Trends In Securities Cases Based On Antitrust Allegations

By Samuel Groner and Andrew Cashmore (July 5, 2018, 1:19 PM EDT)

It has become commonplace for a company’s disclosure of the existence of regulatory, state, criminal and/or other investigations into allegedly anti-competitive conduct to trigger the filing of class action securities litigation against the company. The resulting securities cases typically are premised on the theory that the company failed to disclose, in alleged violation of federal securities laws, that it was engaged in the supposed underlying anti-competitive conduct.

Securities class actions of this type are just one example of what are sometimes referred to as “event-driven” securities cases. As professor John C. Coffee Jr. has explained, whereas “[t]raditional securities class actions usually involve financial misrepresentations,” increasingly it will be “an adverse event (whether a criminal misconduct or a harmful side effect)” that will form the basis for a securities fraud class action.[1] The adverse event triggering the securities case can take many forms — Coffee lists as examples “an explosion, a crash, [and] a mass torts episode (such as a toxic drug with a side effect).”[2]

In each such instance, not only will the victims of the “event” bring litigation, but the company’s shareholders will also bring claims alleging that they were injured by the company’s failure to disclose its misconduct. Increasingly, a company’s disclosure of the existence of investigations into allegedly anti-competitive conduct has constituted the kind of “event” that triggers this type of securities litigation.

Such cases typically are filed soon after a company’s initial disclosure of the investigation or investigations into allegedly anti-competitive conduct, despite the lack of any finding, determination or admission that the company actually engaged in any such conduct. For example, in one recent case, the court, in granting in part a motion to dismiss antitrust allegations, noted that although the complaint cited “a number of [U.S. Department of Justice], congressional, and state investigations into potential anticompetitive conduct by pharmaceutical companies, including [the defendant], in the generic drug market,” the defendant “never has been [] found liable for the misconduct alleged by Plaintiffs.”[3]

In a number of recent decisions in cases of this type, district courts have held that courts must apply the heightened pleading standard imposed by the Private Securities Litigation Reform Act of 1995, or PSLRA — which requires that fraud be pled with particularity — not only to the allegations that the securities laws have been breached, but also to determine whether the plaintiff has adequately pled the existence
of the alleged underlying anti-competitive conduct.

As one court explained, “where [a] plaintiff’s central allegation is that defendants’ statements and omissions during the Class Period were misleading because, on information and belief, they failed to disclose an underlying antitrust conspiracy, [the] plaintiff must plead with particularity the facts that establish the existence of the antitrust conspiracy.”[4] Likewise, in another case, the court explained that “[w]here the ‘[p]laintiffs’ underlying allegation [in a Rule 10b-5 case is] that [a defendant] participated in an antitrust conspiracy’ the ‘[p]laintiffs must plead the facts of the alleged conspiracy with particularity.’”[5]

For similar reasons, district courts have made clear that plaintiffs must do more than simply allege the existence of a government investigation or other government or private action raising mere allegations of anti-competitive conduct. That is because “government investigations are just that, investigations” and thus “cannot bolster allegations of scienter that do not exist.”[6] The same is true with regard to plaintiffs who merely parrot unproven allegations in other private actions: “When [a plaintiff] allege[s] that somebody else alleged something,” even if that is “technically true,” it does not provide the court with “the comfort of knowing that [the plaintiff has] undertaken any investigation other than to read that complaint” and, in such circumstances, the court will not “assume [something] as true ... just because somebody else alleged it in their case.”[7]

Moreover, even where the allegations of anti-competitive conduct might be sufficient to plead an antitrust claim, that does not mean that those allegations are sufficient to satisfy the PSLRA’s heightened pleading standards for securities claims. As one district court explained, in dismissing a securities fraud complaint premised on supposed underlying anti-competitive conduct for failure to adequately allege that the company “entered into an agreement with its industry competitors to suppress the domestic supply of chicken, in order to increase prices,” those findings “incorporate the PSLRA’s heightened pleading standard for falsity, and are not necessarily indicative of how [the court] would have decided the case were it presented as a regular Sherman Act claim.”[8]

Securities class actions of this type are currently pending against a number of pharmaceutical companies arising from alleged anti-competitive conduct. Additional decisions are expected later this year by district courts in New York, New Jersey, Pennsylvania and California concerning the defendants’ motions to dismiss those cases. It will be worth monitoring those and other cases for further legal developments.

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[2] Id.


