THE
Antitrust Practitioner

ABA Section of Antitrust Law *Civil Practice and Procedure Committee* *Volume 4 July 2006*

CURRENT ISSUES IN ANTITRUST CLASS CERTIFICATION, PART I

EDITOR'S FOREWORD

This issue of *The Antitrust Practitioner* is the first of two on critical issues in the certification of class actions in antitrust cases under Rule 23 of the Federal Rules of Civil Procedure. In the first article, Gregory Cook and Charlton Rugg examine recent appellate and district court opinions on certification, and discern in every circuit but the Third a trend toward greater scrutiny of plaintiffs' proposals to prove impact (and in some instances damages) by classwide proof. In the second article, Wesley Powell, Matthew Freimuth, and Shireen Hilal review developments in certification of settlement classes since the Supreme Court's decision in *Amchem* almost decade ago. Although courts have followed *Amchem*'s mandate to apply Rule 23's criteria to proposed classes in which the parties have agreed to settlement terms, the authors find most classes have been certified, in some instances because litigants have taken care to address certification requirements in the settlement agreement.

In the third article, Laila Haider, John Johnson, and Ian Simmons argue that, in deciding whether to certify direct purchaser class actions, courts should permit defendants to conduct "downstream discovery," that is, discovery about whether and how direct purchasers may have passed on an overcharge. Even though passing on is not a defense, they argue, the pattern of passing on may explain differences in the direct purchasers' transactions with the defendants. Finally, Peter Franklyn and Christopher Naudie describe the development of antitrust class certification in Canada and compare it to the U.S. system. American lawyers will be especially interested in the Canadian treatment of indirect purchaser and settlement classes. ◆

William H. Page
page@law.ufl.edu

The Antitrust Practitioner is published two times a year by the American Bar Association Section of Antitrust Law Civil Practice and Procedure Committee. The views expressed in The Antitrust Practitioner are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law, or the Civil Practice and Procedures Committee (or its subcommittees). If you wish to comment on the contents of The Antitrust Practitioner, please write to the American Bar Association, Section of Antitrust Law, 321 North Clark, Chicago, IL 60610.

NOTE FROM THE CHAIR

It has been nearly 18 months since the enactment of the Class Action Fairness Act. While it may be too early to offer any clear assessments of the impact CAFA will have on antitrust class action jurisprudence, it is not too early to focus on developments and trends in class action jurisprudence. In this issue of *The Antitrust Practitioner*, we have four insightful articles addressing key aspects of antitrust class action practice.

In our first article, Greg Cook and Charlton Rigg make the case that federal courts are more rigorously holding plaintiffs to their proof that class certification is appropriate with evidence and not simply in reliance on presumptions of common impact. Our second article, contributed by Wesley Powell, Matthew Freimuth and Shireen Hilat, takes a close look at the extent to which settlement classes are treated differently from other proposed classes. In our third article, Laila Haider, John Johnson and Ian Simmons offer the provocative view that downstream discovery not only should be permitted, but is critically important in the context of class certification. Finally, Peter Franklyn and Christopher Naudie provide an illuminating explanation of Canadian class actions and class certification standards. We are indebted to each of our authors, and to Bill Page, for the quality and thoughtfulness of these articles. I think you will find them all to be timely and helpful in your every day practice.

We are about to begin a new Section year, and with it, there are new opportunities to participate in Section and committee activities and programs. Please let me or any of the vice chairs know if you would like to participate in a committee activity. Looking ahead to this new Section year, we are considering working with the federal judiciary to increase the accessibility of the new antitrust jury instructions. We are considering sponsoring a teleseminar on issues associated with spoliation of evidence. We will also be considering a program on electronic discovery issues. These are in addition to our spring meeting program and our writing projects. If you have other ideas for programs or projects that you think might be of interest, do not hesitate to let us know. Remember, the more you participate, the more you get out of your membership. ◆

Paul Friedman

In This Issue

TIGHTENING TRENDS IN ANTITRUST CLASS CERTIFICATION

*Gregory C. Cook & Charlton A. Rugg**

Although courts remain divided over the level of proof necessary for a class certification motion under Fed.R.Civ.P. 23(b)(3) in an antitrust case, the trend appears to be towards requiring a higher level of proof. The Third Circuit set the more liberal standard in its seminal case of *Bogosian v. Gulf Oil Corp.*,[1] while the Fourth and Fifth Circuits set forth a contrary view in *Windham v. American Brands, Inc.*,[2] and *Alabama v. Blue Bird Body Co.*[3] We argue in this Article that the Sixth and Eighth Circuits have joined the Fourth and Fifth Circuits (whose ruling also stands as law in the Eleventh Circuit). The Second and Seventh Circuits appear to be moving in a similar direction. No Circuit appears to have moved towards the Third. Yet, reviewing reported district court decisions on Westlaw demonstrates that the movement is slow, perhaps because plaintiffs choose the forum. For instance, in 2000 and 2001 combined, there were ten district court decisions certifying classes in antitrust cases and four refusing certification; in 2005 and 2006, so far, the numbers are six to four, while antitrust case filings have remained flat.

This trend accords with the command of *General Telephone Co. of Southwest v. Falcon*[4] that a class "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." It is also in keeping with the 2003 amendments to Rule 23, which no longer permit conditional certification, but now require that plaintiffs demonstrate satisfaction of the rule before the district court may certify a class.[5]

Most certification battles are fought over Rule 23(b)(3)'s requirement that issues of law or fact common to the class members "predominate" over individual issues. In antitrust cases, this requirement prevents a class action from degenerating into myriad minitrials to determine whether each class member was impacted or damaged by the challenged conduct. Instead of assuming predominance simply because price fixing has been alleged, as some courts have historically done, more courts today are requiring plaintiffs to prove that they can supply common evidence of the (1) existence of a conspiracy, (2) antitrust impact on each class member, and (3) antitrust damages.[6] If claims beyond simple price fixing are alleged, courts typically require plaintiffs to demonstrate that they can provide common evidence of each additional element.

Most certification battles are fought over Rule 23(b)(3)'s requirement that issues of law or fact common to the class members "predominate" over individual issues.

The main point of disagreement among courts appears to concern how to analyze the predominance requirement on antitrust impact, including (1) whether to accept the *Bogosian* "shortcut" or presumption of impact if the allegations claim that the wrongdoing raised the base price for all class members and (2) what level of scrutiny to apply to the plaintiff's expert on antitrust impact. Those courts following the trend have begun to look behind the pleadings at evidence and expert testimony, and frequently demand that plaintiffs' experts perform some analysis of real data and testing of hypotheses, rather than state that they will be able to develop a method to demonstrate impact on a class wide basis.

At class certification, the disputes over antitrust impact usually center on (1) what type of market is involved (2) whether there are multiple markets or simply one market (for example, are there multiple local markets or only one national market), (3) what the nature of the industry is, and (4) whether the product is nonstandard and thus whether a model can be constructed to demonstrate the fact of damage for each class member and account for the complications of the markets and the products.

The importance of local markets to the question of predominance has played a particularly significant role in several recent decisions. Local markets may differ in the number and size of competitors, prices, product availability, local laws and regulations, as well as a host of other factors that require an individualized analysis of how the alleged conspiracy may operate in each locality and whether the plaintiffs there suffered antitrust impact. Both § 1 conspiracy claims and § 2 monopolization claims are susceptible to this line of attack.

For instance, the Eighth Circuit recently affirmed a denial of class certification based upon this reasoning in *Blades v. Monsanto Co.*[7] Plaintiffs alleged a price fixing conspiracy in the market for genetically modified corn and soybean seeds. The district court denied certification because plaintiffs failed to demonstrate the predominance of common questions. The plaintiffs' expert presumed that the alleged conspiracy would have class wide antitrust impact, rather than offering a method for determining with common evidence *whether* the alleged conspiracy would have a class wide impact. The

district court criticized plaintiffs' expert for assuming the answer to what is the essential question at the class certification stage.

Blades also recognized that complex pricing within the industry presented a significant problem for plaintiffs in seeking to establish class wide impact. Historically not all courts have agreed that the complexity of the industry at issue should defeat class certification. In *Blades*, the district court found that the seeds were not sold at a uniform price and that nationwide price lists did not reflect the actual prices paid. Plaintiffs sought to resolve this question through a claims procedure, but the district court correctly found that the actual price was important to the question of impact, not simply a matter of the amount of damages due to each class member.

Essentially, plaintiffs in *Blades* were unable to establish the "but-for" market prices, that is, the prices that they would have paid in the absence of the alleged illegal conspiracy. It was not merely the difficulty in proving the amount of damages for each class member (typically subject to a lower burden of proof) but the fact of damage for each. This failure proved fatal to the motion for class certification. Moreover, the district court noted the localized nature of the industry, which made it unlikely that plaintiffs could demonstrate the existence and workings of the conspiracy with common proof.

Local markets were also a significant factor in the Sixth Circuit's affirmance of the district court's denial of class certification in *Rodney v. Northwest Airlines, Inc*.[8] In that case, plaintiffs alleged that Northwest Airlines engaged in illegal monopolistic conduct to dominate and control the market for airline travel in and out of three of its hubs, Memphis, Detroit, and Minneapolis/St. Paul. The Sixth Circuit, however, found that resolving the issue of market definition would require an individualized inquiry into 74 different markets, one for each of the airline routes that plaintiffs alleged Northwest was attempting to dominate. The court noted that "an 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."[9] Even plaintiffs' expert agreed that the analysis of competing travel services and of Northwest's power to monopolize a route would have to be conducted on a market-by-market, i.e. a route-by-route, basis. In addition, the question of antitrust impact would require a market-by-market analysis to determine for each route why Northwest's competitors declined to enter the market and offer a competing service.

Historically not all courts have agreed that the complexity of the industry at issue should defeat class certification.

In *Heerwagen v. Clear Channel Communications*,[10] the Second Circuit also affirmed a denial of certification. The plaintiff alleged that Clear Channel, the largest producer and promoter of live music concerts in the country, engaged in predatory and exclusionary conduct to set uniform prices for concert tickets. The Second Circuit held that "[c]omplying with Rule 23(b)(3)'s predominance requirement cannot be shown by less than a preponderance of the evidence."[11] Plaintiff failed to satisfy this standard, because the court concluded that the relevant geographic market for concert tickets was local: concert-goers generally attend only local events, because travel costs would nullify any potential savings from attending a cheaper concert in other city. Consequently, proof specific to individual class members who live in different geographic markets would predominate over class wide proof.

While there is no definitive Tenth Circuit caselaw, a recent Utah district court decision in *In re Medical Waste Services Antitrust Litigation*, appears to agree with the trend among the Circuits away from the Third Circuit's standard.[12] Plaintiffs had alleged that providers of medical waste disposal services agreed to stop competing and allocate territories to each other, and attempted to monopolize various territories. The court, however, denied certification of both § 1 and § 2 claims, finding that plaintiffs would have to prove their case through "an exhaustive market-by-market, customer-by-customer, product-by-product, time period-by-time period inquiry."[13] The court cited *Blades* in criticizing plaintiffs' expert for presuming antitrust impact, rather than offering a method for demonstrating it. As in *Blades*, defendants were able to show that a range of factors, including a customer's location, size, and type and volume of waste, would affect whether that customer suffered any antitrust impact from the challenged conduct. Thus, the district court found that the customer specific inquiry meant individual, not common issues predominated.

Likewise, although the Ninth Circuit has not directly ruled upon these issues, a recent district court opinion in *In re NCAA I-A Walk-On Football Players Litigation*, while citing *Bogosian,* appeared to apply a stricter level of scrutiny.[14] Various walk-on college football players alleged that the NCAA's rule capping the total number of football scholarships violated §1 and §2 of the Sherman Act. The district court denied class certification, reasoning that each class member would need to prove impact individually (that is, the "but for" world) – because it could not be assumed which players would have received the scholarships and at which schools, requiring an analysis of talent and of the particular coaches at each school.[15]

While most cases challenging plaintiffs' class certification motion focus on

whether common questions of impact predominate, a few recent cases, particularly from the Fifth Circuit, go further and deny certification because individual questions of damages predominate.[16] In *Bell Atlantic Corp. v. AT&T Corp.*,[17] for example, Bell Atlantic alleged that AT&T attempted to monopolize the market for caller-ID services by blocking the free transmission of caller-ID data over its long-distance network. Individual plaintiffs sought certification of two classes of business consumers that had purchased caller-ID services. The district court denied certification on the ground that plaintiffs could not use common evidence to prove antitrust impact. The Fifth Circuit affirmed, however, on the ground that plaintiffs could not use common evidence to prove antitrust damages. Plaintiffs proposed a damages formula that used nationwide cost of labor and time saving averages. The Fifth Circuit found that any adequate estimate of damages would require examining the individual circumstances of each business and how it used the caller-ID services. Because plaintiffs could not show damages through a mechanical or formulaic calculation, but would have to put on individualized proof for class members in widely varying circumstances, individual issues predominated.

In *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*,[18] plaintiffs alleged a conspiracy to fix the prices of bread and cake products in Texas and Louisiana. The district court denied the motion for class certification because individual issues surrounding each purchaser's damages and knowledge at the time of purchase would predominate. The geographic market, delivery costs, discounts, and negotiating skill affected the ultimate price, rendering the case impossible to prove with common evidence. The Fifth Circuit affirmed, criticizing plaintiffs' expert for simply opining that he could find a formula to calculate damages using multiple regressions, rather than offering an actual model for doing so. The court was highly skeptical that the expert could include in his model all the necessary factors, including negotiating ability and geographic markets: "Multiple regression analysis is not a magic formula. It is simply a mathematical tool . . . which may or may not yield statistically significant results."[19]

The Fifth Circuit found that any adequate estimate of damages would require examining the individual circumstances of each business and how it used the caller-ID services.

The Seventh Circuit, in *West v. Prudential Securities, Inc.*[20], while not directly ruling on the issues in the antitrust context, has held that a district court must closely analyze proposed expert methodologies at the class certification stage, including "holding evidentiary hearings and choosing between competing perspectives." Anything less "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert."[21]

Other circuits have also revealed a recent willingness to hold plaintiffs to their burden of proof on motions for class certification. In 2003, the Eleventh Circuit reversed a district court's grant of class certification because of fundamental conflicts within the class (under the adequacy prong in Fed.R.Civ.P. 23(a)(4) rather than the predominance prong of 23(b)(3)). In *Valley Drug v. Geneva Pharmaceuticals*,[22] plaintiffs alleged that a settlement whereby a generic drug manufacturer agreed to refrain from producing and distributing a generic version of a brand name drug was anticompetitive. The Eleventh Circuit found that some class members had benefited from the challenged conduct because they had made more money reselling the brand name product than they would have selling the generic equivalent. This created a fundamental conflict with the class members who had purchased the drug for dispensing, not for resale. Because the interests of the named plaintiffs were in conflict with those class members who had benefited from the challenged conduct, they could not adequately represent the class.[23]

While virtually every other circuit that has considered the issue appears to be tightening their class action jurisprudence in antitrust cases,[24] the Third Circuit continues to apply the "*Bogosian* shortcut." As recently as 2002, the Third Circuit reaffirmed the viability of the doctrine in *In re Linerboard Antitrust Litigation*.[25] The presumption that class wide impact can be inferred from allegations of a nationwide price fixing conspiracy is at odds with the trend in many circuits to examine ever more closely how plaintiffs intend to show antitrust impact and damages with common evidence.

In conclusion, there are some common trends in the recent antitrust class decisions. First, most district courts are requiring plaintiffs' experts to present a viable, well-constructed methodology, rather than simply stating that they intend to construct a formula for showing class wide impact or damages. Second, localized industries are becoming increasingly difficult for plaintiffs to certify. Third, while the predominance of antitrust impact continues to be the most likely avenue for a successful opposition to class certification, courts are becoming more receptive to attacks on other Rule 23 requirements. While the appellate courts appear to be moving towards more scrutiny, a number of district courts continue to certify antitrust class actions based upon the assumption that antitrust claims can presume impact (or presume impact with an expert's assurance that he could construct a class-wide model). The movement towards more scrutiny is slow, particularly because the propriety of certification should rise and fall upon the particular facts, legal theory, and expert's methodology.

[Endnotes]

* Mr. Cook is a partner with Balch & Bingham LLP in Birmingham, Alabama and specializes in defending class actions. He is a graduate of Harvard Law School. Mr. Rugg is an associate in Simpson Thacher & Bartlett's New York office. He graduated from the University of Colorado School of Law and clerked for Judge Carlos T. Bea of the Ninth Circuit. Both are currently defending a putative antitrust class action.

1 561 F.2d 434, 455 (3rd Cir. 1977).

2 565 F.2d 59, 66 (4th Cir. 1977).

3 573 F.2d 309, 317 (5th Cir. 1978).

4 457 U.S. 147, 161 (1982).

5 The Advisory Committee notes on the amendments state: "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."

6 *See, e.g., Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005).

7 400 F.3d 562 (8th Cir. 2005).

8 No. 04-5752, 2005 WL 2009178 (6th Cir. Aug. 22, 2005).

9 *Id.* at *4.

10 435 F.3d 219 (2d Cir. 2006).

11 Id. at 233. *See also In re* Public Offering Fee Antitrust Litig., 2006 WL 1026653 (S.D.N.Y. April 18, 2006) (refusing certification for claim that underwriters fixed fees for IPO's; "cannot presume as a matter of economics that every buyer who purchased services at the standardized price was injured"; noting that underwriting services are not "fungible"; recognizing that "estimated" price for each class member might be sufficient for damages but not impact); *compare In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d, 124, 141 (2d Cir. 2001) (affirming certification in tying case claiming violation because of requirement that debit card be accepted if credit card was accepted; plaintiff expert empirically defined the market and reviewed "empirical" evidence to develop impact and damage model demonstrating that the standard Visa interchange fees charged to everyone would be less in the "but for" world).

12 No. 98 Civ. 7890(LMM), 2006 WL 538927 (D. Utah March 3, 2006).

13 *Id.* at *7.

14 No. C04-1254C, 2006 WL 1207915 (W.D. Wash. May 3, 2006).

15 *Id.* at *11 – 12; *compare In re* Dynamic Random Access Memory (DRAM), No. M 02-1486 PJH, 2006 WL 1530166 (N.D. Cal. June 5, 2006) (certifying price fixing class because product was allegedly a commodity and plaintiff's expert used data produced by defendants to construct analysis and model to show impact on class members; court determined it need not decide *Bogosian* viability); *but see In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346 (N.D. Cal. 2005) (certifying the class and broadly writing that the issue of conspiracy almost predominates and that impact is "usually" sufficient if there are list prices).

16 Complexity of damages issues may also lead a court to conclude that a class action is not superior to individual actions, as required by the second part of Rule 23(b)(3).

17 339 F.3d 294 (5th Cir. 2003).

18 215 F.R.D 523 (E.D. Tex. 2003), *aff'd*, 100 Fed. Appx. 296 (5th Cir. 2004).

19 100 Fed. Appx. at 299.

20 282 F.3d 935, 938 (7th Cir. 2002)

21 *Id. See also Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) ("a judge should make whatever factual and legal inquiries are necessary under Rule 23").

22 350 F.3d 1181 (11th Cir. 2003).

23 *See also In re NCAA I-A Walk-On Football Players Litig.*, No. C04-1254C, 2006 WL 1207915 at *7 - *8 (W.D. Wash. May 3, 2006) (noting "overriding" conflict between class members in showing which walk-on players would have obtained scholarships in the "but for" world).

24 While the First Circuit does not appear to have directly ruled upon the *Bogosian* shortcut, a recent district court opinion cited it as if it were settled law. Likewise, a recent district court opinion in the Ninth Circuit (*Rubber Chemicals*) and some earlier opinions by district courts in the Second Circuit appear to apply this type of reasoning. *In re New Motor Venicles Canada Export Antitrust Litig.*, 2006 WL 1318689 at *8, n.35 (D. Me. May 12, 2006). There, the plaintiffs pursued state law antitrust claims based upon a theory of an illegal agreement among manufacturers and dealers to prevent the sale of cheaper imports from Canada. The court appears to have accepted the plaintiff's assertion that "but for" the import limitation, the base price (M.S.R.P.) would have been lower, thus lowering the starting point for negotiations and the plaintiff expert's claim that there are "standard, economic models" that would provide the "but for" price. The court concluded that it would not determine at this stage whether the methods "are adequate" because the "hurdle at this stage is low" and it could decertify later if necessary. *Id.* at *8, *12.

25 305 F.3d 145, 151–53 (3d Cir. 2002). The Third Circuit did note in *Linerboard* that the district court relied on plaintiffs' experts as well as on the *Bogosian* presumption. Plaintiffs' experts in *Linerboard* had actually conducted significant empirical analysis, which gave their reports more credence than the conclusory reports noted in some of the cases discussed herein. *Linerboard*, 305 F.3d at 153–55. Given the adequacy of the expert evidence, there was no need for either the district court or the appellate court to rely on the outdated and unsophisticated *Bogosian* presumption. ◆

SETTLEMENT CLASS CERTIFICATION:
APPLICATION OF A MORE FLEXIBLE CERTIFICATION STANDARD SINCE *AMCHEM*

*Wesley R. Powell, Matthew Freimuth & G. Shireen Hilal**

INTRODUCTION

In *Amchem*,[1] the Supreme Court sought to resolve the long-standing debate among federal courts about whether a court should apply the same standard in certifying a settlement class as it would in a trial class or, instead, a less stringent standard, since a settlement class will not proceed to trial and risk the management problems inherent in many types of class actions. *Amchem* held that a court should apply the same certification standard, except that it need not conduct the "manageability" inquiry of Federal Rule of Civil Procedure 23(b)(3)(D). Following *Amchem*, federal courts have consistently denied class certification where the claims typically are found incompatible with class treatment in the trial context – for example, RICO, products liability and other claims that generally present individualized causation issues. However, relying on *Amchem's* manageability exception, a number of courts have certified settlement classes – including in the antitrust context – notwithstanding significant individualized issues and potential intra-class conflicts that may have doomed certification in the trial context. Where courts have reached different certification outcomes in the face of similar potential intra-class conflicts (for example, application of different state law to damages claims), the decision has turned on the extent to which the proposed settlement agreement managed any such complexities (for example, through an effective individual damages calculation system).

BACKGROUND

On its face, Rule 23 does not establish different certification standards for putative trial and settlement classes. Until the mid-1990s, most federal courts facing this question found that, because both parties to the litigation had agreed that class certification was appropriate and necessary to the settlement of a putative class action, certification of a proposed settlement class should be assessed under a more deferential standard than a trial class. Courts typically considered, at the same juncture, both whether a settlement was fair under Rule 23(e) and whether the proposed class subject to that settlement should be certified. Under this approach, courts focused first and foremost on the fairness of the proposed settlement. If the court found the settlement to be fair to putative class members, the class would be certified with little discussion of whether it met the requirements of Rules 23(a) and (b).[2]

In the mid-1990s, several courts – led by the Third Circuit – issued a series of decisions rejecting the traditional application of a more deferential standard to settlement class certification. In the first of these cases, *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*,[3] the district court had approved the settlement of a large class action involving purchasers of motor vehicles alleged to have a design defect in the fuel tank on certain GM trucks. In certifying the settlement class, the district court made no findings as to whether the requirements of Rule 23(a) or 23(b) were satisfied. Rather, after conducting a settlement fairness hearing, the district court concluded that the proposed settlement "appeared reasonable," and accordingly, simultaneously certified the class and approved the settlement.[4]

The Third Circuit reversed and remanded for decertification of the class, holding that in the settlement class context a "fairness determination is not a surrogate for Rule 23 findings."[5] The Court concluded the district court had erred in failing to determine if the settlement class complied with all requirements of Rule 23(a) and (b).[6] Not only does Rule 23 draw no distinction between trial and settlement classes permitting a more lax standard for the latter, but a rigorous analysis is all the more essential in the settlement context to protect the rights of absent class members and to permit the court to "effectively monitor for collusion, individual settlements, buy-offs, . . . and other abuses."[7]

The *General Motors* case left open the question of whether the fact of a proposed settlement could even be considered in determining whether to certify a class under Rule 23. A year later, the Third Circuit addressed that question in decertifying another settlement. In *Georgine v. Amchem Products, Inc.*,[8] the Third Circuit reiterated the need for a strict application of the Rule 23(a) and (b) standards and held that the existence of a settlement may not even be considered when deciding whether to certify a settlement class.[9] The court held that "there is no language in Rule 23 that can be read to authorize separate, liberalized criteria for settlement classes . . . . While the better policy may be to alter the class certification inquiry to take settlement into account, the current Rule 23 does not permit such an exception."[10]

In *Amchem* the Supreme Court resolved the developing split between the Third Circuit and other Circuits on

whether a settlement agreement could be considered in reaching the certification decision and whether a different certification standard applied.[11] The Court held that the Rule 23(a) and (b) requirements must be rigorously applied in the settlement context – with one exception: when confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems under 23(b)(3)(D).[12] Indeed, the very existence of the proposed settlement implies that there will be no trial, so any attendant management issues will not be presented. The Court stressed, however, that the other requirements of 23(a) and (b) – namely those designed to protect absentees by blocking unwarranted or overbroad class definitions – demand "undiluted, even *heightened*, attention in the settlement context."[13]

The Court also modified the Third Circuit's *Georgine* decision by holding that the proposed settlement agreement is, in fact, relevant to the determination of granting class certification.[14] However, the Court cautioned that Rule 23(e), which calls for a court to approve a class settlement by assessing the fairness of a proposed terms, was not intended to eclipse the requirements of Rule 23(a) and (b), which are designed to ensure that a certified class has sufficient unity so that absent members can fairly be bound by the decisions of the class representatives.[15] That concern is present in both the settlement and trial contexts.[16]

SETTLEMENT CLASS CERTIFICATION SINCE *AMCHEM*

In the vast majority of cases since *Amchem*, courts have certified proposed settlement classes. However, following *Amchem*'s ruling that Rule 23(a) and (b) should be rigorously applied even in the settlement context, courts have declined to certify classes for settlement purposes where the claims are of a type that typically present intractable individual causation issues, such as fraud-based claims (including RICO), non-employment civil rights cases, and tort cases.[17]

For example, in *Laughman v. Wells Fargo Leasing Corp.*,[18] the district court declined to certify a class in a consumer fraud case that presented claims under the Consumer Leasing Act, the Illinois Consumer Fraud Act and other state unfair trade practices laws. The court found it was "uninformed as to the impact of variations in state law on the significance of the obvious uncommon fact questions … [and so] … Laughman has not shown that the nationwide class meets Rule 23(b)(3)'s predominance requirement."[19] Likewise, issues of reliance and individualized assessment prevented certification in the RICO context in *Richard v. Hoechst Celanese Chemical Group, Inc.*[20] Noting that under existing case law it might be impossible to certify any RICO class, the court declined to certify the settlement class because the proposed class failed to meet the predominance requirement: individualized assessments of injury and damages overwhelmed common issues of law and fact.

The court in *In re Ephedra Products Liability Litigation*[21] based its decision on similar reasoning and explicitly drew upon the *Amchem* decision for support in applying a stringent Rule 23 analysis. The Court concluded that the plaintiff class could not meet the predominance requirement, as each member's use of and experience with the product would require individualized assessment. "Not only would these individual questions *predominate* among members of the proposed settlement class, they would be the only questions having *any* weight."[22]

Apart from the post-*Amchem* cases that decline certification based on a strict application of the Rule 23 criteria, other courts have taken the fact of settlement into account and certified classes – including in the antitrust context – where the fact of settlement makes otherwise insurmountable manageability concerns disappear. Those cases are entirely consistent with *Amchem*'s holding that in analyzing a proposed settlement class, courts need not consider the manageability prong provided for in Rule 23(b)(3)(D).

The court in *In re Warfarin Sodium Antitrust Litigation*[23] applied the holding of *AmChem* in the antitrust context and found that, although calculation of damages in the case would require resolution of numerous individual issues, this factor was not sufficient to defeat predominance. In *Warfarin*, fixed co-pay consumers, out-of-pocket consumers, and third party payors brought antitrust claims against drug manufacturers of anti-clotting medication under various laws of all fifty states. Although differences in state antitrust laws varied the rights and remedies that would be available to the class members, the court approved certification of a nationwide class and approved the settlement. The court noted that although these differences may have precluded certification of a trial class, the fact that the certification arose in the settlement context was "key" to the court's decision to certify the class. Commonality and predominance were not defeated, as "any material variations could be considered in the context of calculating damages as well as in assessing the fairness of the settlement."[24]

Because *Amchem* explicitly directed lower courts to consider the terms of the settlement agreement in evaluating whether to certify a proposed class, courts now assess whether the agreements themselves adequately address any individual issues that would defeat a finding of common-issue predominance. Where a settlement agreement effectively addresses those concerns, courts appear inclined to certify the class. In contrast, where a proposed settlement agreement does little to resolve the underlying Rule 23 concerns, a court will be less inclined to certify. The recent decisions in *In re Relafen Antitrust Litigation*[25] and *In re*

Serzone Products Liability Litigation[26] illustrate these different outcomes.

In *Relafen*, indirect purchasers brought antitrust actions against the manufacturer of an anti-inflammatory drug, alleging the manufacturer unlawfully delayed the marketing of a generic version of the drug by filing meritless patent infringement actions. The court initially certified a class of end payors who purchased the drug in certain states where the antitrust statutes were sufficiently similar that individual issues would not predominate over common ones.[27] Those same end payors subsequently moved to extend certification to a nationwide settlement class. The court denied certification of the nationwide class, because it would have covered end payors in states whose antitrust statutes would produce significant individual issues with respect to valuation of damages claims, which prevent a finding of common-issue predominance.[28] For example, one group of states had so-called *Illinois Brick* repealer statutes that permit indirect purchasers to bring claims under the antitrust laws; another group of states did not. In light of these significant differences in state law applicable to different class members, the *Relafen* court found the time, effort and expense saved by certification of the class would be outweighed the differences in state law.[29] Importantly, the court found that, although the parties had sought to address these individual state-law issues in their proposed settlement agreement, the agreement's pay-out schedule failed to resolve the issues and created a serious risk of multiple recoveries.[30]

In contrast, the decision in *Serzone* illustrates that, when faced with individual issues posing a significant hurdle to a finding of common-issue predominance under Rule 23(b), the parties can reduce the risk of denial of settlement class certification by including in the agreement a sufficiently detailed and sophisticated distribution methodology that avoids the risk of inconsistent

Settlement class certification cases since *Amchem* reveal that courts have been quite consistent in applying a more rigorous Rule 23 analysis to proposed settlement classes.

or duplicative recovery. In *Serzone*, the court approved certification, finding that the "[d]ifferences in state law . . . do not destroy class cohesion because the settlement agreement provides for the distribution of benefits based on objective criteria."[31] The objective criteria for settlement payout in *Serzone* were: (1) proof of use or purchase of Serzone; and (2) for those claiming a specific physical injury, proof of a temporal relationship between a qualifying medical condition (liver failure) and the use of Serzone. The *Serzone* court found that although individual issues such as causation and differing state laws were presented, these objective criteria for settlement funds avoided issues that would otherwise be presented at trial.

CONCLUSION

Settlement class certification cases since *Amchem* reveal that courts have been quite consistent in applying a more rigorous Rule 23 analysis to proposed settlement classes. Nonetheless, the majority of settlement classes are certified, except in cases where individual issues so predominate that courts are reluctant to certify the class in either the trial or settlement context. Following *Amchem*'s directive to take settlement agreements into account when evaluating whether to certify a proposed class, courts have certified settlement classes where the parties address any potential barriers to common issue predominance in the proposed settlement agreement. Where parties fail to do so, courts have not been reluctant to deny certification.

Serzone's lesson – that management complexities and intra-class conflicts can be resolved in an adequate settlement agreement – may be somewhat difficult in the antitrust context, although not impossible. *Relafen* stands as a warning. In part because the allocation provision of the *Relafen* settlement agreement did not divide class members into homogenous subclasses with separate representation, the court declined to certify the nationwide settlement class. Litigants should be particularly careful to draft class settlement agreements in such a way that accounts for wide variations in state antitrust law, particularly with respect to state laws, such as *Illinois Brick*-repealer statutes,[32] that afford antitrust claimants different rights and remedies. Failure to do so will likely result in a court's declining to certify a settlement class.

[Endnotes]

* Mr. Powell is a partner in the global competition group at Hunton & Williams LLP; Mr. Freimuth and Ms. Hilal are associates in the group.

1 *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *modified sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

2 *See, e.g.*, *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987); *Weinberger v. Kendrick*, 698 F.2d 61, 69-73 (2d Cir. 1982); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 177 (5th Cir. 1979); *see also* David Gallucci, *Comment: The Aftermath of* General Motors *and* Georgine*: Are Settlement Classes Doomed?*, 102 Dick. L. Rev. 575, 577 (1998).

3 55 F.3d 768, 777 (3rd Cir. 1995).

4 *Id.*

5 *Id.* at 779.

6 *Id.*

7 *Id.*

8 83 F.3d 610, 618 (3d Cir. 1996).

9 *Id.*

10 *Id.*

11 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (Asbestos products manufacturers who were members of the Center for Claims Resolution, and whose stipulation of proposed global settlement of claims by persons exposed to asbestos had been court-approved, moved to enjoin actions against them by

individuals who failed to timely opt out of class. The United States District Court for the Eastern District of Pennsylvania granted the injunction. Parties objecting to class certification appealed, and the Court of Appeals for the Third Circuit vacated and remanded with directions to decertify class. Certiorari was granted, and the Supreme Court agreed that the class should be decertified, but articulated a different standard for determining settlement class certification.).

[12] *Id.* at 620.

[13] *Id.* (emphasis added).

[14] *Id.* at 619.

[15] *Id.*

[16] *Id.*

[17] *See, e.g., In re Ephedra Prods. Liab. Litig.*, 237 F.R.D. 167 (S.D.N.Y. 2005) (In multi-district products liability litigation against the manufacturer of an ephedra-containing dietary supplement, the court denied certification due to predominance of individual questions of proof of causation of injury); *Richard v. Hoechst Celanese Chem. Group, Inc.*, 208 F.R.D. 575 (E.D. Tex. 2002) (In putative class action against manufacturers of polybutylene for plumbing systems, alleging violations of Racketeer Influenced and Corrupt Organizations Act, court denied certification and settlement approval because requirement of individual proof of reliance on fraud negated commonality); *Gilliam v. HBE Corp.*, 204 F.R.D. 493 (M.D. Fla. 2000) (Court denied certification in action by African-American guests alleging race discrimination at hotel during meeting, based on the "virtual impossibility of certifying a class in a non-employment civil rights case where class members seek compensatory and punitive damages").

[18] No. 96 C 925, 1997 U.S. Dist. LEXIS 13614, *14 (N.D. Ill. Sept. 2, 1997)

[19] *Id.* at *4. Similar reasoning frustrated certification of a settlement class in *Gilliam*, in which the plaintiff class brought race discrimination suit under Title II of the Civil Rights Act of 1964. Because "every member of the class will have to prove actual damage in order to receive compensation for their loss, the policy or practice issue cannot possibly predominate over all the other issues in the case that are necessarily capable of only individualized resolution." 204 F.R.D. at 497.

[20] 208 F.R.D. 575 (E.D. Tex. 2002).

[21] 231 F.R.D. 167 (S.D.N.Y. 2005).

[22] *Id.* at 170.

[23] 391 F.3d 516, 530 (3rd Cir. 2004).

[24] *Id.* at 529-30.

[25] 225 F.R.D. 14 (D. Mass. 2004) (*Relafen II*).

[26] 231 F.R.D. 221 (S.D. W. Va. 2005).

[27] *In re Relafen Antitrust Litig.*, 221 F.R.D. 260 (D. Mass. 2004) (*Relafen I*).

[28] *Relafen II,* 225 F.R.D. at 28.

[29] *Id.* at 21-22.

[30] *Id.* at 23-24.

[31] *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 240 (S.D. W. Va. 2005). *See also, In re Diet Drugs Prods. Liab. Litig.*, No. 1203, 2000 U.S. Dist. LEXIS 12275, *130 (E.D. Pa. Aug. 28, 2000) ("[D]ifferences in state law . . . do not destroy class cohesion because the settlement agreement provides for distribution of benefits based on the objective criteria described therein.").

[32] *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (the Court held only direct purchasers, and not others in chain of manufacture or distribution, are parties injured within the meaning of the Clayton Act). ◆

DOWNSTREAM DISCOVERY IN ANTITRUST CLASS ACTIONS

Laila Haider,[1] John Johnson,[2] & Ian Simmons[3]

The Federal Rules of Civil Procedure allow "parties to obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party."[4] In Sherman Act § 1 cases, discovery, to state a truism, is the lifeblood: it is the means by which plaintiffs learn the nature and structure of industries allegedly subject to Sherman Act § 1 violations and the vehicle through which defendants develop the themes of their defense. In the context of antitrust class actions, although there has been a recent trend towards the bifurcation of class certification discovery and "merits" discovery, it is still the case that discovery rules are "accorded a broad and liberal treatment," because "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[5]

One issue that courts increasingly confront involves motions for downstream discovery at the class certification phase.[6] By downstream discovery, we mean discovery relating to what the direct purchasers did with the alleged price-fixed product, whether/how the direct purchasers resold the product, and the demand and supply substitutability conditions underlying the resale of the product. Below, we explain the potential purpose and relevance of downstream discovery in antitrust class certification matters. We begin by showing why the often cited *Hanover Shoe*[7] and *Illinois Brick*[8] cases do not exclude downstream discovery at the class certification phase (or at the merits phase). We then use a simple example to demonstrate how information gathered from downstream discovery is directly relevant for the assessment of common impact and damages issues in an antitrust class action. Throughout, we emphasize that the individual circumstances and facts of a specific case should be the basis upon which courts decide whether or not to allow downstream discovery.

It is frequently argued in antitrust class actions that downstream discovery is precluded by *Hanover Shoe* and *Illinois Brick*. This fundamental confusion partly arises out of a misinterpretation about the decisions and partly out of confusion over the relevance of downstream discovery in the class certification context. *Hanover Shoe* held that an antitrust offender could not reduce its liability for an overcharge by showing that purchasers had passed on all or part of the overcharge to their own customers, so-called indirect purchasers.[9] *Illinois Brick* held that indirect purchasers could not sue for a passed-on overcharge that they paid. The Court asserted that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it."[10] In some instances, indirect purchasers may sue under state law, and those cases may now find their way into federal courts under the Class Action Fairness Act (CAFA). Nevertheless, federal antitrust class actions for overcharges typically involve only a putative class of direct purchasers.

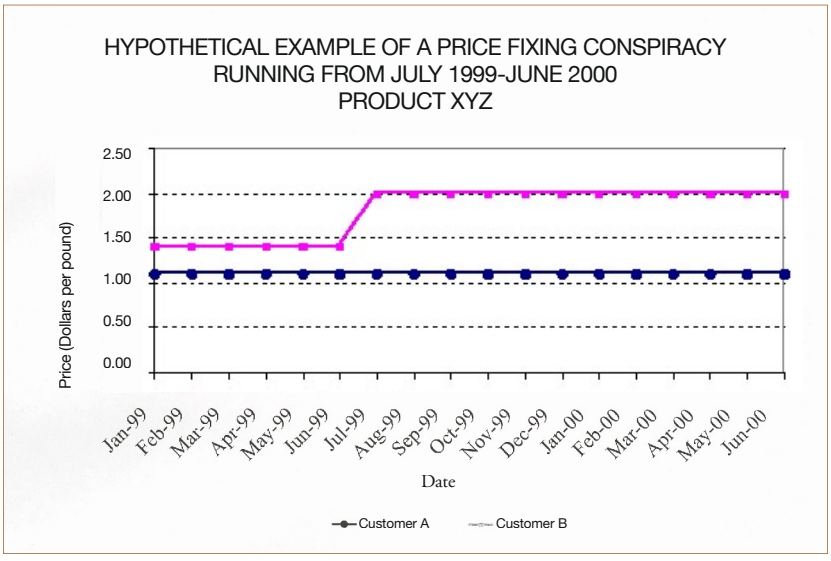
Courts have expressed sensitivity about allowing downstream discovery for the purposes of a pass-on defense.

Just as *Hanover Shoe* precluded the use of pass-on arguments as a shield, *Illinois Brick* proscribed their use as a sword. But nothing in these Court decisions suggests that downstream discovery is irrelevant. Courts have expressed sensitivity about allowing downstream discovery for the purposes of a pass-on defense. But this question is different from a highly relevant question in a class certification matter: does downstream discovery assist the court in determining whether individualized proof is needed to establish fact of injury or the existence of formulaic approaches to damages? At the class certification stage, the court must ascertain whether, given the conduct alleged, class-wide impact can be established by proof that is common to the putative class, and whether a formulaic approach to damages exists for the class. If the issues, evidence, and proof are common to the class members, then class certification may be appropriate. If, on the other hand, individualized inquiries are required into purchasing habits, market positioning, and competition, then a class action may well not be an appropriate device in the litigation.

To illustrate the potential usefulness of downstream discovery in the class certification context, consider a hypothetical case of an alleged horizontal price-fixing conspiracy amongst manufacturers of an industrial product. The nature of demand for the product at issue will dictate whether downstream discovery is relevant for the class certification phase of the litigation. When direct purchasers sell the product to indirect purchasers, the direct purchasers' demand for the product from the alleged offender is a derived demand – it is derived from downstream conditions. The direct purchasers will

be willing to pay the manufacturers the amount their own customers are willing to pay for the product, plus the direct purchasers' costs, including opportunity costs. Thus, any economic factors that affect the end uses or the end users (i.e., the downstream customers) of the product influence the direct purchasers' demand for the manufacturers' product. The downstream customers are not parties in the case, but the conditions they face may have important upstream implications. For instance, the elasticity of demand for the product at issue may vary by the end-use application for which the product is used as an input.

The following simple example illustrates how downstream conditions can be relevant in the context of class certification. This is a hypothetical example of a price-fixing conspiracy running from July 1999 through June 2000. The chart depicts two direct purchasers that pay different prices for the same product purchased from the same manufacturer.



In economics, the law of one price might suggest that such a pattern of prices is an impossibility—all customers face the same supply and demand conditions and hence, the prices of the product at issue move together for all customers. Downstream discovery may likely explain the observed pattern in prices. For example, one potential reason for this price pattern is the nature of substitution possibilities in the end use for the product. If the two customers purchase the product at issue for different end-use applications, it implies that the potential substitutes for this product may also be different.

Customer A purchases the product for a particular end use and benefits from the fact that it can turn to substitute products to meet its application needs. But Customer B purchases the product for a different end use and cannot rely on alternatives to meet its needs. The presence (or lack) of substitution possibilities at the end user level can explain why the two customers pay different prices for the same product.[11] This fact is directly relevant to the class certification inquiry: in the example above, Customer A can avoid an overcharge because of the threat that the end user can turn to a substitute product. Common proof cannot be used to determine class-wide impact in this scenario. *Moreover, the need for individual inquiry can only be uncovered through downstream discovery.*

Another explanation for the observed price trends may lie in the nature of negotiations. For instance, Customer A is able to negotiate favorable prices because it has significant buying power downstream. In other words, the indirect purchaser has leverage in upstream negotiations due to its size and/or buying power. Customer B, however, is not in the same situation. In this scenario, Customer A can avoid an overcharge because it is able to negotiate better pricing terms due to its specific downstream conditions. Generalized proof cannot be used to determine impact for these customers. And again, downstream discovery is needed to determine whether evidence specific to individual class members is dispositive on the question of the presence (or absence) of fact of injury.

These scenarios, although purely illustrative, highlight the importance of downstream discovery to the issue of class certification. One of the only ways to identify whether common proof can be relied upon to determine impact is through an investigation of downstream factors. The purchaser and the ultimate end use can be of paramount importance to the ultimate theory of impact. Note, *neither* of these potential explanations relate in any way to the pass-on defenses that are the focus of *Hanover Shoe*, nor to the indirect purchaser claims that are the concern of *Illinois Brick.* Downstream discovery may provide one of the only methods for determining whether an inquiry into individual issues is appropriate in a given case. From an efficiency perspective, allowing this type of inquiry at an early stage of the litigation may well save considerable time and resources in the long run.

There have been several antitrust class actions where courts have been asked to address issues related to downstream discovery. In *Valley Drug Company v. Geneva Pharmaceuticals, Inc.,*[12] direct purchasers alleged that drug manufacturers conspired to delay the entry of the generic version of the drug into the market. The court of appeals

reversed the certification of the class on the ground that the district court had refused the defendants' request to conduct downstream discovery. The court concluded that discovery concerning wholesalers' sales practices was necessary to determine if they benefited from the alleged conduct of the defendants.[13] This highlights that downstream discovery may not only be useful to address the issue of common impact but also to uncover potential conflicts amongst class members.[14] By contrast, and in keeping with *Hanover Shoe*, the Court in *In re Carbon Dioxide*[15] rejected the request for information regarding the resale of carbon dioxide on the ground that it was an attempt to invoke a pass-on defense. Similarly, *In re Folding Carton* the Court ruled against downstream discovery asserting that "[w]hether purchases absorbed, passed-on, or made a profit on the overcharges in comparison with the industry generally is irrelevant, and investigations into such matters are proscribed...."[16]

With the increased prevalence of class actions and indirect purchaser suits consolidated under CAFA, the potential for confusion over the relevance of downstream discovery is significant. In this paper, we provide some simple examples of circumstances where economic rationales exist for allowing downstream discovery at the class certification phase. As always, the facts and circumstances of a given case must dictate the appropriateness. But for courts to exclude downstream discovery simply based on *Hanover Shoe* is a misreading of the case law. Downstream discovery, in the right circumstances, can provide valuable information that is at the heart of the relevant inquiry that courts need to conduct in antitrust class certification matters.

[Endnotes]

[1] Consultant, NERA Economic Consulting. 1255 23rd Street, NW, Washington, DC 20037. laila.haider@nera.com

[2] Vice President, NERA Economic Consulting. 1255 23rd Street, NW, Washington, DC 20037. john.johnson@nera.com

[3] Partner, O'Melveny and Myers. 1625 Eye Street, NW, Washington, DC 20006. ISimmons@omm.com

[4] Fed. R. Civ. P. 26(b)(1).

[5] *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

[6] For example, see *In re Folding Carton Antitrust Litig.*, MDL No. 250, 1978 U.S. Dist. LEXIS 20409, at *9 (N.D.Ill. May 5, 1978) and *In re Vitamins Antitrust Litig.*, 198 F.R.D. 296 (D.D.C. 2000).

[7] *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

[8] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[9] The Court rejected evidence that indirect purchasers were in fact injured by the illegal overcharge for two reasons: (1) an unwillingness to complicate proceedings with attempts to trace the effects of the overcharge and (2) if direct purchasers were not permitted to sue for the portion of the overcharge allegedly passed on to indirect purchasers, antitrust violators "would retain the fruits of their illegality" and indirect purchasers who "would have only a tiny stake in the litigation" would not have much incentive to pursue the action.

[10] *Illinois Brick*, 431 U.S. at 734.

[11] Arbitrage between customer A and customer B may be impractical.

[12] 350 F.3d 1181 (11th Cir. 2003).

[13] The plaintiffs invoked the cry of downstream discovery, to which the Court responded: "we do note that neither *Hanover Shoe* nor its progeny imbue the named representatives in this case with the automatic right to certify a class where the economic reality of the situation reveals that a fundamental conflict may exist among class members because of their different economic circumstances and different economic interests." *Id.* at 1193. Moreover, "plaintiffs' brief is replete with references to *Hanover Shoe* and *Illinois Brick* as if these cases were a talisman warding away the requirements of Rule 23 and barring this court from exercising its duty to conduct an inquiry into whether the plaintiffs' proposed class satisfies the four requirements of Rule 23 (a)." *Id.* at 1192.

[14] Downstream discovery may also be relevant to mitigation of damages. For instance, seeking downstream evidence may be one of the only methods to determine whether plaintiffs undertook any efforts to mitigate damages.

[15] *In re Carbon Dioxide Antitrust Litig.*, MDL 940, slip op. at 4 (M.D. Fla. Nov. 19, 1993).

[16] *In re Folding Carton Antitrust Litig.*, MDL No. 250, 1978 U.S. Dist. LEXIS 20409, at *9 (N.D. Ill. May 5, 1978). *See also In re Automotive Refinishing Paint Antitrust Litig.*, MDL 1426, 2006 WL 1479819 (E.D. Pa. May 26, 2006); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 226 F.R.D. 492, 497-98 (M.D.Pa. 2005); *In Re Plastics Additives Antitrust Litig.*,Civ. NO. 03-2038, 2004 U.S. Dist. LEXIS 23989, at *50 (E.D. Pa. Nov. 29, 2004). ◆

THE CERTIFICATION OF ANTITRUST CLASS ACTIONS IN CANADA

Peter Franklyn & Christopher Naudie[1]

INTRODUCTION

Antitrust class actions are a relatively recent arrival to the Canadian legal landscape. Indeed, prior to 1976, Canada had no private remedy for antitrust violations under the *Competition Act*. However, with Parliament's adoption of a private right of action in 1976, and with the gradual adoption of class proceedings legislation across the provinces beginning in 1992, Canada has now formally opened the doors to collective private relief for harm resulting from criminal anti-competitive conduct.

In recent years, Canada has witnessed a gradual rise in competition class activity, and Canadian courts have now rendered a number of important decisions in both contested and consent certification cases. But while Canadian courts have grappled with certification issues that are very similar to those that have arisen in the United States, the Canadian courts have embarked upon a remarkably different path. Most significantly, to date, Canadian courts have declined to adopt hard legal rules that are equivalent to *Hanover Shoe* and *Illinois Brick*.[2] As a result, we have witnessed a number of direct and indirect purchaser class actions in Canada, and defendants have regularly invoked passing-on issues as both a defence on the merits and as an obstacle to certification. But while the threshold test for certification in the Canadian provinces is generally lower than the test under Federal Rule 23, antitrust plaintiffs still face considerable evidentiary barriers to obtaining certification in Canada.

The objective of this paper is to provide an overview of the contemporary record of the certification of antitrust class actions in Canada. In particular, we have traced the history and origin of antitrust class actions in Canada. In addition, we have surveyed the test for certification in Ontario and Québec, and we have highlighted some of the significant differences from Federal Rule 23 and U.S. class action practice. We have also reviewed some of the most significant certification decisions that have been rendered to date in Canada in the competition field. Finally, we have offered some views on the future of antitrust actions in Canada.

A SHORT HISTORY OF PRIVATE ANTITRUST ENFORCEMENT IN CANADA

The enactment of the *Combines Investigation Act* in 1889,[3] the predecessor to Canada's present *Competition Act*, was roughly contemporaneous with the U.S. enactment of the *Sherman Act* in 1890. However, in contrast to the *Sherman Act*, the original *Combines Investigation Act* did not include any private right of action resulting from anti-competitive conduct. Rather, prior to 1976, the enforcement of antitrust law in Canada was accomplished virtually exclusively through public enforcement, and there were very limited opportunities for private parties to make complaints or to seek relief for anti-competitive harm under statute or at common law.

In 1976, Parliament amended the *Combines Investigation Act* to create a private right of action for single damages arising from violations of the criminal provisions under the *Act*, including the offences of conspiracy, bid-rigging, predatory pricing, price maintenance, price discrimination and misleading advertising.[4] However, during the period from 1976 to 1993, there were only a small number of private actions commenced under the provision, and based on the reported case law, none appear to have resulted in a successful trial verdict for damages. In short, during its early history, the private remedy does not appear to have resulted in any material impact in the enforcement of antitrust law in Canada.[5]

The lack of private enforcement under section 36 of the *Act* during this period can be explained by a number of factors. Historically, the federal government's adoption of competition legislation was grounded as an exercise of Parliament's constitutional authority over criminal law, but there was considerable constitutional doubt as to whether the creation of a civil remedy under the *Act* was a valid exercise of this authority over criminal law. In addition, private plaintiffs in Canada lacked many of the economic and procedural advantages enjoyed by plaintiffs in the U.S. For instance, plaintiffs are only permitted to seek single damages under section 36, and the provision does not contemplate punitive damages.[6] Furthermore, plaintiffs in Canada are much more limited in their ability to seek jury trials in civil cases, and until very recently, most provinces did not permit contingency fee arrangements.[7] As well, plaintiffs faced considerable financial risks in bringing a novel claim – under the traditional cost rules in the Canadian courts, unsuccessful parties are generally liable for a portion of their opponent's costs. But perhaps most significantly, private plaintiffs in Canada had no access to a modern regime of representative or class proceedings for advancing antitrust claims.

THE ARRIVAL OF ANTITRUST CLASS ACTIONS IN CANADA

However, private antitrust enforcement slowly began to come of age in the early 1990s in Canada as a result of several legal developments. To begin, in 1989, the Supreme Court of Canada upheld the constitutionality of section 36 of the *Act*, holding that it was a valid exercise of the federal government's general constitutional power over trade and commerce.[8] Second, most of the common law provinces in Canada began to adopt class action legislation in the 1990s, beginning with Ontario in 1992.[9] In addition, in 2001, the Supreme Court of Canada held that even in the absence of comprehensive class action legislation, the provincial courts have the power to permit the equivalent of class actions under their traditional representative proceeding rules.[10] As a result, a plaintiff may now bring a class action or the equivalent of a class proceeding in every province in Canada, as well as in the Federal Court of Canada. Third, contingency fees are now more widely accepted in Canada, particularly in the class action domain. These developments, collectively, created a much more fertile ground for pursuing private antitrust litigation in Canada.

THE CANADIAN CLASS ACTION LANDSCAPE

The underlying tests for certification in Canada have also contributed to a favourable environment for pursuing collective relief under section 36 of the *Act*. There are a number of important procedural variations in the class proceedings rules across the provinces. However, as a general proposition, the threshold for certification in the Canadian is generally lower than Federal Rule 23. Most significantly, the main class proceeding jurisdictions in Canada do not have a predominance requirement similar to Federal Rule 23, and the provincial courts have generally adopted a more purposive approach towards certification which tends to favour parties seeking access to class proceedings.

At the outset, it is important to say a few words regarding the federal nature of Canada's judicial system. As a matter of practice, antitrust class actions are generally brought before the provincial Superior Courts across Canada, the rough equivalent of state courts in the U.S. Canada does have a federal court system, and the Federal Court of Canada does have concurrent jurisdiction over private actions under the *Competition Act*. However, in contrast to the experience in the U.S., the Federal Court of Canada has played a relatively minor role in antitrust class action litigation in Canada. This is largely due to the narrow statutory jurisdiction of the Federal Court of Canada. While the Federal Court has jurisdiction over a number of causes of action that arise under federal law, the Court has only very limited jurisdiction over supplemental and ancillary claims that arise under provincial law. Since most antitrust plaintiffs will generally seek to pursue parallel claims at common law (such as the torts of conspiracy and economic interference) in conjunction with their statutory claims for damages under section 36, antitrust plaintiffs have generally elected to bring their actions under the general inherent jurisdiction of the provincial Superior Courts.

The practical consequence of this jurisdictional election is that where multiple plaintiffs seek relief in respect of alleged anti-competitive conduct that is national in scope, a defendant will often face multiple and separate class actions in one or more provinces. To complicate matters further, these multiple and separate class actions in different provinces will often each seek to certify a national class, resulting in overlapping classes. And since the Superior Courts in each of the provinces represent independent courts, there is no equivalent mechanism in Canada to the Multi-District Litigation system whereby multiple proceedings can be consolidated before one court. Rather, to date, these issues of competing actions and overlapping classes have generally been addressed either through contested motions (i.e., a motion challenging a class definition or seeking a stay of proceedings in one province), or through informal arrangements among plaintiffs counsel (i.e., a plaintiff may agree to hold one proceeding in abeyance pending certification or settlement of a parallel action in another province).

To date, most of the significant class action litigation in Canada has been commenced before the Superior Courts of Ontario and Québec. Like other Canadian jurisdictions, both provinces have modelled their certification tests to some extent on Federal Rule 23. In general terms, under the *Class Proceedings Act* in Ontario, a class action must generally meet the following requirements to obtain certification: the pleadings must disclose a cause of action; there must be a class of two or more identifiable persons; the action must raise common issues; a class proceeding must be the "preferable procedure"; and the representative plaintiff must fairly and adequately represent the class, present a plan for the litigation and not have any conflicts with class members on the common issues.[11] The test for certification in Québec is similar, but sets a much lower bar. In general terms, under the Québec *Code of Civil Procedure*, a class action must meet the following requirements to obtain certification: the claims of the proposed class members must raise identical, similar, or related questions of law or fact; the facts alleged must justify the conclusions sought; the proposed class must be such that an action by express mandate or joinder would be difficult or impractical; and the representative plaintiff must represent class members adequately.[12]

The tests for the certification of class actions in Ontario and Québec are considerably less onerous than the certification test under Federal Rule 23. Most significantly, there is no requirement

that the plaintiff demonstrate predominance and superiority similar to Rule 23(b)(3). Rather, in their place, Ontario has adopted the requirement that a class action must constitute the "preferable procedure". In interpreting this concept, the Ontario courts have applied a "practical cost-benefit approach" that is focused on two issues: whether or not the class proceeding is a fair, efficient and manageable method of advancing the claim, and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and so on.[13] The Ontario courts have also adopted a purposive approach to certification. In particular, the courts have assessed certification motions in terms of how well they accord with the three underlying purposes of the *Class Proceedings Act*, namely, judicial economy, access to justice, and behavior modification.

In analyzing and assessing the proposed common issues and the preferable procedure, the Ontario courts have generally examined whether the proposed common issues constitute necessary and substantial ingredients of each class members' claim.[14] To establish the requisite degree of commonality, a plaintiff must normally show that, in the context of the entire claim, the resolution of the common issues will significantly advance the action. Indeed, the Ontario Court of Appeal has recently held that an issue can constitute a substantial ingredient of the claim even if it makes up a very limited aspect of the determination of liability, and even if many individual issues remain to be decided after the resolution of the common issues.[15]

Québec is even more amenable to class actions than Ontario, and has arguably become the most plaintiff-friendly jurisdiction in North America. Unlike Ontario and other North American jurisdictions, a class action in Québec need not be the preferable procedure in order for certification to be granted. In addition, there is no requirement that the common issues of fact and/or of law must be predominant. Rather, the only requirement is that the common issues of fact and/or law must be important, i.e. not simply an ancillary issue.[16] A variety of other procedural mechanisms also make class actions easier to certify in Québec. As a result of a number of significant procedural amendments in 2003, defendants have now have only very limited means to challenge certification.

In particular, the courts have assessed certification motions in terms of how well they accord with the three underlying purposes of the* Class Proceedings Act*, namely, judicial economy, access to justice, and behavior modification.

For example, plaintiffs are not required to file an affidavit or testify at a motion for certification, and the allegations made in a motion for authorization are deemed to be true for the purposes of the motion. In addition, defendants do not have the right to file a written contestation to the certification motion, to file evidence before the motion, or as of right at the motion. Similarly, defendants may only bring preliminary motions in extremely limited circumstances.[17] Defendants are not permitted to appeal actions that are certified in Québec except based on new evidence, but plaintiffs are permitted to appeal from decisions where certification is denied.[18] As a result, Québec has become a very attractive regime for plaintiffs seeking to bring class actions, and the class action bar has witnessed a significant amount of forum shopping in favour of the Québec courts.

THE CERTIFICATION OF ANTITRUST CLASS ACTIONS IN CANADA

This fertile landscape for class proceedings has, unsurprisingly, contributed to a gradual and significant rise of antitrust class actions in Canada over the past few years. However, the number of antitrust class actions still lags considerably behind the comparable experience in the U.S. Based on a recent survey, during the last fifteen years since the adoption of class proceeding legislation in Ontario, there have been 12 antitrust class actions that have resulted in some form of reported decision in Canada.[19] In addition, as a general observation, there have been an equal if not greater number of class actions in the unreported case law. However, as a result of the difficulty of commenting on the unreported case law across ten provinces, we have focused our comments on the general profile of cases in the reported case law.

There are several interesting aspects to these reported cases that merit discussion. To begin, the majority of the reported class actions appear to have been litigated primarily in Ontario.[20] In addition, the great majority of these cases (roughly 75%) were predicated on a prior criminal conviction resulting from a negotiated plea agreement.[21] In virtually all of the cases where the plaintiff initiated a class action on the basis of a prior criminal conviction, the defendants ultimately reached a settlement and agreed to certify the class action on consent to implement the settlement.[22]

Section 36(2) of the *Competition Act* provides part of the explanation for the willingness of defendants to enter a settlement and consent to certification following a prior criminal conviction. Under this section, a plaintiff may rely on the "record of proceedings" from the criminal conviction as part of his or her civil case. In particular, the plaintiff may rely on this record as presumptive proof that the defendant engaged in the anti-competitive conduct in question. This evidentiary presumption provides a significant evidentiary advantage to the plaintiff in civil proceeding. And while this presumption is theoretically rebuttable, there does not appear to have been any reported cases where this presumption has actually been rebutted.

As a result, plaintiffs frequently use this presumption as leverage to negotiate a settlement, and once a settlement has been reached, defendants will normally consent to certification for the purpose of implementing the settlement so that it is binding on a class.

This record of consensual certifications is also explained by the greater willingness on the part of Canadian courts to certify actions for the purpose of implementing a settlement. For example, in Ontario, parties seeking certification for the purpose of implementing a settlement are not required to satisfy the court that certification would have been granted if the motion had been put forward on a contested basis.[23] The Courts have also recognized that these certification and settlement proposals provide a consensual resolution to claims that would have otherwise been contested or brought forward as a series of individual actions.[24] As such, the Courts have generally found that a certification on consent for the purpose of implementing a settlement will normally constitute a "preferable procedure" under the requirements of the *Class Proceedings Act*.

This general approach to consensual certification stands in marked contrast to the U.S. Supreme Court's approach to certification for settlement purposes under Federal Rule 23. In *Amchem Products*, the U.S. Supreme Court underscored that while the existence of a settlement is relevant for certain purposes in considering a consensual certification, the existence of a settlement does not supersede or modify the general requirements for certification, particularly in respect of predominance and adequate representation.[25] By contrast, in *Bona Foods*, the Ontario Superior of Justice expressly held that the commonality requirement for certification may be applied differently in the face of a proposed settlement. In particular, the Court held that "an issue which lacks commonality in contested proceedings may [nonetheless] be a common issue when certification is requested in a settlement context". [26]

However, in circumstances where plaintiffs have commenced an antitrust class action without the benefit of a prior criminal conviction, the record of certification in Canada is markedly different. To date, there have only been four cases where plaintiffs have commenced an antitrust class action in absence of a prior criminal conviction and where the class action has resulted in a reported decision.[27] Of these four reported cases, none of these cases appears to have obtained certification or to have resulted in a successful judicial finding of liability.

The first class action partially survived a motion to strike but does not appear to have advanced beyond the preliminary motions stage.[28] The second class action also appears to have stalled after the action was stayed in connection with a corporate restructuring.[29] The two remaining class actions proceeded to a contested certification hearing, but in both instances, the Court denied certification. These latter two cases are quite significant, because they provide considerable guidance with respect to the certification of future antitrust class actions in Canada. In short, while antitrust plaintiffs in Canada generally have access to a favourable class action regime that has a lower threshold for certification and which permits indirect purchaser claims, there remain considerable and potentially onerous obstacles to obtaining certification in Canada.

In *Price v. Panasonic Canada Inc.*, the plaintiffs sought to commence a class action against an electronics manufacturer on behalf of a class of consumers who had purchased certain electronic components, on the alleged basis that the defendants had engaged in a practice of resale price maintenance over a ten-year period. On its face, the class action in *Price* appears to have been a mixed direct and indirect purchaser claim.[30] At the certification motion, the Ontario Superior Court of Justice declined to certify the proposed class action, on the basis that the proposed class action was a "monster of complexity" and did not constitute the preferable procedure.

In its decision in *Price*, the Court readily found that there was a common issue among class members as to whether the defendant had engaged in conduct which violated the *Competition Act*. However, the Court was not persuaded that there was common issue with respect to the liability of the defendant under the *Competition Act*. The Court's reasoning on this point was closely connected with the nature of the plaintiff's legal burden of proof liability under section 36 of the *Act*. In brief, as a result of the specific language of provision, a plaintiff is required to establish the existence of a "loss" as an integral part of his or her cause of action, above and beyond his or her general onus to prove damages. As such, in order to demonstrate a common issue relating to liability at the certification stage, the plaintiff is required to demonstrate common issues relating to the components of liability, including the existence of a violation of the statute and the existence of a loss.

In *Price*, the Court concluded that the plaintiff had failed to adduce sufficient evidence to establish a common issue of loss, since the pricing of electronics products was the subject of many variables, and "it would be necessary to analyze each of these variables in respect of each sale to determine the extent to which it affected the price at which the product was sold." On that basis, the Court determined that there was only a narrow set of common issues for the court to address, since the common issues relating to the violation of the statute were relatively minor compared to the significant individual issues of loss and damage that would have to be proved at trial. Accordingly, the Court concluded that proposed class action would not serve the interests of access to justice, and was not the pref-

erable procedure under the requirements of the *Class Proceedings Act*.

Following the decision in *Price*, the Ontario Court of Appeal elaborated on these issues in much greater detail in *Chadha v. Bayer*. The plaintiffs in *Chadha* commenced a pure indirect purchaser class action. In particular, the plaintiffs alleged that the defendants had conspired to increase the price of iron oxide, a chemical pigment used in the production of bricks and paving stores that are used in the construction of new homes. On the basis of that alleged conspiracy, the plaintiffs sought to certify a class action on behalf of a broad class of new home purchasers across Canada who had arguably paid a higher price for their homes.

On appeal, the Court of Appeal considered the rulings of the U.S. Supreme Court in *Illinois Brick* and *Hanover Shoe*. In considering these rulings, the Court acknowledged the complexities of private antitrust claims which raised indirect purchase claims and "passing-on" issues. However, the Court implicitly declined to adopt hard legal rules that were equivalent to *Illinois Brick* and *Hanover Shoe*. Rather, the Court considered the plaintiff's request for certification of an indirect purchaser claim on its own merits, including the implications of a potential absorption or passing-on of the price increase through the distribution chain relating to the construction and sale of new homes.

In addressing the merits of certification, the Court of Appeal noted that under the existing case law under the *Class Proceedings Act*, the plaintiffs bore the onus of leading evidence which demonstrated that there were sufficient "common issues" relating to liability and damages to warrant a class proceeding. But on the basis of the evidence that the plaintiffs had adduced before the court, the Court found that the plaintiffs had failed to establish a common issue relating to liability. While the plaintiffs had demonstrated the existence of common issues with respect to the alleged unlawful conspiracy and its anti-competitive effect, the plaintiffs had failed to show that "loss as a component of liability could be proved on a class wide basis." The Court of Appeal noted that the experts of the plaintiffs had simply assumed a complete "pass-thorough" of the illegal price increases, but they did not propose a methodology for proving it or for dealing with the other variables that affect the final prices of new houses. As such, the plaintiffs had failed to demonstrate the existence of a "class-wide loss" – in other words, some purchasers may have suffered a loss, but others may have suffered no loss whatsoever (i.e., the overcharge in iron oxide may have been completely absorbed within the distribution chain). Accordingly, in the absence of such a common issue of liability, the Court concluded that a class action was not the preferable procedure, since individual trials would be needed to establish loss and liability and the resulting action would be unmanageable.

On its face, the Court of Appeal's reasoning in *Chadha* appears to have set a very high evidentiary standard for plaintiffs to meet in order to obtain the certification of an antitrust class action. The Court suggested that as a general rule, a plaintiff is required to lead an evidentiary foundation which establishes the existence of a class-wide loss (i.e., evidence that everyone in the class suffered some form of loss, even if the quantum varied across the class) in order to establish a sufficient critical mass of common issues to obtain certification. This general rule represents a heavy onus for plaintiffs for two reasons. First, given the Court's emphasis on the importance of proving a class-wide loss, the rule appears to act as a *de facto* predominance requirement in light of the components of proof under section 36. Second, given the wide potential for absorption and passing-on of the loss in most distribution chains, it is difficult to imagine the sort of evidence which might be adduced to meet this threshold.

The Court of Appeal, however, did extend some hope for future plaintiffs. To begin, the Court underscored that its decision was based on the evidence before it. In addition, the Court commented favourably on the evidence that been adduced the U.S. case of *In re Linerboard Antitrust Litigation.*[31] In *Linerboard*, there were two classes of direct purchasers (purchasers of corrugated boxes and sheets) who alleged a conspiracy that fixed the price of linerboard (corrugated cardboard). On the facts before it, the Third Circuit found a common issue of loss, since the plaintiffs had led detailed economic evidence that "the price was higher than it would have been under competitive conditions" and that the conspiracy had caused "prices to rise throughout the country". In particular, the plaintiffs had led expert evidence that all purchasers would have paid a higher price because of the conspiracy. While the amount of the loss varied by individual, the Third Circuit concluded that "the fact of loss was common" and therefore loss as a component of liability could be proved on a class wide basis

The circumstances of *Linerboard*, however, would appear to be exceptional. In contrast to *Chadha* and *Price*, the class action in *Linerboard* was a clear direct purchaser class action. To apply the reasoning of *Linerboard* to another direct purchaser class action, a plaintiff would be required to lead sufficient evidence which generally precludes the possibility that direct purchasers had completely passed-off the price increase to their customers (i.e., evidence which generally precludes the possibility that some direct purchasers had suffered no loss). Conversely, to apply the reasoning to an indirect purchaser class action, a plaintiff would be required to lead sufficient evidence which generally precludes the possibility that direct purchasers had completely absorbed the overcharge (i.e., evidence which generally precludes the

possibility that indirect purchasers had suffered no loss). But given the size, diversity and complexity of most modern distribution chains, a plaintiff would appear to face a daunting evidentiary task in demonstrating that there was some form of uniform experience or practice in pricing at a particular distribution level that would permit the court to make a generalized inference regarding passing-on or absorption of the overcharge.

It remains to be seen whether the effect of this evidentiary threshold will be a *de facto* bar to most antitrust litigation in Canada. To date, the plaintiffs have sought to overcome the requirements of *Chadha* by bringing antitrust class actions using a broad and consolidated class definition that includes *both* direct and indirect purchasers, on the theory that a consolidated class raises common issues of liability (since the entirety of the loss was necessarily shouldered by the entirety of the class, even if certain individual members did not experience a loss) and common issues of damage (on the theory that an aggregate damages assessment is a common issue that should be weighed in the balance on certification). There are significant problems with both of these arguments, particularly in light of the reasons in *Chadha* and of the wording of the aggregate damages assessment provisions in the *Class Proceedings Act* in Ontario.[32] But to date, the Courts have certified a number of consolidated antitrust class actions on consent. Most significantly, the Superior Court of Justice in Ontario recently certified a very large, consolidated class action of indirect and direct purchasers of bulk vitamins for the purpose of implementing a national settlement relating to the bulk vitamin conspiracy.[33] However, as part of its decision, the Court underscored that the defendants would have in all likelihood challenged certification under *Chadha* in the absence of a global settlement.

Even if the use of a consolidated class definition may serve as a basis for finding a common issue in respect of liability, there remain other serious questions regarding the elements of the test for certification. In particular, such broad classes may still raise the possibility that individual issues will overwhelm the common issues. The interests of various levels of purchasers in establishing that losses were sustained at their level of the distribution chain (and not others) may similarly raise the spectre of class members having conflicts on the common issues. In short, plaintiffs continue to face a significant burden in future cases and these issues will have to be confronted as the jurisprudence evolves.

CONCLUSION

Antitrust class actions have officially arrived in Canada, and we have witnessed a gradual but significant rise in competition class activity in recent years. But while the test for certification in the Canadian provinces is generally lower than the test for certification in Federal Rule 23, and while the Canadian courts have been receptive to indirect class purchaser actions, there remain significant barriers to obtaining certification of an antitrust class action in Canada. It remains to seen whether a plaintiff will be able to obtain certification of a direct or indirect purchaser class action on a contested basis in light of the passing-on and absorption issues raised by the Ontario Court of Appeal's ruling in *Chadha*. In addition, it remains to be seen whether the other provinces, particularly Quebec, will apply a similar approach to *Chadha* in applying their own provincial rules. But to date, the Canadian courts have charted a very different course from the U.S. Supreme Court in *Illinois Brick* and *Hanover Shoe*, and it remains to be seen where that course will lead.

[Endnotes]

[1] Peter Franklyn is a partner and Chair of the Competition/Antitrust Law Group of Osler, Hoskin & Harcourt LLP ("Osler") in Toronto. Christopher Naudie is a partner in the Litigation Department of Osler, and is also a member of the Competition/Antitrust Law Group. The authors acknowledge the valuable assistance of Derek Leschinsky, an associate in the Litigation Department at Osler, in preparing this article.

[2] *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

[3] An Act for the Prevention and Suppression of Combinations formed in restraint of Trade, S.C. 1889, c. 41 (the "Combines Investigation Act"). The Combines Investigation Act evolved over time, and was significantly amended and renamed in 1986 as the Competition Act, R.S.C. 1985, c. C-34 (the "Competition Act").

[4] The private remedy is now found in section 36 of the Competition Act, and for ease of reference, the remedy will be referred to simply as "section 36" regardless of the applicable historical period.

[5] For an assessment of the early years of private actions under the Competition Act, *see* G. Leslie & S. Bodley, *The Record of Private Actions Under Section 36 of the Competition Act*, Can. Comp. Record 50, at pp. 51-52 (1993), as well as M. Trebilcock & K. Roach, *Private Enforcement of Competition Laws*, 34 Osgoode Hall L.J. 461, at para. 9. (1996).

[6] It is interesting to note that the original bill which proposed to create a private action in Canada under the Competition Act included a remedy for "double" damages arising from several criminal offences, but this bill was subsequently dropped and replaced with a bill which provided for "single" damages. *See* Bill C-256, 3d. Sess., 28th Parl., 1970-71 (First Reading on June 29, 1971).

[7] In Ontario, contingency fees were first explicitly permitted in 1992 with the establishment of class action legislation and were not expressly permitted in other civil actions until 2001. *See, e.g., McIntyre Estate v. Ontario (Attorney General) (2001)*, 53 O.R. (3d) 137 (C.A.). Contingency fees remain impermissible in family law or criminal or quasi-criminal matters.

[8] *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641.

[9] Class Proceedings Act, 1992, S.O. 1990, c. 6 (the "Class Proceedings Act"). Ontario was followed by British Columbia, Saskatchewan, Newfoundland, Manitoba, the Federal Court, and Alberta. See: Class Proceedings Act, R.S.B.C. 1996, c. 50, first enacted as S.B.C. 1995, c. 21; The Class

Actions Act, S.S. 2001, c. C-12.01; Class Actions Act, S.N.L. 2001, c. C-18.1; The Class Proceedings Act, S.M. 2002, c. 14; Federal Court Rules, SOR/98-106 Rules. 299.1 to 299.42, first enacted as SOR 2002-417, s. 17; and Class Proceedings Act, S.A. 2003, c. C-16.5. It is important to note that the civil law jurisdiction of Québec had class action legislation since 1978 (Code of Civil Procedure, R.S.Q., c. 25, first enacted as S.Q. 1978, c. 8, s. 3. (the "Code of Civil Procedure")). However, prior to the mid-1990s, certification remained relatively difficult to obtain. *See e.g., Delauriers v. Order des ingénieurs du Québec*, [1982] C.S. 550.

[10] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534.

[11] Class Proceedings Act, s. 5.

[12] Code of Civil Procedure, Art. 1003.

[13] *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, at para. 28.

[14] *Id.* at para. 18.

[15] *Cloud v. Canada* (Attorney General) (2004), 73 O.R. (3d) 402, at p. 415 (C.A.).

[16] *Comité d'environnement de la Baie Inc. v. Société d'électrolyse et de chimie Alcan Ltée*, [1990] R.J.Q. 655, at p. 659-660 (C.A.); *Hotte v. Servier*, REJB 2002-29909, at p. 6 (C.S.).

[17] For illustration, defendants are generally not permitted to bring motions for summary judgment, to strike allegations, or to seek documents or particulars. Rather, in the ordinary practice, defendants may only bring motions that challenge the jurisdiction of the Québec courts, raise res judicata or lis pendens issues, seek to invoke the right to cross examine the plaintiff, or seek to raise additional issues in defence.

[18] Code of Civil Procedure, Art. 1010 and 1020. *See e.g., Léveillé v. Avantage Link Inc.*, [2004] J.Q. No. 8383 (C.S.).

[19] *See*: C. Naudie, "Private Antitrust Enforcement in Canada: So What Exactly Have We Achieved?" (CBA, Annual Fall Conference on Competition Law, November 2005), at pp. 25-27. This survey was based only on the reported case law in Canada, and it excluded class actions in which the alleged antitrust violations constituted as a relatively minor part the overall claim. This survey also counted multiple class actions across the provinces in respect of a similar matter (such as bulk vitamins) as a single action. The reported cases are: *Wong v. Sony Canada Ltd.* (2001), 9 C.P.C. (5th) 122 (Ont. S.J.) (price maintenance in respect of electronic products); *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co.*, [2001] O.J. No. 6028 (S.C.J.) (price-fixing conspiracy in respect of citric acid); *Alfresh Beverages Canada Corp. v. Hoechst* AG (2002), 16 C.P.C. (5th) 301 (Ont. S.C.J.) (price-fixing conspiracy in respect of sorbates); *Price v. Panasonic Canada Inc.* (2002), 22 C.P.C. (5th) 379 (Ont. S.C.J.) (price maintenance in respect of consumer electronics); *Bona Foods Ltd. v. Pfizer Inc.*, [2002] O.J. No 5553 (S.C.J.) (price-fixing conspiracy in respect of sodium erythorbate); *Chopik v. Mitsubishi Paper Mills Ltd.* (2003), 29 C.P.C. (5th) 277 (Ont. S.C.J.) (price-fixing conspiracy in respect of thermal fax paper); *Mura v. Archer Daniels Midland Co.*,[2003] B.C.J. No. 1086 (S.C.) (price-fixing conspiracy in respect of lysine); *Always Travel Inc. v. Air Canada* (2003), 43 C.B.R. (4th) 163 (F.C.T.D.)(price-fixing conspiracy in respect of travel agencies); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.) (price-fixing conspiracy in respect of iron oxide); *Bona Foods Ltd. v. Ajinomoto U.S.A. Inc.* (2004), 2 C.P.C. (6th) 15 (Ont. S.C.J.) (price-fixing conspiracy in respect of monosodium glutamate); *Ford v. F. Hoffman-La Roche* (2005), 74 O.R. (3d) 758 (S.C.J.) (price-fixing conspiracy in respect of bulk vitamins); and *Fluet v. Bayer Inc.*, [2005] J.Q. no 9341 (C.S.) (price-fixing conspiracy in respect of synthetic rubber).

[20] While antitrust class actions with national class definitions have been commenced in a number of different provinces, plaintiffs have tended to pursue their actions primarily before the Ontario courts, with other actions being stayed or held in abeyance as the action proceeds in Ontario. For example, in the bulk vitamins case, the parties argued their initial motions prior to certification primarily before the case management judge in Ontario. *See, e.g., Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.*, [2002] O.J. No. 298 (Sup.Ct.)

[21] *Alfresh* (citric acid); *Alfresh* (sorbates); *Bona Foods* (sodium erythorbate); *Chopik* (thermal fax paper); *Mura* (lysine); *Bona Foods* (MSG); Ford (vitamins); and *Fluet* (synthetic rubber).

[22] The exception is *Chopik* (thermal fax paper), which was discontinued following motion to strike portions of the claim and before notice was given to the class. The decision did not set out the reasons for consensual discontinuance.

[23] *Bona Foods* (2004), 2 C.P.C. (6th) 15 (Ont. S.C.J.), at paras. 11, 16 and 20.

[24] *Ford* (2005), 74 O.R. (3d) 758 (S.C.J.), at paras. 36-42.

[25] *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997).

[26] *Bona Foods* (2004), 2 C.P.C. (6th) 15 (Ont. S.C.J.), at paras. 11, 16 and 20.

[27] As noted above, these four cases represent a subset of the 12 reported antitrust class actions, and are subject to the limitations set out in the scope of the survey. *See, supra,* note 19.

[28] *Wong* (2001), 9 C.P.C. (5th) 122 (Ont. S.J.).

[29] *Always Travel* (2003), 43 C.B.R. (4th) 163 (F.C.T.D.).

[30] For certain parts of the class period and for certain provinces, the defendant distributed its products through independent distributors who operated their own dealer networks (the "independent networks"). However, for other periods and other provinces, the defendant sold its products through its own authorized dealers (the "authorized dealers"). To the extent that the plaintiffs purchased their products through the independent networks, the plaintiffs constituted indirect purchasers; to the extent that the plaintiffs purchased their products through the authorized dealers under the alleged price maintenance agreements, the plaintiffs arguably constituted direct purchasers.

[31] *In re* Linerboard Antitrust Litig., 203 F.R.D. 197 (E.D. Pa. 2001), *rev'd* 305 F.3d 145 (3d Cir. 2002).

[32] For an elaboration of the argument in favour of the certification of consolidated class actions including direct and indirect purchasers in price-fixing cases, see C.M. Wright & M.D. Baer, *Price-fixing Class Actions: A Canadian Perspective*, 16 Loy. Consumer L. Rev. 463 (2004). For a treatment of the argument relating to the use of the aggregate damages provision in the Class Proceedings Act, see L.K. Fric & T.M. Morgan, *The Impact of Aggregate Assessments of Damages in Certification Motions*, 1 Canadian Class Action Rev. ___ (2005).

[33] *Ford*, 74 O.R. (3d) 758 (S.C.J.). ◆