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'Rigorous Analysis': Recent Developments in Antitrust Class Action Litigation in the United States

Robert G Abrams, Gregory J Commins Jr and Danyll W Foix
Baker Hostetler

Supreme Court and appellate court decisions continue to shape the debate surrounding whether, and under what conditions, an antitrust case is amenable to class action treatment. Where once it might have been said antitrust cases were regularly and perhaps 'too easily' certified, the trend of decisions over the past two decades has been a nearly universal rising of the bar. In the modern era, antitrust class actions are subjected to 'rigorous' scrutiny complete with full discovery, sophisticated economic analysis and the requisite 'battle of the experts'. Indeed, some courts have gone so far as to resolve hotly contested issues of fact, ordinarily reserved for a jury, in resolving the class certification issue.

Recently, however, some courts have begun to question whether the pendulum has swung too far and the standard for class certification has been set too high. Should courts hold mini-trials at the certification stage to resolve contested issues of fact? Should courts choose between competing experts whose opinions are otherwise admissible as offering acceptable economic opinions? Some recent decisions have held that courts should not go so far. And, what of the defendant's economist(s)? Must they too pass standards for admissibility? And, if the courts are to conduct a rigorous analysis of the plaintiff's allegations at certification, must the court also conduct a rigorous analysis of the defendant's assertions and theories against certification? Some courts have said 'yes'.

This article examines recent developments in antitrust class action case law over the past two years concerning how much 'rigorous' analysis is too much, or too little. As these issues develop, it seems clear courts will continue to require parties to support their allegations with evidence. This likely means plaintiffs will be required to come forward with more than allegations and theory – they must support their claims with evidence following an adequate opportunity for discovery. But the trend also is likely to require defendants to meet the same evidentiary standard; simply poking holes in plaintiffs' arguments may not suffice in the future. In sum, plaintiffs and defendants are well advised to be rigorous in their analyses – and to support their allegations and assertions with admissible evidence and reliable economic opinion.

Class actions in the United States

A class action is a litigation process whereby 'representatives' litigate on behalf of many 'class members', and those class members are bound by the outcome of the representatives' litigation.[1] Rule 23 of the Federal Rules of Civil Procedure provides the requirements for certifying a class. Under Rule 23(a) plaintiffs must establish: (1) sufficient numerousness of class such that joinder of all members is impracticable; (2) commonality of factual and legal issues among the proposed class; (3) typicality of the claims or defences and the representatives; and (4) adequacy of representation. In addition, class actions must satisfy at least one of the three requirements of Rule 23(b). Antitrust litigants frequently seek certification under Rule 23(b)(3), because it covers cases seeking monetary damages.[2] This Rule, often called the 'predominance' rule, requires that 'questions of law or fact common to class members predominate over any questions affecting only individual members', and that 'a class action is superior to other available methods for fairly and efficiently adjudicating the controversy'.

The emergence of 'rigorous analysis' of proposed class actions

For years there was uncertainty over the extent to which courts should delve into the merits of plaintiffs' claims to decide whether Rule 23's requirements were met. Two early decisions by the Supreme Court, *Eisen v Carlisle & Jacquelin* and *General Telephone Co v Falcon,* provided what appeared to be conflicting approaches to class certification. In *Eisen*, the Supreme Court admonished lower courts to avoid a preliminary inquiry on the merits of cases when deciding class certification.[3] In contrast, the Supreme Court's *Falcon* decision instructed lower courts to conduct a 'rigorous analysis' to ensure satisfaction of Rule 23.[4] How to resolve this apparent inconsistency? Lower courts attempted to resolve the tension by accepting plaintiffs' allegations and inquiring into the merits of only some aspects of a case when ruling on class certification.[5] Ultimately, this confusion resulted in inconsistent standards among courts and uncertainty for litigants.[6]

More recently, the 'rigorous analysis' set out in *Falcon* has emerged as the dominant standard for review of class actions. Several recent appellate court decisions specifically instructed district courts to apply a rigorous analysis when assessing whether the requirements of Rule 23 are met. More importantly, these courts ruled that a rigorous analysis entails courts resolving disputes over evidence relevant to class certification requirements during the class certification process.

In one of the earliest of these cases, *Blades v Monsanto Co*,[7] the Eighth Circuit upheld a decision not to certify a class and opined that 'the preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap to the merits of the case'. Shortly thereafter, the Second Circuit, in *In re Initial Public Offering Securities Litigation*,[8] in a departure from its prior rulings, embraced a rigorous analysis by ruling certification is possible only after 'the judge resolves factual disputes relevant to each Rule 23 requirement'. The First Circuit followed with *In re New Motor Vehicles Canadian Export Antitrust Litigation*,[9] which vacated certification of a class because the district court failed to conduct a rigorous examination of the plaintiff's 'novel and complex theory'. Finally, the Third Circuit's much-discussed decision in *In re Hydrogen Peroxide Antitrust Litigation*[10] solidified the emergence of this standard by comprehensively laying out the rationale and application of rigorous analysis in the context of antitrust class actions.

While the First, Second, Third, Fourth, Fifth, Eight, Tenth and Eleventh Circuits eventually articulated varying constructions of the 'rigorous analysis' standard,[11] other courts refused to consider the merits,[12] or only sometimes considered the merits,[13] of case allega-

tions when considering certification of a class. The Supreme Court's 2011 decision in *Wal-Mart Stores, Inc v Dukes*[14] resolved the dispute and endorsed a 'rigorous analysis' as the appropriate standard. In *Dukes*, the Supreme Court reiterated its ruling in *Falcon*[15] and held that plaintiffs must 'affirmatively demonstrate their compliance'[16] with Rule 23. Justice Scalia's opinion explicitly acknowledged this 'rigorous analysis' will 'frequently…entail some overlap with the merits of the plaintiff's underlying claim'.[17] Whatever uncertainty remained was thus clarified: rigorous analysis of the underlying merits, as necessary to decide Rule 23, is the standard for review of class actions. What remains to be determined is a far more difficult question – what does it mean to conduct a rigorous analysis? Or stated differently, how much rigour does it take to be rigorous?

The initial impact of rigorous analysis on antitrust class actions

'Common impact' became pivotal and frequently decisive

The emergence of the rigorous analysis standard made 'common impact' a decisive factor for certification of many antitrust cases brought under Rule 23(b)(3). This rule requires that questions common to the class predominate over individual questions. The common questions typically raised in antitrust class actions seeking monetary damages are whether plaintiffs can show a violation of the antitrust laws, injury to the class resulting from that violation, and an amount of damages.[18] These requirements collectively are known as 'common impact' because they generally require plaintiffs to show that the proposed class was impacted by the alleged antitrust violation and that this can be shown with evidence common to the proposed class.

Prior to the emergence of the rigorous analysis standard, courts were willing to assume common impact in antitrust cases alleging conspiracy. Numerous courts cited a 1997 Supreme Court decision stating predominance is 'a test readily met in certain cases alleging…violations of the antitrust laws.'[19] Indeed, the Third Circuit articulated the so-called '*Bogosian* shortcut' – a ruling that permitted courts to presume common impact as long as plaintiffs proved an antitrust conspiracy that caused damages.[20]

Rigorous analysis – and particularly the reasoning of *Hydrogen Peroxide* – has moved common impact to the frontline in antitrust class certification battles. In articulating the rigorous analysis standard, *Hydrogen Peroxide* rejected the notion that predominance can be presumed in antitrust cases.[21] Rather, *Hydrogen Peroxide* held all requirements of Rule 23, including predominance, must be supported by a preponderance of the evidence,[22] and courts must weigh conflicting evidence, resolve factual disputes and make legal findings regarding disputes relevant to certification, even if those disputes overlap with the merits of plaintiffs' claims that would be presented at a trial.[23]

Following *Hydrogen Peroxide*, many class action defendants focused their defence on attempting to convince the court that plaintiffs could not show by common, rather than individualised, evidence that class members suffered antitrust impact from the alleged violation. Indeed, many defendants focused exclusively on challenging common impact.[24] As part of the common impact analyses, courts convened multi-day, trial-like evidentiary hearings, including testimony from the competing experts, on industry pricing patterns.[25] And, some courts that had certified classes prior to *Hydrogen Peroxide*, decertified those classes for lack of sufficient evidence of common impact, after reconsideration and application of *Hydrogen Peroxide's* rigorous analysis.[26]

Expert testimony supporting certification became the object of scrutiny

Common impact, by its nature, frequently depends on statistical analyses and econometric models to show an alleged antitrust violation injured members of a proposed class. *Hydrogen Peroxide*'s emphasis on common impact accordingly increased the significance (and scrutiny) of expert analyses and opinion. Prior to the emergence of 'rigorous analysis', courts generally abstained from resolving 'the battle of the experts' on class certification.[27] Thus, the district court in *Hydrogen Peroxide*, when faced with irreconcilable expert evidence from plaintiff and defendant experts regarding common impact, refused to decide which experts were correct, and rather concluded plaintiffs' expert evidence alone was sufficient to make the then necessary 'threshold showing' of predominance.[28] On appeal, the Third Circuit ruled the failure to consider defendants' expert testimony was error because, with rigorous analysis, 'resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court'.[29]

The application of rigorous analysis to experts in *Hydrogen Peroxide*, as well as *Initial Public Offering*, fostered a surge in challenges to expert testimony at class certification. Defendants increasingly challenged the admissibility of expert testimony under *Daubert v Merrell Dow Pharmaceuticals*,[30] a Supreme Court ruling that expert testimony must be determined by the court to be sufficiently reliable to be considered.

Following *Hydrogen Peroxide* and *Dukes,* it is clear courts must conduct a 'rigorous analysis'. Although the scope and nature of the rigour required remains in flux, following these decisions there can be little doubt that the bar to certification has been raised for satisfying Rule 23.

The pendulum swings?

While rigorous analysis is widely viewed as favouring opponents of class certification – and led to many denials of certification – recent courts have begun the process of assessing whether the standard in the wake of *Hydrogen Peroxide* has not made certification too difficult for the putative class under Rule 23. These courts, grappling with the degree of rigour to be applied at class certification, recently announced rulings that may effectively reduce the degree of scrutiny at certification.

Rigorous analysis of common impact does not require upfront proof

Recent decisions make clear that rigorous analysis does not require, at class certification, actual resolution of all evidence concerning common impact. In fact, the Supreme Court's *Dukes* opinion explained rigorous analysis requires parties seeking class certification to 'be prepared to prove' satisfaction of Rule 23. This distinction between proving common impact as a prerequisite for certification and the capability to prove common impact at trial is further illustrated in *Behrend v Comcast Corp,*[31] a post-*Dukes* ruling.

In *Behrend,* defendants argued class certification was inappropriate because their evidence and expert testimony proved no common impact. In short, they thought their evidence was better than the plaintiffs' evidence.[32] The Third Circuit disagreed, ruling rigorous analysis does not require courts to decide whether plaintiffs 'actually have proven antitrust impact'.[33] The Third Circuit explained rigorous analysis is not the same as 'actual trials in which factual disputes are to be resolved'.[34] Instead, 'a district court may inquire into the merits only insofar as it is 'necessary' to determine whether a class certification requirement is met'.[35] Here, the district court

rigorously analysed plaintiffs' and defendants' evidence, accepted and rejected evidence put forth by both parties, and determined that plaintiffs 'can establish class-wide antitrust impact through common evidence'.[36] Rigorous analysis, *Behrend* explained, requires nothing more.[37]

Decisions following *Dukes* and *Behrend* demonstrate that balancing may be required between rigorous analysis and consideration of the merits of plaintiffs' allegations. A district court in California, when granting certification, explained courts 'generally' do not consider the merits of the plaintiff's claims and 'must take the substantive allegations of the complaint as true'.[38] However, the court recognised that 'frequently [...] rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim'.[39] Similarly, a district court in Oklahoma, when denying certification, recognised 'the Court must conduct a 'rigorous analysis," but also noted that 'the court is not to pass judgment on whether plaintiffs will prevail on the merits'.[40]

Other decisions continue to recognise that, despite rigorous analysis, plaintiffs should be accorded some preference when assessing whether Rule 23 is satisfied. Recently, the district court in the Eastern District of New York, for example, certified a class in *In re Vitamin C Antitrust Litigation*[41] that alleged vitamin C manufacturers engaged in a cartel to fix prices and limit the output of vitamin C. The opinion recognised courts must assess 'all relevant evidence admitted at the class certification stage and resolve any relevant factual disputes, even if this requires a determination of issues that go to the merits of the case.'[42] Yet, the court emphasised this analysis does not negate case law establishing that Rule 23 should be 'given liberal rather than restrictive construction' and that there is 'a general preference for granting rather than denying class certification'.[43]

Expert testimony opposing certification may also be scrutinised

While *Daubert* challenges to expert testimony often focus on plaintiffs' experts during class certification, recent cases have turned to an analysis of defendants' experts' opposing certification. This is reflected in the *Behrend* opinion, which states courts must 'examine critically expert testimony on both sides'.[44]

The Seventh Circuit's recent opinion, *Messner v Northshore University HealthSystem*,[45] affirmed that defence experts must satisfy the same reliability standards as plaintiff experts. The Seventh Circuit vacated the district court's order, which had relied on defendants' expert, denying certification, and explained that 'whenever an expert's report or testimony is critical to a class certification decision, a district court must rule conclusively on a challenge to the expert's qualifications or opinions before ruling on class certification'.[46] In making this ruling, the Seventh Circuit rejected the proposition that the Federal Rules of Evidence apply only to plaintiffs during the class certification stage because they bear the burden of proving satisfaction with Rule 23, and explained that defendants cannot oppose class certification with inadmissible expert testimony any more than plaintiffs can rely on such testimony in support of certification: 'The fact that a defendant is not required to present evidence to defeat class certification does not give that defendant license to offer irrelevant and unreliable evidence.'[47]

The precise parameters of the *Daubert* scrutiny to be applied at the class certification stage remains open,[48] but there can be little doubt that courts will continue to refine the extent to which they are willing to resolve differences in expert opinion – offered by plaintiffs and defendants – prior to deciding class certification.

Conclusion

Recent decisions advise the prudent attorney (whether plaintiff or defendant) to support their arguments (and their experts) with evidence. Plaintiffs should not rest on their allegations but instead should come forward with evidence of common impact that can be established at trial. Likewise, defendants should not simply cast stones at plaintiffs or their experts, but should submit reliable evidence of their own. In the meantime, courts will continue to struggle with the extent to which they need to resolve factual issues at the class certification stage, and, indeed, whether that is the proper question at all in light of the *Behrend* court's concern that requiring plaintiffs to prove their case at the class certification stage 'runs dangerously close to stepping on the toes of the Seventh Amendment by pre-empting the jury's factual findings with our own'.[49]

At the time of writing, the Supreme Court has granted certiorari in *Behrend* to address the limited question 'whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis'.[50] Given the Court's focus, one can expect further guidance on the rigour required to certify an antitrust class action.

Notes

1 For a detailed explanation of class actions, see 1 Alba Conte & Herbert Newberg, Newberg on Class Actions, § 1.1 et seq. (5th ed. 2011).

2 The Supreme Court's recent decision, *Wal-Mart Stores, Inc v Dukes*, 131 S. Ct. 2541, 2558 (2011), confirmed that 'monetary claims belong in Rule 23(b)(3).'

3 417 U.S. 156, 177 (1974) ('nothing in either the language or history of Rule 23…gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action').

4 457 U.S. 147, 156 (1982) (explaining courts should undertake a 'rigorous analysis' to determine whether Rule 23 requirements are satisfied).

5 The Ninth Circuit's position in accepting both the substantive allegations of a class action complaint as true, *Blackie v Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975), and, where necessary, looking beyond the pleadings, *Hanon v Dataproducts Corp*, 976 F.2d 497, 509 (9th Cir. 1992), was indicative of lower courts' struggles to reconcile the Supreme Court's language. See also Ian Simmons & Alexander Okuliar, Rigorous Analysis in Class Certification Rulings: Recent Advances on the Front Line, 23 Antitrust, Fall 2008, at 72.

6 The inconsistent standards were reviewed in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6, 24 (1st Cir. 2008) (explaining, in the absence of recent Supreme Court guidance, Courts of Appeal 'range [...] along a spectrum' in whether or not 'the district court must conduct a searching inquiry regarding the Rule 23 criteria. The Second, Fourth, Fifth and Seventh Circuits coalesce around the more rigorous end of this spectrum, forbidding district courts from relying on plaintiffs' allegations of sufficiently common proof and requiring courts to make specific findings that each Rule 23 criterion is met').

7 400 F.3d 567 (8th Cir. 2005).

8 471 F.3d 24 (2d Cir. 2006).

9 552 F.3d at 6.

10 552 F.3d 305 (3d Cir. 2008).

11 See Initial Public Offering, 471 F.3d at 33; *Hydrogen Peroxide*, 552 F.3d at 316; *Gariety v Grant Thornton, LLP*, 368 F.3d 356 (4th Cir. 2004); *Bell v Ascendant Solutions, Inc*, 422 F.3d 307 (5th Cir. 2005); *Szabo v Bridgeport Machs, Inc*, 249 F.3d 672 (7th Cir. 2001).

12 See, eg, *In re Nifedipine Antitrust Litig*, 246 F.R.D. 365, 368-69 (D.D.C.

2008) ('courts are not to consider the underlying merits of the plaintiff's claim').

13 See, eg, *Chamberlan v Ford Motor Co*, 402 F.3d 952 (9th Cir. 2005) (explaining rigorous analysis need not require in-depth review of evidence when 'the issues are plain enough from the pleadings') (quoting Falcon, 457 U.S. at 160).

14 131 S. Ct. at 2541.

15 457 U.S. at 156.

16 131 S. Ct. at 2551.

17 Id. at 2552.

18 *Cordes & Co Fin Servs v AG Edwards & Sons*, 502 F.3d 91, 107-08 (2d Cir. 2007).

19 *Amchem Prods, Inc v Windsor,* 521 US 591, 625 (1997).

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

21 *Hydrogen Peroxide*, 552 F.3d at 321.

22 Id. at 320.

23 Id. at 324.

24 See, eg, Ellen Meriwether, The 'Hazards' of Dukes: Antitrust Class Action Plaintiffs Need Not Fear the Supreme Court's Decision, 26 Antitrust, Fall 2011, at 18.

25 See, eg, *In re Plastic Additives Antitrust Litig*, 2010 WL 343187 at *1 (E.D. Pa. Aug. 31, 2010) (three day hearing on class certification); *Behrend v Comcast Corp*, 655 F.3d 182, 188 (3d Cir. 2011) (four day hearing on class certification).

26 See, eg, *Plastic Additives*, 2010 WL 343187 at *1; *In re Live Concert Antitrust Litig*, 2012 WL 1021081, at *1 (C.D. Cal. Mar. 23, 2012).

27 See, eg, *In re Playmobil Antitrust Litig*, 35 F. Supp. 2d 231, 247 (E.D.N.Y. 1998) ('the battle of the experts is properly left for the trier of fact to determine'); *In re Potash Antitrust Litig*, 159 F.R.D. 682, 697 (D. Minn. 1995) ('The certification stage of this litigation is not, however, the proper forum in which to resolve this battle').

28 240 F.R.D. 163, 170-72 (E.D. Pa. 2007). Still other courts refused to engage in the battle of the experts at the class certification stage reasoning that – as long as the plaintiff's expert has offered an admissible model to establish class impact using common evidence, Rule 23 could be satisfied. See, eg, *In re Scrap Metal Antitrust Litig*, 527 F.3d 517 (6th Cir. 2008).

29 *Hydrogen Peroxide*, 552 F.3d at 324.

30 509 U.S. 573 (1993).

31 655 F.3d 182 (3d Cir 2011).

32 Id. at 196.

33 Id. at 197.

34 Id. at 199.

35 Id. (quoting *In re Hydrogen Peroxide Antitrust Litig*, 552 F.3d 305, 316 (3d Cir. 2009).

36 *Behrend*, 655 F.3d at 200.

37 Id.; see also *Messner*, 669 F.3d at 802 (when conducting a Rule 23 analysis 'the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits').

38 *In re Aftermarket Auto Lighting Prods Antitrust Litig*, 276 F.R.D. 364, 367-68 (C.D. Cal. 2011).

39 Id. at 368 (quoting Dukes, 131 S. Ct. at 2551-52).

40 *In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig.*, 2011 WL 6826813, at*1, *2 (W.D. Okla. Dec. 28, 2011).

41 279 F.R.D. 90 (E.D.N.Y. 2012).

42 Id. at 98.

43 Id.

44 *Behrend*, 655 F.3d at 190.

45 669 F.3d 802, 814-16 (7th Cir. 2012).

46 *Messner*, 669 F.3d at 814.

47 Id.

48 *In re Zurn Pex Plumbing Prods Liability Litig*, 644 F.3d 604, 613 (8th Cir. 2011) (affirming 'focused' rather 'full' Daubert inquiry at class certification state).

49 655 F.3d at 200.

50 Case No. 11-864, 25 June 2012

Robert G Abrams
Baker Hostetler

Bob Abrams is the chair of Baker Hostetler's antitrust group–a group with great depth and strength in the litigation and trial of antitrust cases, including class actions. The antitrust group also has significant experience in mergers and acquisitions and its partners have been point persons in dealing with the Department of Justice and the Federal Trade Commission on antitrust aspects of clearing transactions.

Mr Abrams is a Fellow of the American College of Trial Lawyers and has more than 30 years of trial experience in cases involving antitrust, patents, trade secrets, dealer terminations, contract disputes, tortious interference and environmental issues. In recent years, Mr Abrams has been lead counsel in lengthy jury trials focusing on, among other claims, antitrust, patent misappropriation and conversion and copyright infringement. He was also co-counsel in a class action involving substantial and complex contract issues that was tried and then retried to a jury. Over his career, Mr Abrams was counsel in one of the largest FTC proceedings ever filed and was lead counsel in numerous other bench and jury trials and in governmental investigations initiated by DoJ, EPA and the California Air Resources Board.

In the appellate area, Mr Abrams has argued in most of the US Courts of Appeal, presenting cases involving distribution and other business practices, the Alien Torts Claims Act and constitutional law issues.

Gregory J Commins Jr
Baker Hostetler

Gregory Commins is an established trial lawyer and has successfully represented clients in complex litigation, in multi-week trials and on appeal in both state and federal courts across the country.

Mr Commins focuses on complex litigation matters involving antitrust class action litigation; intellectual property disputes such as trade secret misappropriation, copyright infringement and patent infringement claims; product liability class actions; environmental claims; and other commercial issues such as breach of contract, fraud and tortious interference claims. Most recently, he was counsel in two five-week jury trials involving successful prosecution of breach of contract and trade secret misappropriation and claims involving proper ownership and inventorship of fuel injector patents, as well as a four-week jury trial involving copyright infringement, trade secret misappropriation and breach of contract claims. Mr Commins also has defended companies investigated by federal and state regulatory agencies and provided antitrust and environmental counseling to his clients.

Mr Commins has been named a 2012 Washington, DC, 'Super Lawyer' in the area of antitrust litigation.

Mr Commins is a member of the American Bar Association and has done pro bono work for the Archdiocesan Legal Network. In January 2012, Mr Commins presented a CLE programme to The Cleveland Intellectual Property law Association (CIPLA) entitled, 'The Intersection of Antitrust and Intellectual Property: Basic Principles, Standard Setting Organizations and Patent Pools'.

Danyll W Foix
Baker Hostetler

Danyll Foix represents clients in a variety of commercial disputes in state and federal courts. His litigation experience ranges from investigations of potential claims to post-trial appeals.

Mr Foix focuses on antitrust litigation and investigations and class action cases. He represents clients in private antitrust litigation and, he has represented individuals and companies in government antitrust investigations. In the class action area, Mr Foix has represented individuals and businesses in complex and multidistrict class actions involving antitrust, fraud, discrimination and consumer protection claims. He has the distinction of representing both plaintiffs and defendants to class actions, providing insight concerning his adversaries and helping formulate strategies for his clients.

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