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ANTITRUST

Use of class actions is on the rise

Key to class certification in antitrust cases is establishing 'impact' or 'fact damage' through common proof.

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TODAY, VIRTUALLY ANY case can be filed as a putative class action. Because of mass-action consumer statutes, it has become easier for plaintiffs to satisfy the standing requirement to bring representative suits. Not surprisingly, attempted class actions have become more common in antitrust cases where, if successful, plaintiffs are statutorily entitled to recover treble damages.

The basic requirements for class action cases are set forth in Federal Rule of Civil Procedure 23, which requires a plaintiff to show that its proposed class satisfies the numerosity, typicality, adequacy and commonality elements of Rule 23(a). In addition, a plaintiff must also satisfy one of the three subsections of Rule 23(b). Generally, plaintiffs in antitrust cases seek certification under Rule 23(b)(3), which requires a plaintiff to show that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods of adjudication of the controversy."

The key to class certification in antitrust cases is for plaintiffs to demonstrate that "impact" or "fact of damage" can be established through common classwide proof. Simply put, the plaintiff's burden is to establish, as a general matter amenable to common proof, that the antitrust violation caused injury to the antitrust plaintiff. *Northwest Airlines Corp. Antitrust Litigation*, 208 F.R.D. 174, 223 (E.D. Mich. 2002).

Differences in the amount of damages sustained by individual class members usually will not defeat class certification. But the inability to establish impact through common proof has been the undoing of many class certification attempts premised on group boycott claims that are analyzed under the rule of reason, attempted monopolization claims and price-discrimination claims arising under the Robinson-Patman Act. 15 U.S.C. 13 (a). Group boycott claims analyzed under the rule of reason require the plaintiff to demonstrate that the defendants' conduct has restrained competition in a properly defined relevant market. Attempted monopolization claims will generally involve an examination of predominantly individual issues: the individual relationship between class members and the defendants; the degree of control in those relationships and market share; and barriers to entry, typically in local geographic markets. See, e.g., *Beer Distribution Antitrust Litig.*, 188 F.R.D. 557 (N.D. Calif. 1999).

Similarly, courts have repeatedly held that "price discrimination claims under the Robinson-Patman Act are manifestly ill-suited to class action treatment" because they will necessarily entail an endless, fragmented series of inquiries into each class member's proof as to competitive injury and thus as to liability. *Kelly v. General Motors Corp.*, 425 F. Supp. 13, 20 (E.D. Pa. 1976); *Abernathy v. Bausch & Lomb Inc.*, 97 F.R.D. 470, 475 (N.D. Texas 1983). In these cases, courts find that the discrimination in price by which favored customers enjoy benefits may vary from one favored customer to another and from one location to another. Moreover, the seller may have certain defenses available to it such as cost justification and the need to meet competition; their applicability may vary from one market to another. There may also be variance in the extent to which price benefits to favored customers are passed on by them in retail sales, and the extent to which all of this will affect a particular class member, if at all, will vary according to the degree of competition that exists between the class member and the favored customer. *Abernathy*, 97 F.R.D. at 475.

Injury presumed

Conversely, many courts have held that when a defendant is alleged to have participated in a price-fixing conspiracy, antitrust injury will be presumed as a matter of law, and the predominance element of Rule 23(b)(3) will generally be satisfied. See, e.g., *Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 382 (S.D.N.Y. 1996). These courts hold that impact can be presumed upon proof of a conspiracy because the alleged violations of a price-fixing conspiracy will relate solely to the defendants' conduct, and, as such, proof for these issues will not vary among individual class members. Id. at 264; *Linerboard Antitrust Litig.*, 203 F.R.D. 197, 214 (E.D. Pa. 2001). This "presumption," however, applies only when a valid method exists to establish impact through common proof; it is not a substitute for such a showing.

Given that price-fixing can consist of "raising, depressing, fixing, pegging, or stabilizing the price of a commodity," it has become increasingly easier for a plaintiff to label any cause of action brought under the antitrust laws as a price-maintenance scheme, irrespective of whether true price-fixing is involved, in order to get a class action certified. *United States v. Socony-Vacuum Oil Co.*, 31 U.S. 150, 223 (1940). For example, a purported concerted refusal to deal with or to provide certain terms to retailers can be argued by

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plaintiffs to be a conspiracy to stabilize prices.

In general, courts are careful not to engage in an improper merits-based inquiry at the class certification stage, but they can look behind the label of a claim to see if causation can be established through common proof. The tension courts face in looking beyond the pleadings when considering class certification stems from two differing lines of authority. In *Eisen v. Carlise & Jacquelin*, 417 U.S. 156, 177 (1974), the U.S. Supreme Court stated that "nothing in either the language or the history of Rule 23 gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

However, a few years later in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the high court backed away from its pronouncement in *Eisen*, and instead stated that "[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims....The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits." 437 U.S. at 469, n.12. Again, in 1982, the court recognized that in complex antitrust cases, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certifications question." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982).

Courts use varying standards.

More than one standard

Today, courts continue to employ varying standards when assessing class certification motions in complex antitrust cases where price-fixing is alleged. Plaintiffs in these cases argue that the court should accept the substantive allegations of the pleadings as true and apply the presumption that impact can be established through common proof. See, e.g., *Potash Antitrust Litig.*, 159 F.R.D. 682, 688 (D. Minn. 1995); *Nasdaq Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 501 (S.D.N.Y. 1996). Defendants, on the other hand, stress the need for a careful examination of whether common proof of impact is possible. See, e.g., *Industrial Diamond*, 167 F.R.D. at 382-83; *Polypropylene Antitrust Litig.*, 178 F.R.D. 603, 610, 620 (N.D. Ga. 1997).

Almost as a compromise between these two positions, a wealth of case law has developed allowing courts to "scrutinize the evidence plaintiffs propose to use in proving their claims without unnecessarily reaching the merits of the underlying claims." *Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 684 (N.D. Ga. 1991); *Alabama v. Blue Bird Body Co. Inc.*, 573 F.2d 309, 312 (5th Cir. 1978); see also, *Telecom Technical Serv. Inc. v. Siemens Rolm Communications Inc.*, 172 F.R.D. 532, 542-43 (N.D. Ga. 1997); *Continental Orthopedic Appliances v. Health Ins. Plan of Greater New York*, 198 F.R.D. 41, 46 (E.D.N.Y. 2000).

The presumption that an illegal price-fixing scheme can be established through common proof is, at most, a general rule, and once a defendant argues that the presumption cannot apply because too many variables enter into setting prices in their industries, then "the court must examine the circumstances of the industry in question to determine whether common proof of impact is possible in that case." *Industrial Diamonds*, 167 F.R.D. at 382.

Early evidentiary showings

In recent years, courts have become more willing to allow parties to present expert evidence on the issue of whether the underlying facts of the claims common to the entire class predominate over individual claims in Rule 23(b)(3) class actions. Most federal antitrust cases addressing this issue declare that a court should not consider whether the expert's opinion is sufficient to establish that plaintiffs may actually prove the classwide impact, or engage in a "battle of the experts." *Magnetic Audiotape Antitrust Litig.*, No. 99 CIV. 1580, 2001 WL 619305, at *4, (S.D.N.Y. June 1, 2001); *Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. 68, 76 (E.D.N.Y. 2000). However, the majority of these cases also agree that the plaintiffs bear the burden of demonstrating that common issues predominate over individual issues, and in antitrust cases, this means that plaintiffs must demonstrate that they possess the means to prove classwide impact through common proof.

In conducting this analysis, the court will assess whether an expert has proposed a viable method of establishing classwide impact that will avoid the need for individualized proof. *Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 486-87 (W.D. Pa. 1999); see also *Methionine Antitrust Litig.*, 204 F.R.D. 161, 164 (N.D. Calif. 2001); *Magnetic Audiotape*, 2001 WL 619305, at *6.

The court in *Industrial Gas Antitrust Litig.*, 100 F.R.D. 280, 288 (N.D. Ill. 1983), for example, expressly rejected the plaintiffs' argument that no scrutiny of their proposed method of establishing impact through common proof was permissible at the class certification stage, noting that "if plaintiffs' position were accepted, a court would be obliged to accept all assertions of the class proponent at face value."

Similarly, many of the antitrust cases that grant certification also scrutinize the expert's opinions to determine whether an expert's opinion comports with well-established economic principles. See, e.g., *Visa Check/Mastermoney*, 192 F.R.D. at 76-77 ("there is a role for a *Daubert* inquiry at the class certification stage"); *Linerboard*, 203 F.R.D. at 217 n.13 ("To preclude such evidence at the class certification stage, it must be shown that the opinion is the kind of junk science that a *Daubert* inquiry at this preliminary stage ought to screen.")

While most courts hold that the inquiry should generally be limited to the purpose for which the expert opinion is offered (see *Polypropylene Carpet*, 996 F. Supp. at 621 (postponing *Daubert* analysis)), others will engage in a lengthy critique of the plaintiffs' expert, stopping just short of declaring the opinion inadmissible. See, e.g., *Agricultural Chemicals Antitrust Litig.*, 1995 WL 757538, at *4-5, 7 (N.D. Fla. 1995).

As the number of class actions increase, the case law is evolving to give district courts a greater ability to look behind the pleadings, and to scrutinize plaintiffs' evidence, including expert opinions, data and methodology. By engaging in this type of inquiry at the class certification stage, courts avoid the time and expense that they would undertake to hear an action that is later found to be unsuitable as a class action vehicle. NLJ