CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
April 2013 (1)

Comparing the U.S. Class Action Mechanism and the Proposed U.K. System: Which Strikes the Right Balance Between Safeguards and Justice?

Sharon Robertson
Cohen Milstein

Comparing the U.S. Class Action Mechanism and the Proposed U.K. System: Which Strikes the Right Balance Between Safeguards and Justice?

Sharon Robertson[1]

I. INTRODUCTION

Free enterprise and competition are critical to the success of a market economy. In the United States, the class action mechanism is one of the most effective and efficient means for consumers to play a part in protecting this basic principle. By treating public citizens as "private attorneys general," class actions incentivize aggrieved consumers to ferret out wrongdoing and seek recompense.

In January 2013, the U.K. government's department for Business Innovation and Skills ("BIS") published a response to its 2012 Consultation on options for reform. The response introduced a limited opt-out class action mechanism. While the proposed U.K. class action device bears some similarities to the U.S. system, it also includes some critical differences. The following article provides an overview of both mechanisms and the merits of the same.

II. THE U.S. CLASS ACTION SYSTEM

In the United States, antitrust laws can be enforced through the federal and state government, as well as private individuals or entities. One of the underlying bases for allowing private actions is the recognition that the government has limited resources with which to investigate and prosecute antitrust violations. In fact, U.S. courts have acknowledged that the government will often decline to bring a case based on the understanding that the antitrust class action bar has both the desire and resources to vigorously pursue such suits.[2]

Under the U.S. class action system, a representative plaintiff has standing to pursue claims on behalf of consumers who are injured by the conduct of a particular defendant or group of defendants. Antitrust cases are viewed as being particularly well-suited to proceed on a class basis for a variety of reasons. As a practical matter, individual damages are often small, making it unrealistic to pursue claims on an individual basis. On the other hand, aggregate damages can be quite large, making the pursuit of claims on behalf of a group of purchasers more economical. This need for economy is reinforced by the fact that antitrust cases are complex and costly to litigate, as they rely heavily on expert economic analysis. Further, antitrust cases involve illegal conduct that often targets a group of consumers and thus impacts and damages each consumer in much the same way.

---

[1] Associate in the New York office of Cohen Milstein where she is a member of the antitrust practice group.

[2] *See e.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 664-65 (7th Cir. 2002).

Despite being well-suited for class treatment, an antitrust class case can still be very difficult to pursue (adding to its cost). An antitrust plaintiff must satisfy several procedural and substantive hurdles in order to obtain certification. As an initial matter, a plaintiff must survive the motion to dismiss phase by pleading sufficient facts to state a plausible claim. If a plaintiff cannot meet this standard, the court can order the plaintiff to amend the complaint or dismiss the case in its entirety.

Assuming a plaintiff survives the motion to dismiss, the case must proceed through costly and often lengthy discovery involving numerous defendant and third-party depositions, as well as the review of thousands and sometimes millions of pages of documents. Discovery culminates in the filing by plaintiffs of a motion for certification. In order to obtain certification, a plaintiff must satisfy Federal Rule of Civil Procedure 23(a)'s numerosity, commonality, typicality, and adequacy-of-representation requirements. In addition, a plaintiff must satisfy, through evidentiary proof, one of Rule 23(b)'s provisions, which in antitrust cases usually involves a showing of predominance and superiority.[3] This necessitates the presentation of a damages model, through a qualified expert, which demonstrates that damages can be measured on a classwide basis. It is only after a court is satisfied that all of these prerequisites have been met that a class will be certified. However, even after certification, a court maintains the ability to amend or decertify a class at any time prior to final judgment. And, after a class is certified, but before a case can proceed to trial, a plaintiff must survive summary judgment by demonstrating that there are questions of fact that are sufficient to submit to a jury.

If a plaintiff survives all of these hurdles and the case proceeds to trial, a successful plaintiff is entitled to treble damages and reasonable costs and attorney's fees. If a plaintiff is unsuccessful, each side bears its own costs and expenses.

Settlements present another opportunity for the court to provide oversight and direction. A suit may settle on behalf of the class either before or after class certification. If a settlement occurs prior to certification, the class must still be certified by the court for settlement purposes and thus meet most of the requirements set forth in Rule 23(a) and (b). Moreover, regardless of when a settlement takes place, a court must approve the settlement as being fair and reasonable, which approval encompasses any resulting fees or expenses that are requested on behalf of class counsel.

Both a settlement and an order granting class certification trigger certain notice requirements. The notice is required to apprise potential class members of the status of their claims and provide them with an opportunity to opt-out of the litigation or the settlement.

III. THE PROPOSED U.K. ACTION SYSTEM

In 2012, the U.K. government published a consultation paper seeking input on options for reforming the private action regime. The government received almost 130 responses and on January 29, 2013, published its response, which proposed, among other reforms, a limited opt-out class action mechanism.

[3] Fed. R. Civ. P. 23.

The motivations and goals underlying the proposed limited U.K. opt-out class action mechanism, as well as the reforms in general, are consistent with many of the fundamental underlying principles of the U.S. system. The foreword to the government's response from the Secretary of State acknowledges that the U.K.'s current approach to private actions is viewed as one of the "least effective aspects of the U.K. competition regime."[4] The proposal also acknowledges the finite nature of government resources and the need to create a framework that empowers private citizens to represent their own interest.

The response also expressly recognizes the costly and complex nature of challenging anticompetitive conduct and sets out two principal aims for the reform: (1) increasing growth by empowering small business to tackle anticompetitive conduct that is stifling their business; and (2) promoting fairness by enabling consumers and business to seek redress for losses suffered as a result of anticompetitive behavior. The response makes clear that because antitrust violations, such as price-fixing, often involve a large number of people losing small amounts of money, they are more effectively remedied through a class mechanism than an individual action.

Under the proposed U.K. system, representative claims can be brought to the Competition Appeal Tribunal ("CAT") by businesses, trade associations, or consumer associations on behalf of a defined group. Law firms, third parties, or special interest vehicles are not permitted to bring class cases. As with the U.S. system, claims must be certified by the judiciary in order to proceed on a class basis. The certification process will include the following:

1. a determination by CAT as to whether the case should proceed on an opt-in or opt-out basis;
2. a "preliminary merits test;"
3. an assessment of the adequacy of the representative; and
4. a determination regarding whether there is sufficient commonality of issues.

A successful litigant would not able to obtain treble damages or contingent attorney's fees. On the other hand, conditional fees are permissible as well as after the event insurance. If unsuccessful, the "loser-pays" rule kicks in and the litigant is responsible for bearing the full costs of its own case as well as those of its opponent.

The opt-out mechanism specifically will be available only to individuals who are domiciled in the United Kingdom. Those located outside of the United Kingdom will need to opt-in to the suit if they wish to participate. All settlements reached through the opt-out mechanism will require approval from the CAT, which will include a determination regarding the reasonableness of any attorney's fees. Any unclaimed funds would revert the U.K.'s Access to Justice Foundation.

IV. COMPARING THE U.K. AND U.S. CLASS ACTION SYSTEMS

The hallmark of an effective private enforcement mechanism is the ability to balance three goals: incentivizing consumers to pursue private claims, preventing unmeritorious claims,

[4] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf.

and detering anticompetitive conduct. In the United States, this balance is achieved through a combination of treble damages, contingency fees, and procedural and substantive safeguards. The treble damages provision incentivizes consumers to seek restitution for anticompetitive conduct. The contingency fee arrangement provides the financial means for consumers to pursue such claims and the necessary incentive for attorneys to take on such challenging, complex, and costly cases. The procedural and substantive safeguards, on the other hand, allow the court to play a gatekeeping function in ensuring that only meritorious claims proceed.

The U.K.'s proposed system, including the limited opt-out feature, takes one large step in the direction of balancing competing enforcement objectives just by creating a mechanism that allows collective relief for anticompetitive violations. It is clear, however, that the U.K. mechanism is born of competing opinions regarding the merits of the class action device.

The government's response makes no secret of the fact that of all the reform proposals, the strongest arguments were submitted both for and against the opt-out collective action. Nonetheless, the government chose to proceed with the limited opt-out class action mechanism, believing that this approach is crucial to filling a longstanding gap in the U.K.'s competition regime. In doing so, the government appears to have been trying to appease those who want class actions, while pacifying critics who fear an influx of unmeritorious and frivolous claims.

In some ways, the resulting proposed system is more expansive than the U.S. class action mechanism. Namely, it allows not only injured individuals or businesses to pursue claims, but also representative bodies such as trade associations and consumer advocacy associations. However, the proposed "safeguards" appear to tip the balance toward discouraging rather than encouraging private suits.

If the underlying principles remain true—antitrust suits are costly, complex, and more suitable for class treatment—merely permitting such suits is only one step in the right direction. It is clear that part of the impetus for the proposed reform is the notion that private claimants in the United Kingdom have encountered far too many hurdles in bringing successful private claims. It is thus equally clear that a successful class action regime will not only need to create safeguards against frivolous claims but incentives for those who want to bring meritorious claims.

However, if litigants: (1) have no hope of recovering additional damages (*i.e.* through a treble damages provision or some other less stringent means); (2) cannot fund a costly and complex case through a contingent fee arrangement; and (3) face the daunting prospect of paying for the entire case if they are unsuccessful, one has to wonder whether *any* individual or business would consider *any* suit, other than a follow-on action, worth pursuing. Thus, if the government's goal is to encourage stand-alone actions, this regime will fall short of that goal.

Given the complex nature of antitrust cases, and in particular price-fixing cases, where the proof of the conspiracy is often in the hands of the alleged wrongdoer, and the wrong can be difficult to precisely quantify, what litigant would take the risk of pursuing a claim based solely on the prospect of recovering the damages that can be proven? Moreover, given the secretive nature of conspiracies, if a litigant is unable to successfully prove his or her case (where a conspiracy does indeed exist), the prospect of paying for the *entire* cost of the case would be daunting to even the most vigilant advocate.

The need for safeguards is self-evident. Neither the judiciary nor any defendant should be subject to frivolous or unmeritorious claims. However, instituting too many safeguards threatens to undermine the aims of the class action mechanism, namely, increasing growth and promoting fairness. It also limits the regimes' ability to deter anticompetitive conduct, which is crucial to a successful private action regime.

Rather than doing away with treble damages and contingent fee arrangements, which discourages litigants from considering collective relief, one could argue that the appropriate mechanism for keeping out meritless claims is to create procedural and substantive safeguards that can be enforced by the judiciary. As BIS has itself acknowledged, "[s]ince its creation, the CAT has built up its expertise in competition cases and has become familiar with competition litigation . . . The concept of a specialist competition tribunal or court is recognized internally as a key strength of the UK regime."

Given this view, the United Kingdom should trust the CAT to ferret out frivolous claims through the exercise of its expertise in the area of competition law. Indeed, the proposed certification process is one such procedural and substantive mechanism that the CAT could utilize to weed out claims that lack merit. As currently proposed, however, the combination of the certification requirements without any incentive, such as treble damages or a contingent fee arrangement, appears to provide more safeguards to those who engage in anticompetitive conduct than those who are victims of such behavior.

V. CONCLUSION

Due to the proposed "safeguards," it seems unlikely that the United Kingdom will see a significant uptick in class action litigation. Nonetheless, because much of the proposal will need to be formalized through legislation enacted by Parliament, it is unclear what the ultimate U.K. class action landscape will look like. The critical question going forward will be whether the safeguards that are ultimately instituted will be sufficient to deter unmeritorious claims, while not being so cumbersome as to also deter meritorious claims.

One thing is clear though: The U.K.'s recognition of the need for a more effective class action regime, and its proposals for the same, are a significant step in the right direction for consumers and businesses that fall prey to anticompetitive conduct.