ORGANIZING THE DEFENSE OF THE PRIVATE ANTITRUST CLASS ACTION

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I. INTRODUCTION

This article will discuss the job confronted by counsel in defending a private antitrust class action, and will focus on the practical considerations affecting the organization and conduct of the defense. Little or no consideration will be given to such matters as the nature and pleading of substantive and procedural defenses, or to techniques used in organizing and conducting discovery, preparing and negotiating stipulations for use at trial, preparing and filing proposed findings of fact and conclusions of law in a non-jury case, and proposed jury instructions in a jury case, or to trial problems or techniques.

It is well to recognize at the outset that there is no single way to organize the defense. One case may call for early and extensive discovery by interogatories and requests for documents and depositions; another for taking the deposition of the named plaintiff only and pressing for an early trial; another for extensive pretrial motions; another for no activity at all. Nevertheless, several common considerations are involved in a determination of the appropriate procedure for the defense of almost every private action.

Preparation of the defense should begin early, if possible before suit is filed, *e.g.*, during the pendency of government proceedings or discussions with a potential plaintiff. For example, the effect on possible private actions is an important element in deciding whether to try to plead *nolo contendere* to a government criminal proceeding.

The defense of almost every private antitrust action involves complex legal and factual issues. Defense counsel should consequently have or obtain a familiarity with substantive federal antitrust laws; be comfortable working in federal court under the Federal Rules of Civil Procedure, particularly the discovery provisions; and have available sufficient office resources to sustain an effective defense.

One additional preliminary matter has to do with the nature of defense counsel's job. Defense counsel's job, simply stated, is to get his client out of the case at minimum financial cost (including defense counsel's fees and expenses) and with the fewest possible limitations on the client's future operating freedom. It is well to keep in mind that the action is only one of the client's many business problems. Defense counsel's duty is to his client and, while counsel must act within ethical limits and keep

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faith with other defense counsel in a multi-defendant case, he should keep his duty to his client clearly in mind, particularly when considering settlement in a multi-defendant case. Treble damage class actions can be very expensive to defend, and the client may become restless after receiving several large bills and may wish to know the alternatives to the drain on his resources. Defense counsel should keep the client advised of what he is doing and why, and meet with him periodically to consider alternatives such as settlement.

II. Factors Affecting the Defense of any Treble Damage Action

As noted above, there is no single approach to organizing and conducting the defense of a private antitrust action. The factors that affect counsel's decision on how to proceed are as follows:

A. Extent of the Client's Actual or Potential Exposure

Defense counsel's first job is to develop facts from available sources relating to the matters alleged in the complaint. It often happens that the complaint only scratches the surface, and that the plaintiff may discover further or more serious violations in the course of discovery. This may indicate that the defendant should make early attempts to settle, or, alternatively, put up very stiff resistance to plaintiff's attempts at broad discovery. In other cases investigation may indicate no exposure at all, so that it becomes appropriate to move quickly for summary judgment or try to persuade the plaintiff's counsel to dismiss the case as to a given client.

B. Type and Size of Action

Generally, any treble damage action will involve either horizontal activities or vertical activities, although some cases will involve both. The horizontal area includes cases alleging price-fixing, group boycotts, market allocations, monopolization, conspiracy, attempts to monopolize, and mergers. With the exception of merger cases, the cases noted are likely to involve numerous defendants, and in many instances will follow the filing of government actions. Vertical activities include refusals to sell, termination of distributors and dealers, price discrimination, exclusive dealing and tying arrangements, restrictions on resale price, territory or customers, and possibly mergers. This type of case is likely to involve a single defendant.

The defense of a treble damage action charging numerous defendants with fixing the price of goods or services sold to a large number of direct and indirect purchasers over an extended period of time will differ substantially from the handling of a treble damage action by existing franchisees asserting Robinson-Patman, exclusive dealing and resale price restrictions.

Whereas the potential damages in a price-fixing case may involve millions of dollars, a Robinson-Patman Act case may involve considerably less.

C. *Origin of the Suit*

Treble damage claims arise in several areas: an action following prior governmental proceedings; a counterclaim in an action on an account against a terminated distributor; a patent infringement action; a competitive torts case asserting theft of trade secrets or customer lists; a new suit, which may in fact be the first strike by a party who knows he is going to be sued by the defendant on an account, for patent infringement, etc.

The handling of an action in which there have been extensive prior government proceedings will usually differ substantially from the handling of a counterclaim by a terminated distributor in response to an action on an account. This is not to say that the handling of the counterclaim should be taken lightly. In more than one instance, an antitrust counterclaim has led to a government investigation that has developed into government proceedings and subsequent treble damage class actions.

D. *Relation of the Treble Damage Action to Prior or Potential Justice Department or Federal Trade Commission Proceedings*

If there have been prior government proceedings, there may be a fund of documents and transcribed testimony, plus considerable publicity that will interest potential plaintiffs and their attorneys in filing suit. The plaintiff may also have the benefit of the prima facie case provisions of § 5 of the Clayton Act. Frequently the same counsel will defend in both the prior governmental proceedings and the subsequent private action in a multi-defendant case: this can be an advantage if defense counsel have developed confidence in one another.

It often happens that plaintiff's attorney will threaten to contact or actually will contact the Justice Department or the Federal Trade Commission (FTC) in an attempt to interest them in investigating and proceeding against the alleged antitrust violations. In some instances, private cases have led to Justice Department and FTC proceedings, *e.g.*, the GM-Ford fleet cases and the Tyson's Corner FTC proceeding.

E. *Relation of Defendant to Plaintiff—Nature of the Plaintiff*

A continuing relationship between the plaintiff and defendant client, such as exists when the plaintiff is a good customer of the defendant, may necessitate a particular approach to the handling of the defense, in respect to such matters as the conducting of depositions of plaintiff's officers.

Further, it is important to consider the plaintiff's resources and whether

he can support the extensive preparation necessary to prosecute a treble damage action. The plaintiff's resources, of course, include the willingness of plaintiff's counsel to take the case on a contingent fee basis and advance expenses. It is also crucial to determine whether the plaintiff really seeks money damages for being driven out of business, lower prices in the cost of goods he is purchasing, an injunction against certain trade practices, divestiture of part of defendant's business, changes in a franchise relationship, etc. This factor is obviously extremely important, as it may form the basis for settling and disposing of the suit.

F. Number of Actual or Potential Plaintiffs—Plaintiff's Attorney

Generally, the more plaintiffs there are, the more difficult and expensive the case will be to defend. This is particularly true in the case of a plaintiff's class action.

If plaintiff's counsel is not sophisticated in antitrust matters, as he may not be if he is defending an account and files an antitrust counterclaim as a negotiating tool, defense counsel's handling of the defense may be primarily concerned with going to trial quickly with a minimum of discovery. Experienced plaintiff's counsel present different problems.

G. Number of Defendants

The more defendants there are, the more defense counsel there will be, the less freedom individual defense counsel will have, and the more problems and "politics" there will be in handling the defense. Except in rare situations, one defendant and its counsel do not participate in the selection by another defendant of its counsel, with the result that defense counsel are pretty much thrown together in a particular situation. When there are wide variations in age, experience, and office resources, the problem of managing or administering the defense can be complex.

In a multi-defendant case, one defendant often possesses information of great importance to other defendants, *e.g.*, the knowledge that one defendant's employee has with respect to what another defendant's personnel said or did at a particular time and place. It is usually essential that there be disclosure of information for the common welfare, and disclosure carries with it certain problems: leakage of confidential trade information to another defense counsel's client; leakage to plaintiff's counsel if a particular defendant settles and works out a deal with the plaintiff or doesn't properly protect privileged material; and leakage by the government if others do not protect the privilege.

Lawyers, particularly trial lawyers, may be *prima donnas*, and their ideas about what they can do or should be doing in a particular case may vary and conflict. This has the potential of creating serious problems in the handling of the defense, and early attention to this problem, and to

developing mutual confidence and a fair and sensible allocation of the defense burden, is essential.

H. State and Local Rules and Practices

The proposed Federal Rules of Evidence have been approved by the Supreme Court, but whether they will be adopted by Congress is a matter of speculation. Under the existing rules, the state's rules of evidence may be critical, since under rule 43(a) of the Federal Rules of Civil Procedure the rules of evidence of the state in which the district court is sitting are used to determine admissibility of evidence.

The judge's approach to the handling of big cases, use of the *Manual for Complex and Multi-District Litigation*, holding of pretrial conferences, etc., will seriously affect defendant's handling of the defense. Some courts normally do not hold extensive pretrial conferences or get involved in anything before trial unless the parties bring matters to their attention. Other courts have extensive rules on identification of issues, documents and witnesses, and filing of pretrial memoranda and briefs.

If the treble damage action is filed outside the home city of a defendant's chief counsel, the local rules in some districts require that each party retain local counsel. Even where there is no such rule, it is usually necessary to retain local counsel to handle filings and provide office resources, as well as such assistance in preparation and trial as may be necessary. The extent to which local counsel actually participate in the preparation and trial of the case will depend on such factors as the client's wishes, avoidance of duplication of prior effort, and how "provincial" is the city where the case is to be tried.

III. CONSIDERATIONS APPLICABLE IN CLASS ACTION CASES

A. Essentials of Rule 23

Rule 23 of the Federal Rules of Civil Procedure provides essentially that one or more members of a class may sue or be sued as class representatives if the following prerequisites are met: The class is so numerous that joinder of all members is impractical; questions of law and fact common to the class exist; the claims or defense of the class representatives are typical; the class representatives will fairly and adequately protect the interests of the class. Further, the court must find that the common questions of law or fact predominate over any questions affecting individual members, and that a class action is superior to other available methods for fair and efficient adjudication.

If the court determines that a class action is maintainable, notice must be given to each class member that: (1) the court will exclude a class member if he so requests; (2) the judgment will include him if he doesn't

request exclusion; and (3) he may, if no exclusion is sought, enter an appearance through counsel.

B. Resisting a Class Action Determination

If the court finds that a class action is appropriate, a defendant may be faced with potentially enormous damage exposure. It is consequently advisable, if settlement is not to be attempted, to resist a class action finding, or, in the alternative, to keep the class as small as possible.

In pursuing this objective, defense counsel should first develop a record by way of affidavits, depositions, interrogatories, etc., with respect to the various grounds for successfully resisting a class action finding. The major grounds on which a successful defense can be based are listed below.

a. The proposed claim is too small.[1]
b. The proposed class is too large.[2]
c. The class representative cannot fairly and adequately represent the class because of conflicts of interest among class members[3] or inadequacy of counsel.[4]
d. A problem of manageability would be created by reason of complexity or proliferation of the issues in the case.[5]
e. The class should be limited to a convenient geographic area such as a state or judicial district or to a single functional level such as wholesalers or retailers.[6]
f. The size of individual claims of class members is sufficiently large to enable and motivate them to sue on their own or to intervene.[7]

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[1] See Weingartner v. Union Oil Co., 431 F.2d 26 (9th Cir. 1970) (15 retail dealers), *cert. denied*, 400 U.S. 1000 (1971); Denver v. American Oil Co., 53 F.R.D. 620 (D. Colo. 1971) (less than 10 of 126 claimed class members); William Goldman Theatres, Inc. v. Paramount Film Distrib. Corp., 49 F.R.D. 35 (E.D. Pa. 1969); Holly Springs Funeral Home, Inc. v. Funeral Serv. Inc., 303 F. Supp. 128 (N.D. Miss. 1969) (10-12 funeral homes).

[2] Reinisch v. New York Stock Exchange, 52 F.R.D. 561 (S.D.N.Y. 1971) (20,000,000 traders on the New York Stock Exchange); *cf.* Eisen v. Carlisle & Jacqueline, 391 F.2d 555 (2d. Cir. 1968) (3,750,000 odd-lot investors). United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970) (all egg consumers in the United States).

[3] Holly Springs Funeral Home, Inc. v. United Funeral Serv., Inc., 303 F. Supp. 128 (N.D. Miss. 1969); Seigel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967); *cf.* Sol S. Turnoff Drug Distrib., Inc. v. N. V. Nederlandsche Combinatie Voor Chemische Industrie, 51 F.R.D. 227 (E.D. Pa. 1970) (class provisionally allowed until interests of class members diverge).

[4] Taub v. Glickman, 14 FED. RULES SERV. 2d 847 (S.D.N.Y. 1970) (laggard performance and improprietous conduct); Halverson v. Convenient Food Mart, Inc., 458 F.2d 927 (7th Cir. 1972) (reversing a denial of class for solicitation); *cf.* Hertz v. Canrad Precision Indus., Inc., [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,570 (S.D.N.Y. 1970) (presumption of qualification unlses contrary clearly demonstrated).

[5] Abercrombie v. Lum's, Inc., 345 F. Supp. 387 (S.D. Fla. 1972); Utah v. American Pipe & Construction Co., 316 F. Supp. 837 (C.D. Cal. 1970); Lah v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio 1970).

[6] Akron v. Laub Baking Co., 1972 Trade Cas. ¶ 91,887 (N.D. Ohio); Philadelphia Electric Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

[7] Van Allen v. Circle K Corp., 1972 Trade Cas. ¶ 92,907 (C.D. Cal.) (149 grocery store franchises).

g. There are more practical alternatives.[8]
h. Questions of law or fact are not common or claims are not typical (similar to (c) in some instances).[9]
i. Individual questions predominate.[10]
j. There are strong individual interests in controlling their actions.[11]

These are not mutually exclusive; other grounds will exist in particular cases, and defense counsel will probably want to combine resistance on these grounds with a suggestion that intervention by potential plaintiffs be permitted under rule 24.

C. Reducing the Number in the Class After an Adverse Ruling

If the court finds that a class is appropriate, defense counsel will normally be faced with a class consisting of everyone in the class who has not opted out. At least two methods exist to attempt to further reduce the number in the class: move to require the class members to file damage claims as a condition of continued class membership,[12] and direct discovery, such as interrogatories to the class members, and move for sanctions in the form of dismissal of any class member who fails to respond.[13]

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[8] Barkal v. Chas. Pfizer & Co., 51 F.R.D. 504 (S.D.N.Y. 1970) (attorneys general of each state preferable to single citizen as consumer representatives).

[9] Abercrombie v. Lum's, Inc., 345 F. Supp. 387 (S.D. Fla. 1972); *In re* 7-Eleven Franchise Antitrust Litigation, 1972 Trade Cas. ¶ 92,829 (N.D. Cal.) (franchises cannot maintain a class action except on illegal provisions of a written franchise contract); Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26 (S.D.N.Y. 1972); Gaines v. Budget Rent-A-Car, 1972 Trade Cas. ¶ 91,602 (N.D. Ill.) (terminated dealer cannot maintain class including existing dealers); Akron v. Laub Baking Co. 1972 Trade Cas. ¶ 91,887 (N.D. Ohio); Denver v. American Oil Co., 53 F.R.D. 620 (D. Colo. 1971); Hyatt v. United Aircraft Corp., 50 F.R.D. 242 (D. Conn. 1970) (former employee not in group with present employees); New York v. International Pipe & Ceramics Corp., 1968 Trade Cas. ¶ 85,559 (S.D.N.Y.) (no national conspiracy and logical interests not adequate for a nationwide class); *cf.* Merit Motors, Inc. v. Chrysler Corp., 1972 Trade Cas. ¶ 92,655 (D.D.C.) (present dealer may maintain class of all present dealers); Seligson v. Plum Tree, Inc., 55 F.R.D. 258 (E.D. Pa. 1972) (class conditionally granted pending discovery). *Contra,* McMackin v. Schwinn Bicycle Co., 1972 Trade Cas. ¶ 93,017 (N.D. Ill.) (terminated franchise can maintain class including past and present franchisees).

[10] Lah v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio 1970). *See also* Abercombie v. Lum's, Inc., 345 F. Supp. 387 (S.D. Fla. 1972); *In re* 7-Eleven Franchise Antitrust Litigation, 1972 Trade Cas. ¶ 92,829 (N.D. Cal.).

[11] Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970).

[12] Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 403-04 (S.D. Iowa 1968); Harris v. Jones, 41 F.R.D. 70 (D. Utah 1966); *cf.* Korn v. Franchard Corp., 50 F.R.D. 57 (S.D.N.Y. 1970).

[13] Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971). *Contra,* Wainwright v. Kraftco Corp., 1972 Trade Cas. ¶ 91,963 (N.D. Ga.). *Cf.* Gardner v. Awards Marketing Corp., 55 F.R.D. 460 (D. Utah 1972) (strong showing of necessity).