

The Changing Landscape in U.S. Antitrust Class Actions



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In 1966, prompted by an amendment to the procedural rules applicable to cases in U.S. federal courts, the United States embarked on an “adventuresome innovation” in litigation³ in which one or a few named plaintiffs would be authorized, under judicial oversight and supervision, to litigate in a single lawsuit not only their own individual damages claims but similar damages claims of other persons not party to the case. Under this approach, not only would claims be aggregated, but non-parties who chose not to opt-out of the litigation would be bound by the outcome of a case in which they did not participate. Thus was born the modern American class action. The aim was to streamline litigation and allow the resolution of many claims arising from a single practice or set of facts to be adjudicated efficiently, including claims in which the potential recovery was far too small to warrant the investment of time and resources into litigation on an individual basis.

While the rise of class action damages actions altered litigation in many areas of law, it certainly changed the landscape in antitrust. Armed with a potent weapon, the ability to aggregate many claims into a single proceeding, antitrust plaintiffs and their counsel began pursuing cases, notably price-fixing claims in which the injured parties were consumers who each had small individual damages, that had previously not been the subject of private litigation. With the development of class actions, those alleged to have violated U.S. antitrust law faced a significant additional threat. Not only were there potential fines in criminal case or potentially broad injunctions in civil proceedings brought by the Department of Justice or Federal Trade Commission, but the rise of damages class actions through private litigation, brought the possibility of massive treble damages claims as well. Today, businesses facing antitrust investigations by the United States government will inevitably consider the potential civil liabilities resulting from follow-on private antitrust class actions in crafting an overall strategy for dealing with the investigation. Private damages class actions have also spawned legal questions that have shaped U.S. antitrust cases in a number of ways.⁴

For many years, private antitrust claims, certainly those alleging price-fixing or other per se violations in which conduct is conclusively presumed to be anticompetitive, were thought to be especially suited for

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³ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) (internal citation omitted).

⁴ See, e.g., *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *California v. ARC America Corp.*, 490 U.S. 93 (1989) (federal rule limiting private antitrust damage recoveries to direct purchasers does not preclude indirect purchasers from recovering damages for the same conduct under state antitrust law).





class treatment. Typically, a single course of conduct affected thousands, if not millions, of persons or entities. The aggregate harm might be significant, but in many situations, the amount of individual damages was too small for a single plaintiff to pursue a claim. If single plaintiffs did pursue their claims individually, the courts might be inundated with cases challenging the same conduct. The class action, therefore, seemed tailor-made for private antitrust litigation, so much so that for a number of years courts routinely certified antitrust class actions with little factual inquiry. In fact, as late as 1997, the United States Supreme Court cited antitrust claims as being especially amenable for resolution on a classwide basis.⁵

In the past ten years, however, the landscape has changed. Prompted by developments in class action law generally, antitrust class actions have undergone a significant evolution. Today, no longer is certification of a damages claim a foregone conclusion. Rather, the United States Supreme Court has instructed federal trial courts to undertake a rigorous analysis of the requirements of Rule 23 of the Federal Rules of Civil Procedure to ensure that a case is amenable to class treatment. That analysis may include extensive factual inquiry and may touch on the merits of a claim and includes resolution of factual disputes relevant to the certification inquiry. In antitrust, that evolution has most recently been seen in the predominance inquiry, the requirement that common questions of law or fact predominate over individual questions. Today, many antitrust class actions, even those in cases in which there is little doubt about the existence of an underlying violation of the law, may founder on this issue. In the past, the courts, with little factual inquiry, often held that common issues predominated in antitrust cases. That is not true any more. Now, courts effectively require named plaintiffs to establish with evidence at a relatively early stage of the litigation that they have a reasonable methodology, based on evidence applicable to the class as a whole, that will allow the factfinder to determine whether the challenged conduct has affected and injured all or substantially all members of the class.⁶ The failure to make a showing that such a methodology exists precludes certification of a damages class.

I. WHAT IS NECESSARY TO CERTIFY AN ANTITRUST CLASS ACTION IN THE UNITED STATES?

A. *The Requirements for Certification of an Antitrust Class Action*

Most antitrust class actions in the United States are brought under section 1 of the Sherman Act, which is the basic U.S. competition law statute. That statute prohibits “every contract, combination . . . and conspiracy in restraint of trade.”⁷ But to recover damages, private plaintiffs must do more than show a violation of the Sherman Act. They must also show antitrust injury, which is an actual injury suffered by the plaintiff flowing from an anticompetitive aspect of the challenged conduct.⁸ Without a showing of antitrust injury, private plaintiffs lose their cases even if they establish that defendants’ conduct violates the Sherman Act. As we explain, that requirement has become increasingly important in class action analysis in recent years.

⁵ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

⁶ *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (classwide injury and damages theory must be limited to injuries and damages occurring from anticompetitive conduct challenged on the merits); *In re New Motor Vehicles Canadian Export Litigation*, 522 F.3d 6, 20 (1st Cir. 2008) (“In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof.”).

⁷ 15 U.S.C. § 1.

⁸ *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).





Antitrust damages class actions are subject to the same procedural rules applicable to damages class actions in any substantive area of law. To obtain class certification, a plaintiff must satisfy six elements:

1. **Numerosity** — The proposed class must be so numerous that joinder of all potential plaintiffs in a single suit is not practical. In most antitrust class actions, the numerosity requirement is easily met, especially when the putative class is a group of consumers.

2. **Commonality** — There must be at least one question of law or fact common to every member of the class. In most antitrust class actions, the requirement is often satisfied because the existence of concerted action, anticompetitive effects, and injury to class members are typically common issues applicable to all. A legal or factual question is “common” to the class if a single litigation proceeding may determine its outcome for all or substantially all of the absent class members.

3. **Typicality** — The named plaintiff — that is, the person who wishes to represent the class — must have claims that are typical of those of other class members. This means that the named plaintiff’s claim must be arise from the same course of conduct and raise the same legal theory as claims of the absent class members. Minor factual differences will not defeat typicality if the named plaintiff’s claim meets those requirements. Typicality will not be present, however, when the named plaintiff is subject to a unique defense, such as lack of standing, statute of limitations, obligation to arbitrate, or some other defense that could potentially cause the named plaintiff to put her own interest ahead of those of members of the class.

4. **Adequacy of Representation** — The named plaintiff must be an adequate representative of the class. This element addresses three issues. First, the named plaintiff must be a member of the class, and her interests must not conflict with those of absent class members that she wishes to represent. Second, the named plaintiff must be willing to prosecute the claims vigorously on behalf of all class members. Third, counsel for the class must be competent and able to represent it zealously. While courts sometimes deny certification in antitrust damages class actions on the second and third issues, more often, if certification is denied for lack of adequacy, it is because the named plaintiff has some interest that is antagonistic to the interests of absent class members. A named plaintiff that cannot meet the typicality requirement will, in many cases, also be an inadequate class representative.

5. **Predominance** — The common issues of fact or law identified under the commonality element must predominate over the individual issues applicable to class members. This inquiry is more demanding than the commonality requirement.⁹ In other words, the principal focus of the litigation must be the common questions identified in the commonality inquiry. If proof of essential elements of the claim require individual inquiry to resolve, then common questions do not predominate. This element has become a central focus of antitrust damages class actions, as we discuss below.

6. **Superiority** — A class must be a superior means for resolving the litigation when compared to individual litigation. This determination turns on a number of factors, including: (a) class members’ interests in individually controlling prosecution of separate actions; (b) the nature and extent of any litigation concerning the challenged conduct already begun by class members; (c) the desirability (or lack thereof) of concentrating the litigation in a single forum; and (d) likely difficulties in managing a class action. Superiority is a fact-bound inquiry and will vary depending on the facts and circumstances of the litigation.

In addition to these express requirements, a number of courts hold that the class must be “ascertainable” — that is, identifying the persons in the class must be possible and feasible.¹⁰

⁹ *Comcast Corp.*, 133 S. Ct. at 1432; *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001).

¹⁰ *Carrera v. Bayer Corp.*, 727 F.3d 300, 305-08 (3d Cir. 2013) (class not ascertainable when individual fact-finding required to show membership in the class).





Before certifying a class, a court must rigorously analyze each of these elements and make a determination that the facts to support a finding that each has been satisfied. Failure to meet any one of these elements means a case cannot be certified as a class action.

B. Predominance as the Central Focus in Antitrust Damages Class Actions

As we note, in the early years of class actions, the courts regularly certified antitrust damages classes with little analysis of whether common questions predominated over individual inquiries. Indeed, as late as 1997, the Supreme Court in dicta stated that “[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws.”¹¹ Today, however, as a number of recent cases show, predominance is not as “readily” established as the Supreme Court’s dictum in *Amchem* may have suggested. Courts are focusing far more on the predominance inquiry, especially as it relates to whether a named plaintiff can establish classwide injury resulting from the challenged conduct. In fact, today, predominance is often the fulcrum of antitrust damages class actions, which rise or fall on whether a named plaintiff can show that the challenged conduct injured all or substantially all members of the class using evidence that is applicable to the class as a whole.

To understand why this inquiry is so important, the focus is on what is actually litigated in many antitrust class actions. The antitrust injury requirement is crucial in civil antitrust litigation in the United States. Without a showing of antitrust injury, not only does a plaintiff not recover any damages, but judgment is entered for the defendants. Thus, as a number of courts have noted, injury is the gravamen of the private antitrust action.¹² Unless that issue can be resolved for virtually all class members using evidence common to all of them, individual questions will predominate over common questions. Particularly when the existence of a conspiracy is readily established, such as by a finding of unlawful agreement in a prior government proceeding, the antitrust inquiry may become the only significant issue to be litigated in a private damages case. Unless that issue can be resolved on a classwide basis, however, an antitrust damages class may not be certified.

Since proof of classwide injury from common evidence is often the central issue in antitrust class actions today, the analysis often turns on expert testimony. Most commonly, antitrust plaintiffs seeking class certification will offer testimony from an economist who will put forth a methodology attempting to show that they can demonstrate that the challenged conduct harmed each and every member of the class, or at the very least a methodology that can determine whether each and every member of the class has been harmed, and the amount of aggregate damages suffered by the class. Named plaintiffs do not have to prove that the challenged conduct actually harms each member of the class at the class certification stage. Rather, their burden is to show that the question *can be answered* for all class members, whether the answer be affirmative or negative, in a single proceeding and on the basis of evidence applicable to all class members. Defendants, on the other hand, will typically offer contrary expert economic testimony explaining why injury to class members cannot be established on a classwide basis or necessarily requires individualized inquiry.

The courts must conduct a rigorous analysis of the evidence offered on predominance (and any other elements of class certification that are contested) and resolve any factual disputes. In the past, courts often accepted assertions that plaintiffs could or would develop a methodology to establish injury to class members. But today, such assertions are not accepted. The allegations must be supported by concrete evidence. When the issue turns on the conflicting evidence of economic experts, the trial judge must now determine which expert is more credible and offers the sounder economic analysis. Often that determination hinges on the judge’s view of the thoroughness of the economic analysis and how closely it fits with the factual evidence

¹¹ *Amchem Prods., Inc.*, 521 U.S. at 625.

¹² *Windham v. American Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) (“The gravamen of the [private antitrust] complaint is not the conspiracy; the crux of the action is injury, individual injury.”); *Burnham Chem. Co. v. Borax Consol.*, 170 F.2d 569, 571 (9th Cir. 1948).





presented and on which it is based. Moreover, courts no longer shy away from at least some inquiry into the merits of the injury issue at the class certification stage.

C. The Practical Effect of the Evolution of the Predominance Inquiry in Antitrust Damages Class Actions

The ramifications of this evolution from limited factual inquiry and ready finding of predominance to a rigorous inquiry into whether antitrust injury can be established on a classwide basis using evidence applicable to the class as a whole has great practical significance. In antitrust damages class actions, the class certification decision often determines the outcome of the litigation. Antitrust damages class actions are rarely tried. Antitrust defendants in cases with certified classes usually face enormous potential liabilities; prevailing plaintiffs recover three times their actual damages plus costs and reasonable attorneys' fees. In addition, liability for defendants is joint and several, meaning that a prevailing plaintiff can collect the entire judgment from one defendant, even if that defendant sold only a small percentage of the product affected by the violation. A defendant that pays the entire judgment has no claim for contribution or indemnity against other defendants. With the size of the potential liabilities and the risk of being obligated to pay the full amount of any judgment, few defendants will risk a trial. Certification of a class, therefore, almost always forces defendants to settle.

On the other hand, denial of class certification often effectively ends the lawsuit. Particularly in consumer antitrust class actions in which individual damages are small, the inability to aggregate many claims into a single proceeding means that, even with the prospect of recovering attorneys' fees, the value of the claim is too low to justify further investment in the litigation. That is particularly true for plaintiffs' counsel, most of whom are paid a percentage of what they recover. Thus, in a real sense the class certification decision is tantamount to a trial for plaintiffs as well.

II. CONCLUSION

Given the stakes, the shift in the last decade to fact-intensive inquiries on the elements of class certification, particularly the demand that requirement that named show that classwide injury can be established using evidence common to the class as a whole are significant developments. No longer are antitrust damages class actions routinely certified with little factual inquiry, forcing defendants into settlements of potentially marginal claims. Rather, the courts focus extensively now on whether named plaintiffs can prove injury to class members on the entire class before permitting cases to proceed on a class basis. While the damages class action remains a potent weapon in the arsenal of antitrust plaintiffs, doctrinal developments in the last ten years, most notably the focus on antitrust injury and predominance, have given defendants the ability to contest and to defeat certification motions in antitrust cases that routinely were granted in the past.

