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ANTITRUST

Expert Analysis

Certifying Settlement Classes

By **Elai Katz**

Several federal courts have grappled with the certification of classes for the purpose of settling antitrust cases: The full U.S. Court of Appeals for the Third Circuit will re-examine a panel decision upsetting a district court's certification of a nationwide settlement class to resolve state antitrust law claims alleging price-fixing in the diamond industry. One district court denied certification of an injunctive settlement class where changing market conditions reduced the possibility of continued harm to car buyers, while another district court preliminarily approved a class settlement with one of three defendants over the objection of the two non-settling companies in an alleged packaged ice conspiracy suit.

Other recent antitrust developments of note included the Third Circuit's assessment of the sufficiency of pleadings alleging widespread antitrust violations in the insurance industry and the Department of Justice's enforcement action challenging non-solicitation agreements between high-technology firms.

Settlement of State Claims

A global gem company agreed to settle claims brought by direct and indirect purchasers of diamonds asserting price-fixing in violation of federal and various state antitrust laws. The settlement agreement required payments to members of classes of plaintiffs, and an injunction prohibiting future anti-competitive conduct subject to the court's consent.

The district court approved the settlement and certified a settlement class over objections that variations in state antitrust laws defeated the requirement of common questions of law and fact, and that an increase in competition in the diamond market rendered the injunctive relief unnecessary.

A Third Circuit panel vacated and remanded the certification in a two-judge opinion (with one member of the panel concurring but expressing disagreement with the majority's reasoning). The appellate panel majority found that the district court had not satisfied its obligation to ensure that the predominance requirement for class certification was sufficiently met even in the context of a settlement. The court noted that some states permitted recovery by indirect purchasers while others precluded such recovery and stated that it would be "improper to certify a nationwide class when the legal right shared by class members purportedly arises under the laws of multiple jurisdictions, but only some of those jurisdictions extend standing to class members to enforce that right."

Moreover, to the extent the settlement created new antitrust rights in certain states, the court found that the settlement certification contravened the Rules Enabling Act, 28 U.S.C. §2072(b), which prohibits a court from interpreting procedural rules in a manner that creates new substantive rights. While explicitly stating that it did not repudiate all nationwide class settlements based on state law, the court condemned those that created rights in states without them, and concluded that "sacrificing the principles of federalism to obtain the benefits of a settlement is a poor trade."

> The Third Circuit will re-examine a panel decision upsetting a district court's certification of a nationwide settlement class.

The panel also stated that the injunctive relief class should not have been certified because the diamond market had become more competitive and the defendant's share of the market had diminished significantly.

Plaintiffs sought a rehearing on the grounds that the panel decision conflicted with a prior Third Circuit decision, *In re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516 (3d Cir. 2004), that certified a nationwide settlement class of indirect purchasers. A sufficient number of judges on the Third Circuit agreed to grant the petition for rehearing en banc and vacated the panel's order scuttling the settlement agreement. The full appellate court is expected to hear the case in February 2011.

Sullivan v. DB Investments Inc., 2010 WL 3374167 (Aug. 27, 2010), vacating 2010-2 Trade Cases ¶77,090 (July 13, 2010).

Comment: The longstanding judicial policy of encouraging resolution of disputes before trial may clash with the requirement that proposed settlement classes must basically meet the same requirements as disputed, litigation classes under Rules 23(a) and 23(b), especially as the appellate courts tighten those standards in cases such as *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008).

Injunctive Settlement Class

A district court denied a request to certify a nationwide injunctive settlement class as part of an agreement between automobile purchasers, manufacturers and dealers associations. The proposed settlement resolved claims of a conspiracy to prevent the importation of Canadian vehicles into the United States market from 2001 to 2003, when as a result of the weaker Canadian dollar, nearly identical vehicles could cost up to 25 percent less over the border.

In 2008, the U.S. Court of Appeals for the First Circuit vacated the district court's certification of an injunctive class for purposes of litigating the controversy because the diminishing gap between the Canadian and U.S. dollars effectively eradicated the arbitrage opportunity and eliminated any "live controversy between the parties such as would justify an injunctive remedy."

The plaintiffs nevertheless sought certification of a nationwide injunctive settlement class precluding, among other things, information exchanges facilitating the reduction of car imports from Canada and argued that the strength of the U.S. dollar had again been rising since the First Circuit decision. The court was not persuaded, however, that the arbitrage opportunity had been renewed, and stated that there was no case or controversy in support of the injunction either

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at the time of settlement, or at any time between then and the present.

In re New Motor Vehicles Canadian Export Antitrust Litigation, 2010-2 CCH Trade Cases ¶77,165 (D. Maine Aug. 17, 2010).

Non-Settling Parties

A district court preliminarily approved a class settlement between a packaged ice company and direct purchaser plaintiffs that sought to recover damages for alleged price-fixing and market allocation in the packaged ice market. The settlement agreement called for payments to members of a proposed class and cooperation with the plaintiffs' prosecution of the remaining two defendants. The court rejected the non-settling defendants' contentions that preliminary approval of a proposed settlement may give an unwarranted presumption of correctness to certification of a litigation class, that additional discovery was necessary prior to approving a preliminary settlement class, and that multiple notices to the class would be confusing.

In re Packaged Ice Antitrust Litigation, 2010 WL 307016 (E.D. Mich. Aug. 2, 2010).

Restraint of Trade

Following a widely reported investigation by the New York State Attorney General into allegations that an insurance broker orchestrated bid rigging and took improper payments in exchange for steering business to insurers, purchasers of insurance filed purported class actions against various insurers and brokers asserting per se violations of §1 of the Sherman Act and seeking recovery of inflated insurance premiums. After allowing for substantial discovery and several amendments, the district court dismissed the second amended complaint on the pleadings. The Third Circuit affirmed in part and reversed in part in a thorough and lengthy opinion that examined pleading standards after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and the limits of the insurance exemption under the McCarran-Ferguson Act.

The Third Circuit panel stated that allegations of "broker-centered" conspiracies—whereby brokers steered clients who wished to buy insurance coverage to preferred insurers in exchange for "contingent commission" payments from those insurers—did not give rise to a plausible inference of horizontal conspiracy (with the exception of conspiracy claims involving one particular broker where bid rigging was alleged, which are discussed below). The court observed that *Twombly* abrogated prior Third Circuit opinions that sustained complaints without examining whether the assertion of conspiracy was plausible given the context of the parallel conduct, as in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977).

The court explained that in light of the "economic landscape," each insurer had a "strong, independent motive" to make contingent commission payments to a broker to get more business and obtain information about other bids irrespective of the actions of its competitors. The appellate court noted that such parallel conduct did not plausibly imply the existence of a horizontal "wheel" or "rim" connecting the "spokes" of the alleged "hub-and-spoke" conspiracies (with a broker as the hub and the contingent-commission paying insurers as the spokes). The court also distinguished other "hub-and-spoke" cases in which the evidence "clearly indicated" that the defendants agreed with the hub's proposal on the condition that their rivals did the same, such as in *Toys "R" Us Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000).

In contrast, the Third Circuit found that one of the alleged conspiracies (orchestrated by one particular broker) was pleaded with sufficient specificity to survive a motion to dismiss because the plaintiffs alleged in detail that insurers submitted sham bids on policies to facilitate the steering of business to other insurers. The court stated that the allegation that the insurers acceded to the broker's request for sham bids on the understanding that the other insurers would later reciprocate supported an inference of a horizontal agreement to refrain from competing for incumbent business. The court also observed that "a spurious bid is almost always anticompetitive."

The Third Circuit panel stated in the insurance brokerage antitrust litigation that allegations of 'broker-centered' conspiracies—whereby brokers steered clients who wished to buy insurance coverage to preferred insurers in exchange for 'contingent commission' payments—did not give rise to a plausible inference of horizontal conspiracy.

The appellate panel went on to rule that the surviving conspiracy claim was not exempt from federal antitrust law under the McCarran-Ferguson Act because the allegedly unlawful conduct did not constitute the "business of insurance" within the meaning of the Act. The court stated that the alleged agreement not to compete did not affect the availability or terms of transferring or spreading a policyholder's risk, but merely "to which insurer that risk would be transferred." The court noted that there was a significant difference in this context between an agreement not to compete to provide insurance coverage and an agreement to fix the rates for such coverage, which would be exempt under prior decisions interpreting the Act.

In re Insurance Brokerage Antitrust Litigation, 2010-2 CCH Trade Cases ¶77,135. The author's firm represents an insurer in this action.

Comment: The pleading decision reported immediately above arises in the atypical context of a complaint crafted after plaintiffs had an opportunity to conduct substantial and costly discovery, which was one of the concerns motivating the Supreme Court's opinion in *Twombly*.

Non-Solicitation Pacts

The Department of Justice agreed to settle charges that six technology companies' entry into bilateral agreements not to cold call one another's employees were per se violations of §1, as they eliminated from the market a significant form of competition to attract high-tech employees and deprived employees of access to better job opportunities.

The complaint also stated that the agreements were broader than necessary for the implementation of any legitimate collaboration between defendants as they were not limited by geography, time period or job scope. The proposed settlement agreement prohibits the companies from entering into any agreements to refrain from soliciting one another's employees for five years.

United States v. Adobe Systems Inc., No. 10-cv-01629 (D.D.C.), available at http://www.justice.gov/atr/cases/adobe.htm.

Non-Discrimination

The Department of Justice and several state attorneys general brought charges against credit and charge card companies alleging that agreements precluding merchants from incentivizing or encouraging their customers to use a card or other payment method that is less costly to the merchants restrained trade in violation of §1 of the Sherman Act. The department asserted that the challenged restraints enabled the defendants to maintain high prices for network services without concern that a competitor will take away substantial transaction volume by offering a better deal to merchants. The department agreed to settle with two of the three defendants.

United States v. American Express Co., No. CV-10-4496 (E.D.N.Y. Oct. 4, 2010), available at http://www.justice.gov/atr/cases/americanexpress.html.

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