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Antitrust and Securities Litigation Primer

What is a class action?

A class action is a type of lawsuit in which one or several persons or companies bring an action on behalf of a larger group of persons or companies.

While the subject matter of class action litigation can vary widely, two factors are almost always present in every class action:

1. The issues in dispute are common to all members of the class, and
2. The persons or companies affected are so numerous as to make it impracticable to bring all of their claims separately before the court

Depending upon the type of class action, resolution of the lawsuit binds all members of the class certified by the Court.

Many cases start as the result of complaints by one or a handful of persons or companies to counsel or to governmental bodies.

Others follow upon government investigations and criminal indictments.

What are some examples of class action lawsuits?

Examples of class action lawsuits include claims such as:

Antitrust- Merchants and consumers who allege payment of inflated prices for products caused by the anti-competitive activities of large corporations; and

Securities- investors who allege they are victimized by fraud committed in connection with the purchase or sale of stocks and other securities.

Telephone Consumer Protection Act, 47 U.S.C. § 227- Did you know that it is unlawful to market via use of computer robo-dialing cellular phone numbers, via text message, or by sending unsolicited faxes unless the unsolicited advertisement is from a sender with an established business

relationship with the recipient? Federal law provides for a private right of action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation. The court can triple this $500 per occurrence damage award to $1,500 per occurrence in its discretion.

What are public policy reasons that support class action lawsuits?

Class action lawsuits are designed to advance several important public policy goals. A class action is often the sole means of enabling persons, even those with serious injuries, to remedy injustices committed by powerful corporations and institutions. As stated by former United States Supreme Court Justice William O. Douglas, "The class action is one of the few legal remedies the small claimant has against those who command the status quo."

Often, individuals and corporations may have suffered only limited damages and the cost of individual lawsuits would be far greater than the value of each claim. The total damages, however, to the class, could be quite large. The wrongdoer would have the incentive to continue its fraudulent conduct but for having to disgorge unlawfully gained profits returned via a class action. Government enforcement of antitrust laws, and resulting criminal fines and penalties, tend to put money back into the Federal Treasury – but often do not actually compensate direct purchasers impacted by cartel activity. This is where the private sector comes in. In fact, most antitrust suits are brought by businesses and individuals seeking damages for violations of the Sherman or Clayton Act. Private parties can also seek court orders preventing anticompetitive or fraudulent conduct (injunctive relief) or bring suits under state laws. Private parties injured by certain violations can bring claims for up to three times their actual damages plus court costs and attorneys' fees. These parties are known as Class Representatives.

What is in it for a Class Representative?

Justice. Standing up for all similarly situated, overcharged or defrauded purchasers. Recoupment of your loss. Upon successful resolution of a matter, Class Representatives can receive not only the *pro rata* percentage of the loss they incurred, but also often a court awarded cash incentive.

What is a typical percentage of returned overcharge?

It depends on a host of factors including the strength of the case, the strength of counsel, the ability of settling offenders to pay and economic analysis of class-wide impact and damages, among other factors. Often the range is between 2% and 7%, but this is highly case specific.

What is an incentive award?

An additional cash incentive award determined completely at the discretion of the Court. These awards have run the range from $5,000 to as much as $300,000 and more.

What are the financial costs associated with being a Class Representative?

Generally speaking, nothing. When a class action settles, the prosecuting counsel are typically paid as the court determines, either as a percentage of the common settlement fund created on behalf of all class members, or directly by defendants by means of a settlement agreement that provides for attorneys' fees separate and apart from what is being paid into the common fund. So, upon successful resolution of a matter, some part or provision of the settlement will be paid to prosecuting counsel. Why not get the benefit of what that money is already paying for? Why not insure that your claims will be filed properly and maximized? Why not seek an incentive award?

What should a would-be Class Representative do at the out-set when anticipating becoming involved in a matter?

Preserve all documents and data pertaining to purchases of the products in question and relating to interactions with sellers of the products, whether they exist electronically or in hard copy. As a Class Representative, or an absent class member, you will need these to make sure that your recovery is maximized. You will need to retain records relevant to the class period in order to do so. If anticipating being involved in litigation, it becomes your duty to preserve these documents. The firm provides data preservation solutions after determining who the custodians of relevant paper and electronic documents are, and we help you make sure this information is properly preserved.

What are the duties of a Class Representative?

To choose good counsel.

To stay abreast of the case by keeping informed via updates from counsel.

To review certain key filings, such as the complaint, prior to filing.

To preserve and produce purchase data and related documents as requested.

To provide testimony as requested, typically regarding your purchases of the price-fixed product, sometimes in the form of a deposition.

Antitrust Litigation – General Overview

Antitrust conspiracies are often exposed by whistleblowers or governmental investigations. Criminal fines, however often only fill government coffers - and not the pockets of those who were actually harmed by anticompetitive activity.

Examples of the antitrust litigation that the firm pursues include:

Price-fixing of commodity products

Manipulation of exchange rates

Output reduction and market allocation

Overview of the Antitrust Law Violations

***Per Se* Antitrust Violations**- Conduct that is illegal under any circumstance.

Price Fixing - These are agreements among competitors on the price at which they will sell their products or services. Price-fixing may exist even if there is no agreement on a specific price to be charged. Any agreement between or among competitors with the purpose of increasing or affecting the price of a product or service will violate the antitrust laws.

Bid Rigging- Attempting to eliminate or reduce price competition, or to assure that, over time, each competing bidder receives a "fair share" of total business awarded on the basis of sealed bids. Bid-rigging includes the designation by competitors of one company to win a bid with the understanding that the remaining companies will submit higher bids or an agreement among competitors not to bid.

Customer Allocations- Any agreement to divide or allocate customers among competing entities.

Geographic / Product Market Allocations- Agreements among competitors to divide or allocate business on the basis of geographic or product markets are *per se* unlawful.

Group Boycotts - A group boycott exists when a group of competitors agrees to take some form of joint action to exclude someone from the market. This anti-competitive act is also known as a "concerted refusal to deal" and can be intended to freeze out another competitor, supplier or customer. Done by an individual company not in concert with others, this only becomes actionable if the perpetrator has tremendous market power.

Conduct Subject to Rule of Reason Analysis- Conduct that is illegal only if the impact upon competition too greatly outweighs any benefits the activity provides.

Standard Setting - Identifying and agreeing upon a specific set of criteria to which a particular type of product should conform. Product standards are generally developed by private industry and are often spearheaded by trade associations. Care must be taken to ensure that any such standards can be supported by legitimate business justifications. Examples include rail lines that need to be uniform; compact discs, and so on.

Information Exchanges- Information concerning matters such as prices charged for services rendered, business plans, marketing plans, new product development, costs and profits, that is not already publicly available, and which is competitively sensitive, can raise antitrust questions. Some of the factors that are important to consider are: whether the information is being collected by a trade association or other third party and will be disseminated in such a way that the data providers are anonymous; whether the information contains historical data or contains projected prices or costs; whether the data providers constitute a significant share of the market; and whether the data is already publicly available. The central question under the antitrust laws is whether the information exchanged tends to restrain trade unreasonably.

Best Practices- It is not unusual for trade associations, particularly professional associations, to promulgate standards of conduct or a code of professional responsibility for members of the association. To the extent these standards are designed to protect the public from clearly unethical, fraudulent, unfair or deceptive practices, there are substantial business justifications to support the standards of conduct under the antitrust laws. Care must be taken, however, to ensure that standards of conduct, such as any proposed industry "Best Practices" standards, do not have the purpose or effect of eliminating competition in the pricing of products or services provided by industry members.

Unilateral Acts Triggering Antitrust Issues - Price discrimination by an individual corporation, is subject to a rule or reason-type analysis and is unlawful when done to restrain competition.

Securities Litigation – General Overview

Private Securities Litigation Reform Act of 1995- Title I: Reduction of Abusive Litigation - Amends the Securities Act of 1933 (SA) and the Securities Exchange Act of 1934 (SEA) (together, the Acts) with respect to private securities class action law suits to mandate that each plaintiff seeking to serve as a representative party file a sworn certification: (1) that the plaintiff did not purchase the subject matter securities at the direction of counsel or in order to participate in a private action; (2) that identifies any other action filed during the preceding three-year period in which the plaintiff sought to serve as a representative party on behalf of a class; and (3) that the plaintiff will not accept payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as approved by the court.

The PSLRA further prescribes guidelines for early notice to class members of the appointment of the lead plaintiff. The PSLRA requires the court to adopt a rebuttable presumption that the most adequate plaintiff is the person with the largest financial interest in the relief sought by the class and declares that a person may be a lead plaintiff (or an officer, director, or fiduciary of a lead plaintiff) in no more than five securities class actions brought as plaintiff class actions during any three-year period.

The PSLRA prohibits settlements under seal except in limited circumstances. It mandates disclosure of settlement terms to class members. It further requires the court to determine whether an interest on the part of plaintiff's counsel in the securities that are the subject of the litigation constitutes a conflict of interest sufficient to disqualify the attorney from representing the party; provides for: (1) a stay of discovery during the pendency of any motion to dismiss; and (2) preservation of the evidence during the pendency of any stay of discovery; mandates court review, upon final adjudication of an action, of the parties' compliance with certain Rules of Civil Procedure and sets forth a rebuttable presumption in favor of award of attorney's fees and costs to opposing counsel by the party in violation of such Rules; establishes each defendant's right to written interrogatories to the jury on the issue of the defendant's particular state of mind with

respect to specified alleged violations; and amends the SEA to authorize the court to require security for payment of class action costs.

The PSLRA also limits damages, where the plaintiff seeks to establish them by reference to the market price of a security, to the difference between the purchase or sale price paid or received by the plaintiff, as appropriate, and the mean trading price of the security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.

Securities Act of 1933 - Often referred to as the "truth in securities" law, the Securities Act of 1933 has two basic objectives:

First to require that investors receive financial and other significant information concerning securities being offered for public sale; and

Second to prohibit deceit, misrepresentations, and other fraud in the sale of securities.

The full text of this Act is available at: http://www.sec.gov/about/laws/sa33.pdf.

Purpose of Registration

A primary means of accomplishing these goals is the disclosure of important financial information through the registration of securities. This information enables investors, not the government, to make informed judgments about whether to purchase a company's securities. While the SEC requires that the information provided be accurate, it does not guarantee it. Investors who purchase securities and suffer losses have important recovery rights if they can prove that there was incomplete or inaccurate disclosure of important information.

The Registration Process

In general, securities sold in the U.S. must be registered. The registration forms companies file provide essential facts while minimizing the burden and expense of complying with the law. In general, registration forms call for:

a description of the company's properties and business;

a description of the security to be offered for sale;

information about the management of the company; and

financial statements certified by independent accountants.

Registration statements and prospectuses become public shortly after filing with the SEC. If filed by U.S. domestic companies, the statements are available on the EDGAR database at www.sec.gov. Registration statements are subject to examination for compliance with disclosure requirements.

Not all offerings of securities must be registered with the Commission. Some exemptions from the registration requirement include: private offerings to a limited number of persons or institutions; offerings of limited size; intrastate offerings; and securities of municipal, state, and federal governments. By exempting many small offerings from the registration process, the SEC seeks to foster capital formation by lowering the cost of offering securities to the public.

Securities Exchange Act of 1934- With this Act, Congress created the Securities and Exchange Commission. The Act empowers the SEC with broad authority over all aspects of the securities industry. This includes the power to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's securities self regulatory organizations (SROs). The various securities exchanges, such as the New York Stock Exchange, the NASDAQ Stock Market, and the Chicago Board of Options are SROs. The Financial Industry Regulatory Authority (FINRA) is also an SRO.

The Act also identifies and prohibits certain types of conduct in the markets and provides the Commission with disciplinary powers over regulated entities and persons associated with them.
The Act also empowers the SEC to require periodic reporting of information by companies with publicly traded securities.
The full text of this Act can be read at: http://www.sec.gov/about/laws/sea34.pdf.

Corporate Reporting

Companies with more than $10 million in assets whose securities are held by more than 500 owners must file annual and other periodic reports. These reports are available to the public through the SEC's EDGAR database and often on the websites of the reporting companies as well.

Proxy Solicitations

The Securities Exchange Act also governs the disclosure in materials used to solicit shareholders' votes in annual or special meetings held for the election of directors and the approval of other corporate action. This information, contained in proxy materials, must be filed with the Commission in advance of any solicitation to ensure compliance with the disclosure rules. Solicitations, whether by management or shareholder groups, must disclose all important facts concerning the issues on which holders are asked to vote.

Tender Offers

The Securities Exchange Act requires disclosure of important information by anyone seeking to acquire more than 5 percent of a company's securities by direct purchase or tender offer. Such an offer often is extended in an effort to gain control of the company. As with the proxy rules, this allows shareholders to make informed decisions on these critical corporate events.

Insider Trading

The securities laws broadly prohibit fraudulent activities of any kind in connection with the offer, purchase, or sale of securities. These provisions are the basis for many types of disciplinary actions, including actions against fraudulent insider trading. Insider trading is illegal when a person trades a security while in possession of material nonpublic information in violation of a duty to withhold the information or refrain from trading.

Registration of Exchanges, Associations, and Others

The Act requires a variety of market participants to register with the Commission, including exchanges, brokers and dealers, transfer agents, and clearing agencies. Registration for these organizations involves filing disclosure documents that are updated on a regular basis.

The exchanges and the Financial Industry Regulatory Authority (FINRA) are identified as self-regulatory organizations (SRO). SROs must create rules that allow for disciplining members for improper conduct and for establishing measures to ensure market integrity and investor protection. SRO proposed rules are subject to SEC review and published to solicit public comment. While many SRO proposed rules are effective upon filing, some are subject to SEC approval before they can go into effect.

Trust Indenture Act of 1939

This Act applies to debt securities such as bonds, debentures, and notes that are offered for public sale. Even though such securities may be registered under the Securities Act, they may not be offered for sale to the public unless a formal agreement between the issuer of bonds and the bondholder, known as the trust indenture, conforms to the standards of this Act.

The full text of this Act is available at: http://www.sec.gov/about/laws/tia39.pdf.

Investment Company Act of 1940

This Act regulates the organization of companies, including mutual funds, that engage primarily in investing, reinvesting, and trading in securities, and whose own securities are offered to the investing public. The regulation is designed to minimize conflicts of interest that arise in these complex operations. The Act requires these companies to disclose their financial condition and investment policies to investors when stock is initially sold and, subsequently, on a regular basis. The focus of this Act is on disclosure to the investing public of information about the fund and its investment objectives, as well as on investment company structure and operations. It is important to remember that the Act does not permit the SEC to directly supervise the investment decisions or activities of these companies or judge the merits of their investments. The full text of this Act is available at: http://www.sec.gov/about/laws/ica40.pdf.

Investment Advisers Act of 1940

This law regulates investment advisers. With certain exceptions, this Act requires that firms or sole practitioners compensated for advising others about securities investments must register with the SEC and conform to regulations designed to protect investors. Since the Act was amended in 1996 and 2010, generally only advisers who have at least $100 million of assets under management or advise a registered investment company must register with the Commission. The full text of this Act is available at: http://www.sec.gov/about/laws/iaa40.pdf.

Sarbanes-Oxley Act of 2002

On July 30, 2002, the Sarbanes-Oxley Act of 2002 was signed into law. Being characterized as one of "the most far reaching reforms of American business practices since the time of Franklin

Delano Roosevelt," Sarbanes-Oxley mandated a number of reforms to enhance corporate responsibility, enhance financial disclosures and combat corporate and accounting fraud, and created the "Public Company Accounting Oversight Board," also known as the PCAOB, to oversee the activities of the auditing profession. The full text of the Act is available at: http://www.sec.gov/about/laws/soa2002.pdf. (Please check the Classification Tables maintained by the US House of Representatives Office of the Law Revision Counsel for updates to any of the laws.) You can find links to all Commission rule-making and reports issued under the Sarbanes-Oxley Act at: http://www.sec.gov/spotlight/sarbanes-oxley.htm.

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

The Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into law on July 21, 2010 by President Barack Obama. The legislation set out to reshape the U.S. regulatory system in a number of areas including but not limited to consumer protection, trading restrictions, credit ratings, regulation of financial products, corporate governance and disclosure, and transparency. The full text of the Act is available at: http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf. You can find links to all Commission rule-making and reports issued under the Dodd Frank Act at: http://www.sec.gov/spotlight/dodd-frank.shtml.

Best Practices For Municipal Entities

Municipalities should have an outsourced platform or platforms which should consist of a team of attorneys and financial professionals who monitor all potential antitrust and securities class action litigation matters for which a municipality may be interested in either proactively litigating or at least from which a municipality may ultimately be due recovery and a cost-effective (*i.e.* contingent-fee based) means to identify and capture all funds that are owed to them. Such a platform should maximize recovery opportunities based on an approach that balances municipal client recovery interests with minimal client time and resources and without the fear of reprisal from key suppliers or other important commercial relationships, where such fear may exist. Such a team should have the experience and *bona fides* to suggest a proper course of action that may be best suited under each circumstance – whether that means joining a class action as a named plaintiff, staying an absent member of a settlement class – or even opting out of class settlements in preference of individual negotiation or litigation where appropriate. Best practice platforms

also provide municipal clients with a means maximize recoveries by ensuring that all current and past subsidiaries, divisions and related entities that may have been impacted are accounted for as well as recognizing the existence of secondary markets in which said prospective settlement fund claims can be monetized via sale and assignment of the claims to provide more immediate cash recoveries. Entities should make sure to recognize the existence and maximize the value of these potential antitrust claims.

A full-service litigation and settlement fund recovery practice specializes in supporting in-house municipal legal departments as an alternative to the traditional legal service practice model, keeping the best interests of resource allocation, time, budget, political and business relations at the forefront of every engagement. Such a practice should not only monitor for opportunities to participate as a class or opt-out litigant, but should also monitor class action settlements, alert clients to potential fund recovery entitlement and provide clients with the services of legal and financial professionals and data specialists to shepherd client data preservation, collection (where needed), analysis, and face claims administrators and lead counsel during the claims filing process through to distribution and financial recovery. Properly implemented, these platforms provide substantial and often tax-free recoveries for municipal entities.