Class Action Madness in Europe—a Call for a More Balanced Debate

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Imagine this. Yankee lawyers flooding the European shores; invading the hallowed halls of European justice; duping the citizenry into useless battle; draining the economy of precious resources and innovation; fostering a litigation frenzy driven solely by greed; and permanently corrupting the various European legal systems and their facility to promote truth and justice.

Not a pretty picture. But one that many have painted as the likely outcome if Europe opens its doors to American-styled antitrust class actions. Is there anything behind this forbidding prophecy? Not really. A serious look at the much maligned US model shows why.

The US system

To properly frame the class action debate, it is important to understand the special role the antitrust laws play in the US legal system. Under US law, the antitrust laws are considered as important to protecting individual rights as the Magna Carta and the Bill of Rights.[1] As the Supreme Court has repeatedly stressed, every antitrust violation strikes at the very heart of the US economy—the free-enterprise system.[2] Unlike a typical business transgression, an antitrust violation has ramifications that extend well beyond the party bringing the lawsuit. It can, and usually does, adversely impact entire industries with wide-scale consumer consequences.

For these reasons, the antitrust laws are treated with special solicitude in the United States and their active enforcement is highly encouraged. Congress recognised early on that the government would not have the resources to adequately handle this task alone. So, it enlisted the support of the public to serve as "private attorneys general" to assist in the enforcement.[3] Congress did so through the bounty of treble damages, attorneys' fees and costs awarded to successful plaintiffs. Private antitrust plaintiffs heeded the call to service and have, as Congress hoped, become an indispensable part of US antitrust enforcement. The number of private antitrust actions for any given year dwarfs the number of government actions, in some years by as much as a factor of 20.

There are numerous benefits to the private attorney general model. Perhaps the strongest is that it provides a much needed supplement to the significant resource constraints of the government. The government only has so many attorneys and so much money it can devote to antitrust enforcement. These constraints often delay government action, or more importantly, cause the government to choose very carefully the cases it brings. There is a definite resistance to difficult cases. The government usually chooses to pour its limited resources only into those cases it views as clear winners.

Government enforcement is also constrained by politics. Under the current Bush administration, for example, it is no coincidence that US civil antitrust enforcement has been at an all-time low. Private enforcement serves as an important counterbalance to this kind of government laxity. Private actions also provide antitrust victims with a vehicle for obtaining compensation for their harm, and serve as an additional level of deterrence by exposing violators to significantly increased monetary risk.

The class action device is essential to maintaining the private attorney general model and all of these associated benefits. Without it, there would unlikely be any private antitrust actions brought by consumers. They are just too risky, too expensive, and typically offer too little reward for any individual consumer to bring alone. The critical interplay between class actions

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1 *US v Topco Assoc.*, 405 U.S. 596, 610 (1972).

2 *Hawaii v Standard Oil*, 405 U.S. 251, 262 (1972).

3 *Cargill v Monfort of Colorado*, 479 U.S. 104, 129 (1986).

and private antitrust enforcement has been a persistent theme in US jurisprudence and competition policy.

Stopping the greedy lawyer

So what is this class action debate really about? Most understand the value of private antitrust enforcement. Most recognise that without class actions, private enforcement efforts would be severely limited. And most appreciate that there have been some—I would say many—but at least some very important antitrust class actions brought in the United States. So, why all the hostility to antitrust class actions?

The answer lies with the greedy lawyer; the one who brings cases of questionable merit, with no meaningful goal other than to make money by blackmailing defendants with the threat of huge damages awards. Fear of the greedy lawyer sits at the centre of the class action storm. It is a fear not entirely unfounded. These gluttonous creatures do exist. And the havoc they have wreaked on the US legal system is the source of legitimate complaint. However, in the context of antitrust class actions, the impact of the greedy lawyer has been very much overstated.

The truth is that class action abuse in the United States is largely driven by non-antitrust cases. Securities actions and business tort cases have traditionally been the more common feeding ground for this kind of mischief. Antitrust cases are simply too dicey and too pricey to engender the gush of frivolous filings found in these other practice areas. Nor are they the kind of cases that typically lack a meaningful objective. Succeeding on virtually any antitrust case requires a showing of market-wide consumer harm in the form of higher prices, reduced output, or diminished choice.

Furthermore, defendants typically will not even think about settling an antitrust class action until they have fully availed themselves of the three opportunities they have to get rid of the case—a motion to dismiss; an opposition to class certification; and a motion for summary judgment. These are three distinct hurdles antitrust class plaintiffs must cross before defendants even have to begin sweating the risk of treble damages.

In the antitrust context, it is extremely difficult for a frivolous case to get by these hurdles. With the Supreme Court's whittling away of per se antitrust liability, its introduction of a heightened pleading requirement for antitrust conspiracy cases, and its revitalised aversion to condemning conduct within regulated industries—all within the last term!—these hurdles are getting considerably higher.[4] This is particularly true in light of the increased rigour with which more and more courts are evaluating the propriety of class certification.

Serving as a further bulwark against a greedy lawyer offensive is the battery of legislation designed to make it more difficult and risky to game the class action system. The Class Action Fairness Act of 2005,[5] for example, has made it significantly more difficult to bring class actions in state court, the traditional hotbed of class action mayhem and illicit attorney recoveries. The Foreign Trade Antitrust Improvements Act[6]—particularly as recently applied by the Circuit Courts following the Supreme Court's *Empagran* decision—similarly hampers class action malfeasance by barring from US courts most kinds of foreign purchaser actions.[7] Finally, there is the r.11 sanction against parties *and their counsel* for bringing frivolous cases.[8] While woefully underutilised, r.11 offers what could be an extremely potent safeguard against the misguided class lawyer.

A lopsided debate

The problem is that an unbridled fear of greedy lawyers and the class action abuse they can foster appears to be dominating the discussion in Europe. To most, it seems to be a foregone conclusion that the US class action model is broken, and that a so-called "litigation culture" runs rampant. The US system has thus become the poster-child for the anti-class action movement abroad. And, almost everyone appears to be signing on. They are doing so, however, without fully appreciating the vital role class actions play in US antitrust enforcement, and by ignoring the protections against frivolous filings inherent in these kinds of cases and reinforced by the courts and legislature.

Even more troubling is that absent from the dialogue appears to be any recognition of the numerous antitrust class actions that have actually succeeded in remedying

4 See *Leegin Creative Leather Products, Inc v PSKS, Inc*, 127 S. Ct. 2705 (2007); *Bell Atlantic Corp v Twombly*, 127 S. Ct. 1955 (2007); *Credit Suisse Securities (USA) LLC v Billing*, 127 S. Ct. 2383 (2007).

5 Pub. L. No.109-2 (2005).

6 15 U.S.C. § 6a (1982).

7 See *F. Hoffman-La Roche Ltd v Empagran SA*, 542 U.S. 155 (2004); *Empagran II*, 417 F.3d 1267 (D.C. Cir. 2005); *Inquivosa v Ajinomoto Co*, 477 F.3d 535 (8th Cir. 2007).

8 28 U.S.C. §11(c).

serious market deficiencies and bringing about wide-scale consumer relief. One such case, for example, is the action brought on behalf of five million merchants against Visa and MasterCard, challenging their exclusionary conduct in the debit card market. Over the six year life of the case, the plaintiffs spent roughly $18 million in costs and 250,000 hours of attorney time. Obviously, it was not a case brought lightly. The results were staggering—$3.4 billion in monetary damages and tens of billions of dollars more in reduced pricing. In the words of the District Court, the case resulted in, "significant and lasting benefits for America's merchants and consumers."[9]

What is particularly notable about that case is that the Government (after refusing the plaintiffs' original requests to bring the action) subsequently brought its own action against Visa and MasterCard on a separate but related issue. The Government then intervened in the private action to secure all of the evidence the private plaintiffs had collected—through millions of pages of discovery and several hundred depositions—and to share in all of the work product plaintiffs' counsel had created. This kind of case is precisely what Congress envisioned when it established the private attorney general model as a critical supplement to government enforcement. There have been many other cases just like it. And there are surely many more to come.

Yet, not many are willing to include these important class action triumphs as part of the debate. They are either brushed aside as aberrations, or ignored altogether. This does not permit a fair assessment of the US system. Nor does it provide reliable direction to those in Europe looking to learn from the American experience (both the good and the bad).

If all of the recent talk in Europe about promoting private antitrust enforcement is for real, then there has to be a more balanced study of the US system. There has to be an understanding of the important role class actions play in American antitrust enforcement. There has to be an appreciation of the significant difficulty, risk and expense involved in bringing these kinds of cases—natural deterrents to frivolous filings. And there has to be a recognition of the many such cases that have succeeded in doing exactly what Congress intended—stepping in to preserve the free enterprise system where the government cannot, or will not. Only then can there be a truly meaningful discussion of what needs to be done in Europe to advance private antirust enforcement beyond the mere recovery of a few quid and a coffee mug for some overpriced football shirts.[10]

9 *Re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp.2d 503, 524 (E.D.N.Y. 2003).

10 Case No.1078/7/9/07, *Consumers Association v JJB Sports Plc*, registered March 5, 2007, CAT.