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TWO “BIG STICKS”: DUAL ENFORCEMENT OF ANTITRUST LAWS KEEPS BUSINESS IN LINE

by Christopher H. Casey, Esq. & Joshua D. Wolson, Esq.

Teddy Roosevelt, the original trust buster, “spoke softly and carried a big stick.” Modern day trust busters wield two big sticks: both government authorities and a well-funded antitrust bar aggressively enforce the nation’s antitrust laws.

The two principal antitrust statutes are the Sherman Act and the Clayton Act. The Sherman Act, which outlaws anticompetitive agreements—such as price-fixing and market division agreements—and monopolization, carries criminal and civil penalties. The Clayton Act proscribes, among other things, merger agreements that result in a substantial lessening of competition. These statutes are enforced by the Antitrust Division of the Department of Justice (with exclusive jurisdiction over criminal antitrust investigations) and the Federal Trade Commission, as well as state attorneys general.

Federal antitrust laws, and many state laws, provide for treble damages and attorneys’ fees. As the Supreme Court noted in a 1972 case, by allowing for recovery of treble damages, “Congress encouraged these persons to serve as ‘private attorneys general.’” Thus, even a company acquitted of criminal conduct may still have to pay large sums in damages for the same conduct.

For antitrust plaintiffs, the presence of an ongoing government enforcement action presents the question of whether to sue right away or wait until the government investigation is completed first. Lawsuits that follow a government action are called “follow-on” suits.

There are advantages to waiting out the government investigation. Section 5 of the

Clayton Act, for instance, provides that conviction in a criminal antitrust case constitutes *prima facie* evidence, for the purposes of a private civil suit, that the defendant has violated the antitrust laws. Another provision of Section 5 provides that the statute of limitations for a private antitrust action is tolled during the pendency of, and for a full year following, any enforcement action based on the same underlying facts. Thus the plaintiff can await the outcome of the government enforcement action without the claims becoming time-barred.

By allowing the government investigation to run its course, plaintiffs get the benefit of the government’s investigative work before suing. In fact, private plaintiffs often rely heavily on the government’s complaint and findings when making their allegations. Thus, private plaintiffs that follow a successful government action have some of their work done for them before they even file suit.

But in some cases the private suit must be filed quickly. This is particularly so where the government is investigating a defendant who is facing multiple lawsuits from class plaintiffs. The Judicial Panel on Multidistrict Litigation will consolidate the cases in one judicial district, and the transferee court is charged with appointing lead counsel for the various classes, forcing those wanting the appointment to get in the case quickly. Thus, where a class action is foreseeable, plaintiffs’ attorneys often file suit while the government investigation is ongoing.

This happened recently to the big four chocolate manufacturers—Hershey, Mars,

Nestle, and Cadbury—when chocolate purchasers in various states filed price-fixing actions against them. The actions were consolidated in April by the Judicial Panel in the Middle District of Pennsylvania in Harrisburg. The complaints followed enforcement actions by German and Canadian antitrust authorities, and the apparent opening of an investigation by our own Antitrust Division. (The authors of this article represent a party in that action).

The dual enforcement of antitrust laws by public authorities and private plaintiffs provides an extra layer of deterrence to those contemplating a price-fixing or market division agreement with their competitors. Potential violators subject themselves to two adverse verdicts, the second carrying treble damages. In addition, they could face private suits from both direct purchasers of their products, and indirect purchasers—those who buy from a distributor rather than directly from the defendant company—who may sue under state antitrust laws. For those states, like Pennsylvania, without an antitrust law, state consumer protection laws may be used in some cases.

Past efforts to eliminate or discourage the practice of follow-on suits have proven unsuccessful, both in Congress and in the courts. Thus, businesses and individuals contemplating antitrust law violations will continue to be subject to dual enforcement to keep them honest.



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