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ANTITRUST

Expert Analysis

Supreme Court Articulates Rigorous Standard for Class Certification

By
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The U.S. Supreme Court ruled that a district court should not have certified a class of cable subscribers asserting antitrust violations by their cable provider because the plaintiffs did not adequately demonstrate that their damages could be measured on a class-wide basis. A district court declined, for the moment, to certify a class of former high-tech employees to pursue antitrust claims because the broadly defined proposed class could have included members who were not harmed by the employers' alleged agreements to restrict employee mobility and suppress their compensation.

Other antitrust developments of note included an amendment to Kansas antitrust law providing that resale price maintenance claims are not per se unlawful but rather subject to rule of reason review and a ruling by a district court that a breach of supply provisions in a "reverse payment" settlement of a patent dispute did not violate antitrust law.

Class-Wide Proof of Damages

Cable subscribers in the Philadelphia area sought to bring claims on behalf of a class to challenge cable provider Comcast's creation of a "cluster" of cable systems by acquiring rival Philadelphia-area cable systems and swapping its systems outside Philadelphia with other cable companies' local systems. The subscribers asserted that the clustering strategy increased Comcast's share of subscribers in the region from 24 percent to 70 percent and led to reduced competition and higher prices in violation of the Sherman Act.

The subscribers had put forth four theories of antitrust impact, asserting that Comcast's acquisition strategy led to increased cable subscription prices throughout the Philadelphia area because clustering (1) made it profitable for Comcast to withhold local sports programming from its competitors, leading to decreased market penetration from direct broadcast satellite providers; (2) reduced the level of competition from "overbuilders," companies that build competing cable networks in the same area as the incumbent cable company, (3) reduced the level of "benchmark" competition on which cable customers rely to compare prices, and (4) increased Comcast's bargaining power with content providers.

The district court certified the class on the basis of the second theory, reduction of overbuilder competition, and rejected the other three theories as incapable of being proven on a class-wide basis. The district court found that the subscribers had met their burden of showing measurable class-wide damages resulting from overbuilder deterrence with their expert's regression model which calculated general damages from all four theories of antitrust impact by comparing actual cable prices in the Philadelphia area with hypothetical prices that would have prevailed but for Comcast's allegedly anticompetitive activities.

The U.S. Court of Appeals for the Third Circuit affirmed the district court's certification in a 2-1 decision, stating that the subscribers did not have to "tie each theory of antitrust impact to an exact calculation of damages" at the class certification stage. The Third Circuit declined to consider arguments regarding the regression model's shortcomings, including Comcast's assertion that the model did not attribute damages resulting specifically from overbuilder deterrence, stating that such an attack "on the merits of the methodology [had] no place in the class certification inquiry."

In a 5-4 decision, *Comcast v. Behrend*, No. 11-864 (March 27, 2013), the Supreme Court reversed. The court stated that subscribers failed to satisfy the predominance requirements of Rule 23(b)(3) of the Federal Rules of Civil Procedure—which permits certification if "questions of law or fact common to the class predominate over questions affecting only individual members" of the class—because they did not demonstrate that damages from deterring entry by overbuilders, the only viable

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antitrust impact theory, could be determined on a class-wide basis.

The Supreme Court noted that the district court had a duty to conduct a "rigorous analysis" of the plaintiffs' damages case to ensure that it is consistent with the alleged anticompetitive effect of the violation. Because the regression model did not attribute damages to the overbuilder theory of antitrust impact in particular, the class was improperly certified under Rule 23(b)(3).

The majority opinion expands on the recent line of rulings, including *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), which insist on strict standards for class certification. The majority's approach is grounded in the observation that class actions are an "exception to the usual rule" that courts resolve disputes between individual named parties. In addition, Justice Antonin Scalia, writing for the court, observed that class certification inquiries frequently require a consideration of the merits of the underlying claim.

Justice Ruth Bader Ginsburg and Justice Stephen Breyer, joined by Justice Sonia Sotomayor and Justice Elena Kagan, dissented, noting that the predominance standard has long been understood not to require that damages—as opposed to liability or impact—be measurable "on a class-wide basis," as "[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal."

Class-Wide Proof of Inquiry

In a lower court decision applying Rule 23(b)(3), a district court determined that former high-tech employees did not satisfy the predominance requirement and denied certification of a class to pursue claims that high-tech firms, including Apple, Intel, and Google, conspired to restrict employee mobility and suppress compensation. The court in the *High-Tech Employee Antitrust Litigation* matter (2013-1 CCH Trade Cases 78,333, No. 11-CV-2509; N.D. Cal. April 5, 2013) stated that damages could be shown on a class-wide basis, but it was not convinced that employees could demonstrate a method for proving impact on a class-wide basis because they might not be able to show, without additional evidence (which was not available when the motion was made) that all or nearly all members of the purported class as defined were harmed, or impacted. The court granted leave to amend.

Resale Price Maintenance

The state of Kansas enacted legislation bringing the state antitrust law's treatment of restraints of trade, including in particular vertical price restrictions, or resale price maintenance (RPM), in line with federal jurisprudence, which subjects most categories of agreements to rule of reason review, as applied most recently to RPM in *Leegin Creative Leather Products v. PSKS*, 127 S. Ct. 2705 (2007). The new law, Kansas Senate Bill 124, overturned a Kansas Supreme Court decision, *O'Brien v. Leegin Creative Leather Products*, 294 Kan. 318 (2012) (discussed in this column a year ago), which held that RPM was per se illegal under Kansas law. The amendment provides that, subject to enumerated exceptions, the Kansas Restraint of Trade Act is to be construed in harmony with U.S. Supreme Court opinions.

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Although precipitated by a ruling on RPM, the amendment's impact is broader, changing Kansas antitrust law from a regime that arguably presumed per se illegality for restraints of trade to a standard that generally applies the rule of reason to most agreements.

Reverse Payment Settlement

In *Louisiana Wholesale Drug Company v. Shire*, No. 12 Civ. 3711 (S.D.N.Y. March 6, 2013), a New York district court dismissed an antitrust lawsuit brought against a brand name drug company for failure to fully perform its obligations under a settlement agreement with generic manufacturers.

Shire, the manufacturer of Adderall XR, a popular drug for treating attention deficit hyperactivity disorder, sued generic manufacturers that sought to sell generic versions of Adderall XR for patent infringement. The suits were settled in 2006: both generic manufacturers agreed to delay launching generic Adderall XR for three years and in return Shire agreed to grant them patent licenses to sell generic Adderall XR, and to supply all of their needs for generic Adderal XR. Settlement agreements of this sort have been challenged repeatedly by the Federal Trade Commission and are the subject of a case before the U.S. Supreme Court, but were deemed lawful by the U.S. Court of Appeals for the Second Circuit in *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006).

Louisiana Wholesale Drug Company (LWD), a drug wholesaler that purchased Adderall XR and its generic equivalents, asserted that Shire violated antitrust law by breaching the settlement agreement. According to LWD, although Shire did grant patent licenses to the generic manufacturers, it intentionally breached the supply provisions of the agreement by providing only some but not all of the requested product, which LWD asserted was to keep supplies artificially low and prices artificially high.

LWD argued that its claims should be considered under *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), a non-patent law case in which the Supreme Court found a ski resort's refusal to cooperate with a rival to be an antitrust violation.

The district court granted Shire's motion to dismiss for failure to state a claim. Although the court conceded Shire's alleged conduct would be an example of "the distasteful act of having its cake and eating it too," it nevertheless noted that "not every sharp-elbowed business practice—though potentially wrongful as a breach of contract or even fraud—necessarily amounts to an antitrust violation, as indeed, Shire's actions in this case do not."

The court stated that, although *Tamoxifen* addressed the legality of entering into, rather than the breach of, settlement agreements such as the

one between Shire and the generic manufacturers, the Second Circuit's reasoning still applied: although anti-competitive, settlements should be granted wide latitude in the patent context as long as the challenged restrictions are within the scope of the patent at issue. Because Shire acted within the bounds of its government-granted exclusive rights, LWD's antitrust claim was barred. The court noted that even if Shire completely failed to provide any Adderall XR to the generic manufacturers, it would still not create a cognizable antitrust claim.

The district court also distinguished *Aspen Skiing* and noted that the Supreme Court and the Second Circuit have been cautious in finding any duty to deal with rivals under *Aspen Skiing*.

ATM Access Fees

Consumers and operators of automatic teller machines, or ATMs, filed actions claiming that ATM access fee pricing requirements imposed by Visa and MasterCard violated §1 of the Sherman Act. *National ATM Council v. Visa*, 2013-1 CCH Trade Cases ¶78,261 (D.D.C. Feb. 13, 2013). According to the complaint, Visa and MasterCard prohibited ATM operators from charging lower transaction fees for the use of cards other than Visa and MasterCard. The complaint asserted that this restriction prevented other ATM networks from providing discounts and forced ATM operators to charge supra-competitive fees. The plaintiffs brought suit against Visa and MasterCard as well as Bank of America, Wells Fargo and JPMorgan Chase (retail banks belonging to the Visa and MasterCard networks).

The district court granted defendants' motions to dismiss the complaints without prejudice on two grounds: (1) the complaints alleged insufficient facts to support the necessary allegations that plaintiffs suffered any injury; and (2) the plaintiffs did not set forth sufficient facts to support their claim that there was a horizontal conspiracy.

In dismissing the complaints, the court caveated that it was not accepting the defendants' argument that the access fee requirements established a pro-competitive price ceiling and explicitly declined to consider whether the provision should be viewed as a ceiling or a floor, observing that the "defects in these complaints compel the dismissal of the pending claims even if there are anti-competitive aspects to the arrangements in question."

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The district court noted that the complaints failed to provide factual details to support the notions that other ATM networks cost less than Visa or MasterCard or that consumers can choose which ATM network to use, nor did they explain whether or how using one network rather than another affects the ATM operator's costs. According to the court, the plaintiffs also did not articulate how the fee restriction affects them in particular; for example, there was no assertion that any of the named plaintiffs actually carried an ATM card in his or her wallet that could access a non-Visa or MasterCard network.

Although plaintiffs asserted additional facts and theories at oral argument, the district court found that it could only assess the sufficiency of the complaints and "not allegations that have been amplified or supplemented or brought in to pinch hit at oral argument."

The district court was also not persuaded by the plaintiffs' allegation that retail banks belonging to the Visa and MasterCard networks were part of the antitrust conspiracy because, before Visa and MasterCard became public companies in 2006 and 2008, they were associations owned by the banks, which continue to hold some equity interests and have seats on the board of directors for each network. Because the complaints did not allege that the banks agreed among themselves to do anything, the court stated that the plaintiffs had failed to sufficiently plead a conspiracy among the banks.

Silver Futures Manipulation

The district court in *In re Commodity Exchange, Inc. Silver Futures and Options Trading Litigation*, 2013-1 CCH Trade Cases ¶78,307, No. 11 Md. 02213 (S.D.N.Y. March 15, 2013), denied a motion by class action plaintiffs for leave to file an amended complaint against JPMorgan for alleged manipulations of silver futures in violation of the Commodity Exchange Act and Sherman Act.

The original complaint had been dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The district court had initially ruled with respect to the antitrust claims that the plaintiffs, individuals who transacted on COMEX, the primary market for metals trading, had not sufficiently alleged the existence of a conspiracy to manipulate prices.

Plaintiffs sought leave to file an amended complaint with additional facts addressing the gaps in the initial complaint, and a new monopolization claim under §2 of the Sherman Act, having previously only alleged a violation of §1.

The court noted that, while it must freely grant leave to amend complaints "when justice so requires," justice did not require as much where the amendment would be futile.

With respect to the proposed monopolization claims under §2 of the Sherman Act, the court remained unconvinced, finding that the plaintiffs had alleged "no factual allegations or authority to support their conclusion that JPMorgan either had monopoly power in the COMEX market or engaged in the willful acquisition of such monopoly power."