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U.S. Antitrust Decisions Frequently Driven by Concerns With Burdens of U.S. Litigation Process

Eric J. Stock (Gibson, Dunn & Crutcher) · Thursday, July 15th, 2010

Welcome to our blog! I thought I would start my postings on U.S. developments with a broader point about recent U.S. case law in the antitrust area. Many of the most important U.S. judicial decisions in antitrust have been driven by judicial concern with aspects of the U.S. litigation process that are perceived by some to impose excessive costs and burdens on the parties – especially on defendants, who often bear most of the costs and risks of antitrust litigation. The massive cost of "discovery" in U.S. antitrust cases drives much of the concern, but recent U.S. decisions have also been driven by concerns with the burdens of the class action process.

High Cost of U.S. Litigation

As anyone with exposure to U.S. litigation is aware, U.S. litigation typically involves a right by both parties to request the production of documents in the custody of the other side. This frequently means that even the most confidential internal documents that defendants might possess are subject to discovery by plaintiffs (frequently under an order restricting access to such documents to the plaintiffs' outside counsel).

The discovery process is not specific to antitrust, and has worked well in many cases in exposing unlawful conduct. However, in antitrust cases the scope of discovery can be hard to contain. In antitrust cases, whether the defendants engaged in wrongful conduct is only part of the story – it is frequently also important to define the relevant market and assess the competitive impact of the alleged conduct. That might require consideration of, among other things, the factors the defendant or defendants consider in setting prices, how they view their position in the market, and what companies appear in their records as their principal competitors. In this context, many if not most documents in the company's files can be argued to be relevant. When the breadth of the issues in dispute in antitrust cases is combined with the advent of email and electronic methods of communication, it is easy to see how discovery costs in modern antitrust cases can spiral out of control. (Of course, it must also be considered that the amount of money at stake for the economy in getting to the right answer in antitrust cases is also much higher than a typical case).

Litigation Over Pleading Standards

A concern with the high cost of antitrust litigation underlies recent litigation over the standards that apply when determining whether a plaintiff should be permitted to proceed past the pleading stage and obtain discovery from the defendants. Prior to the U.S. Supreme Court's decision in Bell Atlantic v. Twombly, 550 U.S. 544 (2007), a U.S. plaintiff was permitted to proceed past the pleading stage "unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in

support of his claim that would entitle him to relief." After Twombly, plaintiffs can only proceed with a complaint against cartel activity if they plead specific facts in their complaint "plausibly suggesting (not merely consistent with)" the existence of an agreement among the defendants to engage in unlawful activity. In issuing its decision, the U.S. Supreme Court reasoned that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence" to support a cartel claim. Many recent U.S. antitrust decisions, including the Second Circuit's decision this year in Starr v. Sony BMG Music Entertainment, 592 F.3d 314 (2d Cir. 2010), concern how to interpret the standard set forth in Twombly. A court's resolution of the Twombly issue is frequently one of the most important factors impacting the settlement value of a particular case.

Class Actions

Other recent U.S. cases have been driven by concerns associated with the U.S. class action process. In the Supreme Court's recent decision in Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., the Court held that the participants in the parcel tanker cartel, whose customers had agreed to arbitrate disputes, could not be forced to participate in a "class action" style arbitration proceeding without their express agreement to do so. The lower appellate court had allowed the arbitral panel to engage in class arbitration where the actual arbitration clauses were silent on whether the defendants consented to such a procedure. The Supreme Court, in reversing the decision, held that given the substantial differences between ordinary arbitrations and a class-oriented process, it would be improper to presume consent to class arbitration based on mere silence. Among other things, the Court noted that the class arbitration would potentially involve and bind many more parties than those appearing before the arbitral panel, and substantially raise the financial stakes facing the defendants. The Stolt-Nielsen case is one of string of recent U.S. decisions that have been more sympathetic to defendants seeking to avoid defending antitrust cases in class actions.

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