

ANTITRUST CLASS ACTIONS: LESSONS FROM THE U.S.

Matthew L. Cantor
Constantine Cannon LLP
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mcantor@constantinecannon.com

POLICY QUESTIONS

- Is the class action bar in the U.S. an effective enforcer of the antitrust laws?
- Do the costs of meritless antitrust class action outweigh the benefits meritorious antitrust class actions?
- If there are benefits to class action antitrust litigation, how do we incent attorneys to bring meritorious claims?
- Does class action antitrust litigation deter entities from engaging in anticompetitive behavior?

ATTITUDES TOWARDS CLASS ACTIONS IN U.S.

- Cynicism, particularly expressed in the media
 - Attorneys get lavish fees for coupon settlements
 - Criminal prosecutors of Milberg Weiss firm for plaintiff kickbacks
- Legislative attempts to make class action success more difficult, particularly in securities cases
 - Motivated by well-financed corporate lobbying
- Certain U.S. judicial panels have aversion to class adjudications.

ATTITUDES TOWARDS CLASS ACTIONS IN U.S.

- Many judicial/legislative opinions show concern about antitrust class litigation.
 - Cost of defense, particularly discovery:
 - Seen in Supreme Court opinion in *Twombly v. Bell Atlantic*
 - Attorney fees regime incents meritless suits.
- Concerns mirror much of discussion in EC Green Paper on damages actions.

BENEFITS OF CLASS ACTIONS

- Increases deterrent effect of antitrust laws by the threat of collective, punitive damages.
- Supplement to limited U.S. governmental resources
- Also, complement to U.S. government Action: Federal and state governments in U.S. generally only seek injunctive relief
- Permits consumers to effectively seek redress when widespread anti-competitive conduct has harmed them

HOW DO U.S. ANTITRUST CLASS ACTIONS WORK?

- Class Motion
- Settlement/Trial
- Class Notice
- Administration of Award
- Class Counsel Fees

CLASS MOTION

Under Fed. R. Civ. P. 23(b)(3), plaintiffs must prove that the:

- Class has **numerous** participants;
- Class representatives and class counsel are **adequate**;
- Class representatives' claims are **typical** of class members;
- Class members share claims that are **common**;
- Common issues relevant to class member claims **predominate** over individual issues.

CLASS MOTION: DEMONSTRATING COMMON IMPACT

- Biggest hurdle on class motion: generally need testimony of economist expert to establish.
 - Generally means that must show some common overcharge based upon prices that would have prevailed in world absent alleged trade restraint
 - Very difficult to satisfy common impact on competitor claims for lost profits

CLASS MOTION: DEMONSTRATING COMMON IMPACT (cont'd)

- Evidentiary standard shift: making antitrust class litigation more difficult.
 - Older cases must make “some showing” that common injury can be shown, *i.e.*, plaintiff need only make *prima facie* case.
 - Newer case law (applicable only in certain courts): must prove “by preponderance of the evidence” at class stage that common injury can be proven, *i.e.*, plaintiff must show that his theory of common injury is right and that defendants’ arguments regarding individual nature of plaintiff issues is wrong.
- Much more fact-intensive review by court
- Multi-day hearings

CLASS SETTLEMENT

- Must prove that settlement is “fair, adequate and reasonable” under Fed. R. Civ. P. 23(e)
- Absent class members can object to settlement – generally court holds “fairness hearing”
- Court approval to protect absent class members

CLASS ADMINISTRATION

- Plaintiffs must provide notice to class members so they can “opt out” of litigation
 - Individual notice: by mail
 - Public notice: in newspapers, journal, etc.
- Work with administrator who will distribute claims forms and award checks.
 - Generally, settling defendants will need to provide data so class members can be located and so actual, individual amounts paid by class members can be determined

COMPENSATING CLASS COUNSEL

- Court-approved fees. Two methods used.
 - Percentage of award provided
 - Multiplier based on risk of litigation
- Court is given wide-latitude: No statutory benchmarks

HOT ANTITRUST CLASS ACTION ISSUES IN U.S.

- Degree of specificity in pleadings: recently grappled with by Supreme Court *Twombly*
- Scope of discovery: recent rules placed to curb burdens of producing e-documents. (Fed. R. Civ. P. 26)
- Evidentiary standard to be satisfied to satisfy class motion

MLC CONCLUSIONS

- A procedure for antitrust class actions can be beneficial
 - Consumer enforcement de-politicizes antitrust law
 - Creates forceful deterrent for antitrust law
- **But** only when appropriate standards/limits set
 - Allows those who should benefit from antitrust regime – consumers – to enforce law
 - Appropriate controls over scope of discovery must be exercised or litigation turns into “circus” and defendants can be coerced to settle meritless claims
- Intensive examination of class allegations need be completed before certification to ensure fairness to defendants and absent class members
- Substantial fees should be granted only when substantial benefit achieved by class attorneys