

# Recent Challenges to Antitrust Class Certification and Proposals for Overcoming Them by Returning to the Basics of Deterrence

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## I. Recent Challenges to Certifying Mass Consumer Antitrust Class Action

A. Core Concern: Efficiently Determining *Class-wide* (vs. aggregate) Liability “*Accurately*”

B. Recent Focus: Determining *Class-wide* (vs. aggregate) Injury (“Loss,” “Causation”)

## C. Current Solution: Generalized-Accurate Proof *Class-wide* Injury

1. Expensive Econometric Models and Applications

2. Pre-certification Review of “Accuracy” in Cases of Heterogeneous Market Conditions and Effects

- a. Combination of Summary Judgment and Daubert

- b. Full-scale Discovery

3. Unreal Problem of Typicality and Adequacy of Representation

4. Paradoxical Solution of Pre-certification Merits Review

## II. Back to Basics of Deterrence

### A. Deterrence Function of Antitrust Class Action

#### 1. Enhance Scale Economies

a. Lower Litigation Cost

b. Increase Litigation Quality

#### 2. Correct Asymmetry in Litigation Power

#### 3. Maximize Law Enforcement Efficiencies

## B. Deterrence Priority

1. Optimal Deterrence: Maximize Deterrence Benefits by Minimizing Sum of Enforcement Costs (e.g., transaction costs + net error costs)

2. Prevent Rather Than Compensate Illegal Harm: Maximizes Social Welfare If Antitrust Violation would Impose Expected Social Cost  $>$  Expected Private (Social) Benefit

## C. Deterrence and Accuracy

### 1. Deterrence, Ex ante Perspective, and Incentive to Obey Law

a. *Internalize* Optimal Sanction

b. Expected Optimal Sanction  $>$  Expected Private Benefit of Illegality

### 2. Optimal Ex Post Sanction

a. Actualized Harm: Normally Optimal Sanction – Actual *Aggregate* Harm

b. Risk-based = Probability of Illegal Conduct x Actual *Aggregate Average* Harm

d. Example:

1) Assume: Firm violates antitrust laws expecting private benefit = \$500, and illegal social harm = 50-50 chance of \$0/\$1200 (correlated expected losses respectively  $A = \$0/\$200 \times 50\%$ ;  $B = \$0/\$400 \times 50\%$ ;  $C = \$0/\$600 \times 50\%$ ). Assume optimal sanction = \$600.

2) Actualize *Aggregate Harm Sanction*:

→ state of the ex post world #1: \$1200 aggregate social harm = \$1200 sanction, or

→ state of the ex post world #2: \$0 aggregate social harm

→ ex ante, Firm internalizes expected aggregate sanction = \$600 ( $\$1200 \times 50\% + \$0 \times 50\%$ )

3) Risk-based Sanction = Probability of Illegal Conduct x Expected Social Harm from Illegal Conduct = \$600 ( $\$1200 \times 50\%$ )<sup>7</sup>

### III. Proposals

#### A. New Method of Random Sampling

##### 1. Description of the method:

*First step:* The parties specify the number of claims for sampling;

*Second step:* The court randomly selects the party-designed number of claims from among the set of claims in question, each of which is then resolved in the normal course by judgment or settlement.

*Third step:* The defendant's aggregate liability and damages are determined by the court employing either of two alternative procedures depending on whether the number of claims selected was one or more than one: single claim sampling ("SCS") or average claim sampling ("ACS");



*SCS: If one claim is randomly selected and resolved, the court applies the resulting outcome – that is, the amount (if any) the plaintiff thereby recovers under judgment or settlement – as per force determinative of the outcome attributable to each and every claim against the defendant, selected and non-selected. In essence the court derives the defendant's aggregate liability and damages by multiplying the recovery from the sampled claim by the number of claims in the group, or*

*ACS: If more than one claim is selected and resolved, the court derives and applies the average of the resulting outcomes – that is, the average of the amounts (if any) thereby recovered from settlement or judgment by the plaintiffs on their respective claims – as perforce determinative of the outcomes attributable to each and every claim against the defendant, selected and non-selected. In essence the court derives the defendant's aggregate liability and damages by multiplying the average recovery from the sampled claims by the number of claims in the group.*

2. Example: Assume that Firm's expected benefit from antitrust violation = \$500 and causes socially sanctionable harm to A = \$100; B = \$200; C = \$300. Compare Firm's (and *class counsel's*) aggregate expected liability as determined claim-by-claim vs. new sampling method (SCS):

→ claim-by-claim: Firm expects to pay total damages of \$600 since this is sum of outcomes from resolving each claim separately and individually

→ SCS: Firm expects to pay aggregate average damages of \$600:

$$\begin{aligned} & \$100 (1/3 \text{ chance} \times \$300 (\$100 \times 3)) + \\ & \$200 (1/3 \text{ chance} \times \$600 (\$200 \times 3)) + \\ & \$300 (1/3 \text{ chance} \times \$900 (\$300 \times 3)) \end{aligned}$$

→ ACS alternative, random selection and resolution of two of the three claims would subject the defendant to expected total damages of \$600 = sum of averages of each of the 6 claim combinations x 3 plaintiffs x 1/6 probability:

- 1)  $A (100) + B (200)/2 = 150 \times 3 = 450 \times 1/6 = 75$
- 2)  $B (200) + A (100)/2 = 150 \times 3 = 450 \times 1/6 = 75$
- 3)  $A (100) + C (300)/2 = 200 \times 3 = 600 \times 1/6 = 100$
- 4)  $C (300) + A (100)/2 = 200 \times 3 = 600 \times 1/6 = 100$
- 5)  $B (200) + C (300)/2 = 250 \times 3 = 750 \times 1/6 = 125$
- 6)  $C (300) + B (200)/2 = 250 \times 3 = 750 \times 1/6 = 125$

## B. “Ex ante Compensation”: Aggregate Class Recovery Net of Attorney Fees and Costs Paid Over to Social Security

1. Decoupling of Class Action Deterrence / Compensation Functions

2. Assuming Consumers are Risk Averse

a. Maximize Insurance Value of Recovery

b. Individuals Prefer Certain Cash Payoff Ex ante to Gamble of Equal Expected Value (ignoring higher administrative cost)

### 3. Assuming Consumers are Risk Neutral: “Behind the Veil” Perspective

a. Ex ante Compensation = Average Expected Loss from  
Antitrust Violation

b. Negates Ex ante Expected Antitrust Violation “Tax” on  
Consumers’ Choices re Consumption and Production