

5 Overlooked Reasons To Be Class Rep In An Antitrust Suit

Law360, New York (May 16, 2013, 1:14 PM ET) -- One of the goals of most in-house attorneys is to avoid litigation at all costs. Given the distraction and expense of protracted litigation, it would seem pragmatic to allocate resources to more profitable endeavors, such as to the management and operation of the business. In certain circumstances, however, the benefits of participating in litigation, and in class actions in particular, far outweigh the cost savings of sitting on the sidelines. This article sets out five often overlooked reasons that may tip the scales in favor of a mid- to large-sized corporation stepping forward as a representative plaintiff in an antitrust class action.



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1) The Larger the Class Representative, The Higher the Settlement

Antitrust cartels increase the cost of doing business in the United States by billions of dollars. In recent years, successful cartels have raised the prices of commodity products by 10-20 percent before ultimately being detected by private or government enforcement authorities. Given these stakes, it is somewhat counterintuitive that many large corporations which have incurred seven-figure overcharges would prefer to have small (or sometimes even bankrupt) entities with modest financial losses lead the quest for monetary relief.

While small businesses certainly satisfy the prerequisites to serve as a class representative under Rule 23 of the Federal Rules of Civil Procedure, they often do not have the same intimate industry knowledge and daily interaction with antitrust defendants to help guide class counsel in its prosecution of the litigation. Additionally, antitrust defendants are likely to take allegations of wrongdoing by major customers more seriously than those of fringe buyers. Not surprisingly, history demonstrates that sophisticated class representatives help obtain higher settlement values for the class.

Congress expressly recognized the benefit of having large sophisticated plaintiffs lead the charge in the context of other class action litigation when it enacted the Private Securities Litigation Reform Act. Under the PSLRA, Congress sought to better align the interests of those with the greatest incentives to pursue a monetary remedy with the leadership of securities class actions by making the investor with the largest financial loss the presumptive lead plaintiff.

Empirical data demonstrates the success of the PSLRA, where securities class actions with institutional investors as lead plaintiffs are less likely to be dismissed and have larger settlements than securities class actions with individual lead plaintiffs. Indeed, data collected by the National Economic Research Associates suggests that large institutional investor plaintiffs increase settlement values by up to one-third. While there is a dearth of similar data on antitrust class actions, it is just as probable that corporations with substantial losses would have a similar impact on antitrust class action recoveries.

2) Class Representatives Drive The Litigation

A company that acts as a class representative will be able to assert its influence over the litigation to ensure that it and similarly situated companies obtain the maximum value for their claims. For example, a class representative can offer its input into litigation strategy, discovery and particularly settlement. Absent class members who wait in the wings do not have any control over the direction of the litigation, and in the case of a dispositive judgment after class certification, may be bound by any negative decisions issued by the court.

3) Class Representatives are Entitled to Experienced Counsel Who, If Successful, Are Awarded Reasonable Attorneys' Fees

Rule 23 of the Federal Rules of Civil Procedure ensures that class representatives are afforded counsel who is "best able to represent the interests of the class." To make such a determination, courts consider:

(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.[1]

Thus, class representatives are provided with a judicial safeguard that their selection of counsel is particularly qualified to handle their dispute.

Moreover, legal fees in a class action are both contingent and subject to judicial review. Specifically, class counsel's fee must be an appropriate percentage of the size of the class settlement or judgment and must also reflect the actual time commitment allocated to the case. Thus, unlike an individual litigant, a class representative is assured highly qualified counsel who will be paid attorneys' fees only if successful and in an amount that is reviewed and approved by the court.

4) Class Representatives Serve the Public Good

It is widely recognized that private lawsuits are one of the pillars of antitrust enforcement in the United States. While government action is also integral to combating anti-competitive conduct, enforcement hinges on the government's limited resources, and even when successfully pursued, the monetary remedy — most often in the form of fines — does not directly compensate victims of anti-competitive conduct. Since competition in our economy is essential for its proper functioning, Congress not only authorized private actions to redress violations of the antitrust laws, but also provided a bounty for

successful parties — in the form of treble damages and attorney-fee shifting.[2]

Given the obvious public importance of private antitrust enforcement, there are a number of intangible benefits to a corporation serving as a class representative. For example, serving as a class representative in an antitrust lawsuit may demonstrate model corporate citizenship to employees and shareholders. Moreover, a corporation serving as a class representative also sends the message to its shareholders that it will aggressively pursue all possible revenue, including the recovery of unlawful anti-competitive overcharges. In this era of corporate scandals and wrongdoing, a company may be well served by seeking monetary overcharges while simultaneously serving the public interest in the process.

5) Class Representatives May Have Their Expenses Reimbursed and Qualify for an Incentive Award.

Courts recognize the “free rider” problem that is inherent in class action litigation — a class representative is expected to do the “work” of litigation without receiving a larger proportional share of the class recovery. Class representatives may, therefore, petition to have their out-of-pocket expenses, such as travel and document-production costs, reimbursed out of the class’ recovery. Some courts also grant “incentive awards” to class representatives in recognition of the contribution they made to the case over and above that of an absent class member. Incentive awards are by no means guaranteed, but they can provide a class representative with additional monetary consideration for its meaningful contribution of its time and effort in helping to bring about a successful outcome in a class action.

Conclusion

Deciding whether to participate in antitrust litigation as a class representative, an opt-out plaintiff or an absent class member is an important decision for a general counsel’s office that can affect its resources, the company’s reputation, and the bottom line. In many circumstances, getting up and standing up as a class representative may be an effective way to protect the company’s interests while assuring that it and other victims of anti-competitive behavior receive the monetary recovery they deserve.

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[1] Fed.R.Civ.P 23(g).

[2] 15 U.S.C. § 15.