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# Why Economics Now Matters for Antitrust Class Actions at the Class Certification Stage

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Wendy L. Bloom

Kirkland & Ellis LLP

## **Why Economics Now Matters for Antitrust Class Actions at the Class Certification Stage**

Wendy L. Bloom\*

**W**hether or not a court will certify an antitrust class action may well depend on the federal circuit in which the lawsuit is filed. In recent years, a trend toward increased scrutiny of plaintiffs' class action allegations has emerged although a conflict among the circuits has developed over the degree of scrutiny courts should apply. With regard to antitrust class actions, this trend toward increased scrutiny of plaintiffs' class action allegations translates into a recent willingness by many courts to seriously evaluate the merits of the economic theories relating to class certification advanced by expert economists for both plaintiffs and defendants.

The economic stakes at issue in antitrust class actions is a key driver behind this trend. For example, in a recent opinion by the U.S. Court of Appeals for the First Circuit in which it vacated class certification in an antitrust case, the classes certified by the district court included "roughly thirteen million car purchasers" and the class was seeking damages, including treble damages, of "as much as \$3 billion."<sup>1</sup> The First Circuit noted that a "searching inquiry" into whether plaintiffs will be able to make their case with

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\* The author is a litigation partner at Kirkland & Ellis LLP. This article is based on remarks made at a panel on class certification at the Newport Summit on Antitrust Law and Economics, Newport, Rhode Island, June 1, 2008.

<sup>1</sup> In re New Motor Vehicle Canadian Export Antitrust Litig., 522 F.3d 6, 9 (1st Cir. 2008).

“common proof of causation,” a de facto predicate in antitrust cases to establishing that the class certification requirements of Federal Rule of Civil Procedure 23(b)(3) are met, is especially warranted when granting class status would “raise the stakes of litigation so substantially that the defendant likely will feel irresistible pressure to settle.”<sup>2</sup>

The critical battle at the class certification stage of an antitrust class action is whether plaintiffs can satisfy the predominance requirement of Rule 23(b)(3). Plaintiffs seeking to certify a class under Rule 23(b)(3) must convince the court that “questions of law or fact common to class members predominate over any questions affecting only individual members” in order to succeed. Often, whether the predominance requirement is met will hinge on whether plaintiffs will be able to demonstrate antitrust impact to *all* members of the alleged class by *common* proof.<sup>3</sup> Typically, plaintiffs and defendants both proffer expert testimony by economists to address this issue.

Defense-side practitioners will recall with frustration the days when many courts would refuse to consider at all the opinions of defendants’ economists in deciding whether the predominance requirement of Rule 23(b)(3) was met. Such courts reasoned that considering the defense experts’ opinions would be tantamount to deciding merits-related issues and therefore inappropriate at the class certification stage. Often, plaintiffs would succeed in certifying a class with scant evidentiary support. The common impact opinion of plaintiffs’ expert economists would hinge on multiple unsubstantiated factual

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<sup>2</sup> *Id.* at 26 (citation omitted).

<sup>3</sup> *See, e.g., id.* at 20 (“In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof.”); *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) (for class certification to be appropriate, “plaintiffs need to demonstrate that common issues prevail as to [both] the existence of conspiracy and the fact of injury”).

assumptions. Mere promises by plaintiffs' expert economists that they would develop economic models capable of serving as a common method for establishing antitrust impact for all the class would suffice.

The days of courts willing to certify antitrust class actions based on "trust me" promises and unsubstantiated assumptions of plaintiffs' expert economists are gone—at least in a good number of federal circuits. As the First Circuit recently observed:

It is a settled question that some inquiry into the merits at the class certification stage is not only permissible but appropriate to the extent that the merits overlap the Rule 23 criteria. It is less settled what degree of merits inquiry is *required* at the class certification stage, and the Supreme Court has not yet addressed the issue.<sup>4</sup> (emphasis added)

A spectrum has developed in terms of the degree of merits inquiry courts require at the class certification stage.<sup>5</sup> At the rigorous end of the spectrum, courts are instructed to resolve factual disputes and make findings that Rule 23 criteria are met. In these circuits, district courts will rigorously scrutinize whether plaintiffs have demonstrated that common proof exists to establish antitrust impact to all members of the alleged class. At the middle of the spectrum, courts are instructed that it is "sometimes" necessary to resolve factual disputes. In these circuits, the degree of scrutiny a court applies to plaintiffs' predominance claims varies. At the lax end of the spectrum, the refrain by courts that it is premature as the class certification stage to decide a "battle of the experts" is alive and well.

Clustered at the rigorous end of the spectrum are the U.S. Courts of Appeals for

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<sup>4</sup> *New Motor Vehicle Canadian Export Antitrust Litig.*, 522 F.3d at 24.

<sup>5</sup> *See id.* at 24 (how "[o]ur sister circuits ... articulate the necessary degree of inquiry ranges along a spectrum which suggests substantial differences.").

the Second, Fourth, Fifth, and Seventh Circuits. Older news is that the Fourth, Fifth, and Seventh Circuits are at this end of the spectrum.<sup>6</sup>

In a stunning reversal of course, the Second Circuit joined the rigorous end of the spectrum in December 2006 when it issued its opinion in *In re IPO Sec. Litig.*: “We thus align ourselves with *Szabo*, *Gariety*, and all of the other decisions discussed above that have required a definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues.”<sup>7</sup> In *IPO Sec. Litig.*, the Second Circuit backed away from its prior holdings in *Caridad v. Metro-North Commuter Railroad*<sup>8</sup> and *In re Visa Check/MasterMoney Antitrust Litig.*,<sup>9</sup> which had placed it at the lax end of the spectrum. The Second Circuit announced:

Obviously, we can no longer continue to advise district courts that “some showing,” *Caridad*, 191 F.3d at 292, of meeting Rule 23 requirements will suffice ... or that an expert’s report will sustain a plaintiff’s burden so long as it is not “fatally flawed” ... see *Visa Check*, 280 F.3d at 135....<sup>10</sup>

In the middle of this spectrum are the First, Third, and Eighth Circuits which find it “sometimes” necessary to resolve factual disputes in deciding whether to certify a class.

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<sup>6</sup> See *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001) (“a judge should make whatever factual and legal inquiries are necessary under Rule 23” even if “the judge *must* make a preliminary inquiry into the merits”) (emphasis added); *Gariety v. Grant Thorton LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (the “factors spelled out in Rule 23 *must* be addressed through findings, even if they overlap the merits”) (emphasis added); and *Unger v. Amedisys Inc.*, 401 F.3d 316, 319, 325 (5th Cir. 2005) (“a careful certification inquiry is required and findings *must* be made based on adequate admissible evidence to justify certification”) (emphasis added).

<sup>7</sup> *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (holding “*all* of the evidence must be assessed, and courts must “resolve[] factual disputes relevant to each Rule 23 requirement and find[] that whatever underlying facts are relevant to a particular Rule 23 requirement have been established....”) (emphasis added).

<sup>8</sup> *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2d Cir. 1999).

<sup>9</sup> *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001).

<sup>10</sup> *Id.* at 40.

The Third and Eight Circuits have been in this camp for some time.<sup>11</sup>

The uncertainty as to how rigorous an inquiry courts in this middle ground will conduct is underscored by some recent opinions by courts within the Third Circuit. The Third Circuit affirmed denial of an antitrust class action in *American Seed Co. v. Monsanto Co.*<sup>12</sup> on the ground that plaintiffs failed to establish a common method for proving impact to all class members, but the case did not present a true test of the degree of scrutiny courts will apply to test plaintiffs' common impact claims. Rather, it was fairly clear that plaintiffs did not meet their burden, for plaintiffs' economist, Morton Kamien, did no independent work. His common impact theory was premised on an assumption that plaintiffs' complaint allegations were true. In two different antitrust suits both involving plaintiffs' economist John Beyer, courts certified classes accepting Beyer's promises that he would be able to develop a common method for establishing antitrust impact to all class members.<sup>13</sup>

The First Circuit joined the middle ground in March 2008 in *In re New Motor Vehicle Canadian Antitrust Litig.*,<sup>14</sup> holding that:

[W]hen a Rule 23 requirement relies on a novel or complex theory as to injury, as the predominance inquiry does in this case, the district court must engage in a

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<sup>11</sup> See *Newton v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001) ("a preliminary inquiry into the merits is *sometimes* necessary to determine whether the alleged claims can be properly resolved as a class action.") (emphasis added); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) ("in ruling on class certification, a court *may* be required to resolve disputes concerning the factual setting of the case" and "[t]his extends to the resolution of expert disputes concerning the factual setting such as economic evidence as to business operations or market transactions.") (emphasis added).

<sup>12</sup> *American Seed Co. v. Monsanto Co.*, 2008 WL 857532 (3d Cir. 2008).

<sup>13</sup> See *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163 (E.D. Pa. 2007) (certifying a direct purchaser suit against manufacturers alleging a horizontal price-fixing conspiracy); *Behrend v. Comcast Corp.*, 245 F.R.D. 195 (E.D. Pa. 2007) (certifying a cable customer class alleging Comcast gained monopoly power through acquisitions and began charging supra-competitive prices).

<sup>14</sup> *In re New Motor Vehicle Canadian Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008).

searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed.<sup>15</sup>

The First Circuit vacated certification of several classes noting that at the time the district court certified the classes “more work remained to be done” by plaintiffs’ expert economist, Robert Hall, “in building of plaintiffs’ damages model and the filling out of all the steps of plaintiffs’ theory of impact.”<sup>16</sup> The First Circuit noted that two years had passed since certification such that plaintiffs “should now have the evidence they need to put their best foot forward,” and the district court “should now have a complete record before it from which to test the viability of plaintiffs’ novel theory for proving common impact.”<sup>17</sup>

Similarly, the court in *Natchitoches Parish Hospital Service District v. Tyco Int’l, Ltd.*,<sup>18</sup> an antitrust class action involving the U.S. market for sharps containers, wanted more information before deciding whether to certify a class. The court chose to defer its class certification ruling, rather than accept the promises of plaintiffs’ economist that he would devise a common method for proving impact to all class members. According to the court:

The class record is not sufficiently developed to resolve this robust economic debate between two highly qualified antitrust titans [Einer Elhauge for plaintiffs and Janusz Ordover for defendants] with respect to the impact of the alleged exclusionary contracts on the sharps container market.<sup>19</sup>

The court was troubled that plaintiffs’ economist had outlined “a general methodology:

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<sup>15</sup> *Id.* at 26.

<sup>16</sup> *Id.* at 27-28.

<sup>17</sup> *Id.* at 29.

<sup>18</sup> *Natchitoches Parish Hospital Service District v. Tyco Int’l, Ltd.*, 247 F.R.D. 253 (D. Mass. 2008).

<sup>19</sup> *Id.* at 272.

maybe-I'll-try-this-or-maybe-I'll-try-that.”<sup>20</sup>

Although the Tenth Circuit has not weighed in, a district court within the circuit staked out a middle ground position in a fairly recent antitrust class action case against manufacturers of polyster polyol.<sup>21</sup> While the district court certified the class, the court did not shy away from considering the common impact opinions of defendants’ expert. The court analyzed the opinions of both plaintiffs’ expert economist, Robert Tollison, and defendants’ expert economist, Barry Harris, on whether fact of injury could be proven on a class-wide basis.

At the lax end of the spectrum is the Ninth Circuit, and, although the DC Circuit has not weighed in, two recent opinions by district courts in that circuit fall squarely at the lax end of the spectrum. The Ninth Circuit staked out a place at the lax end of the spectrum in *Dukes v. Wal-Mart, Inc.*,<sup>22</sup> an employment discrimination case. The Ninth Circuit held that defendants’ challenges to plaintiffs’ expert sociologist “go to the weight” of the evidence, and “arguments evaluating the weight of the evidence or the merits of a case are improper at the class certification stage.”<sup>23</sup> Likewise, the Ninth Circuit rejected defendants’ challenges to plaintiffs’ expert statistician on proof of class-wide impact finding that it was appropriate for the district court to avoid resolving “the battle of the experts” at class certification.<sup>24</sup>

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<sup>20</sup> *Id.* at 273.

<sup>21</sup> *See In re Urethane Antitrust Litig.*, 237 F.R.D. 440 (D. Kan. 2006).

<sup>22</sup> *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir 2007).

<sup>23</sup> *Id.* at 1227.

<sup>24</sup> *Id.* at 1229.



Constrained by *Dukes*, the district court in *In re Live Concert Antitrust Litig.*<sup>25</sup> certified a class in an antitrust action brought by ticket purchasers alleging acts by Clear Channel and its subsidiaries to extend and maintain monopoly power. The district court interpreted *Dukes* as having established that “challenges to expert opinions constitute merits determinations that go to the weight of the evidence rather than admissibility,” so that a district court “is not permitted to discount the testimony of a plaintiff expert merely because the defendant has challenged some aspect of the expert’s opinion.”<sup>26</sup> The district court noted that if it “were free to craft its own standard, it would follow the standard established in *In re IPO Sec. Litig.*” However, the court noted that a plain reading of *Dukes* “clearly demonstrates that the Ninth Circuit intended to prohibit district courts from weighing conflicting evidence when determining whether the Rule 23 requirements are satisfied.”<sup>27</sup> In this case, plaintiffs’ expert economist, Owen Phillips, promised there were several “generally accepted” methods he “could” use to prove impact to all class members through common evidence. Defendants’ expert economists, Richard Gilbert and Jerry Hausman, opined that not all class members would be harmed by the alleged misconduct.

Within the DC Circuit, district courts in two recent antitrust class action opinions chose to align themselves at the lax end of the spectrum. In both cases, plaintiffs proffered testimony by economist Jeff Leitzinger who promised that he would be able to devise a common method for establishing antitrust impact to all class members. And, in

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<sup>25</sup> *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98 (C.D. Cal. 2007).

<sup>26</sup> *Id.* at 110.

<sup>27</sup> *Id.* at 115.

both cases, the courts certified classes.<sup>28</sup>

Both courts characterized efforts of defense expert economists to challenge Leitzinger's claims as merits-related and inappropriate at the class certification stage. The district court in *Nifedipine Antitrust Litig.* opined:

In order to demonstrate that common evidence exists to prove class-wide impact or injury, plaintiffs do not need to prove that every class member was actually injured. Instead, plaintiffs need only present a "colorable method by which they intend to prove impact on a predominantly common basis, and the Court, in reaching its decision, must refrain from either deciding the merits of the plaintiff's claims or indulging in a duel" between opposing experts.<sup>29</sup>

In *Meijer*, citing to *IPO Sec. Litig.* (Second Circuit), *Szabo* (Seventh Circuit), and *Gariety* (Fourth Circuit), defendants asserted that district courts must conduct an "intense factual investigation" and "probe the factual and legal underpinnings" of each of plaintiffs claims when deciding whether to certify a class. The district court responded that the opinions cited by defendants suggest that courts should "resolve factual disputes as required, even if such findings overlap with the merits of the class action." Rejecting this approach, the district court held that "the D.C. Circuit has not taken that step, and *Eisen* remains good law."<sup>30</sup>

In sum, economics is increasingly playing a greater role at the class certification stage of antitrust class actions. While a conflict among the circuits exists over the degree of merits inquiry required at the class certification stage, the trend is clearly toward a more rigorous level of scrutiny.

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<sup>28</sup> See *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365 (D.D.C. 2007); *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293 (D.D.C. 2007).

<sup>29</sup> *Id.* at 369.

<sup>30</sup> *In re Nifedipine Antitrust Litig.*, 246 F.R.D. at n.4.