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# CLASS DISTINCTION

With much speculation centring on the future of class actions, one of the US's top antitrust lawyers Joseph Alioto says the tide has been shifting for decades.

**Lesette Heath** gets his perspective

A 5-4 majority ruling by the US Supreme Court last April ignited a firestorm of debate over the future of class actions. Some chose to mourn an imminent demise, while others clung to hope that the phoenix would emerge from the ashes.

The decision that dealt the harshest blow arose from the case *AT&T v. Concepcion*. As with many class actions, the plaintiffs, Vincent and Liza Concepcion, inked a cell phone contract that included details about resolving a fee dispute through arbitration. Instead, the husband and wife pursued litigation in 2006.

When the case made its way before the nine justices, five of them favoured the telecom titan's ability to enforce arbitration terms, and at the same time to block customers from uniting as a class.

But this isn't the first time class actions have come under assault. The Supreme Court's 2007 decision in *Bell Atlantic v. Twombly* heightened the litmus test in federal civil cases. Now, plaintiffs are required to include enough facts in their complaint to make it plausible – not merely conceivable – that their claims will pass muster.

The tide has been shifting against class actions for decades, according to Joseph Alioto, one of the nation's most outspoken antitrust attorneys.

"Unless there is a different attitude about class actions, they will remain in trouble," he says in a phone interview from his law office in San Francisco. "People see them as a mechanism for lawyers to make money. But class actions allow people to recover what was stolen from them. Whether it was a dollar here or a dollar there, it matters."

Alioto, who began practising law in 1969, has always viewed class actions as a "very good thing." In his mind, they evoke the Latin phrase *e pluribus unum*, loosely translated as "one from many."

*E pluribus unum*, first proposed by the US Continental Congress in 1782, refers to the fact that the United States created a unified nation from 13 smaller colonies joining together. The history buff in Alioto, who peppers the conversation with quotes from moral philosopher Adam Smith, believes class actions serve

a similar purpose.

In April 2012, Alioto's reverence for these types of lawsuits will serve him well when he takes on the top manufacturers of thin film transistor liquid crystal displays (TFT-LCD), for plotting to illegally fix prices for a decade (from about January 1996 to December 2006). TFT-LCDs are used in devices such as flat-panel televisions, computer monitors, laptop computers and cell phones.

Consolidated in a San Francisco federal courthouse, the case will be heard before US District Judge Susan Illston. In 2007, she appointed Alioto interim lead counsel for indirect purchasers, where he will share the duty of overseeing discovery, trial, settlement terms and post-trial proceedings.

Not one to mince words, Alioto anticipates scoring a huge victory in one of the largest price-fixing cases

"The only difference between these people and Jesse James is that he had the personal integrity to wear a mask"

for consumers to date. "We're claiming damages of more than 20 billion dollars, and expect to get it."

That bravado has led Alioto to secure more than 600 million dollars in settlements and, in his own estimation, try the most cases as an antitrust litigator.

### A legal legacy

The grandson of Sicilian immigrants and the son of one of San Francisco's most illustrious mayors, Alioto is continuing the legacy of his late father.

Joseph Lawrence Alioto was a self-made millionaire and a legal eagle specialising in antitrust law, according to a collection of papers stored in the history centre of San Francisco's Public Library. He spent five years with the US Justice Department's antitrust division, before opening his own practice in 1945.

After becoming active in Democratic Party politics, the elder Alioto was elected the city's 33rd mayor in 1967 and served two terms, leaving office in 1976. A philanthropist and patron of the arts, the papers describe Joseph L. Alioto as charming, commanding, articulate, flamboyant and rich in personality.

The apple doesn't fall far from the tree. The younger Alioto remembers his father representing Hollywood moguls Samuel Goldwyn and Walt Disney against big theatre companies accusing them of monopolistic behaviour. Frequently, he logged hours in court absorbing trial after trial and learning the ropes of antitrust law from his father.

Alioto's path would entail taking antitrust law courses at the University of San Francisco, and trying his largest lawsuit in 1974. His clients were cattle ranchers who sued retail chains that had conspired to fix the prices of beef. Another memorable case was the Raiders' battle against the National Football League, when the team attempted to move from Oakland to Los Angeles. *USA Today* wrote that the jury took a mere five and a half hours to hand a thrilling win to the Raiders' owner Al Davis and his attorney, Alioto.

In all, Alioto's antitrust expertise encompasses nearly all sectors from pharmaceuticals to high technology. His eponymous firm has engaged in more than 350 antitrust proceedings and tried about 100 cases in federal and state courts involving monopolisation, price-fixing, group boycotts, predatory pricing, commercial bribery and unlawful mergers and acquisitions, to name a few.

Aside from class actions, where he articulates the concerns of the little guy, the so-called "anti-mergers" get Alioto's blood boiling because so often competition is ruined, innovation suffers and thousands of jobs are lost, he says. At the top of his deals hit list are Pfizer/Wyeth, United/Continental, Delta/Northwest, Anheuser Busch/InBev and Southwest/AirTran.

"The Justice Department has served as a hand-maiden to the monopolists, allowing so many of these mergers to go through. The [Federal Trade Commission]

## CLASS ACTION SUITS: JOSEPH ALIOTO PROFILE



allowed Pfizer to buy Wyeth, and did you see what happened? Pfizer shut down six R&D plants, fired 20,000 people and then fixed prices. The government is definitely asleep," he says.

And, let the record show that Alioto isn't impressed with the DOJ's much-ballyhooed decision to block AT&T's proposed 39 billion-dollar buyout of rival T-Mobile, claiming that he laid the path by "embarrassing them into doing it." He added, "They never would have done it. We said we're going to challenge it. That's when they decided to do it."

While Alioto often criticizes the Justice Department's lacklustre merger enforcement efforts, he too has his share of detractors.

Lawyers for Southwest cried foul when he chose to represent a group of angry airline customers who wanted to unravel the 1.4 billion-dollar merger between carriers Southwest and AirTran after the merger had been consummated. They sued for sanctions in the Ninth Circuit and got them, as well as attorneys' fees totalling more than 82,000 dollars.

In court papers, lawyers for Southwest argued that "counsel in this litigation have a pattern of filing antitrust strike suits against multi-billion dollar mergers that are being (or in the case of Southwest, had already been) thoroughly investigated by the Department of Justice or the Federal Trade Commission."

"Counsel's modus operandi in these cases is to sue companies that are attempting to complete high-profile mergers at the most time-sensitive stage of the transaction, in hopes of extracting a cash settlement that does not benefit (and indeed ultimately increases the costs to) the public at large," they wrote.

Alioto calls the sanctions award "a joke," and says he submitted a motion for reconsideration and

Southwest's attorneys have been ordered to file a response. "Hell, I challenge plenty of mergers and this case is still in court. We will continue to wait and see if the government is going to do anything," he asserts.

Alioto pointed out that US Circuit Judge Ronald M. Gould, who sits in the Ninth Circuit, disagreed with the sanctions award against his firm. In that order, Gould wrote that he did not believe that Alioto showed bad faith or recklessness, and that the sanctions award "may incorrectly discourage vigorous private prosecution of antitrust law claims that is beneficial to the public."

Seeing it as welcome ammunition, Alioto intends to file an immediate request for a hearing before all the judges.

In taking a phrase from Smith's *Wealth of Nations*, Alioto adds "defy the monopolists and they will come after you.' Sanctions are not going to stop me from [opposing] anticompetitive mergers."

A person familiar with Alioto's effort to stop the Pfizer/Wyeth deal said the recent Southwest/AirTran debacle was a case of *déjà vu*. The companies announced their engagement in January 2009, but Alioto waited seven months to sue on anticompetitive grounds and after a lengthy FTC review was nearly complete. Drawing a line in the sand, Pfizer retaliated and received a dismissal of the case. Later, a Ninth Circuit appeal was rejected and Alioto has since petitioned the Supreme Court for review.

"I'm the man who doesn't go away," he says. That same man carries a miniature book of the Constitution and the Rules of Evidence in his pocket every day, and insists that healthy competition is a cornerstone of American business.

"The antitrust laws allow people to prevent companies from trying to regulate trade and that means: divide markets, divide customers and run

competitors out of business. That's not competing on the merits, so anyone who says 'you're just against what's big,' that's baloney."

Given such unbridled disapproval of government, it's hard to imagine Alioto once considered a career in politics. It was 1992 and with three months to kill, he embarked on "the most successful stealth campaign in the history of California politics, because no one knew about it," he laughs.

He competed for the Democratic Senate nomination against fellow candidates Dianne Feinstein and Gray Davis. "They were my opponents, but also great friends of mine," he recalls. "I had the time off, so I decided 'why not.' I gave a lot of speeches at Democratic committees around the state and had a fabulous time."

Feinstein won the nomination with Davis coming in second (he would later become California's 37th governor in 1998) and Alioto a distant third. Since then, re-entering the ring of politics has lost its allure. He's in his element when targeting business outlaws, he says.

In a recent civil action, Alioto sued Pfizer and Ranbaxy on behalf of 11 California retail pharmacies, who claim that Pfizer and its India-based counterpart illegally monopolised the market for the cholesterol-fighting drug Lipitor and then fixed the prices. With his voice rising an octave, Alioto contends "Pfizer has flat-out bribed generics companies to stay off the market. Really, the only difference between these people and Jesse James is that he had the personal integrity to wear a mask."

For its part, Pfizer strongly refutes the allegations. "Pfizer believes this suit has no merit and we are confident that the Lipitor patent settlement with Ranbaxy is appropriate," according to company spokesman Christopher Loder. "In fact, the Federal Trade Commission reviewed the terms of the 2008 settlement. We view this suit as nothing more than an attempt to extract money," he said.

Before the 2008 agreement between Pfizer and Ranbaxy, the drug makers were embroiled in a patent tug-of-war because Ranbaxy wanted to bring its

generic version of Lipitor to the United States.

But after years of disputes, Pfizer reportedly told Ranbaxy it could license the generic Lipitor in seven countries – Australia, Canada, Belgium, Germany, Italy, the Netherlands and Sweden.

Lipitor class actions against Pfizer and Ranbaxy have also begun to mount. During the final days of November 2011, Professional Drug Co. and Value Drug Co. sued in Massachusetts and New Jersey federal courts, respectively. More class actions with similar claims are presumably underway, now that the floodgates have opened with a little help from Alioto.

### What future for class actions?

Even so, what troubles Alioto the most about class actions and their dismal outlook is that they are "much too important of a deterrent to big-business

**"Class actions are much too important of a deterrent to big-business tactics. I hope they can re-establish themselves"**

tactics. I hope they can re-establish themselves," he says, suggesting that his antitrust brethren pursue class actions for a contingency fee.

"If the class members get money, then the lawyers should get money [and vice versa]. That would be an incentive and you wouldn't have class actions that are more than five years old."

Pointing his finger at the government once more, Alioto says US Attorney General Eric Holder and the Obama Administration are not mindful of the uphill battle facing class plaintiffs. "They're not paying attention to the issue. President Obama is a truly brilliant guy, but I don't think he's aware of what's going on – of how difficult it is for folks to gain access to the court, [especially when they've been duped by

large corporations]."

Gordon Schnell, a partner with Constantine Cannon, offered that the ruling in *Twombly* has curbed the number of class actions being brought before the courts. "Four years later, courts are still struggling with what *Twombly* stood for," adding that it was intended to provide the five W's of the conspiracy (who, what, where, when and why).

"Class actions fulfill an incredibly important purpose, but now there's this *Catch 22*. You have the circumstantial evidence, but you're only able to find the supporting documents you need during discovery. *Twombly* makes it difficult to get there," says Schnell, one of the lead attorneys who represented Walmart and others in a landmark antitrust class action against Visa and MasterCard. Netting 3.05 billion dollars (and injunctive relief), it remains the largest antitrust recovery in US history.

Given *Twombly* and *Concepcion*, Schnell says he is interested in seeing how class actions will play out.

Alioto is interested, too. His mission is also twofold – to make certain that consumers benefit from free competition and to hold the bad guys accountable if they "go out of bounds."

"Thurgood Marshall once said 'the antitrust laws are the Magna Carta of free enterprise,'" says Alioto, almost putting a distinct vocal emphasis on each word. Inspired by the words of the late Supreme Court Justice, the 68-year-old isn't afraid to ruffle anyone's feathers.

"When I was a young lawyer, the older guys I challenged in the courtroom would come up to me after their side had won and say 'Joe, you should have driven this point home or done it this way,' then we would all go out for dinner and drinks. These guys today want to throw sanctions at you."

Next on the agenda, Alioto is prepared to clash with one of the world's biggest brewers, claiming that the company conspired to fix beer prices, illustrating that there are no immediate plans to end his crusade.

"It's a lot of fun and takes up a lot of energy," he says, and "quite frankly, retirement equals death." ■