ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LAW 1396
Georgetown University Law Center
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Week 11: Antitrust Class Actions (Unit 4)

This week, we will finish the unit on class actions.

Expert testimony. As is 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.[1] Read the class notes on expert testimony in class certification (slides 119-40), 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).

Notice and opt-out. 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 141-43).[2] A Rule 23(b)(3) class action allows a court to adjudicate common questions of law or fact 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 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."[3] 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.

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[1] 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 amenable 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.

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

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

Other topics. Take a look at slides 144-55. 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.

Class action settlements. First, we will examine class action settlements. Read the slides on settlements (slides 156-66) and look at the *NYC Bus Tour* antitrust litigation settlement agreement (pp. 150-83). Here are some of the significant provisions of the settlement agreement with which you should be familiar:

1. The defendants do not admit that they are liable for any claims and deny any wrongdoing (pp. 151, 152)
2. The definition of the settlement class is a matter of negotiation for the parties (see pp. 153-54)[4]
3. The defendant agreed to pay $19 million to the class (p. 152)
4. The payment was made for the release of claims asserted by the class against them (p. 152)
5. Class counsel has concluded that it is in the "best interests of the class" to enter into the settlement (p. 152)
6. The "Released Claims" include not only the claims asserted in the complaint but also any claims that could have been asserted against the defendants "that that arise out of, are based upon or are related to the allegations, transactions, facts (including allegations of anticompetitive conduct with respect to any acquisition of Defendants' hop-on, hop-off bus tours by Class Members during the Class Period), matters or occurrences, representations or omissions involved, set forth, or referred to in the First Amended Consolidated Class Action Complaint in the Action" (p. 157)
7. The settlement agreement provides for the parties to stipulate to the certification of a settlement class (p. 159), the creation of a settlement fund by the defendants (p. 162), and a plan of distribution of the settlement fund (p. 168)
8. A settlement agreement is just that: a *contract* between the parties. The defendant's payment and the release by the class are subject to conditions precedent (pp. 161, 176). Either the defendant or the class plaintiffs may terminate the agreement if the court rejects either the terms of the settlement or the distribution plan set forth in the settlement agreement (p. 173)
9. The parties to the settlement agreement agree to submit to the exclusive jurisdiction of the United States District Court for the Southern District of New York (the forum for the class action litigation) for any action arising out of the settlement agreement (p. 176).

In settlements, the benefit to the defendants comes from the releases. As we will see, a release in a settlement can cover not only the actual claims in the case to be settled but also any unasserted claims arising from the same course of the defendants' conduct. In addition to reading the language of the release (p. 157), be sure to pay special attention to the slides on releases (slides 165-66).

After finishing our discussion of the remaining major provisions of a settlement agreement, we will examine the steps necessary to obtain court approval of the agreement. The court must approve settlement agreements in class actions under a "fair, reasonable, and adequate" standard from the perspective of absent class members (FRCP 23(e)(2)). As a matter of practice, the burden of justifying the settlement to the court falls on class counsel since the settlement almost always will be for much less relief than the class originally sought in the litigation.[5]

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[4] Settlement classes arise in class actions where the class has not been certified by the court prior to the settlement. To bind the absent putative class members to the judgment, the class needs to be certified. The settling parties agree as part of the settlement negotiation to a class definition that they will propose to the court.

[5] Typically, the most explicit statement by the plaintiffs of the amount of damages sustained by the class will be in a declaration by an economic expert in support of class certification addressing the class-wide proof impact and damages. In *NYC*

The first step in this process is the plaintiffs' motion for preliminary approval of the settlement. Preliminary court approval of a settlement agreement triggers notice to the class, which can be expensive. In considering preliminary approval, the court will examine both the negotiating process for the settlement (procedural fairness) and the settlement's substantive terms (substantive fairness). The Plaintiffs' Motion for Preliminary Approval of Settlement with Defendants (pp. 184-86) and accompanying memorandum in support (pp. 187-218) are worthwhile reads for understanding the legal standard governing preliminary approval and for seeing how the plaintiffs make a case for both procedural and substantive fairness. In their memorandum in support, the plaintiffs must also provide a basis for the court to certify the settlement class. Settlements in class actions are often facilitated by mediators, who have the added benefit—as we see in *NYC Bus Tour*—that they can submit a declaration on procedural fairness in support of preliminary approval (pp. 219-21). While some orders preliminarily approving the class action settlement engage in some reasoned analysis, many are largely boilerplate, like the one in *NYC Bus Tour* (pp. 222-27).

Preliminary approval triggers notice to the class and invites interested class members, if they like, to submit written comments and objections to the proposed settlement or appear at a *fairness hearing* in court on the motion for final approval.[6] If there are objections and the court nonetheless approves the settlement (perhaps with modifications offered by the parties to meet the objections), the court's opinion on the final settlement is likely to address the objections. Otherwise, as appears to be the case in *NYC Bus Tour*, the opinion/order is likely to be short and summary (pp. 228-36).[7] At the same time, the court gave final approval to the settlement in *NYC Bus Tour* and also approved the plan for distributing the settlement funds to class members (pp. 237-39).

In most, if not all, circuits, any objecting absent class member has a right as a matter of law to appeal the entry of a settlement over its objections without the need to formally intervene in the case. There were no objectors in *NYC Bus Tour*, and the court's order finally approving the settlement was not appealed.

Compensating class counsel. Next, we will discuss how class counsel are compensated. If the case goes to trial and the class prevails, the defendants will have to pay reasonable attorneys' fees under the fee-shifting provisions of Sections 4 and 16 of the Clayton Act that we considered in Unit 3. But trials on the merits in antitrust class actions are rare. Most antitrust class actions settle, so that the fee-shifting provisions do not apply (since there is no "prevailing plaintiff" within the meaning of the statute). Instead, class counsel in settlements are compensated under the equitable *common fund doctrine* (slides 167-84). The method for awarding attorneys' fees under the common fund doctrine in settlement cases differs from the method under the Clayton Act's fee-shifting provisions in adjudicated cases. As we will discuss in class, this difference may increase class counsel's incentives to settle antitrust class actions.

What do you think of Judge Carter's order in *NYC Tour Bus* (pp. 297-98)? The class obtained a common fund of $19 million, and the court awarded one-third ($6,333,333) in attorneys' fees, which is fairly typical when the settlement fund is under $100 million. Class counsel claimed a lodestar of $1,873,699 in fees (reasonable number of hours billed multiplied by a reasonable billing rate) or about 10% of the common fund, so the award reflects a multiplier of 3.3x the lodestar. The court also reimbursed counsel for the costs and expenses incurred in the litigation of $863,629, and for notice and administrative costs incurred to date of $1,069,158 (with perhaps more to come), out of the common fund. This left only 53% of the common fund to be distributed to the class. On the other hand, only a fraction of the class

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Bus Tour, for example, the plaintiffs' economic expert estimated actual damages for the class of $29 million, which would be $87 million when trebled, yet the plaintiffs negotiated a settlement that provided a settlement fund of only $19 million.

[6] In a settlement class, class members in Rule 23(b)(3) classes will also be given the opportunity to opt out of the class. In cases where the settlement is negotiated after the class has been certified (so that the class members already had been given the right to opt out), the court has discretion whether to provide an additional opt-out opportunity or simply bind all class members that did not opt out the first time to the settlement judgment.

[7] If you are interested, the transcript of the fairness hearing in *NYC Bus Tour* is in the Unit 4 supplemental materials. It is only 17 pages long and worth a read.

submitted claims, totaling $4,846,660 at $20 per ticket. This left $6 million in the common fund after deducting all awards, counsel fees, and expenses. According to the settlement agreement, the residual would not revert to the defendants but rather must be paid to the Antitrust Division of the Department of Justice or the New York State Attorney General's Office. (Paying the unclaimed portion of an antitrust settlement fund to the state AGs is common.)

Judge Gleeson's fee award opinion in the *Interchange* settlement (pp. 299-315) presents another perspective on class counsel fees. Judge Gleeson's opinion deals with the interesting question of whether attorneys' fees should be awarded on a sliding scale, with lower percentage awards given for higher common fund recoveries. It is likely to be influential in future cases.

Class counsel often try to settle with one defendant relatively early in the case and then seek the court's approval for partial reimbursement of litigation expenses to help finance the continuing litigation. *Korean Ramen* is a good example (pp. 317-18).

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 1. Final versions of the paper are due Tuesday, May 5.

P.P.S. You may have noticed that I did not include the materials on class counsel conflicts of interest, which appear in the reading materials (pp. 320-62). You have enough to read, but if you have the time, the conflicts in *Rodriguez v. Disner* are fascinating, and the court's opinion is well worth reading. Also, the Second Circuit's *Interchange* opinion is a very worthwhile read. The conflict there was obvious from the beginning of the case, although it was not raised until an objector came forward during the fairness hearing on the multibillion-dollar settlement.