

Class Action Reaction: Amended Rule 23 Enhances Judicial Supervision in Class Litigation

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THE FIRST MAJOR REVISIONS to Federal Rule of Civil Procedure 23 since 1966 went into effect on December 1, 2003. Although the changes are primarily procedural in nature, they present significant new tactical choices for class action litigants and new case management options for courts, and they encourage closer judicial scrutiny of key aspects of class litigation, including appointment of class counsel, settlement, and the class certification decision itself. Because price fixing and other antitrust cases are prime candidates for class actions, it is particularly important that antitrust counsel understand the new class action procedures and their potential effects on private antitrust litigation.

Amended Rule 23 increases the oversight responsibilities of the courts in class action litigation. According to the Advisory Committee: "The overall goal . . . has been to develop rule amendments that provide the district courts with the tools, authority, and discretion to closely supervise class-action litigation."¹ Significantly, the new provisions change the process for certifying a class, but, in contrast to earlier proposals considered by the Advisory Committee, they do not change the substantive standards for certifying a class or alter the basic architecture of Rule 23.² Moreover, the majority of the changes appear to embody current good practices, or to expand the discretion and the tools available to district courts to manage complex class litigation. In fact, the Advisory Committee has described its revisions as reinforcing the current Rule rather than seeking transformative change:

Taken as a whole, the package is a balanced and neutral attempt to protect individual class members, enhance judicial oversight and discretion, and further the overall goals of the class-action device—efficiency, uniform treatment of like

cases, and access to court for claims that cannot be litigated individually without sacrificing procedural fairness or bringing about other undesirable results.³

Nevertheless, by encouraging courts to become more involved in almost every aspect of the class action proceeding, some of the changes may prove to be more groundbreaking than they first appear. For example, pursuant to the amended Rule:

- Class certification decisions are to be made at "an early practicable time" rather than "as soon as practicable;"
- Certification orders should define the class, and class claims, issues, or defenses;
- Notice to class members must be in plain, easily understood language;
- Certification orders can be altered or amended "before final judgement" rather than "before the decision on the merits;"
- Courts may no longer certify conditional classes;
- Courts must appoint class counsel who will "fairly and adequately represent the interests of the class," and the order appointing class counsel may include provisions related to attorney fees and costs;
- Parties to a settlement must identify "any agreement made in connection with the proposed settlement;" and
- Prior to approving a settlement agreement, the court must ensure that it is "fair, reasonable, and adequate," and may refuse to approve a settlement for a previously certified class if it does not afford a new opportunity for class members to opt out.

In the coming months and years, it will be interesting to see whether and how the courts take up amended Rule 23's invitation to continue to innovate in managing class litigation. What follows is a review of the key changes to Rule 23 that are particularly relevant to antitrust treble damages litigation and that may prompt more revolutionary developments by the courts.

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Timing of Certification Decision

Old Rule 23 directed a court to make a class action certification decision “as soon as practicable.”⁴ In 1996, the Advisory Committee published a package of proposed amendments to Rule 23 that would have changed that language to “when practicable.”⁵ Despite favorable public comment, the Advisory Committee declined to recommend making a change at that time in part due to concern that the proposed language might “encourage courts to delay deciding certification motions, leading to an unwarranted increase in precertification discovery into the merits of a class suit.”⁶ Amended Rule 23 settled on the phrase “at an early practicable time,” which the Advisory Committee describes as being “consistent with present good practices.”⁷

The old Rule allowed courts to exercise significant discretion in structuring precertification discovery, but it was also subject to misunderstanding in that it could be read to impose an inflexible timeline. This led to undue haste in some cases. The new Rule encourages the existing flexibility but appears to provide more structure than the “when practicable” standard. While the linguistic differences between the three formulations are subtle, the Advisory Committee described the new Rule as “consistent with the practice of authorizing discovery on the nature of the merits issues, which may be necessary for certification decisions, while postponing discovery pertaining to the probable outcome on the merits until after the certification decision has been made.”⁸ Thus, although the amended Rule does not change the substantive standard for certifying the class, the Advisory Committee’s emphasis on flexibility over dispatch is intended to make room for careful judicial exploration of the traditional substantive criteria for certifying a class embodied in other parts of Rule 23.

Amended Rule 23 not only places greater emphasis on flexibility, but the Notes go one step further by speaking directly to “the many valid reasons that may justify deferring the initial certification decision.”⁹ The general theme is captured by their exhortation: “A critical need is to determine how the case will be tried.”¹⁰ The Notes acknowledge that it is inappropriate to predict the outcome on the merits, but state that precertification discovery “often includes information required to identify the nature of the issues that actually will be presented at trial.”¹¹ With respect to unwarranted merits discovery—which was a reason for not recommending the “when practicable” formulation—the Notes state that “it is appropriate to conduct controlled discovery into the ‘merits,’ limited to those aspects relevant to making the certification decision on an informed basis.”¹² While endorsing “active judicial supervision” the Notes also caution that bifurcated discovery may lead to “an artificial and ultimately wasteful division between ‘certification discovery’ and ‘merits discovery.’”¹³ Additionally, the Notes describe with apparent approval the practice some courts have adopted of requiring plaintiffs to submit a trial plan with the motion for class certification, which may take additional time to develop.

Finally, the Notes expressly contemplate the possibility that some defendants may wish to move for summary judgment prior to a certification decision, or that time may be needed to designate class counsel under new Rule 23(g).

The message that emerges from the Notes is that the scope of pre-certification discovery may vary based on the court’s need to understand the nature of merits issues in order to make an informed decision on class certification, and that courts should be encouraged to look for a fairly specific description of how the class claims will be tried. On the thorny issue of whether and how to address the merits, the Advisory Committee appears to be suggesting a distinction between inquiry into “the nature of the issues” as opposed to “prediction of the likely outcome.” In future cases, this theme may join issue with recent appellate decisions discussing the degree to which it is necessary for a court to address merit issues that are incidental to deciding the appropriateness of class treatment. *Compare Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (“if some of the considerations under Rule 23(b)(3) . . . overlap with the merits . . . then the judge must make a preliminary inquiry into the merits”), *with In re Visa Check/Mastermoney Antitrust Litigation*, 280 F.3d 124, 134–35 (2d Cir. 2001) (“The question for the district court at the class certification stage is whether plaintiffs’ expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive.”).

In antitrust cases, the new Rule may make courts somewhat more receptive to deciding such threshold issues as whether the per se rule or rule of reason applies to the conduct at issue if, for some reason, application of the rule of reason would present more individual questions of fact or create conflicts of interests among members of the purported class. Similarly, a court may be more receptive to deciding prior to certification whether the geographic market is national or local, if local markets would create numerous separate inquiries for various class members. While either of these issues might be viewed as a premature determination of the merits inappropriate for a class certification decision, they may be also essential questions for a court to answer “to determine how the case will be tried.”

Will plaintiffs present evidence relating to one geographic market or dozens? Must plaintiffs demonstrate market power? Will experts be weighing procompetitive justifications for the challenged conduct? The revised Rule does not instruct a court to make these inquiries prior to a certification decision, but where such questions are likely to be relevant to deciding whether Rule 23’s substantive standards have been met, the revised Rule may encourage courts to reach such issues earlier in the litigation. Greater precertification discovery could be helpful to plaintiffs who carry the burden of proof on class certification. Defendants also may benefit in some cases if the court weighs certain threshold issues bearing on the merits that are antecedent to

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a determination of whether common issues predominate or the claims are otherwise amenable to class treatment.

Order and Nature of Class Certification

Rule 23(c)(1) has been amended in a number of other significant ways that may lead to increased scrutiny by the courts prior to the class certification decision. First, revised Rule 23(c)(1)(B) provides that a class certification order, “must define the class and the class claims, issues or defenses.”¹⁴ The rationale for this change is to facilitate Rule 23(f)’s interlocutory-appeal provision.¹⁵ This provision was added to Rule 23 in 1998 and allows for permissive interlocutory appellate review under a standard “akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.”¹⁶

The new requirements concerning the contents of a class certification order are likely to cause courts to think more carefully about the contours of the class they are certifying. For example, in an antitrust case, the court may feel compelled to examine more closely issues of geographic and product markets, or the types of individual questions that may arise if the rule of reason rather than the per se rule applies. As discussed above, this also may cause courts to allow more extensive precertification discovery on merits issues.

Another important change to Rule 23(c)(1) relates to the ability of the court to amend its initial class certification order. Under the old Rule, an order granting or denying certification could be altered or amended “before the decision on the merits.” Under the new Rule, such an order may be altered or amended “before final judgment.”¹⁷ This is intended to address ambiguity under the old Rule, which could apply to a decision on liability that occurs prior to final judgment despite the fact that a later proceeding to define the remedy may indicate that the class definition needs to be amended or the class subdivided.¹⁸

A third significant change is the deletion of the provision that allowed a conditional class to be certified.¹⁹ As the Advisory Committee explained, this provision was deleted to “avoid the unintended suggestion, which some courts have adopted, that class certification may be granted on a tentative basis, even if it is unclear that the rule requirements are satisfied.”²⁰ In other words, although courts retain the ability to alter or amend the class definition throughout the proceeding, a court that “is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.”²¹

This amendment is likely to benefit defendants by making it more difficult for a court to justify certifying a vaguely defined class with the intention of clarifying the class later in the proceeding. For example, in *Perez v. Metabolife International Inc.*, 218 F.R.D. 262, 275 (S.D. Fla. 2003), the plaintiffs attempted to overcome deficiencies in their proposed class definition by suggesting that the court could conditionally certify a class and then refine that definition later. The court rejected this suggestion on the basis that it was inconsistent with the requirement that Rule 23’s prerequisites must be satisfied before any class can be certified. Although the court’s ruling was based on the old Rule 23, the court referenced the amended Rule in support of its position that a conditional class cannot be certified if the conditions of Rule 23 are not met.

Appointment of Class Counsel

Amended Rule 23 includes a new subsection 23(g) concerning the court’s appointment of class counsel. Courts previously addressed the adequacy of class counsel as part of old Rule 23(a)(4)’s requirement that the class representative “fairly and adequately protect the interests of the class.” Once again, the new Rule reflects the current practice by requiring that the court appoint class counsel when it certifies a class, and that counsel must “fairly and adequately” represent the interests of the class.²² New Rule 23(g) “build[s] on experience under Rule 23(a)(4) and fill[s] the gap by articulating the responsibility of class counsel and providing an appointment procedure.”²³ It also articulates a separate standard that applies where several plaintiff’s lawyers are vying for the position of class counsel, and encourages the court to address the issue of attorney fees prior to certifying a class and appointing class counsel.

Subsection (g)(1)(C) directs a court to consider the following four criteria along with any other relevant consideration when deciding whether to appoint class counsel:

1. The work counsel has done in identifying or investigating potential claims in this action;
2. Counsel’s experience with class actions, complex litigation, or cases with similar claims;
3. Counsel’s knowledge of the applicable law; and
4. The resources counsel will commit to representing the class.

Some of these issues may be confidential work product, so the Advisory Committee recommends that courts take steps to shield such information from other parties.²⁴

The court also may ask applicants to propose terms for a potential award of attorney fees and nontaxable costs, or it may inquire about any agreement concerning fees.²⁵ As the Advisory Committee explained, “[t]he provision encourages counsel and the court to reach early shared understandings about the basis on which fees will be sought.”²⁶ It expressed a hope that “[t]his feature might obviate later objections to the fee request, serve as a more productive way for the court to deal in advance with fee award matters that seem to defy regulation after the fact, and accommodate competing applications or innovative approaches when appropriate.”²⁷

Subsection (g)(2)(B) explains how the courts’ scrutiny of potential class counsel will differ depending on whether there are multiple applicants for the position. Where there is only one applicant, the court undertakes the existing adequacy criteria now articulated by subsections (g)(1)(B) and (C). Where there are multiple applicants, the new Rule instructs the court to appoint the one “best able to represent the interests of the class.”²⁸

While the Notes stop short of recommending the use of an auction as a preferred method of selecting class counsel from among competing applicants, it seems to contemplate that competition among counsel at the appointment stage may be an effective means for the court to establish appropriate attorney fees. In a comment filed with the Advisory Committee, the FTC recommended that language in the draft Notes referencing a competitive application process be moved to the text of the Rule.²⁹ Other commentators disfavored an endorsement of a competitive application process for fear that it might favor either smaller, lesser known law firms by placing too much emphasis on price, or larger, better known law firms by placing too much emphasis on experience or reputation.³⁰ Although the FTC’s recommendation was not adopted, the Note still indicates the importance of a competitive application process by providing: “The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel.”³¹

In cases where an applicant has invested time and resources in investigating and developing class claims, courts may need to balance increased competition for the class counsel position against the risk that counsel may be deterred from making such initial investments if there is a significant risk that other lawyers will reap the benefit of their work by being selected as class counsel. Subsection (g)(1)(C) identifies the latter concern by instructing a court to consider past work “identifying and investigating potential claims.”

Finally, the new Rule instructs that separate counsel “must” be appointed for each subclass that the court certifies to represent “divergent interests.”³² The use of separate counsel for subclasses is consistent with current practice in many cases,³³ but the new Rule may go one step further by making it mandatory. It is not clear, however, whether it requires separate counsel for each subclass or only for those where the court has made some additional determination that interests “diverge.”

Awards of Attorney Fees

Rule 23’s new subsection (h) adopts current practice regarding attorney fees and costs. Where authorized by law or by agreement between the parties, Rule 23(h) provides a mechanism for plaintiffs to seek “reasonable” attorney fees and nontaxable costs by motion pursuant to Rule 54(d)(2). Notice of motion must be served on all parties and, where fees are sought by class counsel, on the class. The Advisory Committee explains that notice to the class is similar to that required by new Rule 23(e) for a settlement, and in many cases the same notice may fulfill both functions.³⁴ The Rule also provides that the members of the class from whom payment is sought would have standing to object to the motion for attorney fees, that the court may hold a hearing on the motion, and that the motion may be referred to a magistrate judge or special master.

New Rule 23(h) also describes the basis for awarding fees while allowing courts to continue following either the lodestar or the percentage of the fund approaches. The Advisory Committee explains that the new Rule “does not attempt to influence the ongoing case law development regarding a choice between (or combination of) the percentage and lodestar amounts.”³⁵ The Notes summarize the relevant criteria as including the result achieved for the class, the monetary value conferred on the class, directions of the court in connection with appointing class counsel, and agreements between the parties regarding the fee motion. Significantly, the Rule also requires findings of fact concerning fees under Rule 52(a). The Advisory Committee hopes that “[t]he findings requirement provides important support for meaningful appellate review” and is consistent with the stated intention to leave to the courts further development of standards and practices for awarding fees to class counsel.³⁶

The FTC Comment advised that awards of attorney fees should take account of whether governmental authorities, such as the FTC or Department of Justice, have done substantial work building and prosecuting a similar case.³⁷ Because private treble damages actions frequently follow government antitrust enforcement, this may become an important issue for antitrust counsel. A possible answer to this problem, consistent with the overall approach of the Amended Rule, would be for Courts to treat such follow-on class actions as particularly appropriate cases for auctioning the position of lead counsel, as occurred in the recent auction houses class litigation.³⁸ When litigation is pioneered by the government, there may be little risk that competition for the class counsel position will deter private efforts to discover and develop cases.

Review of Settlement

Rule 23(e)(1)(A) clarifies that court approval is only required for settlement of “the claims, issues, or defenses of a certified class.” This change addresses the ambiguity of the previous Rule, which was sometimes interpreted as requiring court approval for settlements that resolved only the named plain-

tiff's individual claims. More significant, however, are the changes to Rule 23(e) that heighten the court's ability to review proposed settlement agreements.

One important change in this regard is new Rule 23(e)(2), which requires the parties to identify "any agreement made in connection with the proposed settlement, voluntary dismissal or compromise." This change addresses the concern that side deals may be entered into wherein certain class benefits are exchanged for advantages that inure to the named plaintiffs or class counsel. Furthermore, although the disclosure of a side agreement does not automatically open the door to discovery, the court can direct a party to disclose the full terms of any agreement identified pursuant to this Rule.³⁹

Another change that is aimed at enhancing the overall fairness of the class settlement process is new Rule 23(e)(3), which permits a second opt-out opportunity for Rule 23(b)(3) classes where the settlement is proposed after the initial opt-out period has expired. The new Rule does not mandate a second opt-out period, but under this Rule a judge may refuse to approve a settlement if a second opt-out period is not afforded to individual class members. The decision to approve a settlement agreement that does not allow a new opportunity to elect exclusion is left to the court's discretion.

As the Advisory Committee explained, there may be instances where there are material changes between the time of certification and settlement, or the amount of information available to class members at the time of the initial opt-out period may be limited. A second opt-out period harmonizes class actions with traditional litigation by providing certified class members the same opportunity to reject a settlement as individual plaintiffs or class members in an action where the court certifies a settlement class. Furthermore, a second opt-out period may provide the court with added assurance that the settlement is "fair, reasonable, and adequate."⁴⁰

The requirement that the court be informed of all side deals, and the possibility that a second opt-out period will be granted, encourages the court and class members to more carefully consider a settlement agreement. These changes, by adding an additional layer of protection for absent class members, are likely to make class settlements more complex and risky. Moreover, the second opt-out period has the potential for abuse. For example, some have expressed concern that it will "inject additional uncertainty into settlement" and "create an opportunity for dissatisfied or mercenary counsel to woo class members away from the settlement."⁴¹ Although this is a legitimate concern, defendants can mitigate this risk by including a provision in the settlement agreement that allows the defendant to terminate the agreement if a specified portion of the class opts out. Such a provision is already employed in some instances where a settlement is reached before or at the same time as class certification.

Tactical Decisions for Counsel

Taken as a whole, amended Rule 23 increases the oversight responsibilities and tools of courts presiding over class action

lawsuits in several important ways.

First, the Rule implicitly encourages courts to take more time in assessing class certification issues by endorsing the practice of courts that engage in at least some merits-related discovery prior to certification, and expressing concern that the previous Rule placed too much emphasis on "dispatch" in making class certification decisions. This will likely prolong the period between when a suit is filed and when a certification decision is made, thereby causing the parties to incur additional litigation costs, including the cost of discovery, when the scope of damages is most uncertain.

Second, by encouraging increased court involvement in the selection of class counsel and the determination of fees, the new Rule has the potential to create additional uncertainty for plaintiffs' counsel who may fear being pushed out of a case or being pressured to accept reduced fees.

Finally, closer scrutiny of settlement agreements—including the possibility of a second opt-out period—makes earlier settlement a more appealing and less costly option.

Some tactical decisions plaintiff and defense counsel may face under the new Rule include:

- **Whether to file a class action in the first place.** Because the new Rule encourages courts to take more time and engage in additional discovery before certifying a class, class actions may become more risky and costly for plaintiffs.
- **How to approach precertification discovery.** Although precertification discovery is generally sought by plaintiffs and opposed by defendants, too much discovery could prove risky for plaintiffs. In particular, because the new Rule requires courts to identify the class claims, issues, or defenses when certifying a class, precertification discovery could result in the court forming a narrow view of the issues early in the litigation or could convince the court that certification is inappropriate.
- **How to best position yourself to be selected as class counsel.** Courts will not only scrutinize the skill of class counsel applicants, but may also consider the investigative work the class counsel has done and agreements related to attorney fees and costs.
- **When is the optimal time to settle the litigation.** Once a class is certified, there is enormous pressure on defendants to settle, particularly in antitrust litigation where there is not only the risk of classwide damages, but also the likelihood that those damages will be trebled. With closer court scrutiny of class certification motions, however, defendants who believe that the class claims are weak may have more reason to hope that those claims will be rejected. This possibility, however, must be balanced with the risk that if certification is granted a later settlement may have to include a second opt-out opportunity. Furthermore, because class certification decisions will likely take longer to reach, it will be more costly to continue litigating during the period prior to certification. The significant impact of the class certification decision on

the eventual path of litigation suggests that it may be wise to encourage courts to take additional time to monitor these cases and to rule on class certification. Nonetheless, because very few certified class actions are fully litigated, the additional cost and uncertainty created by this increased judicial role are likely to affect the manner in which parties litigate and ultimately resolve these cases. ■

- ¹ Agenda F-18 Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 8 (Sept. 2002) [Hereinafter Sept. 2002 Report], available at <http://www.uscourts.gov/rules/jc09-2002/report.pdf>.
- ² See David F. Levi, *Memorandum to the Civil Rules Advisory Committee: Perspectives on Rule 23 Including the Problem of Overlapping Classes 2–3* (Apr. 24, 2002), Lawyers for Civil Justice, available at <http://www.lfcj.com/articles/display.asp?artnum=70> (describing abandoned proposed rule changes to add new criteria for certification, remove existing distinctions between types of class actions, and allow for certification of opt-in rather than opt-out classes).
- ³ Sept. 2002 Report, at 9.
- ⁴ FED. R. CIV. P. 23(c)(1).
- ⁵ Sept. 2002 Report, at 9.
- ⁶ *Id.* at 10.
- ⁷ *Id.*
- ⁸ *Id.* at 11.
- ⁹ FED. R. CIV. P. 23(c)(1) Advisory Committee notes to 2003 Amendments (2003 Notes).
- ¹⁰ *Id.*
- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ *Id.*
- ¹⁴ FED. R. CIV. P. 23(c)(1)(B).
- ¹⁵ Sept. 2002 Report, at 11.
- ¹⁶ FED. R. CIV. P. 23(f) Advisory Committee notes to 1998 Amendments.
- ¹⁷ FED. R. CIV. P. 23(c)(1)(C).

- ¹⁸ Sept. 2002 Report, at 11.
- ¹⁹ *Id.* at 11–12.
- ²⁰ *Id.* at 12.
- ²¹ FED. R. CIV. P. 23(c)(1)(C) 2003 Notes.
- ²² FED. R. CIV. P. 23(g)(1)(A) & (B).
- ²³ Sept. 2002 Report, at 17.
- ²⁴ FED. R. CIV. P. 23(g)(1)(C) 2003 Notes.
- ²⁵ *Id.*; FED. R. CIV. P. 23(g)(1)(C)(iii).
- ²⁶ Sept. 2002 Report, *supra* note 1, at 18.
- ²⁷ *Id.*
- ²⁸ FED. R. CIV. P. 23(g)(2)(B).
- ²⁹ Federal Trade Commission, Comment Concerning Proposed Amendments to Rule 23, at 10 (Feb. 15, 2002) (FTC Comment), available at <http://www.ftc.gov/os/2002/02/rule23letter.pdf>.
- ³⁰ *Id.*
- ³¹ FED. R. CIV. P. 23(g)(2)(A) 2003 Notes.
- ³² FED. R. CIV. P. 23(g)(1)(A); FED. R. CIV. P. 23(g)(1)(A) 2003 Notes.
- ³³ See 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1765 (2d ed. 1986).
- ³⁴ Sept. 2002 Report, at 20.
- ³⁵ *Id.* at 19.
- ³⁶ *Id.* at 20.
- ³⁷ FTC Comment, at 6–8. The FTC also suggested that Amended Rule 23 require parties to notify the court of related governmental cases and the government agencies involved in those cases of the related private class litigation. Although its suggestions were not adopted in the final rule, the FTC has successfully urged courts to award reduced attorney fees in follow-on private litigation, including in one recent antitrust case. See First Databank Antitrust Litig., 209 F. Supp. 2d 96 (D.D.C. 2002).
- ³⁸ *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y. 2000) (class litigation followed criminal investigation).
- ³⁹ Sept. 2002 Report, at 13–14.
- ⁴⁰ *Id.* at 15.
- ⁴¹ *Id.* at 16.

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The ABA Section of Antitrust Law congratulates Robert B. Martin, III for winning the Sixth Annual Section of Antitrust Law Writing Competition. The review committee awarded first prize in the competition to Mr. Martin for his article, *Sherman Shorts Out: The Dimming of Antitrust Enforcement in the California Electricity Crisis*, 55 *Hastings L.J.* 249 (2003). For more information on the competition, see <http://www.abanet.org/antitrust/writing.html>.