New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

WWW.NYLJ.COM

An ALM Publication

VOLUME 247—NO. 31

THURSDAY, FEBRUARY 16, 2012

ANTITRUST

Expert Analysis

Class Action Issues: Certification, Settlement and Arbitration

By
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The U.S. Court of Appeals for the Seventh Circuit decided that patients and payors challenging a hospital merger should not have been required to show uniform price increases to obtain certification to pursue their claims as a class. The U.S. Court of Appeals for the Second Circuit reaffirmed its ruling that a class arbitration waiver clause was not enforceable because it would effectively preclude the plaintiffs' ability to vindicate their rights. In a third appellate decision addressing class issues, the full bench of the U.S. Court of Appeals for the Third Circuit affirmed class certification for settlement of a diamond price-fixing case, notwithstanding differences in state laws applicable to different groups of plaintiffs.

Other antitrust developments of note included the European Commission's decision to block Deutsche Börse's proposed acquisition of the New York Stock Exchange and an unorthodox regulatory challenge to a joint venture combining the two leading New York City double decker tour bus operators.

Class Certification

In an action challenging a hospital merger, the Seventh Circuit ruled that the predominance requirement for class certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure does not require a showing of uniform price increases across the proposed class, but rather is satisfied where plaintiffs can show the antitrust impact on a class-wide basis by using common evidence and common methodology. Patients and health insurers alleged that a merger between two suburban Chicago hospitals, Northshore University HealthSystem and Highland Park Hospital, violated Section 2 of the Sherman Act and Section 7 of the Clayton Act and moved for certification of a class of individual patients and third-party payors who allegedly paid higher prices for hospital care as a result of the merger.

Using the same statistical method that the Federal Trade Commission had previously used in finding that the hospital merger violated federal antitrust laws, the plaintiffs' expert asserted that proof of antitrust injury common to all class members could be established through the use of a "difference in difference" method. Under this method, the difference between prices charged pre- and post-merger is compared to prices charged during the same time period at a control group of comparable hospitals. The district court refused to certify a class, reasoning that the predominance standard of Rule 23(b)(3) was not met because the methodology used by plaintiffs' expert could not show the uniformity of price increases across the proposed class.

For the third time in the last four years, the Second Circuit ruled that an arbitration clause that forbids class adjudication was unenforceable.

While there was a lack of uniformity in the price increases imposed under certain contracts, the Seventh Circuit noted that this lack of uniformity merely required individual analysis of such contracts, and that such analyses would still rely on common evidence and would use a common methodology. The appellate panel stated that "it is important not to let a quest for perfect evidence become the enemy of good evidence" and emphasized that the stringent standard applied by the district court came close to instituting a new requirement necessitating common proof of damages for class members prior to class certification.

The Seventh Circuit stated that it was an abuse of discretion for the district court to rule that uniformity of price increases was a necessary condition to show predominance, noting that "the district court asked not for a showing of common questions, but for a showing of common answers to those questions." The appellate panel stressed that "Rule 23(b)(3) does not impose such a heavy burden."

Messner v. Northshore University HealthSystem, No. 10-2514, 2012-1 CCH Trade Cases ¶77,763 (Jan. 13, 2012)

Comment: Although the decision reported immediately above approvingly cited *In re Hydrogen Peroxide*, 552 F.3d 305 (3d Cir. 2008), the Third Circuit decision that is said to have imposed stricter standards for showing impact in class certification proceedings, the Seventh Circuit also observed that rigorous application of Rule 23 will often lead to the certification of classes in antitrust cases and that the district court set too stringent a standard in this case.

Class Arbitration

For the third time in the last four years, the Second Circuit ruled that an arbitration clause that forbids class adjudication was unenforceable because it would effectively preclude vindication of statutory rights. In a case involving allegations by merchants that American Express's "Honor All Cards" policy constituted illegal tying, the district court granted the payment services company's motion to compel arbitration. The Second Circuit reversed in 2009 and then reaffirmed its decision in 2011 following the Supreme Court's instruction to reconsider in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010), where the Court ruled that a party may not be compelled to submit to class arbitration unless it contracted to do so.

Earlier this month, the Second Circuit revisited the case to consider the impact of another Supreme Court decision: The appellate court stated that *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), which held that a California law barring the enforcement of class action waivers in arbitration clauses was preempted by the Federal Arbitration Act, did not alter the analysis. The Second Circuit noted that *Concepcion* and *Stolt-Nielsen*, taken together, teach that parties cannot be forced to participate in class arbitration unless they agreed to it. But they do not stand for the proposition that all class-action waivers are always enforceable.

The appellate court stated that in this case, the merchants demonstrated that their statutory rights could not be vindicated through individual arbitrations because the cost of an economic expert, at least several hundred thousand dollars, would far exceed the anticipated recovery of several thousand dollars for most merchants. Accordingly, the motion to compel arbitration would be denied.

The Second Circuit emphasized that class action waivers in arbitration agreements are not per se unenforceable and that the plaintiff bears the burden of demonstrating that individual arbitrations would be prohibitively expensive.

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In re American Express Merchants' Litigation, No. 06-1871-cv (Feb. 1, 2012)

Settlement Class

The Third Circuit, sitting en banc, affirmed a district court's certification of two nationwide settlement classes of direct and indirect purchasers asserting a conspiracy to fix diamond prices.

As reported in the October 2010 column, a split three-judge panel previously ruled that the district court did not satisfy its obligation to ensure that the predominance requirement was met before certifying the classes and did not take sufficient account of substantive differences in state laws applicable to subsets of the proposed class.

The en banc court stated, in a 7-2 decision, that the predominance inquiry should be easily resolved based on the defendant gem supplier's conduct and the injury it caused to class members. The majority added that variations in state law do not necessarily defeat predominance and that, in any event, concerns about those variations dissipate when a court is asked to certify a class for settlement.

Sullivan v. DB Investments Inc., 2011-2 CCH Trade Cases ¶77,736 (Dec. 20, 2011)

Exchange Merger

The European Commission (EC) blocked the proposed combination of Deutsche Börse and NYSE Euronext, stating that the transaction would have created a "near monopoly" in the market for European financial derivatives traded on exchanges. Derivatives are financial contracts used for investment and risk management; their value is derived from an underlying asset, such as interest rates or equity stock indexes. Deutsche Börse operates Eurex and NYSE operates Liffe, which, according to the commission, are the two largest exchanges in the world for financial derivatives based on European underlying assets, and, if combined, would account for over 90 percent of that market.

The commission determined that privately traded "over-the-counter" derivatives are not substitutes for exchange-traded derivatives and should not be included in the relevant market. Over-the-counter derivatives typically involve larger amounts and customized terms and conditions whereas exchange-traded derivatives are smaller, highly liquid and standardized. The commission rejected the companies' claim that the merger would create greater liquidity and asserted that competition, rather than consolidation, has generated greater liquidity in the past.

As discussed in last month's column, late last year the U.S. Department of Justice approved the merger, subject to a divestiture. The department has now withdrawn the settlement papers filed in court in light of the parties' abandonment of the transaction following the announcement of the EC's decision.

Mergers: Commission Blocks proposed Merger Between Deutsche Börse and NYSE Euronext, IP/12/94 and MEMO/12/60 (Feb. 1, 2012) available at ec.europa.eu/competition and Justice Department Dismisses Antitrust Lawsuit Against Deutsche Börse and NYSE Euronext (Feb. 9, 2012), available at www.justice.gov/atr

Hostile Tender Offer

The Federal Trade Commission (FTC) issued an administrative complaint to block Omnicare Inc.'s hostile tender offer for its largest competitor, PharMerica Corporation, alleging that the proposed acquisition will violate Section 5 of the FTC Act and Section 7 of the Clayton Act. Omnicare and PharMerica are, according to the FTC, the largest and the only national long-term care pharmacies in the United States The complaint alleges that the proposed acquisition, which would lead to a firm with a market share of approximately 57 percent, will substantially increase Omnicare's already considerable leverage in negotiations with insurers participating in Medicare prescription subsidy plans (sponsors) and will likely result in consumers paying higher prices for their medication.

The complaint measures shares in the relevant market by the number of licensed beds within skilled nursing facilities (SNFs), which contract directly and on an exclusive basis with long-term care pharmacies that arrange for the delivery and administration of prescription medications to residents. The complaint alleges that because Omnicare has exclusive rights to a high percentage of SNF beds nationally, it has successfully invoked the risk that participating sponsors would be barred from participating for failing to meet Medicare Part D's "convenient access" requirement. The complaint further alleges that after the proposed acquisition of PharMerica, the resulting firm, with its even stronger control over SNF beds nationally, would use its bargaining power to increase prices.

In an action challenging a hospital merger, the Seventh Circuit ruled that the predominance requirement for class certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure does not require a showing of uniform price increases across the proposed class.

Commissioner J. Thomas Rosch dissented from the decision to issue the complaint.

In the Matter of Omnicare Inc., FTC File No. 111-0239 (Jan. 27, 2012) available at www.ftc.gov.

Comment: Unlike the typical consensual merger, where both parties advocate for antitrust approval of the deal, in hostile takeovers, the unwilling target may invoke antitrust concerns as a defense and may in some cases provide enforcers with data and arguments.

DVD Rentals

Subscribers to DVD rental programs brought suit alleging that Netflix and Walmart's promotion agreement, whereby Netflix would promote the sale of DVDs at Walmart and Walmart would transfer its online rental subscribers to Netflix, amounted to an unlawful market allocation agreement, a per se violation of §1 of the Sherman Act. The district court granted Netflix's motion for summary judgment, ruling that the challenged agreement was not subject to per se treatment. The court stated that, unlike classic market allocation arrangements, the agreement committed the two companies to carry out cross-promotional efforts for one another's complementary online DVD rental and sales services. The court noted that Walmart independently decided to exit the DVD rental market and retained the right to reenter that market.

In its rule of reason analysis, the court stated that the plaintiffs did not demonstrate that they were injured by the agreement: They did not show that they paid higher prices as a result of the agreement or that they would have paid lower prices in its absence. The court added that a jury could not reasonably conclude that Netflix would have lowered its prices in response to continued competition from Walmart, which had less than 2 percent of the market, especially when the evidence showed that Netflix did not lower its prices in response to a price cut by its more significant rival, Blockbuster.

In re Online DVD Rental Antitrust Litigation, 2011-2 CCH Trade Cases ¶77, 730 (N.D. Cal. Nov. 22, 2011)

New York Tour Buses

Some transactions involving railroads, trucking and intercity buses fall within the exclusive purview of the Surface Transportation Board (STB) and cannot be challenged independently by federal or state antitrust authorities. Two companies that operate "hop-on, hop-off" double decker tour buses in New York City sought STB review of a joint venture combining their competing businesses. Their application to the federal agency was submitted (improperly) after the formation of the joint venture and, the STB noted, shortly following the receipt of inquiries from the Antitrust Bureau of the New York Attorney General's Office.

The board refused to approve the transaction and denied the companies' request to reconsider, stating that the companies had been by far the two largest hop-on, hop-off bus operators, leaving one small remaining competitor, and that prices had increased. The STB rejected the bus companies' argument that the relevant market should include trolleys, bicycle tours, horse and carriage tours, and helicopter tours.

The board ordered the companies to either dissolve their joint venture or dispose of the interstate component of the venture to remove it from the STB's jurisdiction (and back into the state attorney general's jurisdiction).

Stagecoach Group PLC and Coach USA Inc., Docket No. MC-F 21035 (Jan. 9, 2012), available at www.stb.dot.gov

Comment: Although industry-specific agencies with broad authority to regulate mergers may lack the expertise of enforcers principally concerned with antitrust, they often consider competition as part of their public interest analysis and receive input from antitrust authorities, as was the case in the decision reported immediately above.