

A New Approach To Antitrust Class Certification

Law360, New York (June 14, 2010) -- The Third Circuit's decision in *In re Hydrogen Peroxide* in late 2008 marks an important development in the trend of scrutinizing expert opinions at the class certification stage as part of a rigorous analysis of whether plaintiffs can show that impact from an alleged violation can be demonstrated using common proof on a classwide basis.

Hydrogen Peroxide built on important precedents in the antitrust and securities class certification arena, namely the Eighth Circuit's *Blades v. Monsanto* and Second Circuit's IPO decisions, holding that the assessment of "common" proof of classwide impact must be informed by the merits of the claim.



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The decision also made clear that impact could not be assumed and or be demonstrated by a mere "some showing." We take this trend as a rejection of a "promissory note" standard of class certification whereby movants make the barest of showings that classwide impact can be shown with common proof, showings that often amount to assertions or assumptions.

Historically, regression analyses have been proposed by some plaintiffs at the class certification stage and such analyses have been accepted by courts as constituting a common means of proving common impact. Courts increasingly, however, are unwilling to certify a class based on the mere assertion that a regression model can be developed and applied.

This view is nested in an emerging consensus across circuits that plaintiffs must show that Rule 23 requirements are met by a preponderance of the evidence and that district courts must rigorously examine whether the plaintiffs have met these requirements.

It is understood that a well-specified regression analysis may help isolate the average impact of an alleged conspiracy. In the context of an alleged cartel, for example, a regression analysis explaining prices might prove the impact of the conspiracy by showing prices to be higher on average. However, to determine whether estimated average overcharge associated with the conspiracy is common across members of a proposed class requires further evaluation of the regression.

A finding of average impact, even one from a well-specified regression, could combine cases of injury and non-injury to individual proposed class members. For example, in an alleged multi-product conspiracy or monopolization case, the estimated effects of the conspiracy averaged across all products may be positive and statistically significant even if prices of some products were not affected. In an alleged single-product conspiracy or monopolization case, the estimated effect averaged across all proposed class members may be positive and statistically significant even if some individual potential class members were not affected.

To our knowledge, economists have yet to provide a systematic framework to help determine whether a regression analysis (a) constitutes proof of common impact, or (b) hides important cross-group or individual differences. Our forthcoming article in *George Mason Law Review* provides such a framework based on two related tests: (1) macro-commonality and (2) micro-commonality.[1]

The macro-commonality test asks whether estimates of impact are consistent in sign and magnitude across broad subgroups within the proposed class. If a statistically significant result for the proposed class as a whole does not hold up across subgroups, then the regression alone cannot demonstrate common impact across these subgroups.

In an alleged price-fixing conspiracy or monopolization case involving multiple products sold by different defendants over time, the macro-commonality test might compare, for example, product-specific, defendant-specific (conspiracy only) and time-specific estimates of impact to a single average estimate of impact across these different dimensions.

The micro-commonality test then focuses on the relevance of regression results for individual members within any sub-group of a proposed class to assess whether regression estimates of impact are consistent with the predominance of common issues. This might involve, for example, analyzing how the prices paid by individual proposed class members compare to what the regression predicts for that individual or to overall estimates of impact.

These tests can be implemented, for example, in a context where an alleged conspiracy has raised prices on a group of differentiated products during an identified period. The macro-commonality test proceeds by (1) estimating the difference in average prices between the pre-conspiracy and conspiracy periods; (2) separately estimating the difference in average prices across various dimensions such as product type and year. If the average price differentials associated with the conspiracy are consistent across product, time and other dimensions, then the regression satisfies the macro-commonality test.

The micro-commonality test then (1) identifies individual proposed class members who purchased products in the pre-conspiracy and conspiracy periods; (2) for each such individual, compares the prices paid during the pre-conspiracy and conspiracy periods; and (3) compares the individual impact estimates to the average (for any given estimate of average impact). If the proposed individual class member estimates of impact are similar to the average estimate of impact for a sufficiently large proportion of the proposed class, then the regression satisfies the micro-commonality test.

As should be clear from the discussion above, the macro- and micro-commonality tests are complements not substitutes. Macro-commonality tests will indicate whether particular potential sub-groups need to be analyzed more carefully, and may identify sub-groups of the proposed class for which issues relevant to determining impact are likely to be more or less common. Micro-commonality tests can then investigate sub-groups more closely. While the results of the macro-commonality tests may affect the types of micro-commonality analyses undertaken, they will not eliminate the need to test for micro-commonality.

Conclusion

There is an emerging consensus that courts must rigorously examine whether plaintiffs have met the Rule 23 requirements for a proposed class to be certified. This will include closer scrutiny of regression analysis as a proposed method of common proof.

Whether a regression analysis constitutes common proof is an empirical question that should be tested on a case-by-case basis. Our framework involves two such tests, macro- and micro-commonality.

If micro-commonality is not established, then a finding from a regression analysis generally will not constitute common proof of impact. If micro-commonality exists, then proof of macro-commonality increases the likelihood that regression analysis provides a common method of proof for the entire class as opposed to sub-groups within the class.

Ultimately, testing for micro- and macro-commonality is a necessary but not sufficient step to determine whether regression analysis can constitute classwide proof of impact, as factors such as data availability, the existence of a benchmark period and other case-specific elements also should be considered.

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The opinions expressed are those of the authors and do not necessarily reflect the views the firm, its clients, or Portfolio Media, publisher of Law360.

[1] Pierre Cremieux, Ian Simmons, and Edward Snyder, Proof of Common Impact in Antitrust Litigation: The Value of Regression Analysis, 17 Geo. Mason L. Rev. (forthcoming Summer 2010)