



Class Certification In Antitrust Cases




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Agenda

- Not a Rule 23 Basics Course
- Focus on antitrust angle
 - In particular, *Hydrogen Peroxide* case
- Antitrust injury
- Settlements
- Fees



Why Focus On *Hydrogen Peroxide* of all cases?

- Not pathbreaking outside Third Circuit, but a big deal here
 - *Szabo* case in 7th Cir (Easterbrook & Posner) in 2001
- *Hydrogen Peroxide* holding has not been limited to antitrust
- Prior Rule 23 approach in our circuit was similar to 12(b)(6)
 - allegations accepted as true
 - in antitrust, almost a presumption in favor of certification
 - antitrust injury element

Antitrust Injury Is Distinctive

- antitrust plaintiff must show *antitrust* injury, not just any type of harm
- “an injury of the type the antitrust laws were intended to prevent”
- must flow from an anticompetitive practice
- crude summary: must show harm to consumers or to *competition* generally - not just one competitor
 - good examples are effects on prices, quantity of output, quality of good/services
- *injury showing must be individualized to each plaintiff*, which can create tension in class cert context

Cliff's Notes Version Of Facts Of *Hydrogen Peroxide*

- Plaintiffs are direct purchasers of h-p (“consumers”) from multiple industries
- There are different grades of h-p for different uses - they sell at different prices
- Case started as an MDL; many plaintiff groups forged an amended consolidated complaint
- Key common issues identified by district court:
 - existence of a conspiracy to fix prices, restrict output, allocate customers
 - effect on market prices = antitrust injury
 - damages

Key Legal Dispute Regarding Class Certification In *Hydrogen Peroxide*

- Is antitrust injury susceptible of common proof for all class members?
 - Plaintiffs' expert says market structure shows conspiracy could have had common effect on class
 - Plaintiffs expert proposes two methods by which it *might* be possible to show common effect (benchmark and regression)
 - Defendants' expert points to empirical examples of different price trends for different customers for different grades/uses of h-p
- District Court holds that proposal of reliable methods of common proof is sufficient, even without showing that they actually work.

Three Key Holdings of *Hydrogen Peroxide*

- **Class certification requires Plaintiffs to prove elements of Rule 23 are satisfied by a preponderance of the evidence**
 - not just a threshold showing, and no presumptions in favor of certification
 - "task for plaintiffs . . . is to demonstrate that the element of antitrust [injury] is *capable of proof* . . . through evidence that is common to the class"
- **District courts must resolve factual disputes even if they overlap the merits**
 - but note that fact finding at class cert stage do not bind the court at the merits stage
- **This includes expert testimony**

Legal Realist Interlude: Some Unstated Factors Driving The *Hydrogen Peroxide* Court

- Timing - other circuits
- Defense counsel pressed this hard
- Ordover vs. "average list prices"???
- MDL consolidated complaint
- Extensive discovery had been taken, so Plaintiffs were not sandbagged

Settlement Issues To Consider

- joint & several liability and treble damages, but no right of contribution or indemnity
 - creates "last man at the party" pressure
- multiple enforcers, multiple jurisdictions
- multiple or overlapping classes

Attorneys Fees Issues

- Antitrust is no different from most other class actions, *except* that there is a statutory right to fees after a litigated victory
- Common fund logic would usually permit fees anyway
- Cases are gravitating toward a norm of 30%
- But antitrust cases are usually viewed as complicated and risky for Plaintiffs' counsel, so expect awards toward high end
