis for the court to find that the four requirements of Rule 23(a) are satisfied and that the class falls into one of the three Rule 23(b) categories.[3] This requirement raises two important questions: (1) Must the district court consider only admissible evidence in deciding whether to certify a class (slides 96-100)? (2) What are the depth of analysis and the quantum of proof required for the court to make a factual finding for class certification purposes (slides 101-10)?

As typical in antitrust cases, the class in *Processed Egg Products* relied heavily on their testifying economist to show that impact and damages can be proved at trial through a class-wide method of proof. This case reflects the modern antitrust class action case law, including the Supreme Court's *Comcast* decision.[4] Read the class notes on expert testimony in class certification (slides 111-32), and then read with some care the note in the reading materials on the use of expert evidence at trial (pp. 97-105) and at least skim the opinion on the motion to strike expert evidence in the *Lithium Ion Batteries* class action (pp. 106-37).

As you read the *Process Egg Products* Rule 23(b) analysis, you may find it helpful to outline why the shell egg subclass satisfied the Rule 23(b)(3) requirements and the egg products subclass did not.

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. In these cases, 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 adequate 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 (see slides 133-35).[5] A Rule 23(b)(3) class action allows a court to adjudicate common questions of law or facts even where the class members' claims 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

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[2] *See, e.g.*, *In re* Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, 271-72 (3d Cir. 2020); *In re* Modafinil Antitrust Litig., 837 F.3d 238, 262 (3d Cir. 2016).

[3] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

[4] Comcast Corp. v. Behrend, 569 U.S. 27 (2012). If you have not read this case for another course, you should read it now. You can find it in the Unit 4 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.

[5] *See* Rule 23(c)(2) (notice requirements).

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."[6] 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. 139-41). Also, to further ensure that class counsel is providing adequate notice to class members in a certified class, class counsel often retains a commercial class action administrator to maintain a website. The *Blood Reagents* website is a good example (pp. 142-48). Read the materials on notice carefully—chances are we will not have much time to discuss class notice in class.

Finally, take a look at slides 136-47. Those cover the special problem of constitutional standing, the class certification order, the appointment of class counsel, and appeals of orders granting or denying class certification.

See you Tuesday.

P.S. Do not forget that unless you receive an extension, your first complete draft of your paper is due Wednesday, April 2. The final version of the paper is due Tuesday, May 5.

[6] *Id*. Rule 23(c)(2)(B).