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Courts are increasingly examining the factual and economic substance of putative class plaintiffs' assertions that they will prove with common evidence a common injury to all members of the alleged class.[1] In the antitrust context, a legal standard that requires a genuinely "rigorous analysis"[2] of whether common questions predominate over individual issues has led courts to examine whether plaintiffs have identified common evidence capable of establishing that each putative class member sustained an antitrust injury. Although antitrust injury has been central to standing analyses and merits determinations for years, its appearance in the class certification

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[1] For a survey of recent case decisions that demonstrate this trend, see Wendy Bloom's article also in this issue. Wendy L. Bloom, *Why Economics Now Matters for Antitrust Class Actions at the Class Certification Stage*, GCP MAGAZINE 2 (Jun. 08).

[2] Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982).

context has been relatively recent, has received little attention, and has accompanied courts' willingness to examine class issues even if they overlap with merits issues.

Litigating aspects of antitrust injury at the class certification stage has allowed defendants to test important substantive allegations before plaintiffs increase significantly defendants' damages exposure through the Rule 23 certification process.

I. CONTRASTING THE "COLORABLE METHODOLOGY" STANDARD AND THE "RIGOROUS ANALYSIS" STANDARD

Although the U.S. Supreme Court required as early as 1982 that a class be certified only if the trial court finds, after a "rigorous analysis," that the prerequisites of Rule 23 "have been satisfied,"[3] many courts have certified classes on a considerably more limited showing.

In re Vitamins Antitrust Litig. provides an example of the more permissive approach to class certification. In *Vitamins*, the district court "recognize[d] that there [we]re significant differences as to the methods of analyses and conclusions offered by parties' experts."[4] It found, however, that "these differences [we]re not appropriately settled at the class certification stage."[5] The court declined to "assess [the] weight to be given to parties' experts at [the class certification] stage. It [wa]s enough that plaintiffs ha[d] made a threshold showing of how they intend[ed] to prove impact using

[3] *Id.* "[A]ctual, not presumed, conformance" with the requirements of Rule 23 "remains … indispensable." *Id.* at 160. Significantly, the Supreme Court has noted that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.*

[4] In re Vitamins Antitrust Litig., 209 F.R.D. 251, 267 (D.D.C. 2002).

[5] *Id.*

generalized evidence on a class wide basis."[6] The court found "that plaintiffs ha[d] offered a *colorable method* by which they intend[ed] to prove impact on a class wide basis,"[7] and certified the class.

Szabo v. Bridgeport Machines, Inc.[8] illustrates a markedly different and more rigorous approach to class certification. Judge Easterbrook, joined by Judge Posner and Judge Williams on the unanimous U.S. Court of Appeals for the Seventh Circuit panel, reviewed the following district court determination: "[S]ince the class determination is made at the pleading stage of the action, the substantive allegations in the complaint are accepted as true for purposes of the class motion."[9] Judge Easterbrook continued: "In sum, the district judge certified the class without resolving factual and legal disputes that strongly influence the wisdom of class treatment. The judge stated that he had no other option."[10] As a predicate to his assessment of Rule 23, Judge Easterbrook observed that:

> [C]lass certification turns a $200,000 dollar dispute (the amount that [the named plaintiff] claim[ed] as damages) into a $200 million dispute. Such a claim puts a bet-your-company decision to [defendant's] managers and may induce a substantial settlement even if the customers' position is weak.[11]

As to the district judge's reluctance to engage in a factual assessment of Rule 23 issues, Judge Easterbrook stated that "[t]he proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule

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[6] *Id*. at 267-68.

[7] *Id*. at 264 (emphasis added).

[8] 249 F.3d 672 (7th Cir. 2001).

[9] *Id*. at 675 (citing In re Synthroid Marketing Litig., 188 F.R.D. 287, 290 (N.D.Ill. 1999); Jefferson v. Sec. Pacific Fin. Servs., Inc., 161 F.R.D. 63, 66 (N.D.Ill. 1995)).

[10] *Id*.

[11] *Id*.

23 and has nothing to recommend it."[12] Furthermore, he argued:

> [A]n order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises…. Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23.[13]

Judge Easterbrook concluded: "[I]f some of the considerations under Rule 23(b)(3) … overlap the merits—as they do in this case [–] then the judge must make a preliminary inquiry into the merits."[14] The Seventh Circuit's opinion in *Szabo* requiring a more rigorous level of scrutiny now represents the majority trend.[15]

II. EXAMINING ANTITRUST INJURY IN THE CLASS CERTIFICATION CONTEXT

Determinations in antitrust cases of whether common proof can establish common impact under Rule 23(b)(3) necessarily implicate aspects of antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*. defined antitrust injury as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[16] More recent cases have recognized that antitrust injury requires an injury in fact that causes or flows from an injury to competition in a properly defined relevant market.[17]

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[12] *Id.*

[13] *Id*. at 676.

[14] *Id*.

[15] Wendy L. Bloom, *Why Economics Now Matters for Antitrust Class Actions at the Class Certification Stage*, GCP MAGAZINE 2 (Jun. 08).

[16] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[17] *See* Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995) ("To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior, since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition. If the injury flows from aspects of the defendant's conduct that are

Factual and economic evidence as to whether plaintiffs have proven an injury to competition (i.e., a market-wide increase in price or decrease in output) has been generally obtained during discovery and presented at summary judgment and trial. Under recent cases applying the "rigorous analysis" standard, similar evidence as to whether the named and absent class members have suffered an injury in fact that causes or flows from a market injury is also gathered and presented (often for the first time in the litigation) in the class certification context.

In *Rodney v. Northwest Airlines, Inc.*, for example, the Sixth Circuit held that "a court may consider an antitrust plaintiff's failure to define the market as part of its class certification analysis without violating the procedural requirements of Rule 23."[18] In *Rodney*, plaintiffs sought to certify a class of all members of Northwest's frequent flyer program who had purchased airline tickets for non-stop travel into or out of three airports.[19] The Sixth Circuit denied class certification in part because plaintiffs' proposed market definition—all non-stop scheduled flights into and out of each of Northwest's hubs—necessarily involved an analysis of the alternatives available in each of the different routes. The Court reasoned: "[A]n analysis of whether bus travel from Detroit to Toledo is reasonably interchangeable with a flight between those two cities will not help to define the market for travel between Minneapolis and Los Angeles."[20]

The *Rodney* Court found that factors including flight frequencies, flight times,

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beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal *per se*.") (citing Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990)).

[18] Rodney v. Northwest Airlines, Inc., 146 Fed. Appx. 783, 788 (6th Cir. 2005).

[19] *Id*. at 784.

[20] *Id*. at 787.

size of airports, the existence of a layover, and duration of the flight would have to be considered in an analysis of whether substitute products could perform the same function as the Northwest flights on a route-by-route basis.[21] The Sixth Circuit concluded:

> If we were to certify Rodney's class, Northwest would be forced to prove that competitors decline to enter the route that Rodney actually took for reasons other than Northwest's reputation and then make the same showing for each of the 73 other routes at issue. Clearly, issues unique to each of the 74 different routes predominate on the question of antitrust injury.[22]

Similarly, the Eighth Circuit affirmed the denial of certification in *Blades v. Monsanto Co.* of a proposed class consisting of national buyers of genetically modified seeds from defendant.[23] The district court in *Blades* concluded that the market for genetically modified corn and soybean seeds was highly individualized, varied by geographic location, growing conditions, consumer preferences, and other factors, and required individualized evidence to determine the competitive price that would have prevailed in the locality of any individual farmer.[24]

The Eighth Circuit in *Blades* affirmed the district court's finding that:

> [T]he construction of hypothetical competitive prices would require evidence that varied among hybrids and perhaps across geographical pricing regions. The evidence showed the presence of individualized market conditions, which would require individualized, not common, hypothetical markets—thus individualized, not common, evidence.[25]

Siding effectively with *Szabo* in the debate as to whether factual disputes may be

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[21] *Id*.

[22] *Id.* at 791; *see also* Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 228-31 (2d Cir. 2006) (affirming district court's factual determination that the relevant geographic market for retail tickets for live rock concerts was not national, and thus that certification of a national class was not warranted).

[23] Blades v. Monsanto Co., 400 F.3d 562, 575 (8th Cir. 2005).

[24] *Id.* at 571-72.

[25] *Id*. at 574.

resolved on a motion for class certification, the Eighth Circuit held that:

> [I]n ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case. This extends to the resolution of expert disputes concerning the import of evidence concerning the factual setting—such as economic evidence as to business operations or market transactions.[26]

More recently, the First Circuit applied the principles discussed above in *In re New Motor Vehicles Canadian Export Antitrust Litig.*[27] In that case, automobile purchasers brought suit against U.S. and Canadian automobile manufactures, alleging an illegal conspiracy by the manufacturers to block lower-priced Canadian imports from entering the United States.[28] The plaintiffs' theory of antitrust injury operated in two stages:

1. the horizontal conspiracy allowed the manufacturers to maintain artificially inflated national retail prices and dealer invoice prices within the United States; and
2. the higher official pricing resulted in higher purchase prices paid by the individual consumers.[29]

The Court first observed that plaintiffs' expert left unanswered on the class motion an important question as to the existence of a market injury:

> In our view, plaintiff's expert Professor Hall had not yet, at the time of class certification, fully answered such potentially relevant questions as how the size of the but-for influx of cars would be established or how large that influx would have to be to affect the national market sufficiently to raise effective dealer invoice prices and [national retail prices].[30]

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[26] *Id*. at 575.

[27] In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6 (1st Cir. 2008).

[28] *Id*. at 8, 10.

[29] *Id*. at 11.

[30] *Id*. at 27.

The Court also observed that plaintiffs had not disaggregated the impact of permissible vertical restraints from the effects of the alleged, impermissible conspiracy:

> [T]he plaintiffs must be able to sort out the effects of any permissible vertical restraints from the effects of the alleged, impermissible horizontal conspiracy. This question was raised below but was not fully addressed.[31]

The First Circuit insisted on a rigorous analysis of whether any market-wide impact would be sustained by all putative class members and rejected generalized effects evidence as pertinent to the question of injury to all class members:

> Plaintiffs seem to rely on an inference that any upward pressure on national pricing would necessarily raise the prices actually paid by individual consumers. There is intuitive appeal to this theory, but intuitive appeal is not enough…. [A] minimal increase in national pricing would not necessarily mean that *all* consumers would pay more. Too many factors play into an individual negotiation to allow an assumption—at least without further theoretical development—that any price increase or decrease will always have the same magnitude of effect on the final price paid.[32]

The Court vacated the district court's class certification decision and remanded the case for a more thorough factual assessment of market-injury and personal-injury issues in the Rule 23 context.[33]

III. CONCLUSION

The class certification determination is critically important for defendants and putative class members alike. Quietly but consistently, courts have been reviewing more carefully plaintiffs' claims that common proof can establish class-wide injury. In

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[31] *Id*.

[32] *Id*. at 29; *see also* Allied Orthopedics Appliances, Inc. v. Tyco Healthcare Group L.P., 247 F.R.D. 156, 170-71 (C.D.Cal. 2007) (holding that plaintiffs' computation of average prices in the but-for world did not present a viable methodology for establishing with common proof class-wide injury resulting from the defendants' alleged anticompetitive conduct).

[33] In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d at 19.

applying the "rigorous analysis" legal standard, courts have considered factual and economic evidence on antitrust injury in determining whether to certify the proposed class. That trend has permitted the parties to join issue earlier in the litigation process on a centrally important issue—antitrust injury—that previously had been addressed primarily on summary judgment and at trial. Defendants have thereby been able to test important substantive allegations before plaintiffs increase significantly defendants' damages exposure through the Rule 23 certification process.