

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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Georgetown University Law Center
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Tuesdays, 5:30 pm - 7:30 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 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. 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 Rule 23 of the Federal Rules of Civil Procedure (pp. 11-14). 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*. 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 12-35)

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 9, 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, although purely injunctive relief actions are brought as Rule 23(b)(2) class actions. Rule 23(b)(1) is rarely invoked in antitrust class actions.

¹ 28 U.S.C. § 2072.

For the remainder of the class we will discuss the four Rule 23(a) requirements every federal class action must satisfy in the context of the *Processed Egg Products* litigation (pp. 19-79, although for this class you only need to read pp. 19-31). This case reflects the modern antitrust class action case law, including the Supreme Court's *Comcast* case.² I suggest that you do an outline of each of the requirements for a class action. Make sure you understand how the shell egg subclass and the egg products subclass satisfied (or not satisfied) each of the four Rule 23(a) 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.

See you Tuesday.

P.S. Do not forget that your first complete draft of your paper is due Wednesday, April 7. Final versions of the paper are due Monday, May 17.

² *Comcast Corp. v. Behrend*, No. 11-864 (U.S. Mar. 27, 2012).