

Defending Class Actions Challenging Mergers

Law360, New York (March 29, 2012, 3:55 PM ET) -- Class actions challenging mergers are relatively rare, but three such cases have recently been brought challenging mergers in the (1) retail grocery, (2) satellite radio and (3) health care/hospital industries. As is the case in most antitrust class actions, the primary issue before these courts was whether antitrust impact, or injury, could be established on the basis of classwide evidence.

In the first case, the court declined to certify the class, *Kottaras v. Whole Foods Market Inc.* (D.D.C. Jan. 30, 2012), while in the second, the district court certified the class. *Blessing v. Sirius XM Radio Inc.* (S.D.N.Y. March 29, 2011).[1] In the third, the denial of class certification by the district court was found by the Seventh Circuit to be an abuse of discretion. *Messner v. Northshore Univ. HealthSystem* (7th Cir. Jan. 13, 2012).

An important factor in defeating certification of a class challenging a merger appears to be the ability to demonstrate that prices for items moved in opposite directions following the merger thus requiring individual proof of the net effect of the merger. This is similar to cartel cases in which demonstration of variable price movement can be instrumental in defeating class certification. In *re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008). Expert testimony is also critical.

Kottaras v. Whole Foods Market Inc.

Whole Foods Market's proposed acquisition of Wild Oats Markets in 2007 spurred a vigorous challenge by the FTC, which argued that the acquisition would lessen competition in a relevant market of "premium, natural, and organic supermarkets." The U.S. District Court for the District of Columbia denied the FTC's request for a preliminary injunction and the merger went forward. On appeal by the FTC, the D.C. Circuit reversed and remanded after consummation of the deal. Whole Foods subsequently agreed to divest a small number of stores in particular metropolitan areas.

Following the appeal, a consumer in Los Angeles filed a class action complaint alleging that the Whole Foods/Wild Oats merger was unlawful and had resulted in overcharges to a nationwide class of purchasers. She ultimately narrowed her proposed class to consumers in California's Los Angeles County. The U.S. District Court for the District of Columbia denied class certification, finding that plaintiff had not shown that antitrust injury could be proven with classwide evidence. *Kottaras v. Whole Foods Market Inc.* (D.D.C. Jan. 30, 2012).

Plaintiff's expert proposed to analyze antitrust impact through thousands of regression analyses that would purportedly determine if the merger had caused an overcharge on individual items within the relevant market. Plaintiff's expert relied heavily on the fact that Whole Foods' prices were uniform for a given item across all the stores in Los Angeles County. Thus, if he found an overcharge on a particular item, that overcharge would have been paid by all class members who purchased the item. Plaintiff's expert proposed to ignore any items that declined in price due, for example, to efficiencies resulting from the merger.

Whole Foods' expert emphasized the need to determine what "product" customers purchased in plaintiff's proposed relevant market of "premium, natural and organic supermarkets." In such a market, consumers purchase "baskets" of items. The court accepted this view and found that, as Whole Foods argued, post-merger savings could not be ignored in determining injury and would have to be weighed against any overcharges to determine whether a consumer paid more or less for her overall basket of purchases as a result of the merger.

The prospect of such savings was not fanciful: After adjusting for inflation and seasonality, the prices of approximately 50 percent of Whole Foods' items decreased post-merger, which Whole Foods' expert concluded was likely attributable to the merger. Because this would entail an analysis of each consumer's basket, common evidence could not be used to demonstrate antitrust injury.

Blessing v. Sirius XM Radio Inc.

Blessing v. Sirius XM Radio Inc. was a putative class action following the merger of Sirius Satellite Radio Inc. and XM Satellite Holdings Inc. No. 09-CV-10035 (S.D.N.Y. Mar. 29, 2011). The DOJ had investigated the merger and found that it would not substantially lessen competition in the satellite digital audio radio services market. When Sirius added or increased charges for three specific services following the merger, consumers of satellite radio services filed a class action, alleging that they had been harmed by defendant's abuse of monopoly power. As in the Kottaras case, pricing was uniform across class members.

The Southern District of New York certified a class on plaintiffs' federal antitrust claim under Rule 23(b)(3). The court agreed with plaintiffs that classwide evidence could be used to determine impact because of the uniformity of defendant's price increases on the three fees. Unlike Kottaras, there was apparently no evidence of any price decreases to offset the increased prices.

The court summarily rejected the defendant's arguments that (1) fees affected members of the class differently because they subscribed to different services and (2) that individualized proof of the subjective benefits accruing to individual consumers would be required. The court found that a formula could resolve the first question since prices were uniform across class members and that an individual's subjective valuation of the services was irrelevant. The court also rejected defendant's argument that the plaintiffs' expert failed to address other potential causes of the price increase.

Messner v. Northshore University HealthSystem

In 2004, the FTC challenged the consummated merger of Northshore University HealthSystem and Highland Park Hospital, alleging that it would substantially lessen competition and enable Northshore to raise its prices on general acute care inpatient services. An FTC administrative law judge concurred with FTC staff and ordered the divestiture of the Highland Park Hospital assets. On appeal, the full commission affirmed the finding of liability under Section 7 of the Clayton Act but ordered structural remedies in lieu of divestiture.

A class action ensued in which plaintiffs sought to represent a class of persons or entities who purchased or paid for general inpatient or hospital-based outpatient services from the merged Northshore entity.

In re Evanston Northwestern Healthcare Corp. Antitrust Litig., 268 F.R.D. 56 (N.D. Ill. 2010).

To establish their ability to prove impact on the basis of classwide evidence, plaintiffs' expert proposed to use a "difference-in-difference" analysis to compare the percentage change in Northshore's pre- and post-merger prices to the percentage change in prices at a control group of local hospitals during the same period. If the Northshore percentage change exceeded the control group change by a statistically significant amount, the difference would constitute the amount of the overcharge. The district court denied class certification because it believed the expert's method required uniform price increases across goods and services.

While the expert initially premised his opinion on an assumption that Northshore increased prices at a uniform rate across goods and services, he later conceded that not all prices increased by a uniform amount. While this fact complicated his analysis, he nevertheless believed he could account for those differences by conducting his analysis for individual goods and services.

As the Court of Appeals noted, if a contract increased the price of hypodermic needles by 30 percent but saline solution by only 20 percent, the analysis still would show impact on all who paid for one or both products. Thus, the court was not troubled, as was the district court, by the fact that not all prices increased at a uniform rate. Indeed, it was not troubled by the fact that the analysis might show that prices for some services may have decreased as a result of the merger, but the strength of the evidence on this point was unclear and suggested that certain nominal price decreases were simply a function of rebundling of services.[2]

Why the Different Results?

The Blessing and the Kottaras cases, while differing in outcome, appear to be consistent. In each case, there was a single relevant market (satellite digital audio radio services vs. premium, natural and organic supermarkets) comprised of multiple items or services (the three services identified in Blessing vs. the items sold by Whole Foods in Kottaras). All class members paid the same price for a given item or service. Class members may have purchased some but not all of the items or services. The key difference lay in the fact that in Kottaras there was also evidence suggesting decreases in prices for about half the items that comprised the relevant market.

To determine whether class members suffered injury on their overall purchases, these price decreases needed to be offset against the increases — an individual inquiry given the variability in what class members purchased. In Blessing, there was evidence only of price increases. The Blessing plaintiffs did contend that geographic differences existed with respect to competitive alternatives for the three services in question which would cause the "but for" prices for a given service to differ, but the court rejected this argument since consistent nationwide prices suggested that geographic differences did not have a competitive effect.

The evidence in Messner was more ambiguous. As in Blessing or Kottaras, the relevant product market encompassed a variety of items or services. Similarly, in all three cases, class members purchased different combinations of the items or services. So like Kottaras and Blessing, each class member had a different "basket" of purchases. There was also some evidence of price decreases following the merger but the reasons for the decreases appear not to have been merger-related.

Clearly, however, the defendant in Messner did not focus its efforts on arguing that within the basket of purchases, prices of certain items decreased following the merger. Of course, it is possible that the data simply did not support an argument like that made in Kottaras. Instead, the focus in the district court was on uniformity, a focus that the Seventh Circuit determined to be flawed.

Expert Testimony

The three cases highlight the importance of expert testimony at the class certification stage. The defendant in Blessing evidently did not rely on expert testimony, choosing instead to cite obvious deficiencies in the plaintiffs' expert opinion. In Messner, the district court found the defendant's expert testimony, which plaintiffs challenged on a Daubert motion, to be problematic but nonetheless relied on it.

The Seventh Circuit held that this was error, and that a court must conclusively rule on a Daubert motion before the class certification motion if the expert's testimony is critical to the certification decision. The district court's assessment of both plaintiffs' and defendant's expert testimony appears to have played a large role in the Seventh Circuit's decision to vacate the decision.

In Kottaras, it was plaintiff's expert who did not persuade the court. In fact, the court found plaintiff's expert testimony too vague for the court to sufficiently analyze. Not only had plaintiff's expert not looked at the data, he had not even determined the variables he would use to undertake his regression analysis. Whole Foods' expert, on the other hand, demonstrated to the court that there was good reason to believe that prices decreased as a result of the merger and that ignoring the benefits of the merger was counter to economic principles. The court relied on this to find that plaintiff had not carried her burden of showing that antitrust injury could be proven on the basis of classwide evidence.

The Future of Class Action Challenges of Mergers

Regardless of the outcome of a government investigation, plaintiffs seem increasingly interested in pursuing class actions on the heels of government enforcement. Whether this trend will continue remains to be seen, but Whole Foods, Messner and Blessing suggest that traditional class certification principles used in cartel cases can be used to analyze merger cases as well.

The authors represented Whole Foods Market in the Kottaras litigation. Christine Levin represented FMC Corp. in the Hydrogen Peroxide litigation.

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[1] The Plaintiff in Kottaras has moved for leave to file an interlocutory appeal.

[2] The Court likewise was not troubled – for reasons that are not apparent in the opinion – by the fact that insurers negotiated contracts individually.