

Price Dispersion, the “Bogosian Short Cut,” and Class Certification in Antitrust Cases

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Introduction

Class actions generally are viewed by the courts as being particularly appropriate for the litigation of antitrust cases involving horizontal price-fixing. This is because such activity presumably impacts all direct purchasers in the affected market so that common questions on the issue of *legal* liability predominate. In such cases, courts routinely have regarded a conspiracy to fix higher prices as resulting in a common injury to all purchasers during the affected period by reasoning that the laws of economics (i.e., supply and demand) would give rise to lower market prices in the absence of the unlawful conduct. As a result, plaintiffs in such cases often base the presumption of injury on case law stemming from *Bogosian v. Gulf Oil Corp.* (1977).² This case establishes the so-called “Bogosian shortcut” which favors a *presumption* of common impact on members of the proposed class whenever economic reasoning provides a sensible link between the alleged unlawful conduct and common injury to individual class members.³

However, even in these matters, and in markets thought to obey the “law of one price” (e.g., homogeneous commodities), economic analysis is still required and becomes paramount in ascertaining whether

common class-wide impact is a reasonable representation of that suffered by all members of the proposed class, or whether individualized, plaintiff-specific assessment of antitrust injuries is more appropriate.⁴ At the class certification stage, economic reasoning and, we argue, sound economic analysis, is central to whether or not a common methodology will reasonably and reliably establish class-wide injury and damages. Such a sentiment recently was endorsed by the U.S. Court of Appeals for the Third Circuit (“Third Circuit”) in *In re Linerboard Antitrust Litigation*,⁵ a matter in which the authors were involved, and which some legal commentators have termed “extremely significant.”⁶ Here, the Third Circuit appears to have reinforced the role of economic reasoning and sound economic analysis to support a theory of cause and effect (i.e., from alleged unlawful act to common impact). In its decision affirming the lower court’s ruling certifying the class, the Third Circuit cited favorably the economic analysis that was proffered by plaintiffs’ experts in addition to any reliance on the presumption of the “Bogosian shortcut”:

[T]here is more to this case than exclusive reliance on the presumed impact theory. The district court used a belt and suspenders rationale to support its conclusion that the putative class had met its burden of showing impact. In addition to relying on the Bogosian short cut, it credited the testimony of plaintiffs' experts, opinions that were supported by charts, studies and articles from leading trade publications. These experts suggested that advanced econometric models could be effectively prepared to establish class-wide impact... We decide that this was not a case where plaintiffs relied solely on presumed impact and damages.⁷

The Third Circuit's decision in *Linerboard* – in our view – reinforces the role of economic analysis to either support or refute the economic reasoning used for a theory of common impact due to the alleged unlawful act. In this article, we review some of the key issues that economic analysis should address at the class certification stage of litigation.

The Role of Economic Analysis in Class Certification

Even in cases of explicit price collusion, the pricing structure in the industry under study, differences in prices paid by potential class members (“price dispersion”), and how changes in list prices impact transaction prices paid by class members often become major points of contention for or against class certification. In particular, price dispersion frequently becomes a focal point for the economic analysis of class issues. Defendants generally argue that individual, idiosyncratic pricing strategies result in

price variability that make generalized assessment of impact and damages unreliable if not impossible. Plaintiffs, on the other hand, generally argue that such price variability does not preclude class certification because price differences are due to observable and measurable factors and, therefore, are systematic and able to be controlled for in any “but-for” pricing analysis.

In general, the central issue for an economist at the class certification stage is whether there is a common formula, model, or other economic methodology that plaintiffs could use to establish that each class member suffered injury and damages from the alleged anti-competitive act. A key part of the analysis is whether or not issues common to the proposed class predominate over issues related to individual proposed class members, and whether or not damages could be measured reliably by a class-wide formulaic approach. Furthermore, at the class-certification juncture, the focus ought to be on class-certification issues rather than those going to the “merits” of the plaintiffs' allegations.⁸ That is, while an appropriately specified statistical model may be one method to measure the average impact of, say, an anti-competitive price increase (an exercise usually done in the “damages” phase of the litigation), it must first have been established that average impact is a reasonable representation of the impact suffered by all members of the proposed class (an exercise to be done in the “class certification” phase of the litigation).

The economic analysis of the appropriateness of class treatment should proceed assuming that the anti-competitive

practices in question have occurred as specified by plaintiffs. What is not assumed is that injury or damages to putative class members based on the alleged acts would be uniform or systematically calculable. Indeed, this is the question to be answered at the class-certification stage. In other words, the question to be addressed is: Assuming that the anti-competitive conduct occurred, would such conduct commonly impact all members of the class and if they paid higher prices as a result, can the damage for each class member be measured reliably on a common basis using well-accepted empirical methods? If there are issues relating to each class member that must be analyzed individually, or if each class member's transactions must be examined separately to determine impact or damages, then a common formulaic methodology will not reasonably or reliably establish class-wide impact or damages.

Class Certification, Price Dispersion, and the Law-of-One Price

The "law-of-one-price" is a theoretical proposition in economics which states that in competitive markets comprised of many buyers and sellers, identical goods/services ought to sell in a given market at identical prices at a given point in time under conditions such as product homogeneity, zero transaction and search costs, no informational asymmetries, and no market imperfections.⁹ Despite its intuitive appeal, however, the existence of price dispersion has been well-documented in the economics literature both in theoretical models and empirical investigations of pricing, even for goods/service that ought to largely conform to the law-of-one-price.¹⁰ However, the

existence of price dispersion by itself need not weaken the appropriateness of class certification if price differences are due to observable, measurable factors and, therefore, are systematic and able to be controlled for in any pricing analysis.¹¹

One way economic analysis may assist the court in deciding whether or not the Bogosian shortcut is justified in a particular instance, is to investigate whether the existence of price dispersion is consistent with the appropriateness of class certification or whether individualized, plaintiff-specific assessment of antitrust injuries is more appropriate. Moreover, economic analysis can be of paramount importance to support a particular decision on class-wide impact especially where the conditions or allegations are more complex than a simple agreement to raise prices. For economists then, class certification may be viewed as an empirical test of whether or not, subject to conditions, the law-of-one price holds in a particular context after properly accounting for those observable factors influencing pricing. Such analysis will assist the court in determining whether the pricing structure in the particular industry under study either supports or refutes the presumption of the Bogosian shortcut.

When proposed class members represent direct purchasers, several market conditions, while not necessary for class treatment, generally will support the finding that impact and damages are systematically related to readily identifiable product and buyer factors.¹² The first condition is that direct purchasers view the product at issue as fungible regardless of which defendant

produced the good. When direct purchasers view the products from different sellers as highly substitutable in consumption, no seller can raise its price substantially above that of the other sellers without losing a relatively large percentage of sales. The second condition is that competitive forces exist in the market under study that will quickly erase any substantial price differentials among buyers. The last condition is that the supply and demand condition for the product are well-understood and readily observable. Together, these conditions will tend to discipline transactions between sellers and buyers and lead to systematic and common (as opposed to idiosyncratic) pricing patterns among purchasers. This supports the reasonableness and reliability of estimating damages using a class-wide approach.¹³

In the recent *Linerboard* case, a major issue was whether or not an alleged conspiracy among linerboard producers would likely have had a common impact on direct purchasers who use this product in manufacturing corrugated sheet or corrugated boxes. Another issue was whether or not average prices in this industry were meaningful for pricing analysis as opposed to being too idiosyncratic and, hence, inappropriate for class treatment. The court noted that the plaintiffs' expert reliably demonstrated that certain product characteristics and economic conditions were present in the subject industry – which led to a systematic pricing structure – so that class treatment was deemed appropriate. As noted in the court's opinion, demonstrating these conditions was paramount for the opinions about common

impact and whether there existed a reliable formulaic approach to estimate damages for members of the proposed class.

Conclusion

Whether or not impact can be proven on a common basis depends upon the facts and circumstances of each case. What we have argued is that the existence, extent, and nature of the variability in prices often help to inform the class-certification decision, particularly in an antitrust context where the use of the Bogosian shortcut is being contemplated. If observed price dispersion is due to measurable and systematic factors, then price variation *per se* is not a sufficient condition to defeat common impact arguments in class-certification proceedings, nor is its absence sufficient to infer whether common influences predominate over idiosyncratic ones. For example, price dispersion – arising from situations such as differences in prices among long-term contracts (*e.g.*, each contract varies according to non-price factors such as credit terms), among geographic areas (*e.g.*, the commodity at issue is traded on a national basis but regional price differences exist), among purchases by large and small buyers (*e.g.*, the existence of volume discounts), or among contract and spot sales (even though all prices are based upon a national price index) – need not hinder the appropriateness of class treatment if such differences are systematic and reasonably can be controlled in statistical (or other) models that estimate “but-for” prices. In other instances, however, price variation among class members may be due to idiosyncratic influences making a generalized assessment

of impact and damages unreliable and less appropriate than plaintiff-specific analysis.

¹ The views expressed herein are those of the authors and should not be construed as representing the position of either LECG, LLC or other experts in LECG, LLC. Any errors, of course, are our own.

² *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977).

³ In *Bogosian*, the Third Circuit reversed and remanded the district court's denial of class certification, stating that "when an antitrust violation impacts upon a class of persons who do have standing, there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual." The "Bogosian shortcut" holds that if a conspiracy is proven which results in a price increase to a plaintiff class, an individual plaintiff could demonstrate damages simply by showing that the "but-for" price would be lower than the actual prices paid, and that the plaintiff did make some purchases at the higher price.

⁴ Impact or injury can be common in that all class members are negatively affected by the alleged conduct (e.g., pay a higher price). While damages can be plaintiff-specific in a class action, they must be based on a common formulaic approach.

⁵ *In re Linerboard Antitrust Litigation*, (MDL No. 1261), (E.D. Pa.) filed September 5, 2002 (Third Circuit)

⁶ "Class Action Antitrust Suit Wins 3rd Circuit's Approval," Shannon P. Duffy, [The Legal Intelligencer](#), September 6, 2002 (accessed at www.law.com).

⁷ *In re Linerboard Antitrust Litigation*, at 14, 15, and 19.

⁸ "Merit" issues may entail an investigation into the incentives and/or structural characteristics present in the industry under study that could facilitate the existence of, say, an anti-competitive conspiracy, as well as an estimation of "but-for" prices in comparison to actual prices charged by the

defendants (based on appropriate statistical methods or other quantitative analysis).

⁹ Indeed, in the paradigm of perfect competition which embodies these assumptions, all sellers and buyers are price-takers at a single, prevailing market equilibrium price.

¹⁰ See, for example, S. Lach, "Existence and Persistence of Price Dispersion: An Empirical Analysis," [Review of Economics and Statistics](#) 84, 433-442 (2002), who finds that "price dispersion prevails even after controlling for observed and unobserved product heterogeneity" in his econometric study of four homogeneous products.

¹¹ A discussion of price dispersion and its implications concerning the appropriateness of class treatment can be found in instances where courts have certified a class, denied class certification, certified only a sub-class of the original class, or have deemed credible yet conflicting expert testimony on class issues to be more appropriate for consideration by the trier-of-fact than the court.

¹² These conditions are not meant to be exclusive or comprehensive.

¹³ By contrast, in situations involving indirect purchasers, any study of the prices paid by these class members usually requires a more complex assessment. This may involve a detailed study of prices throughout the entire distribution chain (perhaps with numerous intervening levels) that precedes a putative class member. The longer the transactional chain the more difficult the analysis, and the greater the resultant uncertainty about how much a particular class member was impacted. One factor that makes for the difficulty in indirect purchaser cases is the issue of "pass-through." This addresses the extent (if any) that direct purchasers from defendants pass on overcharges to their direct customers who, in turn, sell to another set of customers, and so on, down the distribution chain until the indirect purchasers at issue are reached. Issues of "pass-through" must be analyzed at each level of distribution. A further complicating factor may be that at each level of this chain, there may be a different market structure with different implications for "pass through."