ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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

After finishing anything remaining on private actions, we will turn to antitrust class actions. Antitrust class actions, along with DOJ criminal enforcement actions and DOJ/FTC merger reviews, 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 without joining them as parties to the litigation. The typical antitrust class action plaintiff is a direct purchaser suing alleged horizontal price-fixing conspirators on its own behalf and on behalf of 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, making the litigation economically feasible.

The court must certify that a putative class action satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure before it can proceed as a class action. Once certified, absent members of the class will be bound by any judgment of the court as if they had litigated the case as parties. In Rule 23(b)(3) class actions, which include all antitrust treble damages actions, class members must be given notice of the action and an opportunity to opt out and thereby avoid being bound by any judgment.

I would start with the introduction to class actions in the reading materials (pp. 4-10) and then read the associated class notes (slides 3-9). Next, I would read Rule 23 of the Federal Rules of Civil Procedure (pp. 12-15). Rule 23 generally governs the conduct of class actions in federal courts. While the original 1938 Federal Rules included class actions, the provisions 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 entirely rewritten in 1966 to make class actions a readily available instrument, especially in antitrust and civil rights cases (slides 10-11).

The Federal Rules of Civil Procedure were promulgated by the Supreme Court pursuant to the Rules Enabling Act.[1] The Rules Enabling Act provides, among other things, that the rules promulgated under the act will "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*.[2] You should read the Rules Enabling Act and the accompanying notes (pp. 16-18).

Precertification practice. A typical class action begins with multiple complaints that essentially allege the same antitrust violation and purport to represent much the same class (although there are often separate classes for direct and indirect purchasers). As we saw at the end of Unit 3, when these actions are filed in the same district, they can be consolidated for all purposes, including trial, under Rule 42(a); when the cases are filed in multiple districts around the country, they can be consolidated for pretrial purposes, including class certification, in a single federal court before the same judge under 28 U.S.C. § 1407. Once the cases are consolidated, the next step is to get some organization into them. Under Rule 23(g)(3), the

[1] 28 U.S.C. § 2072.

[2] 564 U.S. 338 (2011). In *Dukes*, the Supreme Court relied on the Rules Enabling Act to hold that Rule 23 cannot be interpreted or applied in a way that effectively abridges, enlarges, or modifies a party's substantive rights under the underlying cause of action.

court may appoint one or sometimes more attorneys as interim class counsel to act on behalf of the putative class—which may be somewhat undefined given differences in the class definitions in the various complaints—during the litigation proceedings (usually including discovery) up to the time when the court decides whether to certify the action as a class action.

From the plaintiff attorneys' economic perspective, the appointment of interim class counsel is critical, as that counsel will allocate work among the involved plaintiff attorneys during the precertification period and thereby determine how they will share in any award of attorneys' fees for work done during that period. In antitrust cases, the class certification proceeding is often put off until the end of discovery, and if the class is certified, the case is likely to settle before trial. Hence, much of the work in an antitrust class action will likely occur in the precertification period. Moreover, if the class is certified, interim class counsel (at least in antitrust cases) is almost always appointed to continue as class counsel, so they can continue to allocate assignments in the post-certification period as well as on appeal.

Read the class notes on initiating a class action (slides 12-14), the materials on the appointment of interim class counsel in the *Parking Heaters* case (pp. 20-30), and the note on magistrate judges (pp. 31-32).[3]

Class certification. Now 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 15-54):

1. *Numerosity*: Requires that the class must be so numerous that joinder of all members is impracticable.
2. *Commonality*: Requires that there be one or more "questions of law or fact common to the class."
3. *Typicality*: Requires that the claims or defenses of the representative parties must be typical of the claims or defenses of the class.
4. *Adequacy of representation*: Requires that the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b), which we will discuss in Class 10, describes three types of class actions, and every federal class action must fit into one of these three categories. All antitrust treble damages class actions (with or without a prayer for injunctive relief) have to fit into the Rule 23(b)(3) category. Purely injunctive relief actions, however, are brought as Rule 23(b)(2) class actions. Rule 23(b)(1) is rarely invoked in antitrust class actions.

For the remainder of the class, we will discuss the four Rule 23(a) requirements that every federal class action must satisfy. The class notes survey the Rule 23(a) requirements in reasonable detail (slides 15-54). We will see how these requirements apply in the *Processed Egg Products* litigation (pp. 34-95, although for this class, you only need to read pp. 34-46). This case reflects the modern antitrust class action case law, including the Supreme Court's *Comcast* decision.[4] I suggest you outline the case with respect to each of the Rule 23(a) requirements. Make sure you understand how the shell egg subclass and the egg

[3] If you want to read a fascinating case on conflicts in class actions, look at the *Rodriguez* case (pp. 261-89). There is already more than enough reading for this week, so I am not assigning it as required reading.

[4] Comcast Corp. v. Behrend, 569 U.S. 27 (2013). *Comcast* established that at the class certification stage, as at trial, any damages model a plaintiff proffers must be consistent with its liability theory, and in particular must measure damages flowing from the specific anticompetitive conduct alleged and not from other potentially price-increasing sources. In *Comcast*, the plaintiffs presented four distinct theories of impact (antitrust injury/proximate cause) but aggregated the effects of those theories in a single damages model. The district court certified the class action, and the Third Circuit affirmed, even though the district court rejected three of the plaintiffs' theories as unsuitable for class action treatment. Because the plaintiffs' damages model did not isolate the harm attributable to the only surviving theory of liability that could be presented at trial, the Supreme Court reversed certification. *Comcast* has become one of the most frequently litigated issues in antitrust class certification proceedings, and you should keep it in mind as you read *Processed Egg Products*.

products subclass satisfied (or not satisfied) each of these requirements. *Processed Egg Products* is an excellent opinion and worth careful study. We will spend most of the class and much of the next class on this opinion.

Enjoy the reading. As always, send me an email if you have any questions.

P.S. Do not forget that your first complete draft of your paper is due Wednesday, April 1. Final versions of the paper are due Tuesday, May 5.