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United States: Private Antitrust Litigation – Class Actions

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The marriage of private treble damages antitrust actions and the class action device has traditionally been a powerful weapon to force settlements. With just one purchaser, plaintiffs could sue for three times the alleged overcharge to all purchasers. This created enormous economic incentives for plaintiffs' attorneys to bring these cases even in circumstances where proof of a cartel or monopoly was less than clear. Once a class was certified, few defendants could take the enormous risk of going to trial for class wide damages or even being the last defendant to settle. Antitrust class actions almost always resolved through settlements and often early.

As many appreciate, two Supreme Court decisions in the last seven years have assisted the defence of antitrust class actions. The first and most significant is the enhancement of pleading standards. Second, the Supreme Court addressed the standards for class certification in terms that at the very least require greater rigour in class certification. While neither Supreme Court decision is new, we review in this article recent cases to see how these decisions have affected the prosecution of antitrust class actions.

Motions to dismiss under *Twombly*

Seven years ago, *Bell Atlantic Corp v Twombly*¹ brought a fundamental change to pleading civil actions. After *Twombly*, it is no longer sufficient simply to give defendants notice of the nature of the alleged violation; now plaintiffs must plead sufficient factual content to make the allegation of an antitrust violation 'plausible'.

This change to the federal common law discourages filing antitrust class actions speculatively in the hope of producing some evidence in discovery. Indeed, *Twombly* changed the law in part because 'the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.'²

Since the decision in *Twombly*, more than half of antitrust claims are dismissed at the pleading stage, including more than half of the type of multidistrict antitrust actions typically filed as class actions.³ This high percentage of dismissals for antitrust class actions has held over a number of years and into 2013–2014. The percentage of dismissals are also high for section 2 monopolisation claims.

While *Twombly* has unquestionably raised the rates of dismissal from a negligible quantity to more than 50 per cent, what constitutes 'plausibility' remains open to varying interpretations. In the prototypical antitrust class action, the complaint follows the announcement of a government investigation. Typically, little to nothing can be learned about the specific manner or means of the conspiracy during the period when the first complaints are filed. Plaintiffs can only enhance the allegation of an investigation with limited evidence of parallel conduct between alleged conspirators such as contemporaneous price increases. Plaintiffs can also typically allege certain economic factors show that the industry in question is conducive to a price-fixing conspiracy such as a limited number of sellers

(oligopoly), barriers to entry, and a commodity product. Finally, plaintiffs often allege publicly available information on industry meetings that present an opportunity to conspire. But is this enough factual enhancement to make the allegation of conspiracy plausible?

In *re Travel Agent Commission Antitrust Litigation*, the Sixth Circuit applied the *Twombly* standard to these types of allegations.⁴ There, travel agencies alleged an airline conspiracy to reduce and eliminate base commissions paid to them. The district court dismissed. Reviewing the dismissal de novo, the Sixth Circuit discounted the parallel conduct as insufficient 'without more' because it is as consistent with 'competitive business strategy' as conspiracy.⁵ The court further rejected allegations of meetings between airline executives as averring 'only an opportunity to conspire.' In affirming the dismissal, the Sixth Circuit concluded that 'plaintiffs have failed to allege sufficient facts plausibly suggesting (not merely consistent with) an agreement in violation of section 1 of the Sherman Act' because defendants' conduct 'was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behaviour.'⁶

The dissent strongly disagreed, emphasising that the complaint alleged specific meetings between the defendants proximate to the announcement of industry-wide commission cuts. The dissent closed by urging the Supreme Court to 'make it clear that *Twombly* may not be used...as a cover for repealing regulation of the market place through private antitrust enforcement'.

In *re Text Messaging Antitrust Litigation*, the Seventh Circuit made clear that *Twombly* was not the end of private antitrust enforcement.⁷ There, the Seventh Circuit took an interlocutory appeal of the denial of a motion to dismiss an antitrust class action. In an opinion by Judge Posner, the Seventh Circuit affirmed the sufficiency of a complaint alleging 'a mixture of parallel behaviours, details of industry structure, and industry practices, that facilitate collusion.'⁸ While plaintiffs alleged the exchange of pricing information at industry meetings, they lacked any direct proof of a conspiracy. Comparing the complaint found sufficient in *Text Messaging* to that held insufficient in *Travel Agent Commission*, the latter arguably stated more compelling proof of collusion in its detailed allegations of specific bilateral meetings between defendants with authority to set base commissions. Comparing these two circuit court decisions demonstrates the disparate application of the *Twombly* plausibility standard.⁹

Recent district court decisions continue to reject complaints alleging parallel conduct combined with conclusory allegations of a conspiracy.¹⁰ Courts generally give weight to parallel conduct when it fits the description in *Twombly* of 'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason.'¹¹ For parallel conduct that is as consistent with interdependent behaviour as with conspiracy, the courts look for certain 'factual enhancements' analogous to the 'plus factors' at the summary judgment stage.

Examples of such factual enhancements include: the existence of government investigations; guilty pleas to parallel criminal charges;¹² economic conditions that make the market conducive to collusion;¹³ evidence of industry meetings and other opportunities to conspire; and evidence of actual meetings and communications between alleged co-conspirators. Of these factual enhancements, we can generalise that the existence of a government investigation (commonly the catalyst for the filing of class action complaints) is afforded some weight, but not when the investigation involves a foreign market or different geographic market.¹⁴ Courts are unwilling to assume that if they did it over there, they must be conspiring here.

Guilty pleas are afforded greater weight (which may have collateral estoppel effect) but these pleas may come too late for inclusion in a class action complaint. The mere opportunity to conspire at industry meetings is unlikely to be deemed much of an enhancement. Records of actual meetings or communications between competitors are far more convincing but difficult to obtain. And in at least one circuit, such detailed facts about actual communications were still not enough.

In sum, the differing application of the *Twombly* standard – even within circuits – still leaves substantial uncertainty as to the form and force of factual allegations necessary for antitrust class action complaints to survive a motion to dismiss. Those complaints that can draw from a government investigation involving the same product and geographic market have the best chance.

Class actions arising from alleged unlawful monopolies in violation of section 2 of the Sherman Act typically do not face the challenge discussed above of pleading factual enhancement of covert conduct. The conduct of the alleged monopolist is generally overt. The challenge post-*Twombly* is to plead sufficient facts to support a plausible claim that the conduct is indeed unlawful under section 2 case law.

In reviewing such allegations, federal courts have been willing at the pleading stage to apply ‘basic economic principles’ to determine whether a section 2 claim is plausible.¹⁵ In doing so, while recognising that the evidence must be viewed in the light most favourable to the plaintiff, federal courts following *Twombly* consider ‘obvious alternative explanations’ for alleged anti-competitive conduct.¹⁶ In other words, even at the pleading stage, *Twombly* is interpreted to invite inquiry into whether the alleged facts support willful anti-competitive conduct. In addition, sufficient pleading of ‘antitrust injury’ – ‘injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful’¹⁷ – is another common point of contention on motions to dismiss.¹⁸

In short, class actions brought under section 2 also face a significant challenge in surviving a motion to dismiss.

Greater rigour in class certification

In *Comcast Corp v Behrend*,¹⁹ the Supreme Court in a five-to-four decision reversed a class certification decision in an antitrust case. The decision reaffirmed that courts must conduct a ‘rigorous analysis’ of whether the requirements for Rule 23 class certification are satisfied and that analysis ‘will frequently entail “overlap with the merits of the plaintiff’s underlying claim”’. This was not new but lower courts were still resisting going to the merits of the allegations themselves in deciding whether to allow cases to proceed as a class action. *Comcast* censures this resistance. Moreover, the majority in *Comcast* cautions against certifying classes where individual issues predominate and plaintiffs cannot establish at the class certification stage that ‘damages are capable of measurement on a class-wide basis’.

The plaintiffs’ antitrust bar has long feared a Supreme Court decision that would foreclose class certification. Commentators have questioned whether *Comcast* is such a decision. The dissent in *Comcast* itself downplayed its significance, stating that the majority opinion ‘breaks no new ground on the standard for certifying a class action’. We survey recent decisions to see how *Comcast* has affected antitrust class certification.

The first major class certification decision after *Comcast* supports its significance as raising the bar for class certification. In *re Rail Freight Fuel Surcharge Antitrust Litigation*,²⁰ the DC Circuit accepted an interlocutory appeal of a decision granting class certification of an antitrust price fixing case against railroads. In taking the appeal, the DC Circuit emphasised the significance of the intervening Supreme Court decision on class certification,²¹ stating that ‘the district court here did not have the benefit of (*Comcast*’s) wisdom when making its certification decision’. The DC Circuit further stated that before *Comcast*, ‘the case law was far more accommodating to class certification under Rule 23(b)(3)’.

The Court vacated the class certification decision and remanded the case to the district court for reconsideration ‘in light of *Comcast*’. The DC Circuit further instructed that the plaintiffs have a problem at the class certification stage in showing ‘that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy’. Fundamentally problematic for the DC Circuit was that certain putative class members held legacy contracts locking in pricing negotiated prior to the advent of the alleged conspiracy period but the plaintiffs’ damages model still yielded a similar overcharge as other class members lacking pricing protection.

Many markets involve differences between purchasers as to contractual price protection, and bargaining power. Moreover, economists have long observed that even with established cartels, ‘cheating’ between conspirators results in certain customers avoiding all or some percentage of the coordinated overcharge. If these individual issues are deemed to predominate over class issues the efficacy of the class certification device for traditional price fixing cases is in serious doubt. While this may be a logical extension of *Rail Freight*, the decision arguably should be limited to questioning the certification of a class where the damages model yields false positives for a class of purchasers who could not have been injured. Its characterisation of *Comcast* as changing the game on class certification itself may be seen as a polite way of reversing the district court while calling for greater scrutiny of class action certifications.

But as *Comcast* itself contains no new bright-line standard, decisions have fallen both ways as to certifying traditional section 1 antitrust actions. For example, *In re VHS of Michigan, Inc.*,²² the district court certified a class of registered nurses who alleged Detroit-area hospitals conspired to suppress their wages. The defendants’ petition to the Sixth Circuit to review the class certification was denied, but with instructions to the district court to revisit its decision in light of *Comcast*. The district court did so and again certified the class.

A district court in California certified a class of purchasers of cathode ray tubes allegedly injured by an antitrust price fixing conspiracy. In so doing, the district court rejected the notion that plaintiffs must prove at the class certification stage that every class member was injured by the alleged conspiracy. The district court stated that its ‘job at this stage is simple: determine whether (plaintiffs) showed that there is a reasonable method for determining, on a class wide basis, the antitrust impact’s effects on the class members’. In certifying the class, the district court expressly rejected

that *Comcast* and other cases ‘somehow drastically changed the standard for class certification’. The district court limited *Comcast* to requiring that the method for calculating antitrust impact and damages relate to the theory of liability. The defendants *In re Cathode Ray Tube (CRT) Antitrust Litig*²³ sought interlocutory review of the class certification decision but the Ninth Circuit Court of Appeals declined to hear the case.²⁴

In short, *Comcast* is not the decision that divorces the antitrust treble damages suit from the class action device. Federal courts continue to certify antitrust class actions.²⁵ But *Comcast* at a minimum signals a general attitudinal shift towards making class certification a more rigorous inquiry.²⁶ For courts disinclined to grant class certification in general or troubled by a particular case, *Comcast* provides support for denial.

Case filings

See the table below for a summary of antitrust class action filings by circuit for the period of 2013 to July 2014. While overall numbers are down from a decade ago, the traditional pattern of plaintiffs filing in the Third, Ninth, and Second Circuit continues. Class plaintiffs continue to avoid the Eleventh Circuit. More class actions are filed in the Sixth Circuit than would be expected given some of the decisions, but this may be explained by the location of industries at issue in current cases. Fewer class actions are filed in the Seventh Circuit than might be expected given the decisions of the Court. One explanation may be the lingering perception of the Seventh Circuit as a stronghold of the Chicago School (whose analysis significantly limited certain theories of liability), but the decisions of Judge Posner and others on the Court – including *In re Text Messaging*, discussed above – are more fairly interpreted as guided by economic theory and not an anti-plaintiff bias.²⁷

Antitrust class actions filed by circuit, 2013 – July 2014

Federal circuit	Antitrust class actions filed	Percentage of total
First	47	4.3
Second	245	22.4
Third	168	15.4
Fourth	16	1.5
Fifth	41	3.7
Sixth	205	18.7
Seventh	29	2.7
Eighth	25	2.3
Ninth	252	23
10th	17	1.6
11th	40	3.7
DC	9	0.8
Total	1094	8.3

Class actions were identified using keyword searches.

Settlements

Despite the more rigorous challenges of civil procedure, class plaintiffs have survived to negotiate significant settlements. Notably, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, the Court approved a US\$7 billion settlement (before reductions for opt outs) for the benefit of merchants who allegedly paid anti-competitive fees in the processing of transactions with payment cards.²⁸ Also notable is the US\$163.5 million settlement of the class action *In re Titanium Dioxide Antitrust Litigation*.²⁹ This result

is particularly notable because it began based on the investigation of private counsel (not a government investigation) and was hard-fought well into discovery.

These results, and the massive attorneys’ fees they generate, will encourage the continued filing of antitrust class actions even if the odds of success are significantly lower than 10 years ago.

Conclusion

The antitrust class action – often a potent tool to move material amounts of money from defendants to purchasers and their class counsel – continues in 2014 but with fewer case filings. The higher bar on pleading a cause of action combined with greater uncertainty as to whether a class will be certified forces plaintiffs’ attorneys to be more selective. Cases with compelling indicia of liability and massive potential recoveries continue to get filed notwithstanding the lower odds of success.

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Notes

- 1 550 U.S. 544 (2007).
- 2 *Twombly*, 550 U.S. at 558.
- 3 See for example, ‘Judicial Application of the *Twombly/Iqbal* Plausibility Standard in Antitrust Cases’, *Antitrust*, Vol. 26, No. 1, Fall 2011.
- 4 583 F.3d 896 (6th Cir. 2009).
- 5 *Id.*, 483 F.3d at 903-04.
- 6 *Id.* at 908.
- 7 630 F.3d 622 (2010).
- 8 *Id.* at 627.
- 9 *In Erie County, Ohio v Morton Salt, Inc.*, 702 F.3d 860 (6th Cir. 2012), the Sixth Circuit revisited the application of the *Twombly* standard to antitrust conspiracy cases. While the Sixth Circuit again affirmed the dismissal of an antitrust conspiracy complaint, its discussion of the law adjusted the bar lower at the pleading stage in potential reaction to its earlier decision.
- 10 See for example, *In re Online Travel Company (OTC) Hotel Booking Antitrust Litig.*, 2014 WL 626555 (N.D. Tex. 18 February 2014).
- 11 *Twombly*, 550 US at 556 n4.
- 12 See *In re Automotive Parts Antitrust Litig.*, 2014 WL 1746121 (E.D. Mich. 30 April 2014) (giving weight to guilty pleas in another automotive product marked involving the same defendants).
- 13 *Id.* at *6–7; *In re Online Travel Company (OTC) Hotel Booking Antitrust Litig.*, at *11–12.
- 14 See *Id.* (citing *In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007)).
- 15 *Somers v Apple, Inc.*, 729 F.3d 953, 964 (9th Cir. 2013).
- 16 *Somers*, 729 F.3d at 965 (quoting *Twombly*, 550 US at 567).
- 17 *Brunswick Corp v Pueblo Bowl-O-Mat, Inc.*, 429 US 477, 489 (1977).
- 18 See *Somers*, 729 F.3d at 964–65 (dismissing a section 2 claim where overcharge theory ‘stops short of the line between possibility and plausibility’ of antitrust injury.); *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367 (D. Mass. 2013) (finding direct purchasers plausibly alleged antitrust injury, namely, that exercise of market power generated anti-competitive consequences); *TI Investment Services, LLC v Microsoft*, 2014 WL 2436174 (D. N.J. 30 May 2014) (granting motion to dismiss in non-class case for failure to plausibly allege a number of elements in a section 2 claim including antitrust injury); *Growers 1-7 v Ocean Spray Cranberries*, 2014 WL 1764533 (D. Mass. 2 May 2014) (denying motion to dismiss in part because class plaintiffs alleged ‘an injury to consumers that arises from decreased output due to departures from the market’).

- 19 133 S. Ct. 1426.
- 20 725 F.3d 244 (D.C. Cir. 2013).
- 21 The Court also relied on the ‘death-knell’ principle supporting interlocutory review of class action decisions where ‘the grant of class status raises the cost and stakes of litigation so substantially that a rational defendant would feel irresistible pressure to settle.’
- 22 *In re VHS of Mich, Inc*, No. 13-0113 (6th Cir. 2014).
- 23 *In re CRT Antitrust Litig*, MDL No. 1917 (N.D. Cal. 10 March 2014).
- 24 The direct purchasers settled with defendants prior to a decision on their motion for class certification which was presumptively more clear cut than the indirect purchaser’s motion.
- 25 See, for example, *In re Nexium (Esomeprazole) Antitrust Litigation*, 296 F.R.D. 47 (D. Mass. 2013) (granting class certification).
- 26 See *In re Skelaxin Antitrust Litig*, 2014 U.S. Dist. LEXIS 11467 (E.D. Tenn. 30 January 2014) (denying class certification).
- 27 Indeed, a number of the decisions, particularly *In re High Fructose Corn Syrup*, 295 F.3d 651 (7th Cir. 2002), are frequently cited by plaintiffs in antitrust conspiracy cases.
- 28 The settlement is currently on appeal.
- 29 Master Docket No. 10-CV-00318, District of Maryland.



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