

“The Good and the Bad and Ugly In United States Antitrust Class Action Practice”

AN ADDRESS BY:

LLOYD CONSTANTINE, CHAIRMAN

CONSTANTINE CANNON P.C.

To

INTERNATIONAL BAR ASSOCIATION CONFERENCE

SHOWCASE PROGRAM

“Enforcement of EU Law and Competition Law by Private Parties”

PRAGUE, CZECH.

September 26, 2005

I am honored to address the International Bar Association and, in particular, lawyers practicing in the European Union – about trends and initiatives underway in Europe to expand the ability of private parties to enforce EU and member states’ competition law and to do so collectively, in class actions or their functional equivalent.

My role, as I understand it, is to explain United States’ class action practice. I assume that Europe wishes to emulate what is beneficial in the United States’ highly evolved class action procedures and avoid what has proven to be wasteful, inefficient and harmful.

I am supposed to be a member of the U.S. Plaintiff’s Antitrust Bar. However, I must disclaim that expertise. I am an experienced antitrust litigator, but I have only litigated to conclusion *one* antitrust case as counsel for a plaintiffs’ class. I have successfully defended against a few antitrust class actions – and during the decade when I was head of antitrust enforcement for the State of New York and coordinated enforcement for all 50 American States, I represented the consumers in New York State and the other states in many antitrust cases, in what we call *parens patriae* actions. These, in effect, are class actions where the State Attorney General can sue and collect antitrust monetary treble damages for consumers in that State.

Finally, as a young civil liberties lawyer, I represented many classes who sued federal, state and local governments in the U.S. who we claimed had violated my clients’ rights – but none of those cases involved antitrust law.

So, I bring all of these experiences to my opinions about what is *good* and what is *bad* and *ugly* in U.S. class action practice. My one plaintiffs’ antitrust class action illustrates this duality, and my ambivalence. In that case, which was subjected to U.S. Supreme Court review – twice – and became final only this past June, I represented a class of several million U.S. merchants against Visa and MasterCard. We sued because Visa and MasterCard were forcing U.S. merchants to accept their debit cards at the prices charged for credit cards - and - because they deceptively designed the debit cards to look like credit cards - and - because they were attempting to monopolize the market for debit cards and trying to destroy competition from other payment networks.

After nine years of litigation, the results were certification of a class of millions of merchants – the payment by Visa/MasterCard and their bank owners of \$3.4 billion in monetary

relief to the merchants, the cessation of all the anticompetitive conduct through an injunction, which the Court measured as providing upwards of \$87 billion in value to U.S. merchants and consumers – and the stimulation of government action against Visa and MasterCard for related practices in the U.S., Europe, Australia, New Zealand and elsewhere.

To be able to achieve all that in a single action, is very good and exemplifies what is best and most efficient in U.S. class action practice. But the fact that this mechanism designed to be the paragon of judicial efficiency took nine years, is *bad*. The class action motion alone took three-and-a-half years to resolve. Moreover, some of the collateral games which our case spawned, are downright *ugly*. I will just list a few of these collateral negative sideshows, and can discuss them at greater length if anyone is interested during our question and answer session.

One ugly game is played by so-called “professional objectors” who are a fixture in U.S. class action litigation -- whether it be antitrust / securities / products liability or mass tort litigation.

In every big and successful case, lawyers whose profession is obstruction, hold up class action settlements in the quest for court-awarded objectors fees or the hope that lawyers for the class will pay them to go away.

Our case was plagued by these parasites who have played an identical game of objection/obstruction in hundreds of other class actions. But I refused to pay off these professional objectors and our Court, by and large, refused to award them fees. But this nasty collateral gambit added two years of delay to the case.

A second ugly collateral game spawned by our case is underway now. A series of secondary cases have been filed against Visa and MasterCard, some against American Express and the Discover network, and even some against individual merchants who sued Visa and MasterCard. These cases allege various antitrust violations similar or related to those we proved – but they do so by and large without significant factual or legal bases, and without much skill. They are lawyer-driven cases.

Unlike our case, where five big U.S. merchants – Wal-Mart, Sears, Safeway, The Limited and Circuit City and three big trade associations hired me to represent them and their fellow merchants – in these second wave lawyer-driven cases, the lawyers are the real parties in interest. And they frequently recruit nominal plaintiffs with little understanding of what these cases are all about.

As I said, I can elaborate later on the pluses and minuses of U.S. class action practice – but primarily for the European practitioner, I should briefly set out the framework in which U.S. antitrust class actions by private litigants occur – and occur frequently.

Last year, there were 752 private antitrust suits filed in U.S. federal court – class and non-class. In the 43 years from 1962 through 2004, roughly 60 private antitrust suits were filed in the 25 EU member states. Those 752 U.S. private suits in 2004 do not include the hundreds of

private suits initiated under the antitrust laws of 49 of the 50 American states in 2004. (The State of Pennsylvania has no antitrust law.)

Focusing for now on just the antitrust class actions litigated in federal courts, these are governed by Rule 23 of the Federal Rules of Civil Procedure.

Antitrust class actions can be, and have been, maintained by classes of hundreds, thousands and even millions of people or businesses injured by antitrust violations falling within the scope of U.S. antitrust law – which can be accurately analogized to the types of anticompetitive conduct subsumed within Articles 81 and 82 of the Treaty of Rome.

To be allowed to proceed as a class action under Rule 23, the representative plaintiffs must show:

(1) that there are too many injured potential plaintiffs to require them all to join the case as parties. This requirement is referred to as “*NUMEROSITY*”;

(2) that the case presents legal and factual issues common to class members. This requirement is referred to as “*COMMONALITY*”;

(3) that the claims of the class representatives are typical of class member claims. This requirement is referred to as “*TYPICALITY*,” and

(4) that the class representatives and their lawyers have the knowledge, skill and resources to protect the class during the litigation. This requirement is referred to as “*ADEQUACY*.”

If the class representative plaintiffs can prove those 4 things, plus also prove,

(5) that the defendants have, in general, acted in the same manner against all members of the class, then the class representatives have met their burden and a class will be certified to seek *non-monetary injunctive relief*.

However, if in addition to, or instead of, an injunction the class representatives seek monetary relief for the class, they must also *prove*

(6) that the common questions of law and fact which the class have presented are quantitatively and qualitatively greater than any issues which are different for various class members, a requirement referred to as “*PREDOMINANCE*,” and finally

(7) that a class action is *superior* to the alternatives, such as hundreds / thousands / millions of separate lawsuits, which is a requirement referred to as “*SUPERIORITY*.”

So, if those two additional requirements are met, the class representatives can also seek money damages for all class members.

Rule 23 and its interpretations give U.S. federal courts and litigants guidance in *how* to prove these things and – *when* during the litigation they must be proven, and it gives the courts extraordinary flexibility in *managing* a class action once a class has been certified. The courts can decertify – create smaller *subclasses*, certify on some issues and claims, but not others, etc. And either the defendants or the plaintiffs are given an expedited mechanism to appeal when a class is certified or when the court has class denied certification.

Similar or, in some cases, nearly identical procedures govern class actions in most American states.

In recent years what some believed was a more consumer and plaintiff friendly atmosphere in certain state led lawyers to choose a state rather than a federal court forum to seek certification of large antitrust class actions – some involving class members in many or all 50 American states.

However, a new law that went into effect in February of this year, the so-called “Class Action Fairness Act” gives defendants the ability to move a state class action into a federal court, if the class members are not all from the same state. Therefore, unless in a specific solution, the defendants favor a particular state forum, nationwide class actions will be in the federal courts for as long as this new law remains in effect.

In each of the seven Rule 23 inquiries I described before, there is the possibility to achieve justice, efficiency and the advancement of a better life under the Rule of Law. However, as with any procedural paradigm, there is also room for gamesmanship and abuse.

There is a comprehensive and masterful treatise called “*Newberg on Class Actions*,” which I commend to Europe as it considers class action mechanisms analogous to those in the United States. Newberg is to class actions what Gibbons was to the decline of the Roman Empire.

As we go forward today, I can just scratch the surface on these issues – for now I will make just one additional observation germane to vigorous and well informed enforcement of Competition Law. Having been both in government and in private practice, I now believe that private antitrust is superior and better informed than government enforcement (except, of course, in the criminal realm where the government’s lawful monopoly obtains). I now blush when I think of the naiveté I exhibited as a government enforcer of the antitrust laws, and I see a similar lack of real world sophistication in much government enforcement today in the U.S., Europe and elsewhere. This is borne of the simple fact that government enforcers primarily have themselves for clients. So as Europe ponders the issues of greater private rights of action and the separate, but related, question of class actions – the former is overwhelmingly recommended, while the latter presents a much more difficult question – presenting the possibility of immense *good*, while running the risk of the *bad* and the *ugly*!

Thank you. I will be pleased to answer your questions.