



# ECONOMICS COMMITTEE NEWSLETTER

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## **The Predominance Requirement for Antitrust Class Actions—Can Relevant Market Analysis Help?**

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### **Introduction**

Adjudication of class certification issues has become a focal point in antitrust class action litigation in recent years, particularly regarding proof of antitrust injury and the “predominance” requirement.<sup>1</sup> A key question has been, “Will common evidentiary issues predominate over individual ones”? As is described below, the evidentiary burden associated with this requirement is changing.

Indeed, the debate in establishing predominance in class certification is often as much about the proper standard as it is about whether the standard can be met. This creates uncertainty and raises the costs of class action review to the parties and to the court system. In the same fashion that generalized evidentiary frameworks have been adopted by the courts for analyzing market power, mergers, and predation, a generally accepted framework within which to assess the predominance requirement for proof of antitrust injury is needed.

We believe that relevant market analysis—along with its accepted analytical framework, modes of proof, and standards for evidence—may be the answer. In particular, there is compelling economic logic to suggest that proof of the relevant market (combined with a showing that the proposed class members were participants within that market) should be sufficient to

meet the predominance requirement as to proof of injury.

### **Predominance and proof of antitrust injury**

We understand that, as a legal matter, the fact of antitrust injury is necessary for a plaintiff to have standing to bring a private antitrust action and collect damages.<sup>2</sup> In deciding whether or not to certify a proposed class, one requirement is that common issues associated with proof of impact predominate over individualized issues.

Procedural timing plays a key role in shaping this requirement.<sup>3</sup> The question of class certification is typically addressed before merits discovery has occurred. Hence, at the time class certification is usually examined, one could not fairly expect plaintiffs to provide evidence demonstrating the fact of antitrust injury as to the proposed class members. Instead, one would typically start with the assumption that the alleged illegal behavior did occur and then ask the question, “Would economic conditions permit some demonstration of antitrust injury using evidence common to the proposed class members, thereby avoiding individualized inquiries (or ‘mini-trials’)?”

Until recently, this question was usually answered in the affirmative. A decade ago, the fact of a price-fixing claim was often considered in itself a presumptive indicator of class-wide injury.<sup>4</sup> There was a straightforward logic supporting this presumption. If plaintiffs allege that defendant sellers conspired to stop competing and raise prices for widgets, it stands to reason that—assuming the truth of those allegations—widget buyers would be injured.<sup>5</sup>

It seems that this historical presumption is eroding, raising the evidentiary burden for proof of classwide injury in antitrust class actions.<sup>6</sup> Recent commentary surrounding class certification decisions consistently speaks to the need to look more closely at the specific nature of the antitrust claims, the operation of the market, and the manner in which class members were injured.<sup>7</sup>

A plaintiff's burden is now described, in some instances, as having to show the likelihood that evidence common to class members will demonstrate their individual antitrust injuries ("common evidence"). In other instances, however, that burden is stated as having to show that antitrust injury was likely shared in common by members of the proposed class ("common injury"). That is, plaintiffs must make a showing that, given the claims in the case, the expected antitrust injury would extend to all members of the proposed class. Finally, notwithstanding the evidentiary limitations inherent in the early procedural stage at which class certification is typically addressed, some recent decisions suggest that plaintiffs must prove the fact of common injury for purposes of class certification.<sup>8</sup>

As a result of these differing formulations, participants in class certification disputes often approach the issue from entirely different analytical perspectives, presenting broadly inconsistent points of view from which to address the predominance requirement. This inconsistency increases the cost of certifying classes, decreases the quality of the information presented to the courts, and increases the uncertainty associated with the outcomes.<sup>9</sup> Clearly, there is need for a consistent, analytically sound approach.

### **The relevant market as an indicator of antitrust injury**

One can frame the predominance inquiry in the following fashion. Assume there has been anticompetitive conduct among sellers for the purpose of raising or maintaining prices above competitive levels. What would one need to know in order to determine whether or not a proposed class member was subjected to supracompetitive prices as a result of that conduct? Under what circumstances would it be reasonable to expect that the same information would suffice to answer the question for all proposed class members?<sup>10</sup>

To address the first question, consider how one typically approaches this question when there is a single antitrust plaintiff. One would typically define a relevant market and then assess the impact of the defendants' conduct on competition and pricing within that market. Liability arises when the conduct at issue materially limits competition and thereby allows the defendants to establish or maintain supracompetitive prices.<sup>11</sup> Once this liability is established, the further showing that the plaintiff purchased a product in that market is sufficient to show antitrust injury. In fact, as Areeda and Hovenkamp put it "...[C]onsumer standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted."<sup>12</sup>

In a class setting, we assume that the evidentiary burden for individual class members with respect to antitrust injury is the same as they would face as individual plaintiffs—certainly no greater. If we apply the logic described for an individual plaintiff above, the fact of injury as to each class member would then be established by: 1) showing antitrust liability on the part of the defendants; and 2) showing that the class member in question was a participant in the

relevant market. Of necessity, the answer to 1) involves the same evidence as to each class member. For a given market definition, the answer to 2) requires the same process generally used to determine the identity of class members.<sup>13</sup>

Therefore, a possible approach to analyzing the predominance requirement in connection with proof of antitrust injury issues at the class certification stage is to address the relevant market question at that time (rather than waiting for the class to be certified and considering it in connection with the merits of the case).<sup>14</sup> If the purchases that define the class fall within the relevant market, the evidentiary demonstration of some antitrust injury as to each of those individual class members will flow directly—just as it would in a single plaintiff case—from the demonstration of antitrust liability concerning conduct directed at that market (evidence that is common to members of the class)

Importantly, we note that as a matter of economics there is a natural relationship between market definition and the question of antitrust injury. The antitrust injury at issue when considering defendant sellers is inflated prices.<sup>15</sup> The ability to raise and maintain prices profitably has been at the center of market definition since the U.S. Department of Justice (DOJ) first formulated its Merger Guidelines in 1982.<sup>16</sup> Market definition involves identification of the customers (technically speaking, the products they purchase) that the defendant must control in order for the anticompetitive conduct alleged in the case to raise prices successfully. If the class members fall within this group, a successful effort to raise prices anticompetitively (i.e., plaintiffs' liability claims are valid) must mean higher prices for those customers.<sup>17</sup>

Furthermore, under the Merger Guidelines, a relevant market is supposed to consist of the smallest group of products that the defendant in question would need to control in order to achieve meaningfully supracompetitive prices.<sup>18</sup> Hence, a properly defined relevant market should not give rise to a situation in which the behavior in question could lead to higher prices for some, but not all, of the participants.

Viewed from this perspective, the logic underlying the traditional presumption of common injury had some validity, even if not always applied correctly. It is technically correct to say that a rising (anticompetitive) tide should float all prices—as long as those prices are formed in the market relevant to that anticompetitive behavior. Hence, while it would be too strong to say that common impact is a foregone conclusion in a class action antitrust case, it seems to us that it would not be too strong to say so with the proviso that all members of the proposed class were participants in the appropriately defined relevant market.<sup>19</sup>

The use of market definition as a means for assessing issues associated with classwide proof of injury at the time of class certification has a number of significant advantages over the status quo. Since the DOJ introduced its approach to market definition in the 1982 Merger Guidelines, there have been almost 25 years of scholarly work on, and practical application of, the approach by economists. There is an accumulated base of legal precedent regarding application of this approach and the associated evidentiary requirements. The use of market definition as a means for assessing predominance regarding proof of injury would add a well-understood framework and intellectual rigor to the undertaking. While the need to tackle the question of market definition at the time of class certification might create some

additional discovery requirements, much of the discovery associated with the behavior at issue (e.g., the parties' intent and the impact on the market) could still be deferred pending class certification. In short, much of the savings in litigation costs afforded by early attention to certification issues could still be preserved.

Interestingly, the use of market definition in determining class certification might more closely align the positions of plaintiffs and defendants. Plaintiffs might find their usual interest in narrower market definition moderated by the desire to have a market definition that supports certification of their proposed class. Plaintiffs might then limit their class definitions to correspond with the relevant market they expect to prove for liability. Similarly, defendants might think twice about advocating broad relevant markets given the effect such advocacy could have on class certification. Closer alignment in litigation positions could simplify the court's task in deciding the issues and improve the accuracy of the litigation process.

Moreover, under this proposal, the parties will have a decision regarding the relevant market at the conclusion of the class certification phase. That would certainly improve the prospects for settlement, potentially making more efficient use of judicial resources and reducing costs for litigants.

### **Relevant market analysis correctly reveals the absence of antitrust injury**

If relevant market analysis is to be considered useful in establishing shared antitrust injury, it should also correctly identify situations in which there has been no injury to a proposed class member, even if the alleged misconduct did in fact occur.

For instance, it is sometimes argued that a particular proposed class member (customer) would not have benefited from the lower prices arising from the competition eliminated by the conspiracy (because, for example, that customer resides in a remote location served only by one of the alleged co-conspirators).

Market definition, properly managed, begins with the products and locations that are directly affected by the conduct which gives rise to the antitrust complaint. If control over that activity does not confer monopoly power on a hypothetical monopolist seller, one then expands the product definition or the locations included to capture the next most immediate source of competitive discipline. One then re-asks the hypothetical monopolist question as to this expanded collection of products and locations, repeating as necessary until the answer as to monopoly power is "yes."

Following that paradigm, our "uniquely situated" proposed class member would not be part of the commerce directly affected by the limits on competition. Hence, it would not enter the analysis at the starting point. Moreover, owing to the fact that this unique customer does not engage in price-related switching among different sellers, it would not then be added to the relevant market in any of the subsequent iterations. In short, this proposed class member would fall outside the relevant market and would not be presumed to have been injured by the conduct in question.<sup>20</sup>

A second circumstance in which an illegal conspiracy would not give rise to injury on the part of a proposed class member occurs when that customer faces uniquely effective alternatives (or, perhaps, has a highly price elastic demand for the product). In that case, one can envision an outcome in which the conspiring sellers forego any effort to

extract a monopoly premium, preferring to keep the customer at a competitive price rather than lose it altogether. In other words, the conspirators were able to successfully institute a conspiracy to raise prices to other customers (proposed class members) without having to eliminate or restrict the competition disciplining this particular customer's prices. In a relevant market context, this means that the boundaries of the market would not be extended to include this proposed class member and the competitive alternatives it faces.

## Conclusion

The evidentiary burden a proposed plaintiff class must now meet to prove antitrust injury using common evidence on a class-wide basis is far from clear. We suggest that relevant market analysis may provide a useful framework in which to assess this issue. If proposed class members all purchased products within the relevant market (the definition of which is an evidentiary question that is independent of individual—and therefore common to all—proposed class members), it seems reasonable to then presume that, given demonstration of antitrust liability, they were all injured.

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<sup>1</sup> Fed. R. Civ. P. 23(b)(3).

<sup>2</sup> Proof regarding the fact of some overcharge (the injury we refer to here) is associated with a higher evidentiary burden—and is therefore dealt with separately—than the quantification of damages.

<sup>3</sup> Marc Ashley, The Scope and Timing of Discovery in Antitrust Class Action Litigation, 5 *The Antitrust Practitioner*, 14-17 (2006).

<sup>4</sup> Under what is often described as the “Bogosian shortcut,” predominance was presumed with respect to proof of injury as long as there was an economic rationale connecting the conduct at issue and injury to class members. See *Bogosian v. Gulf Oil*, 561 F.2d 434 (3d Cir. 1977).

<sup>5</sup> This logic is sometimes expressed allegorically as, “A rising tide floats all boats.”

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<sup>6</sup> There have been several recent articles discussing the evolving treatment of these same issues. See, for instance, Gregory C. Cook and Charlton A. Rugg, 4 Tightening Trends in Antitrust Class Certification, *The Antitrust Practitioner*, 2-5 (2006); Jack E. Pace and Victoria L. Oswald, The Recent Wave, or Ripple, of Antitrust Class Certification Denials, 5 *The Antitrust Practitioner* 2-8 (2006). Also see *In re Linerboard Antitrust Litig.*, 205 F.3d (3d Cir. 2002).

<sup>7</sup> See, for instance, Certification Claims Come Under Tighter Scrutiny, *National Law Journal*, December, 4, 2006.

<sup>8</sup> For instance, *Blades v. Monsanto*, 400 F.3d 562 (8th Cir. 2005); *In re Med. Waste Servs. Antitrust Litig.*, (D. of Utah 2006).

<sup>9</sup> The circumstances are becoming especially perilous from the standpoint of expert testimony addressing these issues in light of increasing calls for the hearing of Daubert challenges to that testimony.

<sup>10</sup> Predominance, as we understand it, does not require that no individualized inquiries are needed. However, for purposes of expositional simplicity, we discuss it here in those terms.

<sup>11</sup> Assuming further that the analysis shows no overriding procompetitive justification for which the anticompetitive restraints at issue are necessary.

<sup>12</sup> Phillip Areeda and Herbert Hovenkamp, Antitrust Law, Vol II, (1995 edition), ¶ 370.

<sup>13</sup> In practice, this “individualized” inquiry is usually managed using defendants’ electronic sales databases.

<sup>14</sup> In many cases, as suggested here, this simply involves a shift of the relevant market analysis from the merits phase to the certification phase. In pure per se cases and in those cases where impact on competition is established through direct evidence, this approach might require relevant market analysis that wouldn’t otherwise be necessary. Even in these instances, we believe the improved focus and predictability of the relevant market framework compared with the status quo brings important advantages and is likely no more costly than the efforts currently undertaken.

<sup>15</sup> By “inflated” we mean prices that are higher than the prices that would have prevailed but for the alleged misconduct. It is not necessary that prices be rising for antitrust injury to have occurred (as the Court indeed affirmed in *In re High Fructose Corn Syrup Antitrust Litig.*).

<sup>16</sup> Department of Justice, Horizontal Merger Guidelines, issued June 14, 1982.

<sup>17</sup> The use of the relevant market paradigm as a screen for assessing predominance of proof of antitrust injury presumes that the criterion embedded

within that paradigm regarding the type, amount and duration of price effects that matter for purposes of liability also apply when gauging antitrust injury. This seems reasonable to us.

<sup>18</sup> Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, issued April 2, 1992 (revised April 8, 1997) (hereafter, Merger Guidelines).

<sup>19</sup> A few years ago, Nieberding and Cantor considered whether the “law of one price” would create a presumption of common impact in antitrust cases. They concluded that generally it would not because the law frequently doesn’t hold when actual markets are concerned. (See James Nieberding and Robin Cantor, Price Dispersion, the ‘Bogosian Shortcut,’ and Class Certification in Antitrust Cases, Texas Business Litigation Quarterly, (Spring 2005).) We would differentiate our proposal by noting that a properly defined relevant market should only include transaction activity and prices that are affected in the event that the conduct at issue has meaningfully affected prices. Hence, where the “law of one price” failed to operate, a properly defined relevant market should capture only that activity affected by the behavior at issue.

<sup>20</sup> Plaintiffs might be able to prove that, as an ancillary matter, anticompetitive behavior within a relevant market also caused some prices outside of that market to increase. Our notion about the potential usefulness of relevant market analysis as a sufficiency threshold for plaintiffs to meet regarding predominance as to class members within the relevant market would not preclude the introduction of evidence regarding additional ancillary effects and affected purchasers outside the relevant market.