CHAPTER II

FILING A CLASS ACTION

The filing of the complaint in an antitrust class action requires a significant amount of pre-complaint research—both factual and legal—as well as numerous strategic decisions that will have far-reaching effects as the case progresses. This chapter explores many of the issues that counsel face in considering and crafting an antitrust class action complaint. These include deciding whether to file a class action, selecting an advantageous venue, determining the representative parties consistent with Rule 23, identifying the defendants to sue, and defining the class. This chapter also addresses a host of related strategic decisions for counsel, such managing the impact of the Class Action Fairness Act of 2005 (CAFA) and the Judicial Panel on Multidistrict Litigation (JPML) on antitrust class actions and considerations for handling class actions after filing the complaint.

A. Whether and Where to File a Class Action

Deciding whether to file a class action, rather than an individual one, and where to bring the case, are two of the most important threshold issues in any case. This section addresses considerations bearing on whether a case should be filed individually or as a class action, whether to file in federal or state court, and which venue is appropriate.

1. Whether to File a Class Action

One preliminary strategic decision is whether to file a contemplated case as an individual claim or as a putative class action. This is often a complex decision for clients and counsel, and one often driven by the realities of litigation costs, potential case recoveries, and willingness to commit to pursuing class claims.

One consideration is whether the litigation is feasible from an economic standpoint on a basis other than as a class action. A consumer allegedly injured by an antitrust conspiracy, for example, often does not have sufficient damages to justify the costs of prosecution of an antitrust case on an individual basis.

Even relatively straightforward antitrust theories customarily cost millions of dollars to prosecute due in large part to the necessity of discovery and expert analysis. As a result, unless the likely recovery would exceed costs of this magnitude, it often would be impractical to prosecute antitrust cases on an individual basis.[1]

A similar consideration is whether a contemplated case would be feasible even as a class action. Modern class certification proceedings routinely involve long evidentiary proceedings preceded by massive discovery efforts, expert economists, and *Daubert*[2] motion practice. Filing an antitrust case as a class action and properly following through with a motion to certify with any reasonable chance of success is a multiyear, multimillion dollar proposition. Some cases, even if they are susceptible to proceeding as a class, simply may not present the damages necessary to cover the investment of cost and time. Counsel proceeding on a contingency case should be particularly mindful of the investments and potential recovery for contemplated class cases.

Some cases with modest potential recoveries might be feasible to prosecute as class actions, however, given the prospect of statutory fee awards. These circumstances arise where there is clear liability and a fee shifting statute for a prevailing party.[3] Even under these circumstances, prosecuting an antitrust class action with modest recovery potential is risky for both counsel and the client. The Supreme Court continues to raise the bar in other contexts on what qualifies as a "prevailing party" to be eligible for an award of attorneys' fees, which may leave counsel and client responsible for substantial expenses and fees.[4]

Another threshold consideration is whether there are legal impediments to pursuing an antitrust case as a class action. In recent years, contractual provisions that require claims to be arbitrated and

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1. As Judge Posner stated, "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." Carnegie v. Household Int'l, 376 F.3d 656, 661 (7th Cir. 2004).
2. Daubert v. Merrill Dow Pharm., 509 U.S. 579 (1993).
3. *See, e.g.*, D.C. CODE § 28-4508(a)(2).
4. Buchannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 600 (2001) (prevailing party for purposes of fee shifting statute does not "includ[e] a party that has failed to secure a judgment on the merits or a court-ordered consent decree," even though "the lawsuit brought about a voluntary change in the defendant's conduct"); Sole v. Wyler, 551 U.S. 74, 83 (2007) (party who prevails in securing a preliminary injunction is not a "prevailing party").

preclude class action claims have become common. Likewise, state laws may preclude pursuing claims as class actions. One example is New York's Donnelly Act.[5] The New York Court of Appeals has limited the private enforcement mechanism of this statute by holding that the state courts cannot certify a class of injured consumers under the New York class action rule.[6] In deciding whether to file a class action, careful counsel should confirm the contemplated case is not prohibited by contract or positive law from proceeding on a class basis.

There used to be significant pre-filing considerations prior to 2003 when settlement was reached before a case was filed or certified as a class. Once a party filed a case as a class action, the counsel and class representative were obligated to disclose the terms of settlements to the presiding court and seek its approval. This requirement evaporated with the 2003 amendment to Rule 23(e) that now only requires judicial scrutiny of the settlement of claims of a "certified class." While this arguably gives named plaintiffs more flexibility in dismissing or settling their own claims upon filing and before classes are certified,[7] careful consideration should be given to whether such dismissals or settlements may moot the actions for the putative class members.[8]

Of course, counsel must consider above all else the willingness and appropriateness of clients to sue in a representative capacity. If, after an explanation of the commitments and burdens of pursuing representative claims, clients do not have the stomach to represent a class, that should end the inquiry. Even if a client is enthusiastic, the careful lawyer should screen for potential adequacy problems as discussed below.

This non-exhaustive list is intended to give the practitioner threshold issues to consider when contemplating whether to file an antitrust case as an individual or class claim. These are general thoughts—every case is different and likely will raise variants of these issues.

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5. N.Y. G.B.L. § 340, *et seq.*
6. Sperry v. Crompton Corp., 8 N.Y.3d 204, 211 (2007).
7. Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1244 (10th Cir. 2011) ("[I]t is now clear that the procedural requirements established by FED. R. CIV. P. 23 attach *only after a class has been certified*.").
8. As the Supreme Court noted in Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1529, n.4 (2013), the circuits are split, for example, on whether an unaccepted Rule 68 offer of judgment that fully satisfies a plaintiff's claims will render the class claim moot.