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Special Comment

Are Antitrust Class Actions Dead In The Sixth Circuit?*

BY LAURA F. ROTHSTEIN**

INTRODUCTION

In *Ohio v. Ric-Con Concrete Corp.*,[1] the United States Court of Appeals for the Sixth Circuit recently affirmed a denial of class certification by the United States District Court for the Southern District of Ohio.[2] As a result of this decision the Sixth Circuit has rendered ineffective any use of the class action device in Sixth Circuit antitrust cases. In effect, the court held that any district court judge who does not want the inconvenience of a class action may deny class certification with little rationale. As the Sixth Circuit's first decision on class certification in an antitrust case, this holding provides dangerous precedent for future antitrust class actions in the circuit.

This article analyzes the history of the class action proceedings in the *Ric-Con* case, compares the result with the status of class actions in other circuits, and examines how this

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* Since this special comment was written the Supreme Court ruled on June 9, 1977 that indirect purchasers in antitrust actions did not have standing to sue. Illinois Brick Co. v. Illinois, 45 U.S.L.W. 411 (U.S. June 9, 1977).

The Court's decision can be criticized for many of the reasons outlined in this comment. As a result of this decision, legislation has been introduced to restore indirect purchasers the right to recover for antitrust violations. S. 1874, 94th Cong., 1st Sess. (1977).

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[1] Ohio v. Ric-Con Concrete Corp., No. 75-2167 (6th Cir., Aug. 6. 1976).

[2] 69 F.R.D. 604 (S.D. Ohio 1975). The lower court case was originally styled as Ohio v. Richter Concrete Corp., but the name "Richter" was changed to "Ric-Con" in an amended complaint. For clarity the case is referred to as *Ric-Con*.

decision effectively eliminates a viable use of class actions in antitrust actions in the Sixth Circuit.

I. HISTORY OF THE CASE

On October 18, 1973, the state of Ohio filed a complaint in United States district court[3] against several suppliers of ready-mix concrete in the Cincinnati area, alleging illegal price fixing under the federal antitrust laws.[4] After filing the complaint, the State of Ohio filed a Motion to Maintain a Class Action. The class was to consist of the State of Ohio (on behalf of its agencies, departments, divisions, commissions, institutions, and universities); four counties; and villages, municipalities, townships, and public school districts in the four counties. There were 185 purported class members. Following a hearing on the class action issue, the district court denied plaintiff's motion for class certification. The court's order stated that the facts were substantially the same as those in *Bill Minnielli Cement Contracting, Inc. v. Richter Concrete Corp.*,[5] and because class certification was denied in that case, the court felt compelled to deny class certification in the present case.[6]

The class action was denied for four reasons: predominant individual questions of impact resulting from the presence of direct and indirect purchasers in the same class; predominant individual questions of fraudulent concealment; lack of numerosity; and the existence of collateral estoppel as a basis for recovery by other ready-mix buyers. The court noted generally that class certification was denied for lack of common-

[3] The case followed two proceedings arising out of the same factual circumstances. In November, 1970, a grand jury called by the Department of Justice indicted two Cincinnati ready-mix supply companies for price-fixing. In 1972 a private treble damage action was filed against several Cincinnati ready-mix companies including the two indicted by the grand jury. In the private action the plaintiff moved for class certification, which was denied. It should be noted, however, that the class included contractors (or middlemen) as well as political subdivisions. The class was denied for reasons discussed in the text accompanying notes 7-9 *infra*. The denial of the motion was not appealed. Bill Minnielli Cement Contracting, Inc. v. Richter Concrete Corp., 62 F.R.D. 381 (S.D. Ohio 1973).

[4] Section 1 of the Sherman Act, 15 U.S.C. § 1 (1970); and § 4 of the Clayton Act, 15 U.S.C. § 15 (1970).

[5] 62 F.R.D. 381 (S.D. Ohio 1973).

[6] 69 F.R.D. at 605-06.

ality and manageability.[7] The State of Ohio appealed the denial of class certification,[8] and the Sixth Circuit affirmed the lower court's decision. The appellate court simply reasoned that there was no abuse of discretion.[9]

II. ERRORS BY THE DISTRICT COURT

A lower court's denial of certification of class action will not be overruled unless there is abuse of discretion.[10] Where the trial court based its decision on erroneous reasons, however, this constitutes abuse of discretion.[11] In *Ric-Con,* the court based its decision in every instance on erroneous reasons. The district court therefore abused its discretion and should have been overruled.

A. *Predominant Individual Questions of Impact*

Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part that a class action may be maintained where "there are questions of law or fact common to the class"[12] and where these "questions of law or fact common to the members of the class predominate over any questions affecting only individual members. . . ."[13]

The district court in *Ric-Con* held that "the presence of both direct and indirect purchasers within a single class gives rise to individual questions of impact which predominate over any common questions of law or fact."[14] The court was implying either that the indirect purchasers did not have standing, or that differing methods of purchase resulted in differing

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[7] *Id.*

[8] It was appealed pursuant to 28 U.S.C. § 1292(b) (1970).

[9] Ohio v. Ric-Con Concrete Corp., No. 75-2167 (6th Cir., Aug. 6, 1976).

[10] Ott v. Speedwriting Pub. Co., 518 F.2d 1143, 1150-51 (6th Cir. 1975). *See also* 3b MOORE'S FEDERAL PRACTICE ¶ 23.50, at 23-1105 (2d ed. 1976).

[11] National Beneficial Life Ins. Co. v. Shaw-Walker Co., 111 F.2d 497, 507 (D.C. Cir.), *cert. denied,* 311 U.S. 673 (1940); *accord,* Someville v. Capital Transit Co., 192 F.2d 413, 414 (D.C.Cir. 1951); Kernan v. Kernan, 165 F.2d 232, 233 (D.C. Cir. 1947).

[12] FED. R. CIV. P. 23(a)(2).

[13] FED. R. CIV. P. 23(b)(3).

[14] 69 F.R.D. at 605. Indirect purchasers in the instant case are government entities that purchased ready-mix concrete through contractors. Direct purchasers are government entities that purchased directly through suppliers. Brief for Appellant at 7-12, Ohio v. Ric-Con Concrete Corp., No. 75-2167 (6th Cir., Nov. 12, 1975).

amounts of damages which were predominant questions.[15] The court apparently based this holding on one of two theories, neither of which is correct.

The holding that indirect purchasers lack standing is contrary to the weight of authority[16] and, in fact, does not follow the Sixth Circuit's liberal standing requirement.[17] In addition, the policy in favor of antitrust enforcement would be seriously frustrated by denying standing to indirect purchasers.[18] In determining that indirect purchasers lack standing, the court incorrectly read the "pass-on" concept in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[19] *Hanover Shoe* was an action by

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[15] Courts have been vague, unclear, and at times inconsistent in the use of terms such as "impact," "liability," "injury," "causation," and "damage." To recover under the antitrust laws, plaintiff must prove a violation, the existence of legal injury, and the amount of damage. 15 U.S.C. § 15 (1970). Thus, in addition to proving the conspiracy, a plaintiff must show that the conspiracy resulted in "legal injury" (or the *fact* of damage) and must then prove the amount of the damages. In other words, a plaintiff must prove both impact on the market and impact on himself. The impact on the market or fact of damage may be inferred from defendant's wrongful acts where there is evidence of a decline in "prices, profits and values." Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969) (citing Biegelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946).) *See also* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927). The Sixth Circuit has used a liberal "fact of damage" standard in holding that illegal activity strongly indicates that "some damages must have resulted." Gaines v. Carrollton Tobacco Bd. of Trade, Inc., 496 F.2d 284, 286 (6th Cir. 1974). For a discussion of current requirements for proof of legal injury and the amount of damages in antitrust cases, *see* Weinberg, *Recent Trends in Antitrust Civil Action Determinations,* 1976 DUKE L.J. 485, 488-500.

[16] *See* note 23 *infra* for cases holding that indirect purchasers have standing.

[17] *See* text accompanying notes 25 through 30 *infra* for a discussion of the Sixth Circuit standing requirement.

[18] Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1970). The importance of private antitrust suits brought pursuant to this statute was stated by the Supreme Court in Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969):

> As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition.

Accord, Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955).

[19] 392 U.S. 481 (1968).

a shoe manufacturer against a shoe machinery manufacturer to recover treble damages for overcharges in leasing shoe manufacturing machinery. The defendant asserted that plaintiff had suffered no injury, because it had passed on any overcharges by raising the prices of its shoes. The Supreme Court rejected this argument and affirmed the district and appellate courts' holdings that plaintiffs *had* suffered injury. Some courts have relied on this holding to deny standing to indirect purchasers,[20] interpreting the Supreme Court's rejection of the defense that overcharges had been passed on to purchasers of shoes as an implicit holding that indirect or remote purchasers do not have standing.[21]

A close reading of the case, however, indicates that the Court in *Hanover Shoe* intended to encourage private enforcement of the antitrust laws.[22] More recent opinions have granted

[20] Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481, 484 (S.D.N.Y. 1973); Balmac, Inc. v. American Metal Prods. Corp., 1972 TRADE CAS. (CCH) ¶ 74, 235 (N.D. Cal. 1972); Denver v. American Oil Co., 53 F.R.D. 620, 628-27 (D. Colo. 1971); Philadelphia Housing Auth. v. American Radiator & Std. Sanitary Corp., 50 F.R.D. 13, 23-30, (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator and Std. Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971); United Egg Producers v. Bauer Int'l. Corp., 312 F. Supp. 319, 321 (S.D.N.Y. 1970); Philadelphia Housing Auth. v. American Radiator & Std. Sanitary Corp., 323 F. Supp. 381, 383-86 (E.D. Pa. 1970). These courts all interpreted *Hanover* as strictly limiting standing to those plaintiffs who were in privity with the defendant or those plaintiffs who were removed from defendant *only* by virtue of a cost-plus contract.

[21] Balmac, Inc. v. American Metal Prods. Corp., 1972 TRADE CAS. (CCH) ¶ 74, 235 (N.D. Cal. 1972); Travis v. Fairmont Foods Co., 346 F. Supp. 679, 680 (E.D. Pa. 1972); Denver v. American Oil Co., 53 F.R.D. 620, 631, 637 (D. Colo. 1971); Philadelphia Housing Auth. v. American Radiator & Std. Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub. nom.* Mangano v. American Radiator and Std. Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319, 321 (S.D.N.Y. 1970).

[22] One of the major reasons for rejecting the pass-on defense in *Hanover Shoe* was that the party in the best position to pursue the action would be eliminated, leaving only a plaintiff with a small stake in the outcome. As a result antitrust enforcement would suffer.

> [T]hese ultimate consumers . . . would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws . . . would retain the fruits of their illegality because no one was available [to] bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.

392 U.S. at 494.

The court in *In re Master Key Antitrust Litigation* clearly felt that the *Hanover Shoe* decision had been incorrectly applied by courts. In holding that the rejection of

standing to indirect purchasers for this and other reasons.[23] In many instances the indirect purchasers were consumers of products sold in chains of distribution even more complex than that which existed in the purchase of ready-mix concrete.[24]

In addition, the district court in *Ric-Con* failed to apply

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the passing-on defense in *Hanover Shoe* could not be used to prevent indirect purchasers from having standing, the court noted:

> The attempt to transform a rejection of a defense because it unduly hampers antitrust enforcement into a reason for a complete refusal to entertain the claims of a certain class of plaintiffs seems an ingenious attempt to turn the decision and its underlying rationale on its head.

1973-2 TRADE CAS. (CCH)¶ 74, 680, at 94,978-79 (D. Conn. 1973). The court rejected those cases which applied *Hanover Shoe* to require privity as "stretching *Hanover Shoe* beyond all recognition." *Id.* at 94,979.

[23] Several cases have interpreted *Hanover Shoe* as allowing standing to indirect purchasers because (1) *Hanover* involved "passing-on" as a defense, not an offensive tactic by plaintiffs to gain standing; and (2) *Hanover's* denial of "passing-on" as a defense was intended to foster, rather than to limit, private antitrust enforcement. Extending the decision in order to refuse a certain class of plaintiffs standing would completely undercut the decision and its rationale. *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 196-99 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287 (S.D.N.Y. 1975); *In re* Master Key Antitrust Litigation, 1973-2 TRADE CAS. (CCH) ¶ 74,680 (D. Conn. 1973); Boshes v. General Motors Corp., 59 F.R.D. 589, 594-95 (N.D. Ill. 1973); Philadelphia v. American Oil Co., 53 F.R.D. 45, 62 (D.N.J. 1971).

Other cases also allowing indirect purchasers standing are: *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 125-29 (9th Cir. 1973); Armco Steel Corp. v. North Dakota, 376 F.2d 206, 210-11 (8th Cir. 1967); *In re* Toilet Seat Antitrust Litigation, 1976 TRADE CAS. (CCH) ¶ 60, 915 (E.D. Mich. 1976); *In re* Plywood Antitrust Litigation, 1976-1 TRADE CAS. (CCH) ¶ 60, 805 (E.D. La. 1976); Bray v. Safeway Stores, Inc., 392 F. Supp. 851,862-63 (N.D. Cal. 1975); State v. Ampress Brick Co., 67 F.R.D. 461, 466-67 (N.D. Ill. 1975); Southern Gen. Builders, Inc. v. Maule Indus. Inc., 1973-1 TRADE CAS. (CCH) ¶ 74,484 (S.D. Fla. 1972); Sol S. Turnoff Drug Distrib. v. N. V. Nederlandsche Combinatic Voor Chemische Industrie, 51 F.R.D. 22 (E.D. Pa. 1970).

[24] Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287 (S.D.N.Y. 1975); *In re* Master Key Antitrust Litigation, 1973-2 TRADE CAS. (CCH) ¶ 74,680 (D. Conn. 1973). In *Carnivale* the court held that the manfacturers of clothing, plastic bags and carryalls had standing to sue manfacturers of zipper sliders for their alleged conspiracy to fix prices, even though the clothing bag makers had purchased the sliders as components of completed zippers through zipper manufacturers and assemblers. In *Master Key,* indirect governmental purchasers of building hardware (lock, latches, keys, etc.) were held to have standing to sue manufacturer-distributors for alleged conspiracy to fix prices and allocate customers. The governmental purchasers did not purchase the hardware directly from the defendants or their distributors but generally from building contractors. Plaintiffs alleged they were the actual victims of the conspiracy, for the overcharges exacted by the defendants were directly reflected in the price they had to pay for the building hardware they purchased. *See also* Bray v. Safeway Stores, Inc., 392 F. Supp. 851, 862-63 (N.D. Cal. 1975) (cattlemen alleged price fixing of beef by retail grocery stores).

the Sixth Circuit standing test, enunciated in *Malamud v. Sinclair Oil Corp.*,[25] which is one of the most liberal in the country. In *Malamud* the Sixth Circuit rejected both the target area[26] and the direct injury[27] tests applied by many courts as "really demand[ing] too much from plaintiffs at the pleading stage of a case."[28] Instead, the court relied on *Association of Data Processing Service Organizations, Inc. v. Camp.*,[29] where the Supreme Court required that the plaintiff allege injury in fact and that the "interest . . . to be protected . . . [be] arguably within the zone of interests to be protected or regulated by the statute . . . in question."[30] Considering the Sixth Circuit's standing requirement in *Malamud* and the number of courts which have granted standing to indirect purchasers, it was error for the district court in *Ric-Con* to deny class certification on the basis that indirect purchasers lack standing.

It is also possible to read the court's opinion as denying the class on the basis that differing methods of purchase resulted in differing amounts of damages; *i.e.*, that in some instances certain remote or indirect purchasers might be precluded from recovery because the overcharge had actually been absorbed by contractors or other intermediate purchasers. The preclusion of these purchasers, however, is really a question relating to the amount of damage rather than the fact of impact or standing. Once it is recognized that all of the indirect purchasers have standing because they were "arguably within the zone of interests to be protected"[31] under the antitrust laws, the fact that in some instances the overcharges were not passed on creates individual questions as to the amount of damage, not individual questions of liability. A significant number of courts have

[25] 521 F.2d 1142 (6th Cir. 1975).

[26] The target area test is applied by courts which find liability where the plaintiff was "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

[27] The direct injury test is applied by courts which require privity between plaintiff and defendant. For an analysis of the target area and direct injury tests as they relate to standing in antitrust cases, *see* Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On*, 123 U. PA. L. REV. 976 (1975).

[28] 521 F.2d at 1149.

[29] 397 U.S. 150 (1970).

[30] *Id.* at 153.

[31] *Id.*

granted class certification where there were common questions of conspiracy and impact on the market because these issues predominated over individual questions of damages.[32]

The question of the existence of a conspiracy and its impact on the market as a whole can be determined by trial on the issue of liability without examining individual questions of each plaintiff's damages.[33] The *Ric-Con* court, in stating that there were individual issues of "impact" which predominated, was referring to impact on the individual plaintiff (which is a question of damage, not liability) and for this reason impact should not have been held to be a predominant individual question which would be a basis for denying the class.

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[32] New York v. Darling-Delaware, Inc., 1976-1 TRADE CAS. (CCH) ¶ 60,812, at 68,512-14 (S.D.N.Y. 1976); *In re* Plywood Antitrust Litigation, 1976-1 TRADE CAS. (CCH) ¶ 60,805, at 68,483-84 (E.D. La. 1976); *In re* Toilet Seat Antitrust Litigation, 1976-1 TRADE CAS. (CCH) ¶ 60,915, at 69,003 (E.D. Mich. 1976); Dennis v. Saks & Co., 1975-2 TRADE CAS. (CCH) ¶ 60,396, at 66,747-49 (S.D.N.Y. 1975); Hemley v. American Honda Motor Co., 1975 TRADE CAS. (CCH) ¶ 60,457, at 67,060 (S.D.N.Y. 1975); *In re* Master Key Antitrust Litigation, 70 F.R.D. 23, 28-29 (D. Conn. 1975); Link v. Mercedes-Benz of N. America, Inc., 1975-2 TRADE CAS. (CCH) ¶ 60,534, at 67,357-58 (E.D. Pa. 1975); Herman v. Atlantic Richfield Co., 1975-1 TRADE CAS. (CCH) ¶ 60,115, at 65,258-60 (W.D. Pa. 1974); Halverson v. Convenient Food Mart, Inc., 69 F.R.D. 331, 334-35 (N.D. Ill. 1974); Professional Adjusting Sys. of America, Inc. v. General Adjustment Bureau, Inc., 64 F.R.D. 35, 39-41 (S.D.N.Y. 1974); J.M. Woodhull, Inc. v. Addressograph-Multigraph Corp., 62 F.R.D. 58, 60-61 (S.D. Ohio 1974); P.D.Q. Inc. v. Nissan Motor Corp., 61 F.R.D. 372, 374-75 (S.D. Fla. 1973); Cohen v. District of Columbia Nat'l Bank, 59 F.R.D. 84, 90 (D.D.C. 1972); Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972); Philadelphia v. American Oil Co., 53 F.R.D. 45, 67-68 (D.N.J. 1971); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 281 (S.D.N.Y. 1971); Butkus v. Chicken Unltd. Enterprises, Inc., 15 F.R. Serv. 2d 1067, 1069 (N.D. Ill. 1971); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 488-89 (N.D. Ill. 1969); *aff'd in part,* 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam,* 400 U.S. 348 (1971); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 458 (E.D. Pa. 1968); Dolgow v. Anderson, 43 F.R.D. 472, 490 (E.D.N.Y. 1968); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 569-72 (D. Minn. 1968).

Those class actions which were not certified because of predominant individual questions can generally be distinguished as involving issues other than damages, such as differing franchise agreements which required individual analysis. *See* Hehir v. Shell Oil Co., 1976-1 TRADE CAS. (CCH) ¶ 60,928, at 69,041-42 (D. Mass. 1976); Plekowski v. Ralston Purina Co., 68 F.R.D. 443, 448-54 (M.D. Ga. 1975); McCoy v. Convenient Food Mart, Inc., 67 F.R.D. 57, 72-74 (N.D. Ill. 1975); *In re* Transit Co. Tire Antitrust Litigation, 1975-1 TRADE CAS. (CCH) ¶ 60,144, at 65,416-18 (W.D. Mo. 1975); Thompson v. TFI Companies, Inc., 64 F.R.D. 140, 147-48 (N.D. Ill. 1974); Hettinger v. Glass Specialty Co., 59 F.R.D. 286, 294 (N.D. Ill. 1973); Abercrombie v. Lum's, Inc., 345 F. Supp. 387, 390-91 (S.D. Fla. 1972).

[33] *See* note 65 *infra* for cases adopting a bifurcated trial procedure for class action antitrust suits.

B. *Predominant Individual Questions of Fraudulent Concealment*

The court in *Ric-Con* also denied class certification because of highly individualized questions of fraudulent concealment.[34] The state of Ohio had alleged fraudulent concealment in its complaint in order to recover damages which might have been incurred before November 16, 1966, although it was believed that the conspiracy began in 1967.[35] It was clear that the plaintiffs were not barred by the statute of limitations from recovering damages from November 16, 1966, to the present. It was, therefore, once again a question of the amount of damages, not the fact of the conspiracy, which was an individual question. As noted above,[36] where there is a common question as to the existence of a conspiracy and its impact on the market, courts will generally find this issue to predominate over individual questions as to the amount of damages suffered by each plaintiff as a result of the conspiracy.

C. *Numerosity Determination*

Another reason for denying the class in *Ric-Con* was that the state of Ohio had offered conclusive proof of purchase from defendants by only thirty-seven proposed class members, and that a "class of 37 [is] not so numerous as to make joinder impracticable."[37] The district court was wrong on this issue because its holding was founded on three erroneous assumptions: that only direct purchasers had standing;[38] that the class size was too speculative;[39] and that the numerosity determina-

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[34] 69 F.R.D. at 605.

[35] Thus any possibility that damages would be sought for the period before 1967 is therefore remote, making it unlikely that there would be any need for proof of fraudulent concealment.

[36] *See* text accompanying note 32 *supra.*

[37] 69 F.R.D. at 605.

[38] By incorporating the language of the *Minnielli* decision into the *Ric-Con* opinion, the court seems to imply that indirect purchasers lack standing. 69 F.R.D. at 605 (citing Bill Minnielli Cement Contracting, Inc. v. Richter Concrete Corp., 62 F.R.D. 381, 386-89 (S.D. Ohio 1973)).

[39] "While class size need not be established with precision, we nevertheless believe it is far too speculative to conclude . . . that all 185 of the proposed class members bought ready-mix, directly or indirectly, from the defendants." 69 F.R.D. at 605.

tion was limited to purchases from the named defendants.[40]

As for the first assumption—that only direct purchasers have standing—it was noted above that indirect purchasers should also have standing.[41] Thus it was error for the court to consider only direct purchasers in determining numerosity.[42]

The district court's second assumption—that class size was too speculative—is also incorrect. In a pre-trial hearing on the class action issue the state of Ohio presented evidence of actual purchases by a number of plaintiffs. In addition, the state offered evidence indicating that each type of government entity included in the class was likely to have purchased ready-mix concrete at some point during the 4 years.[43] In spite of this proof, the court concluded that it was "far too speculative . . . that all 185 . . . bought ready-mix . . . from the defendants."[44]

Contrary to the district court's assertion that the class size was too speculative, the Sixth Circuit itself requires only that *"some information* . . . be presented by plaintiffs from which the *approximate* number of class members can be ascertained."[45] Here the plaintiff identified by name all of the members of the class and offered substantial evidence that each entity was likely to have used ready-mix concrete over a period of several years. This is more than sufficient under the Sixth Circuit standard. To require more places a substantial burden of developing damage data on the plaintiff before liability for violating the antitrust laws is determined. Accordingly, it was error for the district court to require conclusive evidence of purchases by putative class members before including those class members in the suit.

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[40] "The only conclusive evidence shows that 37 proposed class members purchased directly from defendants." *Id.*

[41] *See* notes 16-24 *supra* and accompanying text.

[42] In any event, there were probably more than 37 *direct* purchasers.

[43] Appendix to Brief for Appellant at 307-08, 319-20, Ohio v. Ric-Con Concrete Corp., No. 75-2167 (6th Cir., Nov. 12, 1976).

[44] 69 F.R.D. at 605.

[45] Sims v. Parke Davis & Co., 334 F. Supp. 774, 781 (E.D. Mich.), *aff'd,* 453 F.2d 1259 (6th Cir. 1971), *cert. denied,* 405 U.S. 978 (1972) (emphasis added). Information on class size may be shown by affidavits or other simple evidentiary mechanisms. Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967). *See* Siegel v. Realty Equities Corp., 54 F.R.D. 420 (S.D.N.Y. 1972); Thomas v. Clarke, 54 F.R.D. 245 (D. Minn. 1971); Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971); Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966).

As for the third incorrect determination, the court examined only those purchases of ready-mix from the named defendants.[46] A conspirator in an antitrust case is liable for the acts of his co-conspirators whether they are named defendants or not.[47] The Sixth Circuit has explicitly adopted this standard of liability.[48] In addition, where the existence of a conspiracy is proven, defendants will be responsible for overcharges sustained on purchases from vendors not part of the price-fixing conspiracy where plaintiffs prove that as a result of the conspiracy overall price levels in the relevant market were raised.[49] Therefore, it was error for the court to require that each purported class member must have purchased ready-mix from a named defendant.

Based on these three erroneous determinations, the court found that there was conclusive evidence that only thirty-seven of the proposed class members purchased directly from defendants, and that this was not so numerous a class as to make joinder impracticable.[50] If the court had allowed the number to reflect both direct and indirect purchasers who had purchased not only from named defendants but other sellers as well, and if the court had accepted the well-defined, specifically-named class list, the number of class members would have been 185. Classes of this size are quite commonly certified as being so numerous that joinder is impracticable.[51] Because the court incorrectly applied too strict a standard, it found only thirty-seven class members. Even this class size, however, should have been held to be sufficiently numerous.[52]

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[46] 69 F.R.D. at 605.

[47] Washington v. American Pipe and Const. Co., 280 F. Supp. 802, 804-05 (W.D. Wash.), *appeal dismissed,* 393 F.2d 568 (9th Cir.), *cert. denied,* 393 U.S. 842 (1968).

[48] Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23 (6th Cir. 1903), *aff'd,* 203 U.S. 390 (1906).

[49] Bray v. Safeway Stores, Inc., 392 F. Supp. 851, 863 (N.D. Cal. 1975); Wall Prods. Co. v. National Gypsum Co., 357 F. Supp. 832, 840 (N.D. Cal. 1973); Washington v. American Pipe & Const. Co., 280 F. Supp. 802, 805-07 (W.D. Wash. 1968).

[50] 69 F.R.D. at 605.

[51] Butkus v. Chicken Unltd. Enter., Inc., 15 F.R. Serv. 2d 1067 (N.D. Ill. 1971); Contract Buyers League v. F. & F. Inv., 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd sub nom.,* Baker v. F. & F. Inv., 420 F.2d 1191 (7th Cir. 1970).

[52] Thompson v. T.F.I. Companies, Inc., 64 F.R.D. 140 (N.D. Ill. 1974) (14 persons not too numerous for joinder); Anderson v. Home Style Stores, Inc., 58 F.R.D. 125 (E.D. Pa. 1972) (18 members not too numerous for joinder).

D. *Collateral Estoppel*

As part of its order, the district court noted that "if the State were to prevail on the issue of price-fixing conspiracy, it would seem to inure to the benefit of other ready-mix buyers under the doctrine of collateral estoppel."[53] This doctrine is irrelevant to a determination of whether a given case meets the prerequisites of Rule 23. If it could be invoked as a reason for denying the class in this instance, it would be an equally valid reason to deny certification of any class action. Nevertheless, it is far from settled that collateral estoppel may be used offensively by a plaintiff applying a judgment against a defendant which was originally obtained by a different plaintiff against the same defendant.[54] Even assuming the doctrine may be used offensively, it may be unavailable to class members for two reasons. First, if a plaintiff should enter into a settlement with a defendant, as is often the case in antitrust actions, there would be no final judgment which the aborted class members could apply collaterally.[55] Second, the statute of limitations could run by the time one plaintiff's case reached final judgment, thus permanently barring any action the aborted class members might wish to bring. Thus, it was error to apply the doctrine of collateral estoppel in determining the class action issue.

E. *Manageability*

The court rejected plaintiff's contention that the case was manageable, but gave no specific reason other than incorporating the reasons previously given in its opinion in the *Minnielli* case.[56] The court was apparently referring to the complexities

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[53] 69 F.R.D. at 605.

[54] Blonder-Tongue Lab., Inc. v. University of Ill. Foundation, 402 U.S. 313, 329-30 (1971); Katz v. Carte Blanche Corp., 496 F.2d 747, 766-67, 770-71, 773-74 (3d Cir.) (dissenting opinion), *cert. denied,* 419 U.S. 885 (1974).

[55] United States v. International Bldg. Co., 345 U.S. 502 (1953).

[56] For the foregoing reasons, we decline at this time to certify the present case as a class action. We recognize that the attorneys for the State are of the firm belief that this is not such an involved or complicated case as to bar class action certification on grounds of commonality or manageability. After full consideration of both the present case and *Minnielli,* however, we cannot now share their view.

69 F.R.D. 605-06.

of determining proof of injury in a class of direct and indirect purchasers which had purchased different amounts of concrete through different methods. The court's certification requirement of proof of injury or impact on each plaintiff made the case appear even more complex than it actually was.

The court required each potential class member to present proof of purchase in order to prove impact before they could be counted as a member of the class. It has already been shown that impact on each plaintiff is a damage question, and is relevant only after the fact of the conspiracy and its impact on the relevant market has been proven.[57] It is for this reason that the court erroneously decided that the case was unmanageable.

Moreover, a class should not be denied certification because of difficulities in determining damages.[58] Antitrust cases are by their nature complex and class actions make them even more so. But to deny a class for these reasons is contrary to the intent of the antitrust laws and Rule 23. This is not to say that some cases could not properly be denied on the basis of manageability, where the class consists of millions of plaintiffs[59] or

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[57] *See* text accompanying note 33 *supra* for a discussion of impact and damages.

[58] The basis for this position is that:

> To deny a class determination on the ground that the computation of damages might render the cause unmanageable would encourage corporations to commit grand acts of fraud instead of small ones with the thought of raising the spectre of unmanageability to defeat the class action.

In re Memorex Sec. Cases, 61 F.R.D. 88, 103 (N.D. Cal. 1973).

See *In re* Cessna Aircraft Distributorship Antitrust Litigation, 518 F.2d 213, 215 (8th Cir. 1975); *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 200-01 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); *In re* Toilet Seat Antitrust Litigation, 1976-1 TRADE CAS. (CCH) ¶ 60,915, at 69,004 (E.D. Mich. 1976); New York v. Darling-Delaware, Inc., 1976-1 TRADE CAS. (CCH) ¶ 60,812, at 68,513-14 (S.D.N.Y. 1976); Link v. Mercedes-Benz of N. America, Inc., 1975-2 TRADE CAS. (CCH) ¶ 60,534, at 67,358 (E.D. Pa. 1975); Halverson v. Convenient Food Mart, Inc., 69 F.R.D. 331, 335 (N.D. Ill. 1974); J.M. Woodhull, Inc. v. Addressograph-Multigraph Corp., 62 F.R.D. 58, 60 (S.D. Ohio 1974); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 299, 305-06 (S.D.N.Y. 1971).

[59] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (proposed class action on behalf of 2.25 million odd-lot traders on the N.Y. Stock Exchange); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973) (proposed certification of 17 million automobile purchasers rejected on basis of unmanageability); Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971) (class action not certified because there were 6 million class members); *In re* Motor Vehicle Air Pollution Control Equip., 52 F.R.D. 398 (C.D. Cal. 1970) (a class action on behalf of all American citizens was held inappropriate); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970)

where there are extremely complex chains of distribution.[60]

Perhaps the most favorable case involving issues similar to those in *Ric-Con* is *Windham v. American Brands, Inc.*[61] That case involved a proposed class of more that 20,000 plaintiffs, who alleged injury from price fixing and other restraints of trade in the tobacco industry. The proposed class members were sellers of or had an economic interest in the sale of flue-cured tobacco. The plaintiffs had varying roles in the market and some had antagonistic interests "because of the quality of their tobacco, or their roles in the market. . . ."[62] The case involved a number of other complexities including the existence of thirty-six tobacco warehouses in eleven geographic locations, 161 grades of tobacco, and varying pricing procedures. Because of these complexities the district court concluded that individual issues predominated over common issues. It further determined that the differing impacts involved and the elaborate proof requirements made the case unmanageable. Based on these conclusions, the lower courts denied the class.

The Fourth Circuit reversed this judgment and held that "there is almost a rebuttable presumption that such a class action should be allowed where there is a plausible claim of violation of the Sherman Act."[63] The court considered the public policy in favor of granting private recovery in antitrust suits and went on to hold that it was "an abuse of discretion . . . not to allow a class action at least with respect to issues of alleged violation[s] of the Sherman Act."[64] The Fourth Circuit noted that after the conspiracy issue had been determined, the trial court had discretion to decide how to dispose of the issues of causation and damage.

Like the lower court in *Windham,* the lower court in *Ric-*

(class action on behalf of all egg consumers in the United States denied as being "so large that is is unmistakeably beyond the limit of a permissible class action." *Id.* at 321.)

[60] For an excellent analysis of the manageability issue and other issues relating to the standing of remote purchasers in antitrust actions, see Comment, *Antitrust Law—Private Actions—Remote Purchasers Have Standing to Challenge Alleged Price-Fixing—Carnivale.Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287 (S.D.N.Y. 1975),* 10 SUFFOLK U. L. REV. 1207, 1222 (1976).

[61] 539 F.2d 1016 (4th Cir. 1976).

[62] *Id.* at 1019.

[63] *Id.* at 1021.

[64] *Id.* at 1021-22.

Con raised the issue of manageability as a major obstacle. The granting of a class in *Windham,* where the facts were far more complex than those in *Ric-Con,* is strong support for the requirement of class certifications where there are common questions of conspiracy. The Fourth Circuit established in *Windham* that in view of the strong federal policy favoring private remedies in antitrust cases, the presence of complex damages issues should not preclude class certification. This should be true at the very least as to those issues of liability where common questions could most effectively be adjudicated on a class-wide basis.[65]

CONCLUSION

In the order affirming the denial of the class, the Sixth Circuit held, without stating any reason, that there was no abuse of discretion. Because the circuit court could uphold the district court's denial of class certification even if there was abuse of discretion on every basis but one, it is possible that they found abuse of discretion in all but one instance. Furthermore, given the status of the case law in the Sixth Circuit on the other points—standing, definition of class size, and the clear error in applying collateral estoppel as a basis for denying class actions—it would appear that the most likely basis upon which the lower court was upheld was unmanageability of the class.

It is conceivable that the court felt that the individual questions of damage were so complex that they predominated over common issues of liability. Whether the reason for upholding the lower court was manageability or commonality, future antitrust plaintiffs wishing to maintain class actions in the Sixth Circuit face serious difficulties in attempting to obtain class certification. Unless every plaintiff is at the same level on the chain of distribution, and unless every plaintiff puchased through the identical system, a district court seemingly has complete discretion to deny the class on the basis of managea-

[65] As seen in more recent class action antitrust suits, the courts have used a bifurcated trial procedure. The question of liability is first determined and then, if necessary, the issue of damages will be resolved. New York v. Darling-Delaware, Inc., 1976-1 TRADE CAS. (CCH) ¶ 60,812, at 68,514 (S.D.N.Y. 1976); Link v. Mercedes-Benz of N. America, Inc., 1975-2 TRADE CAS. (CCH) ¶ 60,534 at 67,358 (E.D. Pa. 1975).

bility and commonality. Because of the reluctance of many courts to handle these complex cases, it is inevitable that they will frequently use these grounds to deny class actions. Many potential plaintiffs unable to be included in the class are unlikely to bring actions of their own because they lack resources. Such a result was hardly the intent of the antitrust laws or the class action device. Although the answer may be legislative, the true intent of the class action device should not be thwarted by the district courts.