RECENT DEVELOPMENTS IN ANTITRUST LITIGATION: Class Actions

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Class Actions Primer

- A class action is a type of lawsuit in which one or several persons sue on behalf of a larger group of persons.

- While the subject matter of class action lawsuits can vary widely, two factors are almost always present for every class action:
  - the issues in dispute are common to all members of the class, and
  - the persons affected are so numerous as to make it impracticable to bring them all before the court.
Class Action Primer

Benefits:

- Allows those with small claims to vindicate their rights
- Lower litigation costs
- Judicial efficiency
- Uniform results

Disadvantages:

- The combination of class actions and antitrust treble damages creates a powerful weapon for plaintiffs to use to force settlements
  - Just one purchaser can institute litigation on behalf of a very large group; potential damages are staggering
  - Biggest beneficiaries are usually the lawyers

This has led to abuse of class action litigation
Class Action Primer

Federal Rule of Civil Procedure 23 (a)

(a) One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) The class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class

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Class Action Primer

Federal Rule of Civil Procedure 23 (b)(3)

(b) A class action may be maintained if Rule 23 (a) is satisfied and if

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(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
The Paradigm Shift

- Courts have made it more difficult to assert antitrust class actions.
  - Result: class actions are more challenging and costly for plaintiffs
- Trend is to scrutinize the entire class action mechanism
- Recent developments have had a profound effect in three areas
  - The manner in which antitrust conspiracies must be plead
    - Bell Atlantic Corp. v. Twombly
    - Ashcroft v. Iqbal
  - The determination of “predominance” under Rule 23(b)(3)
    - Comcast Corp. v. Behrend
  - Trial by formula is not permitted
    - Wal-Mart Stores, Inc. v. Dukes
The Paradigm Shift – Plausibility

**Twombly**
- Supreme Court decision (2007)
- Since *Twombly* more antitrust conspiracy cases are dismissed at the pleading stage
- Fundamental change in how plaintiff must plead antitrust conspiracy under Section 1 of the Sherman Act
  - No longer sufficient to simply give defendants “notice” of the nature of the case
  - Now, plaintiff must plead sufficient facts to make the allegation of conspiracy “plausible”

**Iqbal**
- Supreme Court decision (2009)
- *Twombly* applies in all cases, not just antitrust
- Made it harder to piggyback onto government antitrust case
Recent Developments – Plausibility

Plausibility Defined

- *In re Travel Agent Commission Antitrust Litigation*
  - Parallel conduct without more is insufficient;
  - Opportunity to conspire is insufficient as well

- *In re Text Messaging Antitrust Litigation*
  - Parallel conduct plus industry structure/practices facilitating collusion
Recent Developments – Plausibility

Conclusions –

- Absent direct proof of conspiracy, parallel conduct requires factual enhancements, for example
  - Behavior inconsistent with independent decision making
  - Existence of government investigations or guilty pleas
  - Economic conditions which make the market conducive to collusion
  - Evidence of industry meetings or communications between or conspirators
  - “Expert” evidence
The Paradigm Shift – Predominance

Comcast

- Supreme Court decision (2013)
- In deciding whether certification should be granted:
  - Courts must conduct a “rigorous” analysis into whether the class action requirements of Rule 23 have been satisfied
  - This must be done even if there is an overlap with the merits
  - Individual questions of damage can overwhelm questions common to the class
Recent Developments – Predominance

Despite *Comcast*, lower courts are split on whether individualized damages defeats predominance:

- Yes

  - No damages model, no predominance (In re Rail Freight Fuel Surcharge – DC Circuit),

- Predominance can be destroyed if damage determinations require individual inquiry (XTO Energy – 10th Circuit)
Recent Developments – Predominance

No

- Damage issues do not preclude predominance as long as liability issues are genuinely common issues (*Butler – 7th Circuit*)

- Individualized damages cannot defeat certification (*Jimenez – 9th Circuit; Whirlpool – 6th Cir.*)

- The amount of damages is invariably an individual question and does not defeat certification (*Medline Indus – 9th Circuit*)

- A misreading of *Comcast* that it precluded certification under Rule 23(b)(3) (*In re Deepwater Horizon – 5th Circuit*)
Recent Developments – Predominance

Conclusions:

- Those cases holding that damage issues cannot preclude predominance are hard to square with *Comcast*

- Another decision from the Supreme Court confirming *Comcast* is necessary before area can be settled

- Until that time, uncertainty reigns on this important question and whether damage issues can preclude certification depends upon which circuit court the class action is filed in
The Paradigm Shift – Trial by Formula

*Dukes*

- Supreme Court decision (2011)
- Court rejects the use of statistical sampling and extrapolation to circumvent resolution of individual inquiries at trial
- Sampling denies the right of defendants to litigate defenses
Recent Developments – Trial by Formula

- Lower courts are split on the reach of *Dukes*
  - Trial by formula raises due process issues (*Duran* – California Supreme Court)
  - Trial by formula permissible (*Braun* – Pennsylvania Supreme Court)
  - Statistical sampling is acceptable to determine liability as long as it is not used for damages (*Jimenez* – 9th Circuit)
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