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CLASS CERTIFICATION

Robins Kaplan LLP attorneys Hollis Salzman and Ben Steinberg examine the often overlooked and seldom deployed defendant class action, a valuable tool for antitrust litigators.

INSIGHT: Defendant Class Actions—The Solution to Suing Hundreds of Defendants

BY HOLLIS SALZMAN AND BEN STEINBERG

In most antitrust cases involving coordinated conduct, the question of whom to sue is relatively straightforward. The logical defendants are those who participated in the alleged conspiracy and their relevant affiliates.

However, when anticompetitive conduct occurs not as part of a discrete cartel, but rather as part of an industry-wide practice, the question of whom to sue becomes significantly more complicated, as is often the case when price-fixing is facilitated by a trade association or other large industry group.

Because it is rarely feasible to sue dozens, if not hundreds, of defendants in a single proceeding, plaintiffs' attorneys litigating industry-wide antitrust cases must make strategic decisions about which (and how many) entities to name as defendants.

One common approach is to sue a select subset of conspirators, taking into account which parties were most involved in the conspiracy, their possession of relevant evidence, and the relative size of their pocketbooks. While this approach has proven successful in many instances, it also presents certain drawbacks. Suing only a subset of conspirators lets other cartel members off the hook and can create headaches when discovery is needed from unnamed co-conspirators, who now enjoy the heightened protections of nonparties.

Fortunately, there is another option.

The Federal Rules of Civil Procedure provide a lesser-used, but equally viable alternative for suing a large group of defendants in a single lawsuit: the ''defendant class action.''

The defendant class action is the procedural inverse of the more common plaintiff class action. Whereas plaintiff class actions allow a small group of plaintiff class representatives to sue and recover damages on behalf of a larger plaintiff class, defendant class actions allow plaintiffs to sue a small group of defendant class representatives and recover damages from a larger defendant class.

Both types of class actions stem from Rule 23, which states that ''one or more members of a class may sue *or be sued* as representative parties on behalf of all members.'' Fed. R. Civ. P. 23 (emphasis added).

In antitrust litigation involving large numbers of alleged co-conspirators, the defendant class action device can serve as a useful tool because it enables plaintiffs to hold many defendants accountable while still enjoying the efficiencies of litigating against a smaller subset. And although there are additional procedural requirements for certifying defendant classes not applicable in the plaintiffs' context, those requirements rarely impede class action treatment, at least not in the relatively few antitrust cases where defendant class actions have been attempted.

Thus, while often overlooked and seldom deployed, the defendant class action offers antitrust litigators a valuable tool that warrants deeper consideration than what has previously been afforded. This article seeks to peel back the layers by reviewing how courts to date have treated defendant class actions in the antitrust context.

The Defendant Class Certification Standard

To be certified, defendant classes must meet the same certification criteria as plaintiff classes under Rules 23(a) and 23(b). *Bell v. Disner*, 2015 U.S. Dist. LEXIS 15815, *5-6 (W.D.N.C. Feb. 10, 2015). Additionally, defendant classes must also satisfy certain due process requirements not applicable in the plaintiffs' context. The general rule is that each named plaintiff must have a colorable claim against each defendant class member. *Id.* at 675.

The reason for this additional requirement is that unnamed plaintiff class members stand to gain while unnamed defendant class members stand to lose. *See Thillens Inc. v. Cmty. Currency Exch. Ass'n of Ill. Inc.*, 97 F.R.D. 668, 674 (N.D. Ill. 1983). Accordingly, courts require some direct link between each named plaintiff and each absent defendant class member to ensure that absent defendants are not unfairly held liable for other defendants' misconduct.

However, the ''colorable claim'' rule is not absolute. The requirement may be waived in cases where the defendant class members share a ''juridical link,'' which is some relationship or activity between defendant class members ''that warrants imposition of joint liability against the group even though the plaintiff may have dealt primarily with a single member.'' *Akerman v. Oryx Communications Inc.*, 609 F. Supp. 363, 375 (S.D.N.Y.1984).

Common examples of juridical links include joint enterprises, conspiracies, and aiding and abetting. Because most cases involving anticompetitive conduct are rooted in some form of conspiracy, the juridical link exception generally applies in coordinated conduct cases, such that due process concerns rarely prevent defendant classes from being certified. Rather, it is Rule 23(b)(3)'s more familiar ''predominance'' and ''numerosity'' requirements that typically draw courts' attention.

Reviewing the Established Case Law

Although sparse, the case law involving defendant class actions in antitrust cases reveals that the device can serve as a useful tool for plaintiffs' attorneys, particularly in cases where anticompetitive conduct is facilitated by trade associations or other industry groups. Courts have certified defendant classes in a number of such cases, often reasoning that when anticompetitive conduct is facilitated by a trade association, class-wide issues inherently predominate under Rule 23(b)(3).

This is particularly evident in cases where plaintiffs challenge a trade association's public directives, such that the primary dispute is not whether the defendants coordinated their conduct (coordination is presumed given that the conduct occurred through the trade association), but rather whether the coordinated conduct violated the antitrust laws.

Before detailing these cases, it is important to note that because the relevant case law is limited, there is no firm guidance for how courts evaluate defendant class actions in the antitrust context, unlike in other contexts, such as civil rights, constitutional law, and securities litigation, where the jurisprudence is more developed. The limited number of antitrust cases that have reached the defendant class certification stage have yielded mixed decisions, with courts not always applying the same analytical framework. Additionally, much of the relevant case law dates back to the 1970's and 1980's and thus predates the more rigorous class action standards set forth in *Wal-Mart v. Dukes*, 564 U.S. 338 (2011) and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). This makes it difficult to gauge how defendant class actions would fare in today's post-*Comcast* landscape.

Nonetheless, based on the limited case law available, antitrust cases involving trade associations appear particularly well-suited for defendant class action treatment.

Osborn. The case of *Osborn v. Pennsylvania-Delaware Service Station Dealers Ass'n*, 94 F.R.D. 23 (D. Del. 1981) is instructive. In *Osborn*, a class of plaintiffs alleged that a gas station dealer association and its member gas stations engaged in an illegal group boycott to close gas stations to the public in an effort to pressure the Department of Energy to raise the maximum retail price of gasoline.

Rather than suing only the trade association or a mere subset of gas stations, plaintiffs sought to certify a defendant class consisting of the trade association and its 3,700 members. The trade association opposed certification, *inter alia*, on the grounds that individual dealers had distinct and lawful reasons for closing during the boycott and that those distinct reasons precluded a finding of predominance under Rule 23(b)(3).

The court disagreed and certified the class, holding:

> There are two issues which can be expected to consume the vast majority of trial time . . . Did a conspiracy . . . exist and, if so, was [it] . . . unreasonable . . . under the antitrust laws? These are, of course, issues common to all class members. To be sure there may be individual issues relating to the membership of any conspiracy that is proven, but . . . these should be of relatively minor significance. It can be expected that plaintiffs will introduce evidence of action taken by the Association calling for a boycott and of the identity of Association members who in fact closed. Assuming that a conspiracy to boycott is established, this evidence will constitute prima facie evidence of the membership of the conspiracy.

Thillens. The case of *Thillens, Inc. v. Cmty. Currency Exch. Ass'n of Ill., Inc.*, 97 F.R.D. 668, 674 (N.D. Ill. 1983) follows a similar trajectory. Thillens, a Chicago-area mobile check cashing company, alleged that Illinois's Currency Exchange Association, its member exchanges, and certain public officials conspired to deny it licenses to operate, in part through the maintenance of an illegal bribery fund used to pay-off politicians. Thillens sought to certify a defendant class under Rule 23(b)(3) consisting of roughly 900 hundred members of the Currency Exchange Association, with the association serving as the defendant class representative.

The court began its certification analysis noting that the case posed fewer due process concerns because it did not involve a plaintiff class (i.e. was not a *bilateral* class action). Rather, a single plaintiff, Thillens, alleged that it was injured by each member of the proposed defendant class because each class member allegedly joined the conspiracy to harm it via the trade association. *Id.* at 676. The court's predominance analysis emphasized that the overriding issue in the case was whether the conspiracy existed and not whether each defendant participated in the conspiracy. The court ex-

plained that questions of nonparticipation in the conspiracy ''will occupy only a minor portion of the trail time.'' *Id.* at 682.

The court also found the class action was the superior mechanism of adjudication in part because suing all 900 members of the trade association would be unmanageable. *Id.*

As in *Osborn*, the court certified the defendant class under Rule 23(b)(3). The case was later dismissed on unrelated grounds. *See Thillens Inc. v. Community Currency Exchange Ass'n.*, 729 F.2d 1128, 1131 (7th Cir. 1984) (holding that the defendants were immune from liability because the challenged conduct was within the protected sphere of legislative activity).

Sebo. Although not involving a formal trade association, the case of *Sebo v. Rubenstein*, 188 F.R.D. 310 (N.D. Ill. 1999) reached similar findings.

A putative class of urology patients alleged that urologists throughout the Chicagoland area had conspired to fix the price of kidney-stone treatment services. Plaintiffs named certain kidney stone treatment centers as defendants, and sought to certify a broader defendant class under Rule 23(b)(3) comprised of all urologists/shareholders of the named treatment centers.

At the outset, the court explained that due process considerations would not prevent certification because the case involved an alleged price-fixing conspiracy in which the defendant class members shared a juridical link:

> The majority of courts have concluded that a defendant class should be certified only where the plaintiff class has a colorable claim against each member of the defendant class. . . . In antitrust price-fixing cases, though, where each participant in a conspiracy is jointly and severally liable to victims of the scheme, a plaintiff such as Thompson would have a claim against each member of the defendant class even though she only dealt with two of the doctors alleged to be part of the conspiracy. *Id.* at 318.

The court next turned to Rule 23(a). As to numerosity, the court held that the size of the defendant class—approximately 101 members—was sufficiently large because other courts have certified far less numerous defendant classes. *Id.* Regarding commonality and typicality, the Court held that ''[i]ndividual issues do not necessarily preclude a defendant class when the 'paramount representative' defense is to deny that a conspiracy existed. . . . All the issues common to establishing antitrust violations are overriding. The only noncommon issue will be the individual members' defenses of nonparticipation.'' *Id.* at 318-19 Next, the court held that because the named defendants had no interests in the litigation antagonistic to other defendant class members, and because they intended to ''vigorously defend'' the case with competent counsel, adequacy of representation was satisfied. *Id.*

Turning to 23(b)(3), the court held, with relatively little analysis, that predominance was satisfied. The court held that ''the overriding issue is to prove that a conspiracy existed and that this issue predominates over any individualized inquiries.''

The court then certified the defendant class under Rule 23(b)(3), finding that the class action mechanism was the superior method of adjudication given the inferior alternatives of (1) naming all 101 urologist/shareholders as defendants, (2) foregoing the claims altogether, or (3) maintaining approximately 100 similar actions. *Id.*

Research Corp. In a similar yet more dated case, *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497, 501, (N.D. Ill. June 16, 1969), the court certified a large defendant class consisting of hundreds of members of the American Seed Trade Association. Plaintiff, the holder of a patent related to seed technology, alleged that the Seed Trade Association and its members participated in an illegal conspiracy to oppose the plaintiff's seed patent.

The court held that the class satisfied each of the Rule 23 requirements. As to commonality and predominance, the court focused on the defendants' common membership in the American Seed Trade Association, reasoning that all ''class members will be expected to defend on the ground that whatever joint effort took place was not illegal.'' *Id.* at 502. The court explained that while ''[e]ach member of the alleged conspiracy may have individualized issues, such as proof of its participation in the conspiracy, and its share in whatever damages are recoverable . . . overriding these individual questions are the common questions as to whether any joint action taken was in violation of the antitrust laws and what damages, if any, the plaintiff has suffered.'' *Id.*

These cases illustrate the extent to which courts in previous years have certified defendant classes when antitrust violations are facilitated by trade associations or similar industry-wide groups. The courts in such cases have typically granted certification on the grounds that the defendants' common participation in a trade association renders class-wide issues predominant, making class action treatment appropriate under Rule 23(b)(3). Whether today's courts would be as disposed to certifying defendant classes is more difficult to predict, for reasons described below.

More Recent Defendant Class Action Cases

While there have been several notable defendant class action antitrust cases in recent years, for various reasons none have yielded a decisive class certification ruling. This has made it difficult to predict how contemporary courts would approach defendant class actions in today's more rigorous class certification environment.

One case that appeared likely to provide contemporary guidance was *Jung v. Ass'n of Am. Med. Colleges*, 339 F. Supp. 2d 26, 33, (D.D.C. Aug. 12, 2004). There, a putative class of medical school graduates alleged that the Association of American Medical Colleges and its member medical schools and teaching hospitals illegally conspired to fix prices through their maintenance of the National Resident Matching Program. The plaintiffs alleged that the so-called ''Matching'' program, which pairs residents with teaching hospitals, eliminates a free and competitive market for medical school residents because it assigns prospective residents to a single, specific residency program, which is mandatory for them to attend. The plaintiffs named 29 teaching hospitals and seven certifying associations as defendants and sought to certify a defendant class consisting of all other institutional participants in the Matching program. *See Jung*, (Dkt. 206, Nov. 3, 2002).

Before the court could rule on the plaintiffs' class certification motion, Congress intervened by passing the ''Confirmation of Antitrust Status of Graduate Medical Resident Matching Programs,'' which retroactively exempted the Matching program from antitrust liability. Following the law's enactment, the court entered judgment on the pleadings in favor of the defendants, ending the case and preventing the court from reaching the issue of class certification.

Another recent defendant class action that failed to yield a certification decision was *Kamakahi v. Am. Soc'y for Reprod. Med.*, 305 F.R.D. 164 (N.D. Cal. Feb. 3, 2015). There, a class of women who donated human eggs through fertility clinics affiliated with two trade associations alleged that the trade associations' ''ethical guidelines'' restricted compensation to egg donors in violation of the Sherman Act. The plaintiffs initially brought claims against the two trade associations and certain clinics as representatives of a putative defendant class consisting of all fertility clinics that agreed to comply with the trade associations' rules. *Id.* at 170.

However, the case failed to produce a class certification ruling because the plaintiffs later changed their case strategy and dismissed the fertility clinics from the lawsuit, leaving only the two trade associations as individual defendants. As a result, the plaintiffs never sought to certify a defendant class, and the case ultimately settled. *Kamakahi*, (Dkt. 228, Aug. 26, 2016).

Likewise, in *Livingston v. Toyota Motor Sales USA*, 1995 U.S. Dist. LEXIS 21757, *49 (N.D. Cal. May 30, 1995), a group of consumers alleged that various Toyota auto dealers engaged in a price-fixing conspiracy through which they agreed to charge for certain ''assessments'' that misled the public about the cost of their vehicles. Plaintiffs initially sought to certify a defendant class of various Toyota dealers and regional advertising associations. However, after the parties reached a settlement, the court certified the defendant class for settlement purposes, thwarting any substantive certification analysis.

A similar case with an even less clear outcome is *Robinson v. Tex. Auto. Dealers Ass'n*, 2003 U.S. Dist. LEXIS 10595 (E.D. Tex. Mar. 21, 2003), *rev'd and remanded*, 387 F.3d 416 (5th Cir. 2004). There, consumers alleged that the Texas Automobile Dealers Association and its member dealerships conspired to pass-on a state imposed ''Vehicle Inventory Tax'' to auto-buyers as an itemized charge on vehicle sales. Plaintiffs sought to certify a defendant class under Rule 23(b)(3) consisting of all of the several-hundred dealerships that were members of the Texas Automobile Dealers Association.

Initially, the district court declined to certify the defendant class, citing issues with predominance and superiority. The district court held that ''it is clear that the issue of an individual Defendant's involvement in the alleged conspiracy will require an independent factual determination'' and ''the court must allow each Defendant to independently defend itself by presenting direct evidence to disprove Plaintiffs' circumstantial case.'' *Id.* at *7. Because each defendant will have the desire and ''absolute right'' to defend itself by presenting direct evidence of noninvolvement in the conspiracy, the court reasoned that most defendants would choose to opt out of the class. *Id.* at *7–*8. ''Moreover, treatment of all Defendants as a class is procedurally unfair to each individual Defendant and not superior to individual treatment.'' *Id.* at *17.

On appeal, the Fifth Circuit reversed and remanded, finding that the district court had improperly disregarded the logistical problems that would result from forcing plaintiffs to sue several hundred individual defendants in a single proceeding. *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 426 (5th Cir. 2004). The Fifth Circuit reasoned that the ''sheer number of individual defendants and the incentive to offer individual defenses create the possibility of jurors' having to base their determinations on evidence offered throughout a long proceeding.'' ''[B]y failing to consider problems concerning . . . the significantly large defendant group, the district court erred in its superiority inquiry.'' *Id.* Unfortunately, the public docket does not reflect how the case fared on remand.

Unsuccessful Antitrust Defendant Class Actions

In the few antitrust cases in which courts have declined to certify defendant classes, the impediments to class certification have been unique and do not suggest a broader reluctance to certify defendant classes. The most common reasons courts have declined to certify defendant classes in antitrust cases have been the prevalence of individualized issues under 23(b)(3) and numerosity problems under 23(a)(1), neither of which is typically present in cases involving trade associations.

For example, in *Coniglio v. Highwood Services Inc.*, 60 F.R.D. 359 (W.D.N.Y. 1972), the plaintiffs alleged that certain NFL teams engaged in illegal tying practices by requiring season ticket holders to purchase tickets to both exhibition games and regular season games. The plaintiffs sought to certify a defendant class consisting of all NFL teams who engaged in such practices. The court denied certification on several grounds, primarily because each NFL team independently set its own ticketing policies and did not do so as part of a joint agreement. As the court explained:

> [T]he ticket practices of individual clubs depend upon exclusively local factors such as stadium seating capacity, fan interest, geographic location, local population numbers and the like. Although the defenses and questions thus presented are similar, they share little if anything in common. The testimony, documents and theories advanced on behalf of one club will have no practical relevance as to any other club. . . . Accordingly, to proceed as urged by plaintiff would require separate findings with regard to each defendant team, separate trial counsel, separate jury instructions and separate proof covering varying periods of time during which it is claimed that each team engaged in illegal activity. *Id.* at 363-64.

Distinguishing the case from other cases in which courts have certified defendant classes, the court held that ''[n]otwithstanding plaintiff's charge of conspiracy in the second count of the complaint, this court continues to see predominantly individual factual inquiries necessary for a resolution of these issues.'' *Id.* at 364.

In other words, the court looked past the plaintiff's mere allegations of a joint conspiracy and found that the alleged anticompetitive practices were in fact unique and thus not suitable for class treatment. Unlike the cases discussed above in which it was undisputed that defendants engaged in coordinated conduct through a trade association, here the court found that defendants likely developed their policies indepen-

dently, not as part of a conspiracy. The court held this rendered the plaintiff's claims inappropriate for class treatment.

At least one court has also declined to certify a defendant class in an antitrust case due to adequacy and typicality concerns. In *Miller v. Hedlund*, 1983 U.S. Dist. LEXIS 13705, *1-2 (D. Or. Sept. 16, 1983), the owners of a bar brought antitrust claims against certain private Oregon beer and wine wholesalers and public officials at the Oregon Liquor Control Commissions. Plaintiffs alleged that defendants conspired to restrain trade in the beer and wine distribution market by imposing restrictions on the posting of prices and prohibiting discounts and delivery charges. Plaintiffs sought to certify a defendant class composed of all persons who sold wine or beer pursuant to the liquor commission's regulations. The court declined to certify the class in part because the proposed class representatives, state-employees, were ''inappropriate representatives of a class that includes both themselves and *private* wholesalers.'' *Id.* at 8 (emphasis added).

Courts in antitrust cases have also occasionally denied certification when joinder of defendants was practicable. In *New York v. Anheuser-Busch Inc.*, 117 F.R.D. 349 (E.D.N.Y. 1987), the court declined to certify a defendant class, ruling that joinder of 124 beer seller defendants was ''not impracticable and is therefore preferable.''

Similarly, in *Wolfson v. Artisans Savings Bank*, 83 F.R.D. 547 (D. Del. 1979), the court declined to certify a defendant class because plaintiffs failed to demonstrate that there would be additional class defendants ''other than those already joined in the suit'' and if ''others exist, [plaintiffs] have done nothing to show that their joinder as defendants would be impracticable.''

Finally, at least one federal appellate court has declined to certify a defendant class in an antitrust case because of concerns over fairness—although the court's reasoning is noticeably out-of-step with modern class certification jurisprudence. In *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), a class of home sellers alleged that the Los Angeles Realty Board, its several divisions, and 32 individual real estate brokers had unlawfully agreed to implement a uniform brokerage commission schedule. The plaintiffs sought to certify a defendant class under Rule 23(b)(3) of all real estate brokers who were members of the Realty Board.

Following the district court's certification of both a plaintiff class and a defendant class, the defendants appealed to the Ninth Circuit.

Without clearly differentiating between the plaintiff and defendant classes in its analysis, the Ninth Circuit reversed the district court's grant of class certification, holding generally that the case ''was unsuitable for class action treatment.'' *Id.* at 236.

The Ninth Circuit focused primarily on individualized issues related to whether the brokers actually knew of and adhered to the commission schedule. The Ninth Circuit held that ''each defendant is clearly entitled to come forward and prove that he did not know of the commission schedule or that he opposed it or ignored it or, perhaps, some other yet unknown defense.'' The Ninth Circuit also expressed concern over the financial burden that trebling damages and joint and several liability could place on relatively minor members of the Realty Board. Notably, the Ninth Circuit did not address these concerns within the typical Rule 23 framework, nor is it clear how its decision can be reconciled with the grants of certification in the other cases mentioned above.

Conclusion

With few exceptions, the antitrust cases in which courts have declined to certify defendant classes have featured characteristics atypical of trade association cases, such as lack of coordination between defendants, practicability of joinder, or inadequate class representatives. Conversely, the antitrust cases with more typical trade association fact patterns have been deemed suitable for class action treatment. The resulting pattern is clear: absent unique circumstances, courts have been prone to certify defendant classes in antirust cases involving trade associations.

Nonetheless, the case law underlying this trend is both sparse and dated. There have been relatively few antitrust cases in which plaintiffs have sought to certify defendant classes and virtually none of these cases occurred under the more intensive class certification standards that now apply. This makes it difficult to predict how defendant class actions might fare in today's antitrust landscape.

For Plaintiffs' attorneys, this represents a window of opportunity. Given the potential advantages of certifying a defendant class over suing a subset of defendants, plaintiffs' attorneys should consider bringing putative defendant class actions when prosecuting large numbers of similarly situated co-conspirators. There is little downside to doing so. Even if the court declines to certify the defendant class, plaintiffs can still proceed against the remaining named defendants, leaving plaintiffs in the same position they would have been in had they not pursued a defendant class action in the first place.

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