Key Antitrust Class Certification Questions Remain Unclear

By **Jonathan Berman** (May 10, 2024)

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It's a recurring issue when plaintiffs seek to certify a class in antitrust cases. The plaintiffs proffer an expert report and other evidence that, if credited, would show that wrongful conduct injured all class members.

The defendants counter with their own evidence that, if credited, would show that the alleged misconduct, even if proven, would have left many class members uninjured — and that there is no feasible means of sorting out who may be injured and who is not.

How should a court analyze issues of predominance when confronted with dueling evidence?

Approaches vary. Some courts resolve disputed issues of fact that bear on class certification, even when the issues overlap with the merits, denying class certification where the plaintiffs' evidence is less persuasive than that of the defendants.

But other courts require only that the plaintiffs provide admissible evidence, eschewing any attempt to determine whose evidence is more credible and delegating such decisions to the jury.

The U.S. Supreme Court on April 15 denied a petition for certiorari in Visa Inc. v. National ATM Council Inc., following a U.S. Court of Appeals for the District of Columbia Circuit decision from July 25, 2023. This move leaves the applicable standards unclear instead of resolving the split of authority.

Class Certification, Predominance and Proof of Classwide Injury

Under Federal Rule of Civil Procedure 23, in order to obtain class certification, a plaintiff must show that the case meets all four criteria listed in Rule 23(a).

These criteria are often referred to by the shorthand of numerosity, commonality, typicality and adequacy of representation.

In the most common type of class action, Rule 23(b)(3) requires the plaintiffs to also show that "the questions of law or fact common to class members predominate over any questions affecting only individual members."

This predominance requirement often plays a key role in class certification decisions.

To meet this requirement, plaintiffs will focus on the fact that, in most class actions, there is only one defendant or a small number of defendants who are alleged to be acting in concert.

Plaintiffs will argue that proof showing whether the defendants broke the law does not depend on the actions of the class members, and that the contours of the defendants' course of conduct can be shown through a single presentation of common evidence. Therefore, the argument goes, questions of liability are common to the class.

The defendants' rebuttal will often focus on the fact that there are many plaintiffs and they could be differently situated; one cannot assume that every class member is necessarily injured by the alleged misconduct.

For example, an antitrust violation causing prices to rise generally might not affect a buyer that individually negotiated its purchases. Therefore, the argument goes, proving injury requires evidence that varies from one class member to the next, defeating the plaintiffs' ability to prove predominance.

Plaintiffs of course will dispute this. Their expert will testify that, notwithstanding the defendants' evidence, no class member could have escaped injury, and that classwide injury can be proven in a single proceeding through evidence that is applicable to all members of the class.

And this is often where the rubber meets the road: In many antitrust class actions, certification depends on whether the plaintiffs can prove classwide injury through common evidence.

Proving Predominance

The Supreme Court has been clear that the suitability of class certification is a question of fact, and that it is the plaintiff's burden to provide evidentiary proof.

The requirements of Rule 23 are not, as per the Supreme Court's 2013 Comcast Corp. v. Behrend decision citing the high court's 2011 Wal-Mart Stores Inc. v. Dukes ruling, "a mere pleading standard."[1]

The trial court must conduct a rigorous analysis, which "will frequently entail overlap with the merits of the plaintiff's underlying claim," the Comcast and Wal-Mart citations continue.[2]

The standard set out by the Supreme Court seems clear enough. The court did not indicate that a mere proffer of disputed evidence would suffice. Rather, the court held that plaintiffs seeking class certification "must be prepared to prove" compliance with all requirements of Rule 23, according to Wal-Mart.[3]

And such proof may well overlap with merits issues. Indeed, the court provided a specific example of an issue that plaintiffs "must prove" in order to obtain class certification, even though that is "an issue they will surely have to prove again at trial in order to make out their case on the merits," as per Wal-Mart.[4]

But while the lower courts recognize the need to base their certification decisions on facts, evidence and rigorous analysis, the courts are not consistent regarding what they should do when faced with disputed evidence.

This split is exemplified by the 2020 U.S. Court of Appeals for the Third Circuit decision In re: Lamictal Direct Purchaser Antitrust Litigation,[5] as well as by National ATM.[6]

Lamictal

Lamictal was an antitrust class action involving an anti-epilepsy drug. The plaintiffs alleged that manufacturers of branded and generic Lamictal entered into an illegal agreement to

prevent a competing version of the product from being marketed.

The plaintiffs, backed by a detailed expert report, argued that the agreement artificially inflated the prices paid by all or almost all class members, and that this classwide injury was proven through common evidence. The defendants presented contrary evidence.

Their expert opined that the plaintiffs' expert analysis was deeply flawed, and rested on an incorrect understanding of the underlying facts.

According to the defendants, the best reading of the evidence showed that real-world pricing policies and price negotiations resulted in many purchasers being uninjured, and that there was no ability to sort out the injured from the uninjured other than through an individualized inquiry.

The district court viewed the defendants' arguments as going "far beyond the realm of predominance and well into the merits of Plaintiffs' claims." The district court declined to "address the multi-leveled microanalysis" necessary to resolve the dispute, and certified the class.[7]

The Third Circuit disagreed. No class could be certified unless the plaintiffs proved predominance as a factual matter.

It was therefore the district court's job to ensure "the micro-level analysis here, even though it touches on the merits" was addressed. Resolving those factual issues was required "in order to determine whether [plaintiffs], in light of the competing expert reports and evidence, could show that common issues predominated by a preponderance of the evidence."[8]

On remand, the district court got into the weeds to sort out the issue, and sided with the defendants.[9]

National ATM

The courts in National ATM took a very different approach.

Nonbank businesses that operate automatic teller machines, or ATMs, charge consumers a fee to use the ATMs. The ATM owners, in turn, are charged fees by the networks that connect the ATMs to the consumers' banks.

Visa and Mastercard, which operate large networks, were accused of violating the Sherman Act by prohibiting ATM operators from charging consumers lower fees for transactions routed over other ATM networks than they charge for transactions over a Mastercard or Visa network.

The plaintiffs, backed by expert reports, argued that these policies cause all consumers to pay higher ATM fees. They further argued that the policies injure all independent ATM operators by preventing them from gaining market share by using lower-cost networks to lower consumer fees.

The defendants, unsurprisingly, countered plaintiffs' experts with their own experts, who disputed these conclusions.[10]

The district court viewed the defendants' evidence as essentially irrelevant to the class

certification decision. In the July 25, 2023, decision, the D.C. Circuit cited the district court as saying "[P]laintiffs, at this stage in the proceedings, need only demonstrate a colorable method by which they intend to prove class-wide impact,"[11] The defendants' contrary evidence was viewed as a merits issue, to be resolved later.

The D.C. Circuit, in an unpublished opinion, affirmed. Because "a reasonable factfinder could credit" the plaintiffs' evidence of classwide injury, the defendants' rebuttal "may raise some material issue for trial, but … cannot defeat predominance," according to the D.C. Circuit.[12]

It was appropriate, according to the panel, that the district court "did not focus on which of the conflicting models to credit."[13] "A defendant does not defeat predominance by offering a contrary statistical model that the ultimate factfinder might or might not embrace," the panel added.[14]

The Road Ahead

Lamictal and National ATM show a clear divergence in the legal standards applied. If the district court's opinion in National ATM had been presented to the Third Circuit panel that decided Lamictal, the decision to grant class certification would have been vacated and remanded for further analysis.

The Supreme Court's decision to deny certiorari in National ATM ensures that this confusion will continue. Antitrust class actions, already highly complex, will be further complicated by debates over what legal standard governs class certification decisions.

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[1] Comcast Corp. v. Behrend, 569 U.S. 27, 33-34 (2013); accord Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51 (2011).

[2] Id.

[3] Dukes, 564 U.S. at 350.

[4] Dukes, 564 U.S. at 352 n. 6 (emphasis original) (discussing need to prove, in securities class actions, that stocks were traded on an efficient market).

[5] In re Lamictal Direct Purchaser Antitrust Litigation, 957 F.3d 184 (3d Cir. 2020).

[6] Natl. ATM Council, Inc. v. Visa Inc., No. 21-7109, 2023 WL 4743013 (D.C. Cir. July 25, 2023),cert. denied sub nom.Visa Inc. v. Nat. ATM Council, Inc., No. 23-814, 2024 WL 1607963 (U.S. Apr. 15, 2024).

[7] In re Lamictal Indirect Purchaser and Antitrust Consumer Litig., No. 12-CV-00995, 2018 WL 6567709, *6 (D.N.J. Dec. 12, 2018).

[8] Lamictal, 957 F.3d at 194.

[9] See In re: Lamictal Direct Purchaser Antitrust Litig., No. CV 12-995, 2021 WL 2349828 (D.N.J. June 7, 2021).

[10] See National ATM Council, Inc. v. Visa Inc., Civil Case No. 11-1803, 2021 WL 4099451, *1, 6 (D.D.C. Sept. 7, 2021).

[11] Id. at *6.

[12] National ATM Council, 2023 WL 4743013 at *8 (emphasis added).

[13] Id. at *9.

[14] Id.