Hastings Law Journal

Volume 31 | Issue 2 Article 4

1-1979

Substantive Policies and Procedural Decisions: An Approach to Certifying Rule 23(b)(3) Antitrust Class Actions

Matthew Lloyd Larrabee

Substantive Policies and Procedural Decisions: An Approach to Certifying Rule 23(b)(3) Antitrust Class Actions

*By Matthew Lloyd Larrabee**

Trying a class action in any field of the law can be a difficult task. When the claim being pressed is a violation of the antitrust laws, the complexities of the trial can be staggering. These complexities and the high stakes often involved have led to the expenditure of tremendous amounts of legal energy on the certification of antitrust class actions under Rule 23 of the Federal Rules of Civil Procedure.[1] The primary battle has been waged over the predominance of common questions and superiority requirements of Rule 23(b)(3). This Note evaluates current judicial analyses of these requirements and suggests a framework within which the costs and benefits of certifying private antitrust class actions can be analyzed in light of underlying substantive antitrust policies.

To accomplish this task, the Note first briefly outlines the problems faced in certifying Rule 23 antitrust class actions, examining the combined requirements of Rule 23 and section 4 of the Clayton Act.[2] Using the courts' treatment of Rule 23(b)(3) in cases involving conspiracies in restraint of trade and unlawful tie-in sales to highlight the impact of substantive antitrust policies on procedural decisions, the Note next evaluates current approaches to the predominance and superiority requirements of Rule 23 and suggests approaches to these requirements which are consistent with substantive policies. The Note concludes by examining the continuing need for an active trial bench in antitrust class actions and by taking a brief look at past and pending legislative responses to the dissatisfaction with current class proceedings.

---

* A.B., 1977, University of California at Davis. Member, Third Year Class.

1. FED. R. CIV. P. 23.

2. 15 U.S.C. § 15 (1976). This section provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

Class Actions and Section 4 of the Clayton Act

The web of antitrust legislation in the United States has resulted in a national antitrust enforcement program with confusing and often conflicting goals. Despite recognized inconsistencies in our national economic policies,[3] antitrust statutes and case law reflect a dominant theme, expressed by Justice Burton's declaration that "[t]he heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' "[4] Although this statement tends to oversimplify the law, there is little doubt that the major purpose of antitrust enforcement is to protect the efficiency of the marketplace from the harms of anticompetitive conduct.[5]

To achieve this goal, both the federal government and private plaintiffs have been authorized to file a broad range of suits against violators of the antitrust laws.[6] The limited effectiveness of government enforcement efforts,[7] however, has necessitated a high degree of reli-

3. *See, e.g.*, Asch, *Antitrust and the Policymaking Problem: The Law-Economics Dichotomy*, 5 ANTITRUST L. & ECON. REV. 45 (1972), in which the author discusses inconsistencies in enforcement policies in the treatment of mergers under § 7 of the Clayton Act and the concentration allowed under § 2 of the Sherman Act, the selective prosecution of some types of conspiratorial price fixing schemes, and the allocation of enforcement resources toward industries and practices of relatively minor impact. *See also* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 1-13 (1977); Green & Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871 (1973) (exploring the anticompetitive impact of government policies promulgated by departments and agencies outside the Department of Justice and the Federal Trade Commission).

4. Standard Oil Co. v. FTC, 340 U.S. 231, 248-49 (1951) (quoting A.E. Staley Co. v. FTC, 135 F.2d 453, 455 (7th Cir. 1943)).

5. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 2 (1977).

6. The Department of Justice has statutory authority to enforce the Sherman Act by civil and criminal proceedings. 15 U.S.C. §§ 1, 2, 4 (1976). The Department also has authority to enforce the Clayton Act by civil proceedings. 15 U.S.C. § 25 (1976). The Federal Trade Commission (FTC) has concurrent power to enforce §§ 2, 3, 7, and 8 of the Clayton Act, as well as sole power to enforce § 5 of the Federal Trade Commission Act. 15 U.S.C. §§ 21, 45 (1976). Under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976), private litigants can file antitrust actions alleging price discrimination under the Robinson-Patman Price Discrimination Act (§ 2 of the Clayton Act) (15 U.S.C. § 13 (1976)), tie-in sales and exclusive dealing requirements under § 3 of the Clayton Act (15 U.S.C. § 14 (1976)), illegal mergers under § 7 of the Clayton Act (15 U.S.C. § 15 (1976)), and interlocking directorates violative of § 8 of the Clayton Act (15 U.S.C. § 19 (1976)).

7. For 1979 the Department of Justice Antitrust Division estimated total obligations at $46,377,000 while the Maintaining Competition element of the FTC projected a total direct program of $29,746,000. BUDGET OF THE UNITED STATES GOVERNMENT 596, 876 app. (Fiscal Year 1979). Expenditures of this magnitude have resulted in relatively few lawsuits, however. During 1977 the Department of Justice filed 34 civil and 37 criminal cases, while it terminated 40 civil actions and 35 criminal proceedings, leaving 154 total cases pending. [1977] ATT'Y GEN. ANN. REP. 143. During 1976 the FTC began the year

ance on private treble damage actions brought under section 4 of the Clayton Act.[8] In many instances private actions provide the only real threat to unlawful business behavior and as such have become necessary tools of effective enforcement.[9] The sheer volume of private actions in recent years has resulted in the displacement of public prosecution as the chief means of enforcing the antitrust laws.[10] One commentator has gone so far as to suggest that the chief function of public suits may have shifted to facilitating prosecution of subsequent

with 33 cases on hand, received 14 new cases, and disposed of a total of 17. [1976] F.T.C. ANN. REP. 14. Total antitrust cases filed by the government declined from 78 in 1977 to 72 in 1978. [1977] AD. OFF. U.S. COURTS ANN. REP. 207. Civil filings by the government have declined steadily since 1975 (from 56 in 1975 down to 42 in 1978), while criminal filings have been erratic (36 criminal filings in 1975, 19 in 1976, 31 in 1977, and 30 in 1978). *Id.*

The number of lawsuits filed is an incomplete measure, however, as the number of investigations instituted by the Department of Justice (400), and terminated (461), indicate the low percentage of potential violations that went to trial in 1977. [1977] ATT'Y GEN. ANN. REP. 143. Furthermore, antitrust cases are becoming more complex and consuming more staff time to adjudicate. [1976] F.T.C. ANN. REP. 13.

8. 15 U.S.C. § 15 (1976). The Supreme Court consistently has emphasized the importance of private interest in stimulating antitrust enforcement. *See, e.g.*, Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965); Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-53 (1947). *See also* United States v. Borden Co., 347 U.S. 514, 518-19 (1954) (in general support of private actions while delineating the differences between the duties of the public sector and the self-interest of the private sector).

In addition, Congress has shown its belief in the value of private antitrust enforcement, beginning with the passage of § 4 of the Clayton Act, 15 U.S.C. § 15 (1976), which provides treble damages, court costs, and attorney's fees to a successful private plaintiff. Two more recent additions to the law have eased the burden on private plaintiffs. Section 5 of the Clayton Act, 15 U.S.C. § 16(a) (1976), allows a final judgment or decree rendered in a government suit to be used by private plaintiffs as prima facie evidence against the same defendant, unless a consent decree is signed by the defendant in the government action prior to the taking of any testimony for trial.

The passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976), further evidences the congressional belief in the importance of private enforcement. The Act empowers any attorney general of a state to bring a civil action, "in the name of such State, as parens patriae on behalf of natural persons residing in such State" for injuries resulting from violations of the Sherman Act. 15 U.S.C. § 15c (1976). See notes 198-202 & accompanying text *infra* for a discussion of the limits of *parens patriae* relief.

9. *See, e.g.*, Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5, 5-8 (1959); Blecher, *The Only Game in Town*, 8 S.U.L. REV. 550 (1976); Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958). *Cf.* Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319, 1319-21 (1973) (citing the lack of empirical data supporting the proponents of private actions, but reaching no conclusion as to the effectiveness of such actions).

10. Crumplar, *An Alternative to Public and Victim Enforcement of the Federal Securities and Antitrust Laws: Citizen Enforcement*, 13 HARV. J. LEGIS. 76, 84 (1975).

private claims.[11]

A major tool of plaintiffs suing under section 4 is the Rule 23 class action.[12] Class actions have created controversy in many settings, but nowhere has the controversy been more noteworthy than in the antitrust field in which the inherent complexities of the litigation virtually compel the use of Rule 23 and yet simultaneously discourage its effective operation. This paradox is created by the effects of consolidating large numbers of claims in a single proceeding. On the one hand, the economies gained from consolidating numerous common questions into a single trial are increased in proportion to the complexity of those issues. The alternative to class adjudication, repeated litigation of a complex question, greatly increases the time necessary to resolve what is, essentially, a single dispute. On the other hand, one of the major arguments against class actions in all fields stems from the complexity of a trial involving a myriad of parties and issues. The inherent complexities of specialized economic proof may exacerbate this problem in the context of antitrust suits.[13]

Despite the exceptional burdens of a consolidated trial, there are several reasons why private antitrust plaintiffs need access to the class-wide remedy. A powerful supplier may gouge individual customers of minor amounts which, when totalled, comprise staggering sums.[14] Absent the risk of class proceedings, the potential defendant has little to

11. *Id.* at 84 n.49. Nonetheless, commentators have criticized the treble damage action as economically inefficient for a variety of reasons. *See* Briet & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329 (1974). The authors argue that treble damages may eliminate incentives to minimize losses and in fact may induce plaintiffs to attempt to "suffer" losses, *id.* at 335, and that treble damages may induce unfounded nuisance suits, *id.* at 340. *See also* Crumplar, *An Alternative to Public and Victim Enforcement of the Federal Securities and Antitrust Laws: Citizen Enforcement*, 13 HARV. J. LEGIS. 76, 87-88 (1975), where the author suggests that large treble damage awards may create overdeterrence of business behavior. See notes 160-77 & accompanying text *infra*. Crumplar also notes the incentive for attorneys to settle cases at less than the socially optimal amount to receive their fees. Crumplar, *supra*, at 88-89.

12. There were 183 private antitrust class actions filed in the federal district courts during 1978, down from 235 in 1977. [1978] AD. OFF. U.S. COURTS ANN. REP. A-154. The importance of the class action to antitrust plaintiffs is evidenced by the fact that although antitrust claims constituted only 1.1% of the civil cases commenced in 1978, antitrust class actions represented 12.4% of the total 1978 class action filings. *Id.* at 58, 100. The decrease in antitrust class actions may be attributable in part to the restrictive Supreme Court opinion in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). See note 21 & accompanying text *infra*.

13. Economic theory suggests that the continued aggregation of complex issues would cause economies to cease eventually, as the marginal costs of concentration exceeded marginal gains. Critics of class actions in general could take the position that an antitrust class suit is so complex that the trial begins at a point where the costs of trial exceed gains from possible economies.

14. *See, e.g., In re* Hotel Telephone Charges, 500 F.2d 86, 88 (9th Cir. 1974), in which a class of an estimated 40 million hotel guests alleged that defendants had conspired to raise

fear as there is no economically viable remedy for individual plaintiffs.[15] Similarly, a single purchaser may be reluctant to risk the wrath of a dominant supplier. In these instances, class treatment allows buyers to combine their market power to prevent retaliation for enforcing their rights. Denial of class status in such situations may leave plaintiffs without a remedy and defendants with unlawful gains, secure in the knowledge of the low risk of government prosecution.[16]

The certification of a class, although a procedural decision, thus inevitably has enormous impact on substantive rights, for it permits enforcement that otherwise might not occur. As such, the decisionmaking process should reflect the substantive policies underlying the cause of action, taking into account the manner in which, and degree to which, granting class status would promote national antitrust goals without unduly burdening defendants. The key substantive issue in the certification process therefore becomes how to measure, consistently with Rule 23 and the Rules Enabling Act,[17] the extent to which certifying an individual class action will implement the policies behind specific antitrust laws. This process requires that the need to provide aggrieved plaintiffs with an effective remedy be balanced against the need to prevent the erosion of defendants' substantive rights. This erosion process can stem from procedural innovations if such innovations effectively lessen the substantive requirements for a viable cause of action in an effort to bring more cases within the ambit of Rule 23.[18] In

their room rates by 1% to 3% via increased phone charges, resulting in an average claim of $2.00 per person and a total damage claim of $80 million before trebling.

15. The small amount of damages suffered in this situation by any single plaintiff may not justify the costs of an individual trial. If the class action remedy is not available, the sole incentive for violators to cease unlawful behavior is the risk of government prosecution. See note 7 & accompanying text *supra*.

16. See note 7 *supra*.

17. 28 U.S.C. § 2072 (1976). The Rules Enabling Act provides that the rules of civil procedure "shall not abridge, enlarge or modify any substantive right . . . ." This does not require that substantive considerations be ignored during procedural decisionmaking, but only that any substantive criteria applied be consistent with the existing substantive policies of Congress. While class certification surely should not increase defendants' exposure by *altering* the congressional antitrust enforcement scheme, the Act can be read to authorize courts to protect substantive goals as expressed by statute, while simultaneously protecting the rights of all parties.

18. *See, e.g.*, the discussion of unlawful tie-in sales at notes 77-117 & accompanying text *infra*. In the context of tie-in sales, a defendant could argue: (1) Proof of an unlawful tie-in requires a showing that a seller has imposed on the buyer the sale of the tied product, by conditioning the sale of the tied good to that of the tying good; (2) This substantive requirement therefore requires each plaintiff to show that he or she was coerced into accepting a tie-in sale; (3) If a court allows an inference of coercion, or makes classwide proof possible, it is thereby creating a common question out of an individual one to allow class certification; (4) This lessening of proof requirements in fact is the use of a procedural device, *i.e.*, class certification, to abridge the substantive rights of the defendants in violation of the Rules Enabling Act.

fact, fear of this erosion process may have motivated the Supreme Court in recent years to limit severely the availability of class actions by narrowly interpreting the requirements of Rule 23. The well known trio of class action decisions, *Snyder v. Harris*,[19] *Zahn v. International Paper Co.*,[20] and *Eisen v. Carlisle & Jacquelin*,[21] illustrates that the Court is likely to scrutinize closely any future procedural innovations in this area, despite the liberal intent evidenced by the drafters of Rule 23.[22]

Plaintiffs alleging a violation of section 4 of the Clayton Act and seeking certification as a class must meet the requirements of Rule 23(b)(3) as applied to the elements of their prima facie case. Under section 4, a prima facie case requires proof of three distinct elements: the occurrence of the unlawful activity (violation); the fact of injury to the plaintiff (impact); and the extent of the injury suffered (damages).

Before class certification can occur, an action must fulfill the two groups of requirements set forth in subdivisions (a) and (b) of Rule 23. Subdivision (a)[23] establishes the basic prerequisites for maintenance of

19. 394 U.S. 332 (1969). In *Snyder* the Court held that separate and distinct class member's claims could not be aggregated to meet the amount in controversy requirement. *Id.* at 336. For a thorough discussion of this case, see Note, *Aggregation of Claims*, 17 LOY. L. REV. 187 (1970); Note, *Aggregation Doctrine Continues to Limit Class Actions*, 24 SW. L.J. 354 (1970). See note 20 *infra*, discussing Zahn v. International Paper Co., 414 U.S. 291 (1973).

20. 414 U.S. 291 (1973). In *Zahn* the Court held not only that plaintiffs are precluded from aggregating their claims under *Snyder*, but also that every member of the class must meet the jurisdictional amount. *Id.* at 300. For discussion of this case see Note, *Diversity Class Action*, 26 BAYLOR L. REV. 123 (1974); Note, *Consumer Class Actions With a Multistate Class: A Problem of Jurisdiction*, 25 HASTINGS L.J. 1411, 1411-23 (1974); Note, *The Trouble with Zahn: Progeny of Snyder v. Harris Further Cripple Class Actions*, 53 NEB. L. REV. 137 (1974); Comment, *Solutions for Consumer and Environmental Wrongs Are Not Embodied in Federal Rule 23*, 28 RUTGERS L. REV. 986 (1975).

21. 417 U.S. 156 (1974). The Court in *Eisen* interpreted Rule 23(c)(2) as requiring individual notice to each class member at the expense of the representative parties. *Id.* at 177. For discussion of the notice problem, see McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues*, 25 HASTINGS L.J. 1351 (1974); Note, *Notice Obligations of Representative Plaintiff*, 16 B.C. INDUS. & COM. L. REV. 254 (1975); Note, *Meeting the Notice Requirements in Rule 23(b)(3) Class Actions*, 21 LOY. L. REV. 228 (1975); Note, *Class Actions and the Need for Legislative Reappraisal*, 50 NOTRE DAME LAW. 285 (1974).

22. "Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness. . . ." Advisory Committee's Note to Proposed Rule 23, 39 F.R.D. 98, 102-03 (1966). One of the main thrusts of the rule as amended was to provide a remedy for the injured small claimant, who otherwise would have none. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968); Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. INDUS. & COM. L. REV. 501, 504 (1969).

23. FED. R. CIV. P. 23(a) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that

any class action. Subdivision (b) lists the categories into which a class which has satisfied subdivision (a) may fall. Subdivision (b)(3), controlling the certification of most claims for damages and therefore private actions under section 4, provides that a class action may be maintained if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[24]

The duty of the court addressing a request for class certification thus is to examine the three elements of the plaintiffs' section 4 claim to determine whether these elements, when considered together, satisfy the multiple requirements of Rule 23. The difficulty which many courts have encountered[25] in ruling on the predominance of common questions and the superiority of a class action can be appreciated more fully upon examination of the prima facie elements of each type of violation. The number and importance of the common and individual questions, as well as the complexity of the litigation as a whole, vary greatly with the type of violation. Consequently, a mechanical approach to certification that ignores the facts and circumstances of each case must result in inequities and a failure to uphold consistently the substantive policies of antitrust law.

Although section 4 authorizes suits for any violation of the antitrust laws,[26] this Note focuses in detail on two types of claims: conspiracies in restraint of trade[27] and unlawful tie-in sales.[28] This focus should not unduly limit the applicability of the analysis, however, for two reasons. First, these two violations have comprised the bulk of an-

joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

24. FED. R. CIV. P. 23(b)(3).

25. See notes 29-177 & accompanying text *infra*.

26. 15 U.S.C. § 15 (1976).

27. Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade . . . ." 15 U.S.C. § 1 (1976). This prohibition often is enforced against conspiracies to fix prices, but also prohibits group boycotts, market divisions, and similar restraints.

28. 15 U.S.C. § 14 (1976), the codification of § 3 of the Clayton Act, provides in relevant part that "[i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or other commodities . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition . . . that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Unlawful tie-ins also may fall under the prohibitions of § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). See note 79 *infra* for a discussion of the comparative coverage of each statute.

titrust class suits to date. Second, the analytical approach to certification urged by this Note should prove applicable to other violations, as many of the general issues presented by conspiracy and unlawful tie-in claims arise in other antitrust class suits. Nonetheless, an understanding of the elements that comprise each violation is crucial to the certification process as unnecessarily restrictive treatment by the courts of a single element can tip the scales of superiority and predominance, preventing class certification and effectively terminating all litigation of the claim.

Predominance of Common Questions

A judicial finding of predominance rests upon a combined treatment of the alleged violation, the impact on the plaintiffs, and the amount of damages. The court not only must decide whether proof of these elements can be considered common to the members of the class, but in the event that some significant individual questions are raised, it also must decide whether the common questions do indeed justify trying the case as a class action. An effective analysis of predominance of common questions requires a court to be conscious of any unique problems raised by the type of violation in question. Consequently, the violation and impact issues of claims involving conspiracies in restraint of trade are discussed in this Note separately from those claims involving unlawful tie-in sales. Discussion of the third issue, proof of the amount of damages, is applicable to either claim and accordingly is presented last, completing the treatment of predominanace.

Conspiracies in Restraint of Trade

The Violation

Plaintiffs claiming damages for violations of section 1 of the Sherman Act have been very successful in obtaining class certification.[29] In fact, several courts have virtually abandoned a careful analysis of pre-

29. *See, e.g.*, Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978); *In re* Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation, 78 F.R.D. 622 (W.D. Wash. 1978); Axelrod v. Saks & Co., 77 F.R.D. 441 (E.D. Pa. 1978); *In re* Folding Carton Antitrust Litigation, 75 F.R.D. 727 (N.D. Ill. 1977); Campus Cleaners, Inc. v. Dallas Tailor & Laundry Supply Co., 25 Fed. R. Serv. 2d 1003 (S.D. Tex. 1977); *In re* Plywood Anti-trust Litigation, 76 F.R.D. 570 (E.D. La. 1976); *In re* Sugar Industry Antitrust Litigation, 73 F.R.D. 322 (E.D. Pa. 1976); *In re* Toilet Seat Antitrust Litigation, 23 Fed. R. Serv. 2d 1005 (E.D. Mich. 1976); Barr v. WUI/TAS, Inc., 66 F.R.D 109 (S.D.N.Y. 1975); *In re* Master Key Antitrust Litigation, 70 F.R.D. 23 (D. Conn.), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975); Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 66 F.R.D. 581 (E.D. Pa. 1975); Link v. Mercedes-Benz of North America, Inc., 21 Fed. R. Serv. 2d 1294 (E.D. Pa. 1975); Dennis v. Saks & Co., 20 Fed. R. Serv. 2d 994 (S.D.N.Y 1975); Herrmann v. Atlantic Richfield Co., 65 F.R.D. 585 (W.D. Pa. 1974); Professional Adjusting Sys. of America, Inc. v. General Adjustment Bureau, Inc., 64 F.R.D. 35 (S.D.N.Y. 1974); City of Philadelphia v. American Oil Co., 53

dominance in conspiracy cases, subsuming all elements of the claim in the generalized belief that "proof of the conspiracy will present predominant questions of both law and fact."[30] This philosophy may unduly burden defendants by overshadowing consideration of both impact and the amount of damages as potentially individual questions, thereby fostering unjustified certifications.[31] Proper treatment of conspiracy claims requires that all of the prima facie elements be examined to determine the relative importance of the individual or common questions presented by each.

Even in cases in which the courts have separated the issue of the conspiracy violation, many courts have expressed the view exemplified by *In re Master Key Antitrust Litigation*,[32] in which the court concluded that

> the central and common element of these cases [is] the question whether the defendants acted in concert to decrease competition among them. If this element is shown, differences in the way the plan was manifested around the country are unimportant, except perhaps as they may affect the amounts of recovery different plaintiffs may obtain.[33]

Repeated recognition of the violation as a predominant common question in conspiracy cases has even led one court to attempt to establish a rebuttable presumption for certification whenever a "plausible claim of violation of the Sherman Act"[34] was present.

Such receptiveness to requests for certification is most apparent, and perhaps best justified, in conspiracy claims involving price fixing, as price fixing is a per se violation of the Sherman Act,[35] and proving

F.R.D. 45 (D.N.J. 1971); Sol S. Turnoff Drug Distrib., Inc. v. N.V. Nederlandsche, 51 F.R.D. 227 (E.D. Pa. 1970).

30. Minnesota v. United States Steel Corp., 44 F.R.D. 559, 572 (D. Minn. 1968). *See also* Sol S. Turnoff Drug Distrib., Inc. v. N.V. Nederlandsche, 51 F.R.D. 227 (E.D. Pa. 1970). These cases apparently have decided that damage issues may be treated separately and that the fact of injury either can be established as a common question or is not of sufficient importance to prevent the violation issue from predominating.

31. If proof of both the fact of injury and the amount of damages required individualized evidence, individual questions would likely predominate. To the extent that impact is presumed erroneously and common questions are therefore found to predominate, unwarranted class certifications may occur. See notes 54-66 & accompanying text *infra*.

32. 70 F.R.D. 23 (D. Conn.), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975).

33. *Id.* at 26.

34. Windham v. American Brands, Inc., 539 F.2d 1016, 1021 (4th Cir. 1976) (*Windham I*). Judge Wyzanski's rebuttable presumption rule was overruled on rehearing *en banc*, Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977) (*Windham II*), yet the attempt to establish such a rule indicates the regularity with which many courts accept the violation issue as a dominant common question.

35. Under the per se approach to illegality, the type of conduct in question is deemed to have such a pernicious effect on competition that there is no need for plaintiffs, or the government, to establish its unreasonableness. *See generally* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 153, 192-94 (1977). This has no effect, however, on the need to establish

the fact of injury often is simplified to the point where that issue also becomes common to the class.[36] It is essential, however, that this willingness to certify not be carried so far that defendants become forced to bear the burden of establishing the *impropriety* of certification.[37]

A well reasoned approach to this problem is found in *Sommers v. Abraham Lincoln Federal Savings & Loan Association*.[38] In *Sommers* the court relied on a test for predominance that required, at the outset, that all legal and factual issues be paired with the members of the class to which they related.[39] Under this test, the court at least will be aware of the number of class members with common interests in each of the disputed issues. The conspiracy by lending institutions alleged in *Sommers* involved alterations of accounting methods relating to the prepayment of escrow accounts by the plaintiff mortgagors. As this activity did not constitute a per se violation of the Sherman Act, the plaintiffs' claim also required proof that the defendants' conduct had unreasonably restrained trade. Despite the court's recognition that existence of the conspiracy was a central common question, it was unpersuaded that this factor alone created a predominance.[40] The plaintiffs also would have to prove unreasonableness to present a successful claim and the court felt compelled to consider this issue as well in ruling on the commonality of the violation element. The court held that because the evidence would overlap substantially among members of the class, reasonableness could be considered a common question.[41] Although the result in this case followed the well established trend of approving certification,[42] the case nonetheless exemplifies the judicial inquiry that should precede such a decision.

The general acceptance of the violation issue as a common question stands in contrast to the view of the Court of Appeals for the Ninth Circuit which has focused on what it considers to be the individual nature of section 1 claims. Illustrative of the Ninth Circuit court's ap-

the fact of injury or the amount of damages for a successful claim under § 4 of the Clayton Act.

36. See notes 52-66 & accompanying text *infra*.

37. The burden of establishing the propriety of certification of a specific class falls on the party seeking to have the class certified, which often is the plaintiff. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1759 (1972) [hereinafter cited as WRIGHT & MILLER].

38. 66 F.R.D. 581 (E.D. Pa. 1975).

39. *Id.* at 590 (quoting Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3rd Cir. 1974), *cert. denied*, 419 U.S. 885 (1974)). The test suggested therein appears to fail to provide any means of weighing the common questions against the individual ones, a process at least as important as identifying the issues and members.

40. 66 F.R.D. at 590.

41. *Id.*

42. *See, e.g.*, cases cited note 29 *supra*.

proach are *In re Hotel Telephone Charges*[43] and *Kline v. Coldwell, Banker & Co.*,[44] antitrust class actions brought under Rule 23(b)(3) with both defendant and plaintiff classes. The court, through these two cases, has established that in the Ninth Circuit proof of a conspiracy requires proof that each member of the conspiracy "knowingly, intentionally and actively participated in an *individual* capacity in the scheme."[45] The *Kline* court felt that general proof was insufficient to establish a conspiracy and that "liability is *inherently* an individual question"[46] in these cases. While the problems of trying a class action undoubtedly are exacerbated by the simultaneous existence of plaintiff and defendant classes, the rationale for these decisions hampers effective antitrust enforcement by making it nearly impossible to bring a class suit against a defendant class, or against any large group of alleged conspirators, for violation of section 1 of the Sherman Act.

The approach to certification taken in the *Hotel Telephone* and *Kline* cases misinterprets Rule 23. The inevitable result of their reasoning is that a plaintiff class alleging a conspiracy by a large group of defendants will be deemed to have presented a predominant core of individual questions concerning each defendant's participation in the conspiracy. This approach focuses on the liability of each defendant rather than on the commonality of the issues facing the plaintiff class. The existence of a conspiracy, whether it requires the knowing participation of each member or not, is a question common to the members of the class alleging the violation. If all the plaintiffs in such cases were required to file individual suits against the group of defendants, each individual defendant would have to repeat his or her defense in each suit, and the plaintiffs' proof of unlawful conduct would be similarly repetitive. Predominance of common questions cannot depend on whether the parties opposing the class are apt to raise separate issues,

43. 500 F.2d 86 (9th Cir. 1974). The complaints in this case alleged a nationwide conspiracy among 47 hotel chains and approximately 600 individual hotels to increase room rates by adding a surcharge for telephone services to the quoted room rate. The named plaintiffs sought to represent themselves and all other hotel guests who had been damaged by the conspiracy, a class consisting of an estimated 40 million people. The parties agreed that the average plaintiff recovery would be about $2.00. The court held that the plaintiffs had failed to establish predominance of common questions or the superiority of the class suit. *Id.* at 88.

44. 508 F.2d 226 (9th Cir. 1974). The *Kline* plaintiffs sought to represent all real estate sellers in Los Angeles County in a suit against the county realty board and 32 named real estate brokers representing a class of all brokers who were members of the board during the time of the alleged unlawful practice. The complaint alleged a conspiracy to fix brokerage commissions through the distribution of a fee schedule. The *Kline* court denied certification for failure to establish the predominance of common questions and the superiority of the class action and because the class appeared unmanageable. *Id.*

45. *Id.* at 232 (emphasis added).

46. 508 F.2d at 233 (emphasis added).

so long as each class member has a common interest in overcoming that defense. Instead, the inquiry must focus on whether there is a sufficient number of issues affecting the class members as a group to justify certification. Under this test the plaintiff classes in both *Hotel Telephone* and *Kline* should not have been denied certification for lack of common questions. This does not suggest that certification could not have been denied for lack of a finding of superiority;[47] however, to the extent that any decision actually is based on grounds other than those articulated, it offers a confusing precedent for future decisions.

More difficult problems are raised by the defendant classes involved in these cases, a distinction the Ninth Circuit failed to address explicitly in both instances. The complications arise from the fact that each individual defendant may have defenses available that are not common to other defendants. Consequently, there may not be a sufficient number of issues common to the defendants to justify treating them as a class. Effective analysis would seem to require that a distinction be drawn between the plaintiff and defendant classes and the likelihood evaluated that evidence presented by individual defendants would eliminate the advantages of dealing with them as a class. Moreover, the flexibility of Rule 23 would allow for a rearrangement of the defendants if a subclass would conform to the requirements of the Rule[48] and if a certifiable plaintiff class existed.

A survey of the opinions in this area thus indicates that most courts believe the violation element of a section 4 conspiracy claim presents a significant, if not predominant, common question. Although language exists that can be interpreted as contrary to this position, such language is based on a misapplication of Rule 23. In this regard, private antitrust enforcement must not be unduly impeded by confusing applications of Rule 23. Separate analyses of the certification requirements for plaintiff and defendant classes also will aid in establishing better reasoned precedents.

Proof of Impact in Conspiracy Claims

The requirement that plaintiffs establish the fact of injury (impact) has proven to be more troublesome in certification disputes than has the proof of a violation. The general standard for proof of impact was

47. In fact, concern for the manageability of large class actions was the major focus of these opinions and probably would have precluded certification based on a lack of superiority. See notes 148-77 & accompanying text *infra*.

48. FED. R. CIV. P. 23(c)(4) states: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

set forth in *Zenith Radio Corp. v. Hazeltine Research, Inc.*:[49]

> [The] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by . . . proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.[50]

Despite the existence of this general standard there have been substantial variations in the treatment of impact as either a common or individual question in conspiracy cases. In cases alleging conspiracies to fix prices, however, a dominant approach has evolved.

Impact in Price Fixing Conspiracies

The decision in *In re Master Key Antitrust Litigation*[51] provides an approach which addresses the requirements of section 4 and Rule 23 without unduly burdening parties seeking certification. The court stated that

> [i]f the plaintiffs introduce proof . . . at the liability stage that they bought master key systems and that the defendants engaged in a pervasive nationwide course of action that had the effect of stabilizing prices at supracompetitive levels, the jury may conclude that the defendants' conduct caused injury to each plaintiff.[52]

Under this approach a jury can *infer* the fact of injury when a conspiracy to fix prices has been established and plaintiffs have established that they purchased the affected goods or services. This inference eliminates the need for each class member to prove individually the consequences of the defendants' actions to him or her. Accordingly, impact can be treated as a common question for certification purposes. This approach has been adopted by a fairly large number of courts.[53]

Other courts have taken this rationale one step further by presuming impact rather than merely allowing an inference, stating that "an illegal price fixing scheme presumptively impacts upon all purchasers of a price fixed product in a conspiratorially affected market."[54] Al-

49. 395 U.S. 100 (1969).

50. *Id.* at 114 n.9 (emphasis by the Court).

51. 70 F.R.D. 23 (D. Conn.), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975).

52. *Id.* at 26 n.3.

53. *See, e.g.*, *In re* Independent Gasoline Antitrust Litigation, 79 F.R.D. 552, 560-61 (D. Md. 1978); *In re* Plywood Anti-trust Litigation, 76 F.R.D. 570, 583-84 (E.D. La. 1976); *In re* Sugar Industry Antitrust Litigation, 73 F.R.D. 322, 346-47 (E.D. Pa. 1976); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 281, 287 (S.D.N.Y. 1971); City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 60, 67-68 (D.N.J. 1971); *see also* Alabama v. Blue Bird Body Co., 573 F.2d 309, 323-28 (5th Cir. 1978) (accepting the theory of inferred impact, but rejecting application to the facts of the case before the court).

54. *In re* Folding Carton Antitrust Litigation, 75 F.R.D. 727, 734 (N.D. Ill. 1977). *Ac-*

though both approaches allow class suits to be tried without individual proof of injury and thus preserve the class action remedy, a presumption of impact may threaten defendants more seriously by allowing uninjured class members to avoid proof of an essential element of the prima facie case.[55] The other danger lies in leading courts to neglect the issue entirely, as some apparently have done.[56]

The fear that defendants' rights would be eroded by inadequate attention to this issue may have led two courts of appeals to reject any inference of impact on a classwide basis. The Ninth Circuit opinion in *In re Hotel Telephone Charges*[57] expresses the view that after a violation is established, individual proof of injury should be required:

> After the basis for computing damages had been individually determined for each defendant, each member of the class seeking recovery would then be required to prove that he patronized the hotel while the surcharge was in effect and that he absorbed the cost of the surcharge. Furthermore, it would then be necessary to compute the amount of damages due the class member. . . . Unless the court is to allow the procedural device of the class action to wear away the substantive requirements to maintain a private antitrust cause of action, this suit raises far too many individual questions to qualify for class action treatment.[58]

Hence, the court refused to accept any generalized treatment of the impact issue. The opinion contains no real explanation as to why an inference of impact necessarily would erode substantive rights, yet that rationale for curtailing class actions was tacitly affirmed by the same court in *Kline v. Coldwell, Banker & Co.*[59] with even less discussion.

This individualized approach to the impact question also surfaced in the Fourth Circuit Court of Appeals *en banc* rehearing of *Windham v. American Brands, Inc.*[60] (*Windham II*). The action involved complicated groupings of South Carolina tobacco growers who alleged that

cord, Chevalier v. Baird Sav. Ass'n, 72 F.R.D. 140, 149 (E.D. Pa. 1976); *In re* Ampicillin Antitrust Litigation, 55 F.R.D. 269, 275-76 (D.D.C. 1972).

55. Defendants are unduly threatened only to the extent that someone who has not suffered any damage is allowed to maintain class membership. Proper limitations on the use of an inference of impact should provide adequate protection from this danger, although the danger is increased one degree when a presumption is allowed. In any event, most courts still require individual proof of the amount of damages, so that an uninjured plaintiff is not guaranteed any recovery, absent a classwide settlement.

56. *See, e.g.*, Link v. Mercedes-Benz of North America, Inc., 21 Fed. R. Serv. 2d 1294, 1294-98 (E.D. Pa. 1975); Professional Adjusting Sys. of America, Inc. v. General Adjustment Bureau, Inc., 64 F.R.D. 35, 39-40 (S.D.N.Y. 1974); Albertson's, Inc. v. Amalgamated Sugar Co., 62 F.R.D. 43, 50, 52 (D. Utah 1973).

57. 500 F.2d 86 (9th Cir. 1974).

58. *Id.* at 89.

59. 508 F.2d 226, 233-34 (9th Cir. 1974).

60. 565 F.2d 59, 65-66 (4th Cir.), *cert. denied*, 435 U S. 968 (1977). The *Windham II* court relied in part on both *Hotel Telephone* and *Kline* for its rationale. *Id.* at 66 n.16.

the defendant tobacco companies and the Secretary of Agriculture had committed various antitrust violations. Although the case presented serious manageability problems, the impact issue was addressed rather succinctly by the court:

> The gravamen of the complaint is not the conspiracy; the crux of the action is injury, individual injury. While a case may present a common question of violation, the issues of injury and damage remain the critical issues in such a case and are always strictly individualized. . . . Generalized or class wide proof of damages in a private antitrust action would, in addition, contravene the Rules Enabling Act that the Rules of Civil Procedure "shall not abridge, enlarge, or modify any substantive right."[61]

The approach taken by these courts can be criticized on several grounds. First, the *Windham II* opinion lumps together proof of the fact of injury and proof of the amount of damages as though they were identical and created a single individualized question. This, as demonstrated earlier, is not the case. Second, the argument that allowing the trier of fact to infer injury on a classwide basis necessarily enlarges the substantive rights of the plaintiffs or abridges the rights of defendants is unsupported and misguided.[62] Nowhere in *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[63] which established the requirements for proof of injury, is it suggested that class treatment of the issue is inappropriate. Nor does the language found in the Clayton Act or Rule 23 suggest that an inference of impact necessarily alters substantive rights. Finally, a plaintiff class member who is not required to establish the fact of injury individually must still prove the amount of his or her actual loss and, absent a classwide settlement, will not receive damages for injury not suffered.

Although the notion that a classwide inference of impact erodes substantive rights may stem from a healthy fear of potential abuse of both defendants and courts, the precedent established by those cases

61. *Id.* at 66.

62. The sole authority for this proposition cited by the court was a quotation of Professor Handler, which merely supports the undisputed proposition that antitrust plaintiffs may not recover damages unless they themselves have sustained injury as a result of an antitrust violation: "[The treble damage remedy provided by Clayton Act § 4, 15 U.S.C. § 15 (1976)] is . . . limited by its terms, the only person who may recover damages is one who had been 'injured in his business or property by reason of' a violation. The amount of his recovery, except for costs, is limited to 'threefold the damages *by him* sustained.' The language that Congress used in this statute . . . leaves no room for awarding damages to some amorphous 'fluid class' rather than, or in addition, to one or more actually injured persons. It likewise does not permit any person to recover damages sustained not by him, but by someone else who happens to be a member of such class." *Id.* (quoting Handler, *Twenty-fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 37 (1972)) (emphasis by Professor Handler). See notes 17-18 & accompanying text *supra*.

63. 395 U.S. 100, 114 n.9 (1968). See text accompanying notes 49-50 *supra* for a brief discussion of *Zenith*.

has dangerous implications. The immediate effect is to prohibit large plaintiff classes from establishing predominance under Rule 23(b)(3). If impact presents an individual question, only the violation is left as a potentially common question, and individual proof requirements likely will predominate, precluding certification in most cases.[64] The *Windham II* court attempted to minimize these concerns by distinguishing the facts of the case before it from those instances in which classes had been certified[65] and by suggesting that courts generally agree on the legal principles involved.[66] Nonetheless, its opinion evinces a notable lack of enthusiasm for innovative treatment of class suits.

Other courts have allowed certification solely on the issue of violation, bifurcating impact and damage issues for separate consideration. Under this approach the court may avoid addressing, at least temporarily, the commonality of the impact issue. In *Herrmann v. Atlantic Richfield Co.*[67] the court noted that excessive concern over the individual nature of injury overlooks the utility that Rule 23 is supposed to provide. The court apparently felt that the class could be certified for purposes of establishing violation, leaving open the possibility of decertification for subsequent trial of the "damages" issues.[68] In *Windham v. American Brands, Inc.*[69] (*Windham I*), Judge Wyzanski adopted a similar technique, certifying the class for questions of liability, meaning a violation of the antitrust laws, while separately trying the issues of

64. The *Windham II* court might have been satisfied if a workable damage formula were available to reduce damage calculations to a mechanical task, thereby increasing the importance of the violation issue, a common question: "[T]here is a substantial basis for the district court's conclusion that there appears to be no workable formula to aid in computing the damages of each member of the plaintiff class and that the action was unmanageable as a class action. The district court estimated—conservatively, we think—that, in the absence of a practical damage formula, determination of individual damages in this case could consume ten years of its time. The propriety of placing such a burden on already strained judicial resources seems unjustified." Windham v. American Brands, Inc., 565 F.2d 59, 70 (4th Cir. 1977).

65. 565 F.2d at 67-68. The primary factual distinction noted was the size of the class. The court stated that "[t]his conflict in result among the decisions seems to reflect more a factual difference in the cases themselves than a difference over legal principles." The sole authority for this statement was an appended footnote which read: "Judge Gibbons in his dissent in *Link* at 877, states that the difference in the decisions on this point arise from the fact that a number of circuits deny class action treatment in those anti-trust cases 'involving a large number of plaintiffs.'" *Id.* at 68 n.21.

66. *Id.* at 67-68. The *Windham II* court failed to explain how, if the legal principles were well settled, decisions that reach startlingly different results still appear. See notes 34 & accompanying text *supra*, 69-73 & accompanying text *infra*, for a discussion of *Windham I*, the decision overruled by *Windham II*.

67. 65 F.R.D. 585 (W.D. Pa. 1974).

68. *Id.* at 593.

69. 539 F.2d 1016 (4th Cir. 1976).

"causation."[70]

This approach to impact poses several difficult problems. On a practical level it increases the exposure of defendants by increasing the chances of class certification. While at first glance such an effect may appear to further the goals of private antitrust enforcement, it in fact may restrict beneficial business activity and erode the substantive rights of defendants. Such a restriction at least arguably contravenes the Rules Enabling Act which provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge, or modify any substantive right."[71] To the extent that bifurcated treatment of issues results in unwarranted certification of classes, with a concurrent increase in settlement payments by defendants, this application of Rule 23 can be said to alter substantive rights.[72] This approach ignores the fact that the ultimate issue for resolution at trial is the liability of the defendant, proof of which requires both a violation and the fact of injury.

In addition, bifurcation of the impact question may distort the certification process. If impact ultimately is found to be a common question, bifurcation has only postponed the decision until the damage portion of the trial. If, on the other hand, impact is found to be an individual question, bifurcation effectively has distorted the analysis necessary for certification. Rule 23 is not designed to break down every claim into minute common issues to be viewed in isolation from the rest of the case. Such an approach to Rule 23 would encourage plaintiffs' attorneys to seek certification on extremely narrow issues in hopes of exploiting the enormous tactical advantages of class status during settlement negotiations.

Moreover, granting such certifications ignores the need to examine the totality of the disputed issues. The narrower the scope of the issues that can be treated on a classwide basis, the less desirable, *i.e.*, superior, the class action becomes. By not analyzing the liability issue in its entirety a court avoids the conflict between the commonality of the violation issue and the individualized impact question. Accordingly, even though common issues may predominate in a narrow segment of a given case, certification on those issues alone is not justified if it distorts the trial or only avoids the resolution of fatal class problems. Continued certification in spite of these problems can only lead to abuses which eventually will result in further curtailment of the availability of the class remedy.[73]

70. *Id.* at 1022.

71. 28 U.S.C. § 2072 (1976).

72. See note 18 *supra* for a discussion of this argument as applied to tie-in sales.

73. In fact, one circuit already has evidenced a strong fear of large class actions. The court in Reiter v. Sonotone Corp., 579 F.2d 1077 (8th Cir.), *rev'd*, 99 S. Ct. 2326 (1979), construed § 4 of the Clayton Act to require a commercial injury, thus denying consumers

As the foregoing analysis demonstrates, in price fixing cases at least, there is strong theoretical and case law support for some generalized treatment of the impact issue. Although common questions can be formed on this issue, bifurcating the impact issue is unsound, as it distorts the certification process and may alter substantive rights.

Impact in Non-Price Fixing Conspiracies

In a price fixing claim it is readily apparent that one suffers damage by purchasing at the fixed price. On the other hand, in a monopolization claim based on alleged loss of profits or loss of competitive advantages, for example, it is not at all clear that every class member has suffered harm merely by dealing with the defendants. The competitive and financial makeup of each firm is a unique combination of circumstances, which may or may not be affected by the conduct of a given set of conspirators. Unless all the class members have entered into the same or substantially similar transactions with the defendant, the costs of which were raised as a direct result of the illegal conduct, there is much less justification for treating impact as a common question. A proper test of the commonality of the impact issue therefore must focus on the type of injury and violation alleged.

These factors were considered in *San Antonio Telephone Co. v. American Telephone & Telegraph Co.*,[74] in which the court refused to certify a plaintiff class of independent companies alleging a conspiracy to monopolize the telephone service market by several phone operating companies. The damage claim was for lost profits and inability to compete. The court recognized the possibility of inferring impact in price fixing cases, but refused to certify the class due to the highly individualized proof required to establish the impact and damage issues. By adopting this ad hoc approach to impact in non-price fixing claims, other courts would be able to protect defendants while not uniformly precluding certification.[75]

standing to bring private antitrust actions. *Id.* at 1081-84. The court not only construed the Clayton Act to contain surplus verbiage in the phrase injury "to business or property," but also made a policy judgment that large antitrust class actions are actually anticompetitive. *Id.* at 1085-86. The Supreme Court, however, reversed, holding that "[a] consumer whose money has been diminished by reason of an antitrust violation has been injured . . . within the meaning of § 4." 99 S. Ct. at 2331. The court of appeals decision, although reversed, is evidence of the distaste that many courts have for consumer class actions, particularly in the antitrust field.

74. 68 F.R.D. 435 (W.D. Tex. 1975).

75. duPont Glore Forgan, Inc. v. American Tel. & Tel., 69 F.R.D. 481 (S.D.N.Y. 1975), exemplifies a non-price fixing conspiracy that justified a classwide inference of impact. In that case, 1,000 users of a Centrex communication system alleged a conspiracy by the defendants to deprive the plaintiffs of a tax exemption by refusing to separate charges to the users. The resulting overpayment of taxes was treated as a common question of impact by the court: "[P]laintiffs in effect allege a conspiracy among AT&T and the various other

Even when impact must be treated as an individual question, no insurmountable barrier to certification is erected. In *Sommers v. Abraham Lincoln Federal Savings & Loan Association*,[76] despite the necessity of individual proof of impact the court concluded that the substantial overlap of evidence to be presented at trial meant that common questions would predominate.[77]

Sommers highlights the considerations necessary for a thorough predominance analysis in any conspiracy. If the issue of impact can be established by a presentation of evidence to the trier of fact that applies to all or most of the claimants equally well, there is little reason not to allow classwide treatment of the issue. If the same evidence will not establish impact for the entire class, the degree to which overlapping evidence will create economies at trial should govern the weight given to the impact element in the overall assessment of predominance.

The cases discussed show that upholding substantive antitrust policies through procedural remedies requires that courts exploit the flexibility provided in the federal rules. This does not imply that potential classes deserve blind certification; in fact quite the opposite is true. Only after clear, reasoned analysis of Rule 23 and the limits imposed by the Rules Enabling Act[78] should class suits be allowed. In cases involving price fixing conspiracies, it is often possible to treat both violation and impact as issues common to the class which predominate over individual proof requirements. The categorical approach taken by some courts in not allowing an inference or generalized proof of impact in conspiracy cases indicates a failure to use properly the flexibility of Rule 23 to analyze each certification issue separately. In non-price fixing cases the need for this close examination of impact is highlighted as the various potential injuries are more likely to create individual issues.

Unlawful Tie-in Sales

The Violation

In actions alleging unlawful tie-in sales[79] the predominance re-

defendants to deprive plaintiffs . . . no matter by which operating company there were serviced, of their right to a tax exemption. . . . The acts and conduct attributed to the defendants had the same impact upon all Centrex users; all allegedly were injured thereby except for differences in amounts of overpayment of taxes." *Id.* at 486.

76. 66 F.R.D. 581 (E.D. Pa. 1975).

77. *Id.* at 590.

78. 28 U.S.C. § 2072 (1976).

79. Tie-in sales are prohibited under § 1 of the Sherman Act, 15 U.S.C. § 1 (1976), and under § 3 of the Clayton Act, 15 U.S.C. § 14 (1976). Despite the fact that there are differences in the scope of conduct that may be reached under each law, both sections are interpreted similarly. *See* Pearson, *Tying Arrangements and Antitrust Policy*, 60 NW. U.L. REV.

quirement is complicated greatly by judicial indecision as to the proof necessary for a prima facie showing of a violation. Unlike the preceding conspiracy cases, in which the weight of authority holds a violation to be a common question, the occurrence of an unlawful tie-in often is held to present individual questions. The proper treatment of the tie-in violation is more readily understood after a survey of decisions that have addressed the problem in the context of the franchisee-franchisor relationship.

As expressed in *Ungar v. Dunkin' Donuts of America, Inc.*[80] (*Dunkin' Donuts I*):

> Under the Supreme Court cases there are three basic requisites to the establishment of an illegal tie: (1) there must be separate tying and tied products; (2) the seller . . . must possess sufficient economic power to appreciably restrain competition in the tied product; and (3) the tying arrangement must affect a "not insubstantial" amount of commerce.[81]

In most instances, the answers to the first and third questions will be identical for each plaintiff and therefore courts generally have not hesitated to treat them as common questions. This is not to suggest that courts should ignore an analysis of these elements,[82] but only that the focus of the class action controversy has centered on the more difficult question of how to treat economic power.

Use of the economic power of the defendant, not its mere possession, creates the economic evils that prompted tie-in prohibitions.[83]

626, 653 n.96 (1965). For purposes of class certification, the differences in the statutes present no significant problems.

80. 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

81. *Id.* at 89.

82. *See, e.g.*, Plekowski v. Ralston Purina Co., 68 F.R.D. 443, 449 (M.D. Ga. 1975). In *Plekowski*, the court, when forced to consider whether the delivery of feed on credit (the tying good) was separate from, or merely ancillary to, the sale of the feed, held that an individual question was present.

83. The underlying rationale for the law of tying was summarized by Justice White in his dissenting opinion in Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969): "There is general agreement in the cases and among commentators that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product. This distortion injures the buyers of the second product, who because of their preference for the seller's brand of the first are artificially forced to make a less than optimal choice in the second. And even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first, such tying agreements may work significant restraints on competition in the tied product. The tying seller may be working toward a monopoly position in the tied product and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market. They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if

The crux of the tie-in certification conflict is whether proof of that use of economic power is a common or individual question. The issue is often dispositive; in cases in which individual proof has been required, certification has been denied uniformly.[84] Because the resolution of substantive law conflicts in this area is a prerequisite to any comprehensive approach to predominance, proof of use of economic power is examined briefly.

The question of whether the defendant used its economic power in the tying good market to condition the sale of one good upon the purchase of another is often discussed in terms of the coercion of the purchaser by the seller. This individual coercion doctrine requires the plaintiff to show that the tie-in was imposed upon the buyer by the seller, *i.e.*, that the particular buyer was "coerced" into the agreement by the defendant's use of economic power in the tying good market.[85] In cases applying the individual coercion doctrine, defendants may attempt to avoid liability by asserting that the plaintiffs either requested or did not object to the tie-in and thus that no use of economic power was involved.

In instances in which an express contractual tie-in is evidenced in writing, a second approach to proof of use of economic power has evolved from the landmark franchisor-franchisee case of *Siegel v. Chicken Delight, Inc.*[86] In *Siegel*, the Chicken Delight franchisees

this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers." *Id.* at 512-13 (footnotes omitted).

84. *See, e.g.*, Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976); Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108 (C.D. Cal. 1978); Plekowski v. Ralston Purina Co., 68 F.R.D. 443 (M.D. Ga. 1975); *In re* Transit Co. Tire Antitrust Litigation, 67 F.R.D. 59 (W.D. Mo. 1975); Smith v. Denny's Restaurants, Inc., 62 F.R.D. 459 (N.D. Cal. 1974).

85. As noted in Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108 (C.D. Cal. 1978), "[i]n this . . . instance the buyer must show that he was coerced into purchasing the tied item." *Id.* at 118. The second method of showing the tie, in the absence of an express agreement, is by proving a course of conduct. Abercrombie v. Lum's, Inc., 345 F. Supp. 387, 391 (S.D. Fla. 1972).

86. 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). Many cases have adopted the *Siegel* position. *See, e.g.*, Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 118 (C.D. Cal. 1978); Schuler v. Better Equip. Launder Center, Inc., 74 F.R.D. 85, 87 (D. Mass 1977); Hi-Co Enterprises, Inc. v. Conagra, Inc., 75 F.R.D. 628, 632 (S.D. Ga. 1976); Hawkings v. Holiday Inns, Inc., 19 Fed. R. Serv. 2d 1332, 1325 (W.D. Tenn. 1975); Halverson v. Convenient Food Mart, Inc., 69 F.R.D. 331, 335 (N.D. Ill. 1974); Abercrombie v. Lum's, Inc., 345 F. Supp. 387, 390 (S.D. Fla. 1972); Butkus v. Chicken Unlimited Enterprises, Inc., 15 Fed. R. Serv. 2d 1067, 1069 (N.D. Ill. 1971). *Accord*, Bogosian v. Gulf Oil Corp., 561 F.2d 434, 452 (3d Cir. 1977); Hill v. A-T-O, Inc., 535 F.2d 1349 (2d Cir. 1976); Warriner Hermetics, Inc. v. Copeland Refrigeration Corp., 463 F.2d 1002 (5th Cir. 1972); Aamco Automatic Transmission, Inc. v. Tayloe, 67 F.R.D. 440, 448 (E.D. Pa. 1975).

sought treble damages for injuries suffered from unlawful ties of the franchise trademark to business supplies. The tied sales were imposed by a standard form franchise agreement which was essentially identical for each franchisee, thus allowing the trial court to certify the class based on a predominance of common questions.[87] The court of appeals held that the registered trademark of the defendant, when combined with the demonstrated power to impose a tie-in, established the requisite use of economic power as a matter of law.[88] Consequently the court affirmed the trial court's holding that the contractual agreements constituted an unlawful tying arrangement. Thus, the *Siegel* court did not require the particularized proof needed in cases applying the individual coercion doctrine.

Since *Siegel*, several cases involving non-contractual ties have faced the apparent conflict between the *Siegel* rationale and the individual coercion doctrine. Three opinions from the Third Circuit provide the leading discussions of this problem: *Ungar v. Dunkin' Donuts of America, Inc.*[89] (*Dunkin' Donuts I*); *Ungar v. Dunkin' Donuts of America, Inc.*[90] (*Dunkin' Donuts II*); and *Bogosian v. Gulf Oil Corp.*[91]

A lengthy analysis of the history of tying law led the court in *Dunkin' Donuts I* to reject the notion that each plaintiff must show individual coercion in buying the tied product.[92] The court examined the case law which had led to the birth of the individual coercion doctrine in *Abercrombie v. Lum's, Inc.*[93] and found the cases distinguishable from the *Dunkin' Donuts I* fact situation and unpersuasive precedent for the advancement of the individual coercion requirement.[94] It then ex-

87. 271 F. Supp. 722, 726 (1967) ("the franchise agreement is the focal point of the alleged acts perpetrated by the defendants").

88. 448 F.2d at 49.

89. 68 F.R.D. 65 (E.D. Pa. 1975), *rev'd*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976). For a brief discussion of *Dunkin' Donuts I* and *Dunkin' Donuts II* see 89 HARV. L. REV. 1318, 1507-11 (1976) (*Developments in the Law—Class Actions*) [hereinafter cited as *Developments*].

90. 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

91. 561 F.2d 434 (3d Cir. 1977). For a thorough discussion of the individual coercion doctrine and these three cases see Austin, *The Individual Coercion Doctrine in Tie-In Analysis: Confusing and Irrelevant*, 65 CALIF. L. REV. 1143 (1977).

92. 68 F.R.D. at 114.

93. 345 F. Supp. 387 (S.D. Fla. 1972).

94. 68 F.R.D. at 99-107. The case cited as the seminal opinion for the individual coercion doctrine was Abercrombie v. Lum's, Inc., 345 F. Supp. 387 (S.D. Fla. 1972). As *Abercrombie* involved a complex fact situation concerning 12 types of franchise agreements, the court in *Dunkin' Donuts I* looked to the authority cited in *Abercrombie* rather than suggest that the decision therein was decided incorrectly on its facts. 68 F.R.D. at 101. The court closely examined the coercion language in the three major cases cited in *Abercrombie*: Ford Motor Co. v. United States, 335 U.S. 303 (1948); American Mfrs. Mut. Ins. Co. v. America Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972); and Lah v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio 1970). The court found

amined the Supreme Court opinions in *Federal Trade Commission v. Texaco, Inc.*[95] and *Perma Life Mufflers, Inc. v. International Parts Corp.*,[96] interpreting them as support for the proposition that evidence of persuasion or influence will suffice as proof of the use of economic power.[97]

The trial court went on to hold that such influence may be inferred where there is a dominant relationship of franchisor over franchisee,[98] and therefore reached the conclusion that common questions of economic power predominated in the case before it. Class certification was granted.

The *Dunkin Donuts I* theory was rejected by the Third Circuit Court of Appeals in *Dunkin' Donuts II*. While clearly distinguishing the *Siegel* contract situation,[99] the apellate court felt that the "language and analysis respecting leverage, force and coercion"[100] in several Supreme Court decisions had established a coercion requirement. Because substantive tying law revolves around the concept of leverage, *i.e.*, the use of power in one market to gain an advantage in another, the court felt a coercion requirement necessarily was implied. The court perceived the harm from tie-ins as arising from the forced abdication of the buyer's judgment of the worth of the tied goods. From there it was but a short step to determine that coercion was necessarily an individual question as it involved the economic will of each claimant.[101] The court went on to distinguish the fact situations in *Texaco* and *Perma Life Mufflers* from the claim before it and decided that those cases failed to support the trial court opinion.[102]

The Third Circuit modified this stance in *Bogosian v. Gulf Oil Corp.*,[103] in which plaintiffs alleged that the defendant gas producers

that, where apposite, the term coercion was used to mean nothing more than the exercise of economic power. 68 F.R.D. at 101-05. Finally, *Abercrombie* was rejected for failing to consider the effect of the decision in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968). 68 F.R.D. at 105.

95. 393 U.S. 223 (1968). The *Dunkin' Donuts I* court recognized the factual distinctions between *Texaco*, a Federal Trade Commission Act case, and the case before it, but thought that the analysis of the use of economic power made the case useful as precedent. 68 F.R.D. at 108.

96. 392 U.S. 134 (1968).

97. 68 F.R.D. at 107-14. The court stated that "*Perma Life Mufflers* emasculates the individual coercion doctrine." *Id.* at 110.

98. *Id.* at 114.

99. 531 F.2d at 1215 n.5.

100. *Id.* at 1219.

101. *Id.*

102. The court noted simply that *Texaco* was factually and legally too different to be of any use. *Id.* at 1221. *Perma Life* was discarded because it was not a class action and because it was decided by the Supreme Court to eliminate a threat to effective antitrust enforcement. *Id.*

103. 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

had imposed tie-ins upon them through lease provisions. Despite language in *Dunkin' Donuts II* to the contrary, the court found that coercion was not the exclusive means of establishing a tie-in. Returning to the basic definition of an unlawful tie-in, imposition of a sale upon condition, the court held proof of individual coercion to be necessary only where the allegations are based on coercion of the franchisees and "an economic arrangement in which the perceived threat of termination buttresses the franchisor's salesmanship."[104] The court, distinguishing claims based on franchisor threats from those based on the *effects* of contractual obligations, created a possibility of common proof of issues which was unavailable after *Dunkin' Donuts II*. Under the facts in *Bogosian*, the combined practical effect of the lease provisions was to make it impossible for the plaintiffs to obtain alternative supplies. Accordingly, proof of individual coercion was unnecessary. Although clearly more restrictive than the *Dunkin' Donuts I* rationale, *Bogosian* implicitly does recognize the need for a flexible approach to proof of the use of economic power.

None of these Third Circuit opinions, however, discussed the issue of whether an explicit contractual agreement negates the need to show individual coercion in a class action. The Ninth Circuit Court of Appeals in *Moore v. Jas. H. Matthews & Co.*[105] recently addressed the issue and held that although a "modicum of coercion"[106] must be shown in such cases it can be inferred from proof of sufficient economic power in the tying good market.[107] Thus, despite a possible contrary interpretation of *Siegel*, the Ninth Circuit in theory reaffirmed the coercion requirement; at the same time the court negated the need for individual proof when an express tie is presented. The Second Circuit has taken a similar position in *Hill v. A-T-O, Inc.*[108] Hence, the *Siegel* fact situation still justifies class certification.

The lack of a definitive Supreme Court statement on the question of whether individual proof of coercion must be shown, or whether a *Siegel*-type rationale is permissible in class actions, has left the requirements of the substantive law of tying in doubt. Despite the clarification

104. *Id.* at 450.

105. 550 F.2d 1207 (9th Cir. 1977).

106. *Id.* at 1216.

107. The court held, similarly to the *Dunkin' Donuts I* court, that coercion could be inferred from proof that "an appreciable number of buyers have accepted burdensome terms, such as a tie-in, and there exists sufficient economic power in the tying product market." *Id.* at 1217.

108. 535 F.2d 1349 (2d Cir. 1976). The court held that "[a]n unremitting policy of tie-in, if accompanied by sufficient market power in the tying product to appreciably restrain competition in the market for the tied product constitutes the requisite coercion." *Id.* at 1355. After remand, class certification in the case was upheld on reargument. Hill v. A-T-O, Inc., 80 F.R.D. 68 (E.D.N.Y. 1978).

in *Bogosian*, the precedents and opinions do not address fully the use of economic power as the crux of the issue. This uncertainty in the substantive law, in contrast to substantive conspiracy law, has increased the problems in assessing predominance in these cases.

The problem of the coercion requirement can be distilled to a question of defining terms. The courts agree upon the basic elements of an unlawful tie-in; they agree that use of economic power is the critical behavior; and finally they agree that, generally, certification cannot be granted if individual proof of coercion is required. However, the meaning of the phrase "conditioning the sale of one product upon the purchase of another" is disputed.[109] If this phrase requires the bending of the buyer's economic will, it surely means individual coercion in the ordinary sense of the word. If, however, it merely means that the use of the economic power of the defendant is sufficiently shown in the tying market by the existence of an *otherwise* undesirable purchase, then perhaps the *Dunkin' Donuts I* court was correct.

The focus of the court in *Dunkin' Donuts II* on the need for establishing the overborne will of the individual franchisee suggests the reason for the individual proof of coercion requirement. The court feared that without the individual coercion requirement mere salesmanship by franchisors could result in liability, windfalls to plaintiffs, and the demise of the franchising industry.[110] In focusing solely upon the effects that a successful suit would have upon the litigants, however, the court ignored much of the foundation of antitrust law. In antitrust, perhaps more than any other branch of law, the emphasis is not only on the rights of the individual litigants. The very existence of treble damage awards highlights the unique regulatory goals of the substantive law. This broad outlook, as applied to a tie-in claim, is explained by Professor Turner:

> [T]he interest of buyers is not the only legitimate interest at stake. The [Supreme] Court has shown at least equal concern, and in later cases perhaps primary concern, with the interests of competing suppliers of a tied product in free access to the consuming market—a strong desire that competition in the sale of each product be "on the merits."[111]

Thus, particularly in tie-in claims, the private treble damage action is not merely a compensatory vehicle, but performs an established social function as well. Recognizing this function, the Supreme Court has upheld the use of private treble damage suits,[112] despite potential windfalls to individual litigants. As to the benefits of allowing franchisors to

109. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958).

110. 531 F.2d at 1222-24 & n.10.

111. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 60 (1958).

112. See note 8 *supra*.

go unmolested, the oft-quoted reminder of Justice Black that " 'tying agreements serve hardly any purpose beyond the suppresion of competition' "[113] seems to have been forgotten momentarily by some courts. The underlying forces promoting enforcement of tie-in law thus require a broader view of the economic consequences of the conduct than that taken by the court in *Dunkin' Donuts II*.

The court of appeals in *Dunkin' Donuts II* argued further that without proof of individual coercion there is no assurance that a tie-in even occurred, the mere sale of two products by one seller not being unlawful.[114] This argument overlooks the major point of the trial court opinion, *i.e.*, that it is the *use* of economic power which is the source of the tie. The oversight was remedied to some extent in *Bogosian* where the court refocused on this issue.[115] In light of this change in position the *Dunkin' Donuts I* decision to allow an inference of a tying violation from "evidence of a firm and resolutely enforced company policy to influence the franchisees . . . . at least . . . . where there is an unequal relationship between the parties"[116] or evidence of the "acceptance by large numbers of buyers of a burdensome or uneconomic tie"[117] seems more justified. The mere fact that more franchisors may be liable under this theory does not discredit its propriety. Furthermore, if the franchisors are indeed innocent, then there will be no overcharges resulting in recoverable damages.

Recognition of these concepts mandates a flexible approach to proof of economic power in class actions. Although the opinion in *Bogosian* focuses on one area in which individual proof of coercion is unnecessary, the influence of *Dunkin' Donuts II* remains. In the class action setting, the approach of that court unnecessarily limits the possibilities for framing common questions.

Proof of Impact in Tie-in Cases

Unlike the violation issue, the existence of common questions in establishing the fact of injury in tie-in cases has received very little attention by the courts. Many decisions, particularly those involving franchisee claims,[118] fail even to mention the requirement. Yet the problems raised by this issue are as important to tie-in claims as they are to conspiracy claims. The great concern over proof of coercion may

113. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 6 (quoting Standard Oil Co. of California v. United States, 337 U.S. 293, 305-06 (1949)).

114. 531 F.2d at 1224.

115. Bogosian v. Gulf Oil Corp., 561 F.2d 434, 449-50 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

116. 68 F.R.D. at 115.

117. *Id.* at 116.

118. See note 86 *supra*.

have diverted judicial attention from the impact issue. The individual coercion doctrine even may have acted as a substitute for proving the fact of injury; proof of a buyer purchasing goods against his or her business judgment is not far removed from proof of harm in one's business or property. Again, the franchisee-franchisor cases serve to illustrate the problem.

Proof of impact in franchisee tying claims based on express contractual ties is a vital aspect of the plaintiffs' prima facie case. Absent a requirement that impact be proven, plaintiffs not required to show individual coercion could maintain class membership despite an advantageous tie-in. Although damage *amounts* presumably could not be proven by unharmed buyers if the trial were bifurcated and the class certified, settlement pressures could result in awards to undamaged plaintiffs. Thus, certification of classes of the *Siegel* type without express consideration of the impact issue is unwise.

Courts addressing the impact issue would not necessarily be precluded from treating the question on a classwide basis. In the franchisee-franchisor setting there is a strong case to be made for inferring impact, following the approach developed in conspiracy decisions such as *In re Master Key Antitrust Litigation*.[119] If the franchisees all are operating under similar agreements, inquiry into the terms of the agreements and the status of the markets in which they operate, rather than into the plaintiffs' individual economic status, may provide the basis for a classwide inference of impact. In short, as in conspiracy claims, if the defendant is overcharging for goods, and all franchisees receive similar treatment, there is little point in requiring particularized proof of impact.

In one recent case, *Krehl v. Baskin-Robbins Ice Cream Co.*,[120] the court applied this approach to a franchisee-franchisor situation. The franchisees alleged that the franchisor's trademark had been used to force unlawful ties to several goods, including ice cream products, equipment packages, and supplies. The claims based on the equipment packages and supplies were denied certification, in part because impact would have required individual proof.[121] The other claims were sufficiently susceptible to general proof, in the court's opinion, to justify certification. The distinction appeared to lie in the magnitude of the existing alternative markets and their structures. If a market for a lower priced substitute exists, with a reasonably stable price structure, and that market is sufficiently widespread to reach the majority of the class members, then arguably buyers have been denied access to these cheaper goods. Impact then reasonably can be established on a class-

119. 70 F.R.D. 23 (D. Conn.), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975). See also cases cited note 53 *supra*.

120. 78 F.R.D. 108 (C.D. Cal. 1978).

121. *Id.* at 120.

wide basis. Absent a clear alternative market, there is great difficulty in establishing that each plaintiff did in fact have another viable source of supply at a lower price. Accordingly, in *Krehl* the limited markets for the equipment and supplies precluded a reasonable inference of impact and the individual proof requirements predominated on those claims.

The type of analysis used in *Krehl* would appear applicable to most franchisee-franchisor tie-in disputes. Some other flexible approach also may be appropriate. The basic and essential need is for courts to clearly articulate the approaches being used.

Outside of the franchise agreement cases, the impact issue becomes more complex and the decisions reveal an amazing array of sentiment. In one of the most pro-class action, if not the most legally sound, opinions in this field, the court in *Herrmann v. Atlantic Richfield Co.*[122] expressed the opinion that concern over individual proof of impact "overlook[s] the utility of the vehicle written into Rule 23."[123] This opinion is even more remarkable in view of the fact that *Herrmann* combined allegations of conspiracy and tie-in. The solution, according to this court, was to decertify the class for trial of the "damages" issues if necessary.[124]

A more thorough analysis of the impact issue appears in *Sommers v. Abraham Lincoln Federal Savings & Loan Association*,[125] another case containing both conspiracy and tie-in claims. The court squarely addressed the question of impact and, despite the absence of a written agreement, found that the evidence on this point would overlap sufficiently to make impact a common question.[126] This case, which involved a proposed class of 370,000 mortgagors seeking damages from mortgage writing companies for requiring escrow prepayments and keeping the interest generated thereby, indicates that under certain circumstances impact need not be established by individual proof. If individual evidence would be completely repetitive, courts need not assume that this element presents an inherently individual question.

Just such an assumption prompted the court in *Plekowski v. Ralston Purina Co.*[127] to hold that impact in that case was indeed an individual question of fact and law.[128] While the complex facts of this case, which involved the alleged tying of feed purchases to the advancement of loans and the extension of credit for such purchases, may justify the conclusion reached by the *Plekowski* court, the lack of analysis sets a

122. 65 F.R.D. 585 (W.D. Pa. 1974).
123. *Id.* at 593.
124. *Id.*
125. 66 F.R.D. 581 (E.D. Pa. 1975).
126. *Id.* at 591.
127. 68 F.R.D. 443 (M.D. Ga. 1975).
128. *Id.* at 449-50.

harmful precedent. The court relied primarily on *Shaw v. Mobil Oil Corp.*[129] for the proposition that in tie-in cases "proof of impact . . . will necessarily be different for each member."[130] *Shaw* cited a string of opinions in support of its critical assertion, yet of the six cases cited,[131] only one—*Siegel*—involved a class action certification. The remaining cases did not address the necessity for individual as opposed to classwide proof but merely recited the well accepted rule that before recovery can be allowed there must be sufficient evidence submitted from which a jury can find actual damage to the particular plaintiffs.[132] The opinions in *Sommers* and *Master Key* do not dispute this proposition, but merely hold that in a class setting there may be instances in which the fact of injury can be established on a classswide basis.

The *Siegel* opinion also provides no support for the individual proof requirement. The appellate court in *Siegel*, a franchisee suit, merely refused to find, as a matter of law, that the franchise agreement established impact for the entire class.[133] The simple fact that the class in *Siegel* was certified and the case went to trial is evidence that the opinion is not persuasive in requiring individual proof of impact.

Thus, despite the influential opinion in *Plekowski*, the rationale of the *Sommers* court appears to be a more sound approach to certification. It not only upholds the substantive goals of private antitrust enforcement by preserving a remedy for aggrieved plaintiffs, but it does so without eroding the substantive or procedural rights of defendants. So long as a jury, upon hearing the evidence supporting a classwide finding of impact, can reasonably infer that each class member was in fact injured in his or her business or property, defendants are not prejudiced. The question of impact deserves, as does the question of a violation, a careful analysis based upon the facts of each case and not upon judicial misgivings about class suits in general. The national antitrust laws and the Federal Rules of Civil Procedure demand that

129. 60 F.R.D. 566 (D.N.H. 1973).

130. *Id.* at 569.

131. *Id.* (citing Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 901 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973); Gray v. Shell Oil Co., 469 F.2d 742, 748-49 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 52 (9th Cir.), *cert. denied*, 405 U.S. 955 (1971); Wincker & Smith Citrus Prods. Co. v. Sunkist Growers, Inc., 346 F.2d 1012, 1014 n.1 (9th Cir. 1965); Herman Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906, 909-10 (2d Cir. 1962); Carswell Trucks, Inc. v. International Harvester Co., 334 F. Supp. 1238, 1239 (S.D.N.Y. 1971)).

132. *E.g.*, the passage referred to in Herman Schwabe Inc. v. United Shoe Mach. Corp., 297 F.2d 906 (2d Cir. 1962), merely states that the Supreme Court has never "held that mere proof that a defendant has injured its competitors generally warrants recovery *in the absence of evidence that would justify a finding of injury to the particular plaintiff. . . .*" *Id.* at 909-10 (emphasis added).

133. 448 F.2d at 52-53.

courts undertake the burden of these trials whenever the requirements of Rule 23 are met.

As discussed earlier, tie-in claims have proven to be a source of confusion when tried as class suits. The confusion has led to some unnecessary restrictions on the classwide treatment of the violation issue which fail to take into account the national policies behind antitrust regulation. Proof of impact in these cases has suffered similarly from unnecessary assumptions restricting class treatment. Well reasoned opinions exist addressing the predominance of common questions in finding a violation and establishing impact. The flexible aproaches shown in these cases, as in the conspiracy cases discussed previously, serve as models for addressing the first two elements of a prima facie case under section 4.

Proof of the Amount of Damages

The final element in a section 4 claim is proof of the amount of damages. Differences among plaintiff class members as to the amount of damages suffered are almost sure to exist. As a result, in the absence of the use of a lump sum or fluid recovery,[134] the courts generally have agreed that the amount of damages suffered presents an individual question.[135] This has not meant that differences in the amount of damages always militate against certification. Rather, under Rule 42(b),[136] the question of damages may be severed from that of liability for separate trial. Consequently, predominance analysis has focused on determining whether the alleged violation and impact effectively can be adjudicated for the entire class in a proceeding independent from the damage assessment.[137] Moreover, this treatment of the damage assessment portion of a case has not varied with the type of antitrust claim being pressed—proof of damages for all commercial injuries is remarkably similar. Hence, the following discussion of the final prima facie

134. The use of a fluid class recovery allows the court to try the damage issue once, arriving at a single award for the entire class. The lump sum then can be divided among the members by an administrative scheme created by the parties and approved by the court. Although this concept has caused considerable controversy in the past, it is not seriously pursued by plaintiffs today and was explicitly rejected by the Second Circuit in Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974). *See generally* WRIGHT & MILLER, *supra* note 37, § 1784 & authorities cited therein.

135. "[A]s the federal judiciary has recognized, 'damages' is generally an individual question." *In re* Sugar Antitrust Litigation, 73 F.R.D. 322, 351 (E.D. Pa. 1976).

136. FED. R. CIV. P. 42(b) provides that "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States."

137. *See generally* 3B MOORE'S FEDERAL PRACTICE ¶ 23.45[2], at 23-335 (2d ed. 1978).

element of a section 4 claim considers conspiracies and unlawful tie-ins simultaneously.

The use of bifurcation in antitrust class actions has led to two problems which bear on the certification process. The first problem, recognized in *Alabama v. Blue Bird Body Co.*,[138] stems from the use of separate juries for the liability and damage portions of a trial. This practice creates a risk that a plaintiff who has established the fact of injury at the liability stage may be unable to convince the second jury that he or she is deserving of a damage award. On the other hand, once liability is established a sympathetic jury limited to assessing merely the remedy for aggrieved plaintiffs may be tempted to overcompensate—an especially dangerous consequence in treble damage actions. The possibility of such inconsistent jury awards led the court in *Blue Bird* to emphasize that bifurcation must be approached cautiously and with a clear understanding between the parties and the court of the issues and proof involved in each phase of the trial.[139] Furthermore, although bifurcation is an accepted method of dealing with the damages element in class suits, it has not escaped criticism from commentators.[140]

A second, more subtle problem involves the weight to be given the damage issue in assessing the overall balance between common and individual questions. In instances where the court is convinced from the outset that wholly individual proof of damages will be necessary, thereby necessitating either bifurcation or denial of certification, most courts have been willing to base their determination of predominance solely on the issue of liability.[141]

This approach seems justified if the entire scope of Rule 23 is kept in mind. As Rule 23(c)(4) allows certification on single issues, predominance can be assessed with respect to only those issues to be adjudicated on a classwide basis. A problem arises only if avoiding the apparent conflict between the individuality of proof of damages and the commonality of the remaining issues distorts the certification process. As discussed previously,[142] bifurcation of violation and impact issues ignores the need to at least consider all of the issues as a whole and distorts analysis of the issue of liability—the ultimate concern for trial. Although removing proof of damages from the predominance analysis undoubtedly changes the picture, it does not distort the evalua-

138. 573 F.2d 309 (5th Cir. 1978).

139. *Id.* at 318-19.

140. *See* AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE 8-10 (1972); Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D 375, 382-83 (1972).

141. See note 137 & accompanying text *supra*.

142. See notes 67-73 & accompanying text *supra*.

tion of a major issue for the court or jury by separating two aspects of a unitary question.

Neither should it lead to unwarranted certifications as problems of individual proof can be given their due attention in the analysis of superiority. To the extent that proof of damages dominates the overall dispute as an individual question the class action becomes a less desirable remedy. If the adjudication of individual damages creates an insoluble puzzle for the court, making the class unmanageable, then class adjudication of the claim is not warranted. Several techniques have been adopted, however, which may lessen the load on the court. Among them are the use of masters and statistical methods of classwide proof.[143] Thus, it is the rare case in which damage assessment problems alone will prevent certification.

This brief discussion indicates that the courts have developed a workable, if imperfect, method of integrating the damages issue into the framework of Rule 23 without unduly hampering substantive antitrust policy. This success may be due in part to the fact that the treatment of damage arises in all 23(b)(3) suits and as such has required more consistent and widespread attention to preserve the class action remedy.

The Superiority of Class Actions in Antitrust Claims

Even if predominance of common questions is found, antitrust class certification analysis under Rule 23(b)(3) is not complete until the class proponents have shown that the class suit "is superior to other available methods for the fair and efficient adjudication of the controversy."[144] The question of superiority in antitrust cases is simpler than the issue of predominance in one respect at least. Predominance analysis requires a substantially different set of standards for each type of violation alleged. In contrast, superiority analysis depends to a higher degree on the factual situation of the plaintiffs, *i.e.*, the number of plaintiffs, the size of their claims, and the costs of the trial. Further, Rule 23 provides some guidance in the evaluation of superiority by listing "matters pertinent to the findings."[145] Of these factors, the man-

143. "A range of techniques, including reference to masters, streamlined summary judgment procedures, shifts in burdens of proof, class-wide calculation of damages, administrative processing of individual claims, and the so-called fluid class recovery . . . have been proposed as means for making delivery of relief feasible in class actions involving individually nonrecoverable or nonviable claims." *Developments*, *supra* note 89, at 1517 (footnotes omitted); *see also In re* Sugar Antitrust Litigation, 73 F.R.D. 322, 350-55 (E.D. Pa. 1976).

144. FED. R. CIV. P. 23(b)(3).

145. FED. R. CIV. P. 23(b)(3) provides that "matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or

ageability aspect of the class action has been the crucial focus of superiority analysis, often to the exclusion of everything else.[146] Both proponents and opponents of certification have refused to be limited to these factors listed in Rule 23 when arguing superiority, however, and a multitude of other arguments for and against class suits have been raised. Many of these issues appear in virtually all class suits and this Note does not attempt to restate them here.[147] Other issues have a magnified impact when raised in antitrust claims and therefore warrant further discussion.

The first of these more significant problems has been raised by proponents of class actions who argue that a class action should be deemed superior when there are large numbers of small claims or when the defendant has such economic power that it can be deterred only by a class suit.[148] The essence of the argument is that because no viable alternative method of private adjudication exists in these cases the class suit necessarily must be superior.[149] Despite the relative frequency with which antitrust actions may fit this mold, not all courts have been receptive to the idea, particularly in the Ninth Circuit. In the *Hotel Telephone* case the argument was rejected firmly, the court believing that if no suit could be maintained absent the monetary incentives of class status, then " 'that decision of the legal marketplace may be the best reflection of a public consciousness that the time of the

undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

146. "A number of federal courts . . . have appeared to treat 'manageability' as a self-contained criterion for evaluating class actions, and have placed primary reliance upon the conclusion that a class action was unmanageable in holding that class litigation should not go forward." *Developments*, *supra* note 89, at 1498-99. *See, e.g.*, Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir.), *cert. denied*, 435 U.S. 968 (1977); *In re* Hotel Telephone Charges, 500 F.2d 86, 90-92 (9th Cir. 1974); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974).

147. *See generally Developments*, *supra* note 89, at 1578-1622 (overview of issues concerning attorney conduct, including solicitation of cases, settlement proceedings, and fees); Note, *Computing Attorney's Fees in Class Actions: Recent Judicial Guidelines*, 16 B.C. INDUS. & COM. L. REV. 630, 633-34 (1975); Note, *New Standard to Determine a Reasonable Fee Award for Class Action Attorneys*, 8 SUFFOLK U.L. REV. 1354 (1974). *See also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (individual claims averaging two dollars would have been wholly consumed by costs of notice); *In re* Hotel Telephone Charges, 500 F.2d 86, 88 (9th Cir. 1974) (similar facts; discussed at note 43 *supra*); WRIGHT & MILLER, *supra* note 37, § 1786; Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 390-92 (1972).

148. *See Developments*, *supra* note 89, at 1355-56 & authorities cited therein.

149. *See, e.g.*, Professional Adjusting Sys., Inc. v. General Adjustment Bureau, Inc., 64 F.R.D. 35 (S.D.N.Y. 1974), in which the court found the class action superior, rationalizing that a decision "to bar a class action would mean that GAB could never be challenged on the nationwide conspiracy allegedly focused in GAB. If it is desirable that full scope be allowed for proof of the conspiracy alleged, there is no way to do that except by a class action." *Id.* at 39-40.

lawyers and of the court should be best spent elsewhere.' "[150]

The logical extension of this argument is that the procedural remedy provided in Rule 23 was not designed to serve any function other than to operate as a joinder tool for viable individual actions and therefore its availability is worth little judicial consideration as a reason for certifying a class. The need for a remedy for aggrieved plaintiffs and the goals of the Rule's drafters suggest otherwise and require that the unavailability of alternatives to a class action be given some weight in the evaluation of superiority.

A related issue with significant impact on antitrust claims stems from the position taken by some courts that a class suit is unnecessary where the average claim is large enough to justify an individual trial.[151] Antitrust claims are particularly susceptible to this criticism; both the statutory trebling of damages and the attorney's fee provisions, as well as the potential for significant individual economic harm from an antitrust violation, provide the possibility of substantial damage recoveries. Yet the mere fact that individual claims are viable does not invalidate the economies and uniformity to be gained from a class suit. The argument appears to be little more than a useful device for justifying decisions based on other, perhaps unarticulated, grounds; at the very least it evidences a strong distaste for class adjudication. If indeed a class should be denied certification, the court so deciding should base its opinion on the true reasons for denial and avoid relying on unjustified criticisms of class treatment.

Although these factors are of importance in assessing the superiority of antitrust class suits, rarely have they been dispositive. Courts have more frequently focused on other aspects of superiority analysis, particularly the burden of managing large and complex class suits.

Manageability of Antitrust Class Actions

The dominant superiority issue to date has been the manageability of the large class. Despite the fact that Rule 23 denotes manageability as but a single factor in addressing superiority,[152] many courts have elevated the question to the status of a separate, and often dispositive, certification requirement.[153] This emphasis on manageability problems has created a substitute for evaluating superiority. The result has been

150. 500 F.2d at 92 (quoting Hackett v. General Host Corp., 455 F.2d 618, 626 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972)).

151. *See, e.g.*, Kline v. Coldwell, Banker & Co., 508 F.2d 226, 234 (9th Cir. 1974); San Antonio Tel. Co. v. American Tel. & Tel. Co., 68 F.R.D. 435, 441 (W.D. Tex. 1975).

152. See note 145 & accompanying text *supra* for the listing of matters pertinent to the findings of superiority. The term manageability is undefined in Rule 23, and the case law has not utilized the term in any consistent manner. See note 155 & accompanying text *infra*.

153. See note 146 *supra*.

an expansion of the manageability concept to include issues that are unrelated to the actual management of a class.[154] This lumping together of unrelated issues has generated a hodgepodge of decisions rather than a cohesive doctrine of manageability or superiority.[155] Moreover, it has allowed courts to avoid the type of analysis that 23(b)(3) would seem to require—a comparative evaluation of available adjudicatory techniques. While some courts have examined the test case concept,[156] or have opted for liberal joinder rather than class certification,[157] there has been little analysis of those alternative techniques in most antitrust cases.

Manageability analysis would be more useful if it were restricted to addressing the court's ability to proceed with the case. Virtually all classes would be to some degree manageable under this definition, with the difficulties of a particular case going to the weight of the problem in a comparative superiority analysis. The adoption of such a comparative analytical approach, however, would not require certification whenever the class suit is the only available remedy. If indeed a specific class is so burdensome that it threatens to swamp the available judicial resources, then the fact that any other adjudicatory technique would be even more troublesome is no justification for continuing the trial.

One of the problems with this analysis, however, is that the limits of the judicial system's ability to deal with large cases are not known. In truth, if a court were to accept even a horrendously complex case, some resolution eventually would come about. Obviously that is not a desirable approach as there comes a point at which there is no reward to be gained from muddling through a case that cannot be handled

154. *See generally* Note, *Federal Rule 23 Class Actions: The Manageability Problem*, 4 SW. U.L. REV. 112, 113 (1972). Issues frequently cited include the costs of notice, *see, e.g.*, Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1016-17 (2d Cir. 1973), *vacated*, 417 U.S 156 (1974); and the small size of individual claims, *see, e.g.*, *In re* Hotel Telephone Charges, 500 F.2d 86, 91 (9th Cir. 1974).

155. "[T]he courts have not attempted to develop a general doctrine of manageability, but rather have limited their analysis to the identification of the 'unmanageable' features of particular class suits." *Developments*, *supra* note 89, at 1499. *See also* Note, *Federal Rule 23 Class Actions: The Manageability Problem*, 4 SW. U.L. REV. 112 (1972).

156. A test case approach, as proposed in Katz v. Carte Blanche Corp., 496 F.2d 747, 758 (3d Cir. 1974), involves litigating an individual suit, which is given wide collateral estoppel effect in subsequent litigation. The scope of the collateral estoppel effect has been the subject of substantial confusion. *See, e.g., id.* at 758-62.

157. *See, e.g.*, School Dist. of Philadelphia v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967): "Recognizing that practical considerations, among others, materially affect our determination of the class issue, we are impelled to conclude that the class action device is not, in this instance, 'superior' to the more conventional procedure of allowing liberal intervention under Rule 24 and permissive joinder under Rule 20." *Id.* at 1004. *Cf.* WRIGHT & MILLER, *supra* note 37, § 1781, at 84-87 (general discussion of advantages and disadvantages of joinder as a substitute).

efficiently. Thus, courts are left to balance the degree of the problems in managing a given case. If a more consistent approach were developed, the experience of other courts would be of more value to a judge assessing the burden of a potential class certification upon his or her court. For example, those cases denying certification due to complexity[158] or the sheer number of class members[159] could be identified more readily and hence compared with successful suits of a similar size or character. In this manner, more liberal courts would act as experimenters for those more reluctant to attempt innovative class management techniques. While this certainly occurs today, if the focus of the issues under the manageability doctrine were narrowed, the success or failure of these innovators would be more easily monitored. As the doctrine is used currently, there is little or no evidence of the limits to which judicial resources can be stretched without unduly hampering judicial effectiveness.

Placing unrelated issues outside the rubric of manageability also might alter the manner in which a trial judge would consider those issues. For example, if courts were precluded from deeming a particular class unmanageable simply because notice costs were exorbitant, clearer analysis of both issues—manageable class size and procedures, and the viability of classes faced with staggering costs—might be achieved. While manageability analysis must include an assessment of the ability of the court to shoulder its administrative burden, comprehensive superiority analysis requires more—a comparative analysis of alternative procedures and an evaluation of substantive policies.

The Fear of Overdeterrence

The final group of issues with magnified import in the antitrust setting revolve around the effectiveness, or overeffectiveness, of the treble damage action as a deterrent. Many courts have taken into account the substantive policies behind treble damage actions when evaluating the superiority of class actions. The rationale behind this approach was explained in *Hackett v. General Host Corp.*[160] where the court noted:

> The chief policy argument in favor of a hospitable attitude toward such class actions is that they tend to reenforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or by single-party private enforcement. Viewed in this light the revised Rule 23 may be seen as an extension by the

158. *See, e.g.*, Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir.), *cert. denied*, 435 U.S. 968 (1977). Cotchett v. Avis Rent A Car Sys., Inc., 56 F.R.D. 549, 553 (S.D.N.Y. 1972).

159. *See, e.g.*, *In re* Hotel Telephone Charges, 500 F.2d 86, 90-91 (9th Cir. 1974); City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 70-71 (D.N.J. 1971).

160. 455 F.2d 618 (3d Cir. 1972).

> Supreme Court, acquiesced in by Congress, of the deterrent policies of such statutes as § 4 of the Clayton Act.[161]

The fear now has been expressed, however, that treble damages, when claimed by the large numbers of plaintiffs in a 23(b)(3) class action, may result in overdeterrence and the imposition of undue penalties. One court has gone so far as to reject the idea of promoting deterrence through section 4 class actions altogether, stating that "the Congressional scheme does not contemplate that private attorneys are to act as prosecutors to force antitrust violators to disgorge their illegal profits in the general interest of society at large."[162] This approach not only ignores the fact that plaintiffs must prove their individual damages before the award is trebled, but also seems to go against the explicit views of the Supreme Court, Congress, and commentators.[163]

Other courts have expressed similar fears in denying certification of class actions. *Kline v. Coldwell, Banker & Co.*[164] exemplifies such an attitude. The court in *Kline* analogized a section 4 claim to a claim for a statutory penalty.[165] The court then looked to case law under the Truth in Lending Act[166] as precedent for ruling that class treatment was inappropriate where the joint and several liability of a small offender, as a result of trebling the class claim, could be $750 million.[167] The court adopted the conclusion of Judge Frankel in *Ratner v. Chemical Bank New York Trust Co.*[168] that there was no need for class actions in such cases and that allowing certification would " 'carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement.' "[169]

Since the time of the *Kline* case the Truth in Lending Act has been amended to eliminate any concern for overdeterrence.[170] The antitrust laws also have been amended, but rather than showing a move towards less deterrence, the enforcement aspects of the laws have been strengthened. The move towards increased deterrence is evidenced by the pas-

161. *Id.* at 623.

162. *In re* Hotel Telephone Charges, 500 F.2d 86, 92 (9th Cir. 1974).

163. See notes 7-8 *supra*. But see note 11 & accompanying text *supra* for criticisms of treble damage suits.

164. 508 F.2d 226 (9th Cir. 1974).

165. *Id.* at 234.

166. 15 U.S.C. § 1640 (1976).

167. 508 F.2d at 234.

168. 54 F.R.D. 412 (S.D.N.Y. 1972).

169. 508 F.2d at 234-35 (quoting Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 414 (1972)).

170. Act of Oct. 28, 1974, Pub. L. No. 93-495, Title IV, §§ 406-408(d), 88 Stat. 1518 (amending 15 U.S.C. § 1640 (1970)). The amendments placed a ceiling on the amount of damages recoverable in a class action brought under the Act. The maximum recovery is set at the lesser of $100,000 or 1% of the net worth of the defendant. *Id.*

sage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[171] which authorized state attorneys general to bring *parens patriae* suits on behalf of their states' citizens who were injured as a result of Sherman Act violations. The legislation authorizes the payment of treble damages despite the risk of joint and several liability for substantial sums.

Beyond the fact that the *Kline* court may have misconstrued congressional intent in applying the rationale of the Truth in Lending Act cases to an antitrust case, the impact upon future misconduct of disallowing potentially large recovery class actions must be considered. Such consideration is especially important in light of the apparent expansion of the *Kline* approach in *Marks v. San Francisco Real Estate Board*.[172] In that case the court made an explicit judgment that the potential size of the award imposed unfair liability upon the defendants.[173] This type of reasoning, which logically would preclude all joint and several liability in claims for large amounts, can be criticized on several bases. First, the reasoning discounts the congressionally provided incentives to promote private enforcement.[174] Second, it actually tends to create an incentive for knowing violators to cause as much widespread harm as possible, for the large scale plan would be virtually exempt from private attack.[175] Third, it seems to forget that to be liable for sums as large as $750 million a defendant must wreak substantial economic havoc.[176] Thus, despite the potential "unfairness" or overdeterrence created by class suits for treble damages, the argument certainly must not be allowed to dominate findings of superiority nor should it be given undue weight in the evaluation process.[177]

A Suggested Approach to Superiority

The foregoing discussion is not meant to suggest that a given case will deal with all, or even most, of the issues relating to superiority

171. Pub. L. No. 94-435, 90 Stat. 1383 (1976).

172. 69 F.R.D. 353 (N.D. Cal. 1975).

173. *Id.* at 355-56. The court applied the rationale even though there was no defendant class. The only consideration was whether the potential liability was unfair.

174. See note 8 *supra*.

175. Under the *Marks* rationale, it appears that if large numbers of plaintiffs are injured only slightly, there is little chance of a viable class suit, yet there is insufficient incentive for an individual lawsuit. In these instances, defendants who are potentially liable for large amounts need only fear government prosecution, the shortcomings of which have been discussed. See note 7 & accompanying text *supra*.

176. A related point that the court's rationale seems to ignore is that to recover, plaintiffs must prove to the court's satisfaction that they were in fact injured and also establish the amount of the damages (before trebling) at trial.

177. There may well be some danger of businesses avoiding lawful practices to escape potential prosecution; nonetheless current congressional policy would seem to suggest that this danger is not of great concern in the certification process. This danger may well be of greater concern when evaluating reform of existing substantive law.

considered above. An awareness of the issues potentially involved is necessary, however, if a comprehensive approach to superiority analysis is to be developed. Certain factors in the approach suggested below may not be relevant to specific cases, but the approach does point out the more typical concerns in an attempt to develop a general method of evaluating superiority.

There is little reason to doubt, particularly in light of the discussion of potential overdeterrence, that substantive policies play an important role in superiority analysis. Incorporation of substantive policies in superiority analysis has been urged before as a more desirable method of deciding whether or not to grant certification.[178] Recognition of this interplay requires consideration of the benefits to be gained from litigation of a claim that may be more indirect than compensation for losses, *e.g.*, the disgorgement of unlawful gains and deterrence from future misconduct.[179] Although a step in the right direction, balancing these policies alone would not provide a complete answer for superiority analysis. For a trial judge to determine whether a specific antitrust class action is superior to other adjudicatory methods, there must be an evaluation of the available alternatives.

Initially, perhaps inquiries should center around potential misconduct of the attorneys. This issue necessarily will be of continuing concern to the court in a class action, as the court must protect the interests of absent class members. The next inquiry can most profitably be made into the manageability of the class,[180] for in the rare case in which the class is absolutely unmanageable there is little need for further analysis. In the event that the court is able to devise class procedures that will allow the class to meet some threshold level of manageability, substantive antitrust policies become more relevant. For instance, classwide proof of an unlawful conspiracy may well be the most desirable form of proof, as there are very few variations from class member to class member.[181] Similarly, the cause of action alleged may have some bearing on the availability of alternative remedies, including joinder and individual trials.[182]

The question is complicated, however, when no alternative remedy is available. In these instances a judge must keep a broad perspective on the substantive policies at issue to determine whether enforcement

178. *Developments*, *supra* note 89, at 1498-504.

179. *Id.* at 1502.

180. *Cf. id.* at 1503-04 (suggesting that a court initially should be concerned with class procedures, then with the manageability of the class).

181. See text accompanying notes 29-48 *supra*.

182. For example, a plaintiff alleging a monopolization violation under § 2 of the Sherman Act may well have fewer parties to the action than a conspiracy violation of § 1 of the same Act. The fewer number of parties involved may make a joinder a feasible alternative or may prompt that court to adopt the test case approach. See note 156 *supra*.

of the rights involved is desirable despite potential problems such as allowing the costs of litigation to devour a large part of any direct compensation. The range of interests to be protected by the antitrust laws, as discussed earlier,[183] is wider than that found in many areas of the law. Superiority analysis should reflect this broad scope and take into account the clear regulatory and deterrent facets of the private treble damage suit.

The Continuing Need for Judicial Action in Antitrust Class Proceedings

The Role of the Active Trial Bench

Underlying the preceding discussion of certification has been the assumption that continued evolution of the judge's role is a necessary and beneficial aspect of promoting effective private enforcement. Historically, the role of the trial judge has been limited; the adversaries before the court shaped the issues and controlled the litigation while the bench served as a passive decisionmaker.[184] A corollary to this litigation model was that the courts were concerned primarily with the resolution of the conflict immediately before them, with little regard for societal welfare.[185] Although the federal judiciary has always been limited in its ability to assume a lawmaking role,[186] as early as 1906 federal

183. See notes 4-11 & accompanying text *supra* for a discussion of private antitrust enforcement policies.

184. For a description of the traditional model of litigation as well as its modern counterpart, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-84, 1302 (1976). *See also* K. LLEWELYN, THE BRAMBLE BUSH 12, 21 (1930).

185. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285 (1976); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 57 A.B.A.J. 348, 348-50 (1971) (1906 speech reprinted in abridged form); Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 346 (1905).

186. U.S. CONST. art. III limits federal courts to deciding "cases" and "controversies," terms not especially clear standing alone. Chief Justice Earl Warren summarized the problem: "The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.' As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine." Flast v. Cohen, 392 U.S. 83, 94-95 (1968).

courts were being exhorted to be more responsive to societal pressures.[187] One of the methods for doing so was to expand the role of the trial judge.

In response to these pressures, the role of the judiciary has changed dramatically in recent years, to the point that many types of litigation, such as antitrust claims, now are more closely attuned to a public law model.[188] The lawsuit has become a vehicle for furtherance of constitutional and state policies, as Professor Chayes indicates: "[T]he new model reflects and relates to a regulatory system where these arrangements are the product of positive enactment. In such a system, enforcement and application of law is necessarily implementation of regulatory policy."[189] The broadened interests affected by individual lawsuits has forced the federal judiciary to incorporate new procedures and remedies.[190] One result of these changes is that the judge must take an active role in protecting the interests of those not before the court. The breakdown of this expanded judicial role would be inevitable absent a judiciary willing to enter the litigation process actively and ready to accommodate modern litigation.

Evidence of the existence of this model can be found in the adoption of the Federal Rules of Civil Procedure, which streamlined trial formalities and gave the trial judge considerable power and discretion.[191] Further, of all the Federal Rules, Rule 23 epitomizes these beliefs in the role of the judge and the function of the court. The wording of Rule 23, as well as the power and discretion granted the judge therein, mandate that the trial judge not only be active in, but actually dominate, class certification proceedings.[192] Class actions by definition

187. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 57 A.B.A.J. 348, 350-51 (1971) (1906 speech reprinted in abridged form).

188. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

189. *Id.* at 1304.

190. The amendments to the Federal Rules of Civil Procedure made in the 1960s significantly altered the federal rules relating to discovery and joinder of claims and parties. The 1963 and 1966 amendments have been discussed by Professor Kaplan, Reporter of the Advisory Committee on Civil Rules. Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 HARV. L. REV. 601, 801 (1964); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 591 (1967). The broadened interests of those supporting the proposed amendments in the early 1960s can be found in Kaufman, *The Philosophy of Effective Judicial Supervision Over Litigation*, 29 F.R.D. 207 (1962).

191. See note 190 *supra*.

192. FED. R. CIV. P. 23. Rule 23(c) requires the court to (1) determine whether the class suit may be maintained; (2) direct notice to the class members in a 23(b)(3) suit; (3) determine the members of the class; and (4) apply the provisions of the Rule to subclasses when appropriate. Rule 23(d) empowers the court to make "appropriate orders" to (1) determine "the course of proceedings . . . to prevent undue repetition or complication"; (2) protect the class members by giving notice of any developments in the proceedings; (3) impose "condi-

raise issues which transcend the interests of the immediate parties. To that extent, the judge must adopt a "societal" outlook on the litigation to protect absentee class members.

This role is taken to perhaps its furthest extreme in antitrust class suits. The regulatory nature of a class suit is magnified substantially when the class is used as a private antitrust enforcement tool under section 4 of the Clayton Act.[193] The trial judge in a private Rule 23(b)(3) antitrust suit must be constantly aware of and protect the interests of the public in the immediate litigation. In essence, the trial judge is charged with the responsibility of upholding substantive antitrust policies.

Legislative Responses to Class Action Problems

The result of this delegation of discretion and power to the trial judge has been innovation on the one hand and confusion on the other. The flexibility built into Rule 23 has allowed courts to enter new situations with new procedures and remedies. Not all the results have been beneficial. Attorneys,[194] courts,[195] and commentators[196] have expressed dissatisfaction with Rule 23 on issues ranging from the inaccessability of federal courts to the costs of litigation. Proposals for reform are numerous.[197]

---

tions on the representative parties or on intervenors"; (4) require that the trial and pleadings eliminate reference to absent persons; and (5) deal "with similar procedural matters." Further, Rule 23(e) requires that dismissals and compromises, *i.e.*, settlements, be approved by the court, with notice directed to all members of the class in a manner also approved by the court.

193. 15 U.S.C. § 15 (1976).

194. *See, e.g.*, Responses to the Rule 23 Questionnaire of the Advisory Committee on Civil Rules, *reprinted in* 5 CLASS ACTION REP. 3 (1978) [hereinafter cited as Rule 23 Questionnaire]. The study shows that substantial numbers of practitioners, citing Rule 23 as being wasteful, forcing unwarranted settlements, and ineffectively providing the desired remedies, favored amendment of the Rule. However, the analysis of the responses suggests a potentially biased sample as well as inconsistent responses. For a broader discussion, see AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE 18 (1972); Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 5-12 (1971) (suggesting class actions are a form of legalized blackmail).

195. "Two out of three judges favor emasculating the modern class action remedy, leaving a mere multiparty joinder device in its stead. In a flight of hypocrisy, this view was championed by roughly the same margin as district judges earlier in the questionnaire had favored the deterrent and compensatory functions of class actions." Rule 23 Questionnaire, *supra* note 194, at 19.

196. *See, e.g.*, H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 118-20 (1973); Kennedy, *Federal Class Actions: A Need for Legislative Reform*, 32 S.W.L.J. 1209 (1979); Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1972); *Developments*, *supra* note 89, at 1354-55 & authorities cited therein. See note 11 *supra*.

197. *See, e.g.*, Baker & Stigler, *Law Enforcement, Malfeasance, and Compensation of En-*

In response to these criticisms, at least one source has recommended the increased use of *parens patriae* suits authorized by the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[198] The advantages of *parens patriae* suits stem not only from a decrease in the burden on the court, although many procedures remain identical to current class actions, but also from more effective potential relief. The primary advantage is express authorization for determination of damages in the aggregate,[199] but effects on settlements can also be expected. The crucial point from a procedural perspective is the elimination of Rule 23 as an operative force. By granting states standing to sue as representatives rather than requiring a class certification, the certification decisions are made for the court.

Despite this vastly decreased role for the court in assessing the propriety of the trial, Congress expressly limited the scope of the remedy. First, attorneys general may only bring suit under the Sherman Act[200] and therefore private claims under the Clayton and Robinson-Patman Acts must be brought under section 4. Second, only natural persons may be represented in the *parens patriae* suit.[201] Thus, the procedure is of no use to corporate plaintiffs who often are damaged as much as other consumers. Finally, for an injured plaintiff to receive relief the state must be convinced to act. Suits of a localized nature may receive less attention, particularly when the limited fiscal resources available to state enforcement agencies are strained. Accordingly, although *parens patriae* suits may promote enforcement of some consumer class claims, the major thrust of large group antitrust enforcement remains in Rule 23.[202]

---

forcers, 3 J. LEGAL STUD. 1, 13-16 (1974) (suggesting that enforcement of laws be generalized so that anyone could enforce the law against violations and share in fines levied against those found guilty); Briet & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329, 345-55 (1974) (proposing a wholly public enforcement effort utilizing substantial fines to be divided among sellers and buyers in monopolistic markets); Crumplar, *An Alternative to Public and Victim Enforcement of the Federal Securities and Antitrust Laws: Citizen Enforcement*, 13 HARV. J. LEGIS. 76, 99-124 (1975) (proposing a model statute that would give all citizens the right to institute civil proceedings in the name of the United States, seeking the imposition of fines while giving enforcers incentive awards and costs). *See also* questions posed in Rule 23 Questionnaire, *supra* note 194.

198. Duval, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II)*, 1976 AM. B. FOUNDATION RESEARCH J. 1273, 1356-58 (1976).

199. 15 U.S.C. § 15d (1976). In price fixing cases the statute allows aggregate proof and assessment of damages, "without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought." *Id.* It should be noted that *parens patriae* suits are given res judicata effect for all persons on whose behalf the suit was brought. 15 U.S.C. § 15c (1976).

200. 15 U.S.C. § 15c (1976).

201. *Id.*

202. "The *parens patriae* lawsuit provides an important alternative to private consumer

Senate Bill 3475[203] is a more far-reaching legislative endeavor and proposes a complete overhaul of Rule 23(b)(3). The proposed statute would create two separate procedures to replace the old rule, one designed to act as a deterrent by creating a "public action" for widespread injury in small amounts, the other a class compensatory action for larger individual claims.[204] The first action is a public action which could be brought in federal district courts by the United States directly or by a private party who has been damaged unlawfully.[205] Although there would be several prerequisites to bringing the suits,[206] the government would be empowered to take control of the privately initiated suit or to inform the court that it felt that the suit was not in the public interest.[207] The other action created would be a class compensatory action which also could be brought only if certain prerequisites were met.[208] The scope of this action would be substantially broader than that of the public action. The primary innovations would be changes in the allowable methods of damage assessment[209] and management of the class.[210]

Both proposed procedures have laudable goals: (1) increased ac-

class actions. Even in the consumer context, however, some scope for the private class action may remain. Particularly in cases involving local as opposed to statewide violations the extent to which the state will proceed is an open question. Probably the greatest potential for the private class action, however, is in suits by business customers, franchisees, and dealers. Such suits are expressly excluded from the scope of state power under the *parens patriae* legislation. Often such suits can be brought only as class actions. Moreover, because the classes are relatively small, these cases do not present for private attorneys the problems of notice and settlement administration posed by the consumer class action. It is, however, in the area of franchisee and dealer suits that some of the most serious obstacles to the use of the class action have been encountered in this district. The utility of the class action as an antitrust enforcement device will depend in important part on whether these obstacles can be overcome." Duval, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II)*, 1976 AM. B. FOUNDATION RESEARCH J. 1273, 1358 (1976).

203. S. 3475, 95th Cong., 2d Sess. (1978).

204. *Id.* §§ 3001-3007 (public action), 3011-3014 (class compensatory action).

205. *Id.* § 3001.

206. The suit could be brought if (1) the conduct in question injured 200 or more persons, each with damages not exceeding $300; (2) the combined injuries totalled more than $60,000; (3) the injuries arose out of the same transaction or occurrence or series of transactions or occurrences; and (4) there was a substantial question of law or fact common to the injured persons. *Id.*

207. *Id.* § 3002.

208. The compensatory action would require: (1) forty or more injured persons, each with damage claims exceeding $300, or a claim establishing liabilities for forty or more persons in excess of $300 each; (2) proof that the injuries arose out of the same transaction or occurrence or series of transactions or occurrences; and (3) a substantial question of law or fact common to the injured or sued persons. *Id.* § 3011.

209. Section 3014, relating to the class compensatory action, would allow for bifurcation of liability and damages issues and also for proof of damages "by any method permitted or required by law." *Id.* § 3014.

210. Sections 3021 to 3030 make provision for a wide range of management techniques

cess to federal courts for aggrieved plaintiffs; (2) promotion of substantive enforcement policies including antitrust; (3) decreased costs to the judiciary with increased ease of management; and (4) prevention of unjust enrichment of wrongdoers.[211] Nonetheless, the legislation fails to remove the burden now placed on trial courts of finding a predominance of common questions.

The language of the statute avoids the term predominance and replaces it with two requirements that "the injuries arise out of the same transaction or occurrence or series of transactions or occurrences" and that "the action presents a substantial question of law or fact common to the injured persons."[212] While at first reading the new language seems to indicate a more relaxed standard, such apparently was not the intention of the drafters. An analysis of the bill prepared by the Office for Improvements in the Administration of Justice,[213] which developed the proposal, takes the position that the existing predominance standard has been interpreted by the courts not to require actual predominance.[214] The Office suggests that the current requirement, if read literally, would prevent certification of virtually every suit, and hence that courts have not read the language so narrowly: "[T]he courts have discarded literal predominance and have used the test to determine pragmatically whether there is a significant common issue and to force counsel to articulate their theories of recovery early in the lawsuit."[215] Thus, the judiciary correctly may read the analysis of the authors of the bill to propose no new standard for predominance: the language would change without a meaningful change in the standard. The role of the judge would remain the same in analyzing predominance. If the bill is enacted into law,[216] however, the results of these inquiries may differ as the bill provides legislative changes in class procedures which would support a finding of commonality in damage proceedings as well as in liability inquiries.[217] Furthermore, the bill would eliminate the superi-

including transfer and consolidation of actions, litigation timetables, expedition of judicial rulings, settlements, and calculation of attorney's fees. *Id.* §§ 3021-3030.

211. *See* OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, U.S. DEP'T OF JUSTICE, COMMENTARY ON SENATE BILL 3475, 95TH CONG., 2D SESS. 9-11 (1978).

212. S. 3475, 95th Cong., 2d Sess. § 3001(a) (1978).

213. OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, U.S. DEP'T OF JUSTICE, COMMENTARY ON SENATE BILL 3475, 95TH CONG., 2D SESS. (1978).

214. *Id.* at 28.

215. *Id.*

216. The proposals have already received substantial criticism. *See* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 682-93 (1979); Rule 23 Questionnaire, *supra* note 194, at 1, 113 (providing a thorough analysis of the legislation and suggesting that "[w]hatever form the Justice Proposals ultimately take, the going will be extremely tough in Congress").

217. The bill's major change in this regard involves mandated, statistically computed class damages in the public actions. S. 3475, 95th Cong., 2d Sess. § 3006 (1978). This would

ority analysis presently required.

These proposed actions may offer advantages to antitrust litigants and promote substantive antitrust policies. Their potential impact on the process of actually litigating antitrust class actions is unclear. Nonetheless, all indications suggest that the trial judge would continue to play a vital role in antitrust class certification. As such, he or she would remain a major focal point of private enforcement of the antitrust laws.

The promotion of substantive antitrust policies through class action analysis will continue to require the judiciary of the federal courts to be aware of defendants' rights, plaintiffs' rights, and the fact that the use of class actions in antitrust has placed substantive law in a different perspective. Perhaps this perspective can be enlarged and emphasized to the point that a consistent approach to certification can be realized.

Conclusion

The impact of substantive antitrust policies on class action proceedings is undeniable. This Note has attempted to present an objective approach to the certification of Rule 23 (b)(3) antitrust class actions which not only promotes substantive antitrust law but remains within the ambit of procedural neutrality required by the Rules Enabling Act. By examining the substantive foundations behind the prohibitions against conspiracies in restraint of trade and unlawful tie-in sales, courts assessing predominance may be better equipped to decide what modes of proof are acceptable, what facts need to be established, and whether or not the issues can be considered common to the members of the class.

The analysis of the superiority of class suits in antitrust claims also is in need of refinement. If courts will narrow the scope of the analysis now conducted under the rubric of manageability perhaps the issues will become more clear. Substantive policies are an integral part of the superiority analysis and should be reflected in certification decisions. Past legislative action and pending legislation suggest that Congress intends to continue to foster private antitrust enforcement, although the procedural problems inherent in Rule 23 may remain for some time.

Finally, if the class remedy is to continue to be a viable source of relief for injured plaintiffs, the federal bench will have to continue an active role in certification procedures. The broad societal outlook reflected in section 4 of the Clayton Act and the other antitrust laws, as well as in Rule 23(b)(3), commands no less than an active analytical

allow the court to discount entirely the problems of individually computed damages when assessing predominance.

trial bench that reflects the will of Congress while protecting the rights of parties to antitrust litigation.