



# ***SULLIVAN v. DB INVESTMENTS:*** **ARE DIAMONDS STILL A CLASS ACTION** **PLAINTIFF'S BEST FRIEND?**

by  
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Antitrust class action defendants should take note of a recent decision from a panel of the U.S. Court of Appeals for the Third Circuit. In *Sullivan v. DB Investments, Inc., et al.*,<sup>1</sup> the court vacated a multi-million dollar settlement with a nationwide class of indirect diamond purchaser plaintiffs. Because of the wide variation in state antitrust law, the panel determined that class treatment was not appropriate. This case follows a series of decisions that take a hard look at whether plaintiffs' antitrust actions should be allowed to proceed. Whether the decision will have lasting impact is up in the air: the Third Circuit has decided to review the appeal *en banc*.<sup>2</sup>

***Private Rights of Action under the Antitrust Laws.*** Section 4 of the Clayton Act, 15 U.S.C. § 15, allows private litigants to file suit against antitrust law violators. Because antitrust injury can impact a large number of victims in similar ways, antitrust actions are often susceptible of class treatment. And it is common for antitrust class actions to allege violations of both state and federal antitrust laws.<sup>3</sup>

Recognizing the expense and potential burden of an antitrust class action, the Supreme Court has given the lower courts methods to separate frivolous from meritorious claims early in the litigation. In *Bell Atlantic v. Twombly*, the Court noted that an antitrust conspiracy claim should be dismissed unless it contains "plausible grounds" creating "a reasonable expectation that discovery will reveal evidence of illegal agreement." 550 U.S. 544, 556 (2007). Early dismissal of frivolous claims is necessary "to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the discovery process will reveal relevant evidence' to support [an antitrust] claim." 550 U.S. at 559 (citations omitted). The Supreme Court and the courts of appeal have also made clear that the requirements of Rule 23 should be rigorously applied in class action litigation.

***Class Actions Under Rule 23.*** To qualify for class treatment, a class must first meet the prerequisites of Rule 23(a): "(1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical . . . of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (citing Fed. R. Civ. P. 23(a)). If the requirements of Rule 23(a) are met, a class can proceed if it is one of the types described in Rule 23(b). Typically, antitrust class actions are brought under Rule 23(b)(3), which

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<sup>1</sup>613 F.3d 134 (3d Cir. 2010).

<sup>2</sup>--- F.3d ----, 2010 WL 3374167 (3d Cir. 2010)

<sup>3</sup>See, e.g., *In Re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, Case No. M-02-1486-PJH (N.D. Cal. filed Aug. 17, 2007) (alleging violations of the Sherman Act and the laws of 34 states and the District of Columbia).

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requires that common issues of law or fact “predominate over any questions affecting only individual members,” and class treatment is “superior to other available methods for fairly and efficiently adjudicating” the matter.

The Supreme Court and the Third Circuit have applied the requirements of Rule 23 strictly. In *Amchem Products*, the Supreme Court, evaluating a proposed class action settlement, noted Rule 23’s requirements “demand undiluted, even heightened, attention.” 521 US at 620. Similarly, the Third Circuit has called for a “rigorous assessment of the available evidence” in deciding whether a proposed class has met Rule 23(b)(3)’s predominance requirement.” *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2008).

**DB Investments.** In *DB Investments*, the Third Circuit again turned to the predominance requirement of Rule 23(b)(3). Actions were brought against the De Beers family of companies for their role in fixing the price of diamonds. Between 2001 and 2005, plaintiffs brought several class action complaints, all eventually consolidated in New Jersey federal court. The plaintiffs proposed two classes: (1) direct purchasers of rough gems that were bought directly from De Beers or one of its competitors; and (2) indirect purchasers, who purchased rough or finished gems from resellers or diamond retailers.

The direct purchasers alleged antitrust violations under the Sherman Act. But because the Supreme Court in *Illinois Brick Co. v. Illinois*<sup>4</sup> prohibited indirect purchasers from pursuing damages claims under federal antitrust law, the indirect purchasers based their damages claims on state law.<sup>5</sup> Both the direct and indirect purchaser plaintiffs brought federal claims for injunctive relief under section 16 of the Clayton Act.

Eventually, the defendants reached settlements with both plaintiffs’ classes that provided both money damages and injunctive relief. The district court approved the settlements over the objections of a group of indirect purchasers, and the objectors appealed.

The Third Circuit panel focused on whether common issues predominated in the proposed class of indirect purchasers. The panel reviewed the antitrust laws of the states and found considerable divergence among the states as to whether indirect purchasers have standing to sue. Some states follow the federal rule and do not allow indirect purchaser actions. Other states have passed “*Illinois Brick* repealer” statutes that confer standing on indirect purchasers. Still other states allow indirect purchaser standing when the state joins as *parens patriae*.

Because of differences in state antitrust laws, the proposed class of indirect purchasers would have included plaintiffs with standing to sue, plaintiffs without standing to sue, and plaintiffs who may have had standing if their suit was joined by their state attorney general. The Third Circuit panel found it impossible to reconcile these differences with the Rule 23(b)(3) requirement that common issues predominate the class – the variations in state antitrust law “represent fundamental policy differences among the several states, and they are in consequence as different as it is possible to be.”<sup>6</sup> So, in a two-to-one decision, the panel vacated the order of the district court approving the settlement.

**Implications for the Future.** The Third Circuit has been active in defining the requirements of Rule 23. For example, its *Hydrogen Peroxide* decision has been widely cited on the question of how to evaluate evidence at that class certification stage.<sup>7</sup> *DB Investments* could yield another important decision clarifying how courts should approach antitrust class actions based on conflicting state laws. But with *en banc* review looming, the panel opinion is really just a trailer of coming attractions. It remains to be seen whether the court will follow the panel’s lead in rejecting class action lawsuits based on conflicting state laws, or whether the court will take a less severe approach. Either way, the case bears watching.

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<sup>4</sup>431 U.S. 720 (1977).

<sup>5</sup>The plaintiffs sued under the laws of each state and the District of Columbia. *DB Investments*, 613 F.3d at 138.

<sup>6</sup>613 F.3d at 148.

<sup>7</sup>See, e.g., *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 584 (9th Cir. 2010); *In re Evanston Northwestern Healthcare Corp. Antitrust Litigation*, 268 F.R.D. 56, 65 (N.D. Ill. 2010); *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 258 F.R.D. 167, 169 (D.D.C. 2009).