

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LAW 1396
Georgetown University Law Center
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Tuesdays, 3:30 pm - 5:30 pm
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Week 9 (old Week 8): Antitrust Class Actions (Unit 4)

After finishing attorneys' fees and changes of venue, 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 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 to make the litigation economically feasible.

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*. You should read the Rules Enabling Act and the accompanying notes (pp. 16-18).

Precertification practice. A typical class action begins with multiple complaints essentially alleging much the same antitrust violation and purporting 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 4, 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 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 since that counsel will allocate the distribution of work among the involved plaintiff-attorneys in the precertification period and hence determine how they will share in any award of attorneys' fees for work

¹ 28 U.S.C. § 2072.

done during this 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 allocate assignments in the post-certification period as well 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).²

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 15-51)

Numerosity: Requires that the class must be so numerous that joinder of all members is impracticable

Commonality: Requires that there be one or more “questions of law or fact common to the class”

Typicality: Requires that the claims or defenses of the representative parties must be typical of the claims or defenses of the class

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.

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 15-52). 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. 19-46). This case reflects the modern antitrust class action case law, including the Supreme Court’s *Comcast* case.³ 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 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.

I hope that you enjoyed the break. See you Tuesday.

P.S. Do not forget that your first complete draft of your paper is due Wednesday, April 2. Final versions of the paper are due Monday, May 5.

² 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.

³ *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).