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The evolving standard for assessing class certification should have particular import on antitrust cases, which have long looked to expert analysis to frame the arguments for and against certification. For the most part, plaintiffs have had considerable advantages in seeking certification. First, they have been able to cite a litany of cases that essentially conclude that antitrust cases are ideally suited for class actions. Second, the courts have taken a number of shortcuts, not the least of which is the *Bogosian* presumption, which the courts have used to assume antitrust impact. Third, courts have often punted altogether on the economic issues, using a variety of conveniences, including the avoidance of a battle of the experts or at least an avoidance of deciding merits issues that are often the foundation of expert opinions. Finally, the boilerplate language of antitrust violations that plaintiffs have been allowed to assert in their complaints, without additional factual detail, has failed to provide the necessary analytical framework to determine whether common issues predominate over individual ones. The last three of these factors have undergone profound changes that may

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ultimately shift the balance from those cases that assert that antitrust actions are prone to certification.

The *Bogosian* presumption or "shortcut" of impact has been around since 1977, when the U.S. Court of Appeals for the Third Circuit allowed plaintiffs' expert to assert that his class-wide method of calculating damages was also sufficient to show class-wide impact.[1] Since then, defendants have often faced an uphill battle of convincing courts that impact and damages are not only different concepts, but have to be evaluated by different means. A consistent criticism has been that damages formulae only provide an average (which itself can be a problem in determining whether individual damages can be proved through common evidence) and that averages merely mask whether all members of the class have actually been impacted by the conduct. Because impact is a fundamental element of an antitrust cause of action, presuming its existence across the class does a disservice to the Rule 23 requirements for class certification and is at odds with the U.S. Supreme Court's admonition that the class certification decision should be the result of "rigorous analysis."[2]

Although the *Bogosian* presumption has not disappeared—and indeed may not until if and when the Supreme Court has a say in the matter—it is finding its rightful place on the scrapheap of misguided legal principles. The reasons for its demise are many, but a key factor has been the courts' increasing openness to analyzing the expert materials placed before them. Fundamentally, it is difficult to present arguments on the differences between impact and damages if the courts are unwilling to address the

[1] Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977).

[2] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

substantive issues presented by both parties' economic experts. Fortunately, that reluctance is also diminishing.

Courts have struggled with how to use economic analysis in reaching class certification decisions in antitrust cases. Amazingly, a number of courts have felt comfortable simply throwing up their hands and stating that they will not resolve battles of experts at the class certification stage. Defense counsel has often been left with the cold comfort of being told that the carefully formed arguments against plaintiffs' class expert can be saved and used for cross-examination at trial. Such reasoning turns the court from its gatekeeper role at the certification stage to the proverbial gate closer after the animals have all escaped. None of the asserted reasoning behind such decisions holds up to scrutiny.

Perhaps the most specious, yet reasonable sounding, is the rationale that the courts should not address the merits at the class certification stage and thus any debate among the experts about how alleged anticompetitive conduct impacted members of the class. While most would not disagree with the basic class/merits premise, it has been stretched and kneaded in the expert context to allow courts to simply sidestep the required rigorous analysis. There is a significant difference between substantive issues and merits issues. The merits questions fundamentally deal with whether the defendant committed the alleged conduct and whether it was illegal. Plaintiffs will also have to demonstrate that the conduct resulted in antitrust injury or impact. *How* plaintiffs intend to prove the latter point and whether they can do it with evidence common to the members of the class is

the crux of the certification decision. Consequently, economic evidence that the members of the class bought a product or service in different geographic markets with differing levels of competition will have a significant effect on whether impact can be determined through class-wide evidence or must be analyzed at least by the different geographic or product markets.

If courts are unwilling, for example, to define market boundaries for purposes of class certification because such a determination is a "merits" question, they will be missing one of the most important aspects of determining preponderance of common proof. Likewise, courts must address the issue of how the conduct was allegedly perpetrated on the market. It need not conclude whether the conduct in fact occurred (truly a merits question), but how can it analyze questions such as class-wide impact without understanding how products are bought and sold? For example, plaintiffs may be asserting a price-fixing conspiracy among defendants. If the product at issue is sold from price lists, and the alleged conduct is that the defendants agreed on movements in their price lists, one can see the possibility that any agreement on prices will impact the entire class of purchasers. But, if the product was sold through individually negotiated contracts to buyers with varying degrees of buying power without references to price lists, then it is just as easy to see that agreements to raise prices may or may not be effective and impact all buyers. Perhaps even harder to assess is whether such agreements had class-wide impact when some buyers bought off price lists, some bought through long-term contracts, and some bought on the spot market at whatever the buyer could bear. The

court can assume the conduct based on the pleadings of the party, but it must understand the market dynamics to determine whether the mechanism for the pricing could actually result in class-wide impact. The economic evidence and expert testimony will provide the necessary analytical tools, and courts do a disservice by shying away from assessing the merits of the experts' conclusions.

The recent Supreme Court decision in *Twombly*[3] may also provide some assistance to the class certification process. *Twombly* should provide greater specificity to the conduct that plaintiffs consider anticompetitive. Rather than, for example, naked allegations of price-fixing, plaintiffs will presumably have to articulate more fully the mechanism by which defendants' conduct harmed the purported class. This information should aid the courts in understanding impact and the effects of different markets or product differentiation and whether those effects point toward or against class certification. Any motion to dismiss based on *Twombly* should make this point.

So all of these developments should have defendants rejoicing and plaintiffs cowering, right? Not exactly. The class certification battlefield is still heavily tilted toward plaintiffs in antitrust cases. Now that defendants are better able to appeal immediately adverse class decisions under Rule 23(f), we may see more and more decisions from courts of appeals that apply the rigorous analysis standard to assessing the competing views of experts. This would be a far cry from merely determining whether the theories of plaintiffs' economists are "not fatally flawed" before granting

[3] Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007).

certification[4]—a "standard" that is not much above checking to see if the economist has a pulse.

Fortunately, the more recent appellate decisions are recognizing the value and importance of economic evidence at the class certification stage. If the courts are truly willing to engage in the analysis needed to place the competing opinions within the legal standard, the class certification decisions will be better reasoned and should even streamline the case going forward when a class is certified. For example, courts may find opportunities to designate appropriate sub-classes based on the economic analysis and may eliminate certain parts of the purported plaintiffs' class that are distinguishable from other class claimants. It may also have the ancillary effect of limiting the *Daubert* challenges that have arisen at the certification stage.

This latter benefit may seem counter-intuitive at first, if the evolving standard invites more economic analysis. But the fact is that economic analysis is offered in virtually every class certification battle in antitrust cases, so there should not be any discernible increase in that regard. The problem in the past has been getting the economic evidence fully heard by the court. If courts were reluctant to weigh conflicting evidence and theories, the only sure way to focus attention on such evidence was to bring a *Daubert* challenge. Unfortunately, it was often self-defeating because the *Daubert* standard could be more difficult to meet than the class certification standard. With the evolving standard, both parties can have some degree of confidence that the economic evidence will not be given short shrift, even without resort to the more focused *Daubert*

[4] *See* In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001).

process. That should mean that the court can analyze the economics without the sideshow of a *Daubert* challenge. That is not to suggest that those challenges will disappear in the certification process, but the tactical value should shift to the merits of the presentations without the need for a whole raft of additional motions and briefing.

With this new environment, the question may more often be one of presentation now that we have the court's attention. It hardly needs to be said that voluminous reports and four-times-as-large appendices are not very productive if the court's willingness to look at the economics is reluctant at best. For some reason, lawyers who are so careful about limiting repetitious and mind-numbing presentations to a jury are more than willing to unload the full scope of what a million dollars or so may buy in economic analysis. They then compound the error by repeating much of it in the briefs submitted to the court. Some may contend that the repetition was necessary because the court and its clerks would never actually wade through the expert's report. Certainly, the expert analysis must be persuasively summarized and incorporated in the briefs, but if the brief is not sufficiently inviting and interesting to cause the court to peruse the actual expert report, then a disservice has been done to the time and expense put into the report's presentation. Likewise, the report better hold the court's attention if the lawyer has been able to attract it.

Defense lawyers and their economists must distill the class certification arguments into the one or two most critical and, importantly, understandable issues that would compel a court to find that individual issues predominate. Most often, this will

necessarily focus on why the plaintiffs' economist is wrong or is conveniently simplifying the issues. Focusing on the mechanism of the alleged violation and how it would affect members of the class differently is also a good tactic because it uses plaintiffs' own theories as the basis of the argument, rather than relying on hypotheticals or presumptions that the plaintiffs' reply brief will disavow. For the same reason, the deposition of the plaintiffs' economist should focus on how the economist would obtain the data necessary for the analysis and whether it can apply to all members of the purported class. Even if class certification is granted, those questions and the failure of the economist to follow through on how he would marshal class-wide evidence to arrive at impact and damages can be used very effectively in a decertification motion or in cross-examination at trial.

The evolution in how the courts will look to economic evidence at the class certification stage is a positive movement in reaching the correct result. Defendants should take advantage of the opportunity to present economic evidence in a way that helps the court define and understand the issues, particularly as they relate to impact. Turning the exercise into a graduate level class on theory or econometrics will only waste the opportunity.