ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LAWJ/G-1396-07
Georgetown University Law Center
Spring 2025

Tuesdays, 3:30 pm - 5:30 pm
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Week 12: Conspiracy and Dispositive Motions (Unit 6)

Unit 6 addresses dispositive motions in the context of the element of conspiracy in a Section 1 case. Recall that every Section 1 violation requires:

(1) *plurality*, that is, the legal capacity of two or more companies to agree or conspire within the meaning of Section 1;
(2) an *agreement* between these companies;
(3) the *object* of the agreement must be a *restraint of trade*; and
(4) the restraint of trade must be *unreasonable* within the meaning of Section 1.

We will be focusing on the second element: agreement. The introduction in the reading materials (pp. 5-10) and the class notes (slides 3-8, 15-20) will refresh your recollection. Look at Slides 21-28 for some important ideas about types of evidence (direct and circumstantial), inferences from circumstantial evidence (permissible and impermissible), and the *Monsanto/Matsushita* rule, which is fundamental in the law of antitrust conspiracies. Slides 29-30 introduce dispositive motions—motions to dismiss, summary judgment motions, and motions for judgment as a matter of law—and where they fit in the flow of litigation.

Motions to dismiss are governed by Rule 12(b)(6), which provides for dismissal of the action for "failure to state a cause of action for which relief may be granted." Motions to dismiss test the legal sufficiency of the complaint, that is, they test whether, looking only at the complaint and assuming that all of the (nonconclusory) factual allegations are true, the plaintiff is entitled to proceed to the next step in the litigation process, which is usually discovery. Read Rule 12(b) carefully (and skim over the rest of Rule 12) (pp. 12-14).

Until the Supreme Court's decisions in *Twombly* in 2007 and *Iqbal* in 2009, courts only rarely granted a defendant's motion to dismiss in antitrust cases generally and on the element of conspiracy in particular. As a result, plaintiffs almost always could proceed to discovery. The cost, burden, and length of discovery provided many defendants an incentive to settle even before they had the opportunity to dismiss the case on a motion of summary judgment or defeat class certification. *Twombly* and *Iqbal* made a motion to dismiss a meaningful hurdle for a plaintiff by requiring that the complaint contain enough factual (empirical) allegations to make the claim "plausible" and so justify imposing the burdens of discovery on the defendants. The class notes summarize Rule 12(b)(6), the test for deciding a motion to dismiss, and *Twombly* and *Iqbal*, and provide some applications (slides 31-48).

Next, look at the excerpts from the cases on motions to dismiss (pp. 19-21). I have not included *Twombly* in the required reading, but if you have not already read it for another class, I encourage you to read it now. *Twombly* is one of the most important cases in recent antitrust law and more generally in the law of civil procedure, and you should at least have read it once before you leave law school. You can find a copy in the supplemental materials in Unit 6 on AppliedAntitrust.com.[1] If we had more time, I also would have assigned a case study, *In re*

[1] The supplemental materials also contain a link to the Oyez site with the oral argument in *Twombly*. It is well worth the investment of an hour to listen to it.

Domestic Airline Travel Antitrust Litigation, which has a good discussion of the law and can be found on the Unit 5 web page. The note on motions to dismiss (pp. 22-32) provides more detail, but you only need to skim it because the most important points are in the class notes and the case excerpts.

Next, we will turn to Rule 56 and summary judgment motions. Rule 56 motions test whether there are genuine issues of material fact for the trier of fact to decide at trial. A *material fact* is a fact that can make a difference in the outcome of the case, while a *genuine issue* exists if there is sufficient evidence on both sides so that the trier of fact (think the jury, although, in a bench trial, it will be the judge) will have to make a decision on which side of the issue will prevail. If there is no genuine issue of material fact for the trier of fact to decide, the court can render a judgment by simply applying the law to the undisputed facts. Either plaintiffs or defendants may bring motions for summary judgment, and in a typical antitrust case, both will file motions. Although little discussed, motions for summary judgment also serve as a vehicle to cause the opposing party to reveal much of its case's legal structure and supporting evidence. When a plaintiff, for example, is confronted with a motion for summary judgment by the defendant, the plaintiff usually will respond with a brief providing a detailed description of its legal theory as well as the evidence to support it. This serves a good public policy purpose since the judge's opinion on the summary judgment motion is likely to clarify what exactly is in dispute and how the case may ultimately turn out if it goes to trial, which in turn can propel the parties into a pretrial settlement.[2] Read FRCP 56 and Local Rule 56.1 carefully (pp. 14-17) and look at the class notes (slides 49-57). Also, read the excerpts of the cases and skim the note on summary judgment motions (pp. 34-50).

I wish I could find a nice, short case in which to see the rules of proving conspiracy in action in the context of a motion for summary judgment (not that you need more to read). But the opinions in those cases tend to be lengthy—the court has to examine the evidence resulting from discovery to determine whether there is a genuine issue of fact on conspiracy. I am still looking, so there is no case to read on summary judgment.

Motions to dismiss and motions for summary judgment are known as *dispositive motions*.[3] But the mere granting of the motion does *not* mean that the case is over in the district court. Instead, courts have held that Rule 54 of the Federal Rules of Civil Procedure requires that the court enter a *judgment* to end the case and give the losing party a right to appeal as a matter of law (pp. 52-53).

Courts do not always enter a judgment after granting a motion to dismiss. Typically, a motion to dismiss will be granted *without prejudice* and *with leave to amend* (at least the first time) so that the plaintiff will have the opportunity to file an amended complaint that cures the deficiencies in the original complaint and allows the case to continue. In both motions to dismiss and summary judgment, courts may *grant in part and deny in part* the motion so that some claims are dismissed and other claims are allowed to proceed. Similarly, when multiple parties are involved, the court may grant the motion to dismiss or for summary judgment only with respect to some but not all of the parties. In the *CRT litigation*, for example, the court granted the defendants' motion for summary judgment against plaintiff MARTA for lack of standing, but the case proceeded with the other plaintiffs. But remember, the grant of a motion for summary

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[2] As a general rule, the less uncertainty in the outcome of the trial the greater the likelihood of a settlement. After all, trials are expensive for both sides, and when both parties have a similar view as to the outcome of the trial, they might as well settle and save the costs of trial. Conversely, trials are more likely when the parties have significantly different views on what the outcome of the trial likely will be.

[3] To be clear, summary judgment also may be granted against a defendant, in which case the defendant could not proceed with its defense.

judgment dismissing the case is *not* a final judgment and hence does not make an appeal by the losing party immediately ripe. To enable it to appeal, MARTA moved for the immediate entry of judgment against it under Rule 54(b), which the court granted. The order granting MARTA's motion for Rule 54(b) certification is short and instructive on the standard and is worth a careful read (pp. 54-58).

The unaccepted invitations to collude section is just fun. I always enjoy reading the DOJ *American Airlines* complaint (pp. 60-70), and the FTC *Alifraghis* complaint (pp. 71-80) is an eye-opener on what some people will do. If you are interested in what happened in these cases, you can find the materials in Unit 5 on Applied Antitrust.com. The *American Airlines* case is an outlier since the facts allowed the DOJ to make out a Section 2 attempted monopolization case. Almost all unaccepted invitations to collude fall outside Section 1 (no agreement) and Section 2 (no monopolization or attempted monopolization), so the FTC has gone after them as violations of Section 5.

Finally, read the slides on appeals (slides 64-73). They are short but very important.

See you in class on Tuesday.

P.S. Do not forget that absent an extension, the final draft of your paper is due Monday, May 5.