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## Economics Now Plays an Important Role at The Class Certification Stage for Antitrust Class Actions

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Economic analysis now plays an important role at the class certification stage of antitrust class actions. This is due to the increased scrutiny by courts of plaintiffs' class action allegations. Although not all federal courts apply a rigorous analysis to class action allegations, the trend is moving in this direction. As a result, there is a real opportunity now, with the help of economic experts, to defeat certification of antitrust class actions.

The critical battle in certification of a class pursuant to Federal Rule of Civil Procedure 23(b)(3) is whether plaintiffs can establish that common issues predominate over individual issues. Economists opine on whether plaintiffs can prove the elements of an antitrust claim—existence of a conspiracy, market definition, market power, anticompetitive effect—with common evidence.<sup>2</sup>

For antitrust class actions whether a class will be certified under Rule 23(b)(3) often turns on whether a defendant (and the economist it has retained) succeed in convincing the court that plaintiffs will be unable to prove antitrust injury to all alleged class members through common evidence. As the Third Circuit explained:

[I]ndividual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation. *In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common proof.* Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial.<sup>3</sup>

Many courts now recognize that whether antitrust injury can be established through common evidence is a make or break issue for antitrust class actions at the class certification stage. The First Circuit opined, "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."<sup>4</sup> As the Fifth Circuit has explained, "where fact of damage cannot be

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<sup>1</sup> The author is a litigation partner at Kirkland & Ellis LLP. This article is based on remarks made at a presentation on March 10, 2010 in Chicago with Cornerstone Research.

<sup>2</sup> See, e.g., *Reed v. Advocate Health Care*, No. 06 C 3337, 2009 WL 3146999, at \*5 (N.D. Ill. Sept. 28, 2009) ("whether plaintiffs can prove that a conspiracy *existed* is not an issue that we consider on class certification; rather, the question is whether plaintiffs can prove a conspiracy with *common proof*, and the answer is yes") (emphasis in original) (internal citations omitted).

<sup>3</sup> *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008) (emphasis added).

<sup>4</sup> *In re New Motor Vehicle Canadian Export Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008).

established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3)'s predominance."<sup>5</sup> Likewise, the Eighth Circuit identified that 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."<sup>6</sup>

Whether a defendant will persuade a district court that antitrust injury cannot be established through common proof may hinge on the level of scrutiny of class allegations that the district court undertakes. As the First Circuit has explained:

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>7</sup>

U.S. Supreme Court opinions leave room for federal courts to conclude that deference to plaintiffs is appropriate at the class certification stage. In *Eisen*<sup>8</sup> the U.S. Supreme Court observed that nothing in the language or history of Rule 23 gives a federal district court 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."<sup>9</sup> Yet, in *General Telephone Co. of the Southwest v. Falcon*,<sup>10</sup> the U.S. Supreme Court instructed that trial courts should conduct a "rigorous analysis" of whether the prerequisites of Rule 23 are met in which it "may be necessary [to] probe behind the pleadings."<sup>11</sup>

As a result of the language in *Eisen*, for years many courts in evaluating a plaintiff's motion to certify an antitrust class action would simply accept "trust me" promises by plaintiff economists that they would be able to devise a model capable of proving antitrust injury through common evidence. And many courts were unwilling to give due consideration to opinions of defense economists at the class certification stage on the ground that deciding a class certification motion is not a time for a "battle of the experts."

Starting in 2001, however, some courts of appeal began to require that trial courts engage in a true "rigorous analysis" of class action allegations as the U.S. Supreme Court instructed in *Falcon*. The Seventh Circuit was the trail blazer in this regard instructing in *Szabo*<sup>12</sup> that "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," and that a judge should "receive evidence (if only by affidavit) and resolve disputes before deciding whether to certify a class."<sup>13</sup>

The Second, Third, and Tenth Circuits are more recent recruits to this trend toward requiring a true rigorous analysis of class allegations. In a stunning course reversal, the Second

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<sup>5</sup> Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003).

<sup>6</sup> Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005).

<sup>7</sup> New Motor Vehicle *supra* n. 4 at 24 (internal citations omitted).

<sup>8</sup> Eisen v. Carlisle & Jacquelin,<sup>8</sup> 417 U.S. 156 (1974).

<sup>9</sup> *Id.* at 157-58.

<sup>10</sup> Gen. Tel. Co. of the S.W. v. Falcon, 457 U.S. 147 (1982).

<sup>11</sup> *Id.* at 160-61.

<sup>12</sup> Szabo v. Bridgeport Machs. Inc., 249 F.3d 672 (7th Cir. 2001).

<sup>13</sup> *Id.* at 676. See also *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("factors spelled out in rule 23 must be addressed through findings, even if they overlap with the merits."); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) ("a careful certification inquiry is required and findings must be based on adequate admissible evidence to justify class certification.")

Circuit joined this end of the spectrum in *IPO*<sup>14</sup> holding “We thus align ourselves with *Szabo*, *Gariety*, and all other decisions...that have required a definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues.”<sup>15</sup> In *IPO*, the Second Circuit repudiated its prior holdings in *Caridad* and *Visa Check*.<sup>16</sup> In particular, the Second Circuit announced “we also disavow the suggestion in *Visa Check* that a[] [plaintiff] expert’s testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed,” and expressly noted that it was declining to follow prior dictum “suggesting that a district judge may not weigh conflicting evidence and determine the existence of a Rule 23 requirement just because the requirement is identical to an issue on the merits.”<sup>17</sup>

Until last year, the Third Circuit was a safe haven for antitrust class actions where district courts would accept without scrutiny mere assertions by plaintiff economists that antitrust injury could be established via evidence common to all purported class members. In a landmark opinion, *Hydrogen Peroxide*,<sup>18</sup> the Third Circuit renounced this practice: “A party’s assurance to the court that it intends or plans to meet the requirements [of Rule 23] is insufficient.”<sup>19</sup> The Third Circuit elaborated: “Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.”<sup>20</sup>

Although not entirely clear, it appears the Sixth Circuit may also be at the rigorous end of the spectrum. In *Romberio*,<sup>21</sup> the Sixth Circuit held that the district court must conduct a “searching examination” of plaintiff’s claims and the proof required to establish them in deciding whether class certification is appropriate.<sup>22</sup>

The First and Eighth Circuits have adopted more of a middle ground approach with regard to the level of scrutiny courts should apply to class allegations. In *Blades*,<sup>23</sup> the Eighth Circuit held that “[t]he closer any dispute at the class certification stage comes to the heart of the claim, the more cautious the court should be in ensuring that it must be resolved in order to determine the nature of the evidence the plaintiff would require.”<sup>24</sup> More recently, in *New Motor Vehicles Canadian Export*,<sup>25</sup> the First Circuit held:

We do not need to resolve now whether ‘findings’ regarding the class certification criteria are ever necessary, but we do hold that when 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 searching inquiry into the viability of that theory and the existence of the facts necessary for that theory to succeed.<sup>26</sup>

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<sup>14</sup> In re IPO Sec. Litig., 471 F.3d 24 (2d Cir. 2006).

<sup>15</sup> *Id.* at 41.

<sup>16</sup> *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999) and *In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001).

<sup>17</sup> *Id.* at 42.

<sup>18</sup> *Hydrogen Peroxide*, *supra* note n.3.

<sup>19</sup> *Id.* at 318.

<sup>20</sup> *Id.* at 323; *see also* *Vallario v. Vandehey*, 554 F.3d 1259, 1265-67 (10th Cir. 2009) (holding that “findings” are required in conducting a “rigorous analysis” of whether class allegations satisfy Rule 23, and citing with approval the Second Circuit’s IPO opinion).

<sup>21</sup> *Romberio v. Unumprovident Corp.*, No. 07-6404, 2009 WL 87510 (6th Cir. Jan. 12, 2009).

<sup>22</sup> *Id.* at \*5.

<sup>23</sup> *Blades*, *supra* note n.6.

<sup>24</sup> *Id.* at 567.

<sup>25</sup> *New Motor Vehicles*, *supra* note n.7.

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

The D.C. Circuit recently signaled its place at the lax end of the spectrum denying an interlocutory appeal of a district court's certification of an antitrust price-fixing conspiracy. In certifying the class, the district court in *Nifedipine*<sup>27</sup> accepted the plaintiff economist's claims that he would devise a model capable of establishing antitrust injury to each class member through common evidence: "[P]laintiffs 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 or the plaintiffs' claims or indulging in a duel between opposing experts."<sup>28</sup> Citing *Eisen*, the D.C. Circuit denied an interlocutory appeal request by defendants opining that "the propriety of a district court's refusal to scrutinize the probative value of evidence proffered to demonstrate that the requirements of Fed. R. Civ. P. 23 are satisfied is well-settled."<sup>29</sup>

The state of play with regard to the level of scrutiny courts should apply to class allegation is unknown in the Ninth and Eleventh Circuits. Originally, the Ninth Circuit held, in an opinion now withdrawn, *Dukes I*,<sup>30</sup> that class certification is not a time to resolve any "battle of the experts."<sup>31</sup> However, *Dukes I* was supplanted by *Dukes II*<sup>32</sup> in which the Ninth Circuit reached the opposite result holding that "courts are not only 'at liberty to' but must 'consider evidence which goes to the requirements of Rule 23 even [if] this evidence may also relate to the underlying merits of the case."<sup>33</sup> But last year, Chief Judge Kozinski issued an order granting an *en banc* rehearing and held that *Dukes II* "shall not be cited as precedent by or to any court of the Ninth Circuit."<sup>34</sup> Thus, we will need to await the rehearing to learn where the Ninth Circuit will land. As for the Eleventh Circuit, a district court recently observed, "The Eleventh Circuit, however has not clearly articulated the standard of proof required at the class certification stage when courts must perform a 'rigorous analysis' of the Rule 23 prerequisites without determining the merits of the case."<sup>35</sup>

In the antitrust class action context, this increased willingness of courts to scrutinize plaintiff class claims means courts are willing to dig in to assess whether it really is the case that the plaintiffs will be able to provide antitrust injury to all class members using common evidence. To this end, district courts now expect plaintiff economists to have working economic models at class certification; mere promises to create them are insufficient. In *Reed v. Advocate Health Care*,<sup>36</sup> the district court denied certification of an antitrust class action holding, "In our view, plaintiffs have been coy about their theory of common impact and their proposed damages methodology.... Essentially, plaintiffs have made a superficial presentation that comes close to asking us to take [the Expert's] analysis on faith. But we cannot simply take his declarations on faith."<sup>37</sup>

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<sup>27</sup> In re Nifedipine Antitrust Litig., 246 F.R.D. 365 (D.D.C. 2007) (internal citations omitted).

<sup>28</sup> *Id.* at 369.

<sup>29</sup> 2009 U.S. App. LEXIS 3643, at \*2 (D.C. Cir. Feb. 23, 2009) (per curiam).

<sup>30</sup> In re Wifedipine Antitrust Litig., No. 08-8014, *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007).

<sup>31</sup> *Id.* at 1229.

<sup>32</sup> *Dukes*, 509 F.3d 1168 (9th Cir. 2007).

<sup>33</sup> *Id.* at n.4.

<sup>34</sup> *Dukes v. Wal-Mart, Inc.*, 556 F.3d 919 (9th Cir. 2009).

<sup>35</sup> In re Healthsouth Corp. Sec. Litig., 257 F.R.D. 260, 272 (N.D. Ala. 2009).

<sup>36</sup> *Reed*, *supra* n.2.

<sup>37</sup> *Id.* at \*14.

In *Natchitoches*,<sup>38</sup> the district court deferred ruling on class certification in an antitrust action to await final expert reports that would address methodologies for proving antitrust injury, explaining:

The preliminary nature of [the Expert's] analysis, however, is troubling ....[H]e has outlined a general methodology: maybe-I'll-try-this-or-maybe-I'll-try-that. Some courts have denied certification where the experts simply relied on a theory of 'presumed impact.'....As such, the Court will defer a final decision on class certification until the Court reads the final expert reports.<sup>39</sup>

Failure of plaintiff's expert to develop workable economic models was a key reason the court denied certification of direct and indirect purchaser classes alleging a price-fixing in *Graphics Processing*.<sup>40</sup> With regard to the direct purchaser model, the court noted that plaintiff's expert economist "contends that a more acceptable model will be developed as the case further progresses;" however, the court pointed out that "formal discovery will close in a little over a month....The undersigned judge has expressly made himself available to resolve any discovery problems on shortened time, but no request for assistance ever arrived."<sup>41</sup> With regard to the indirect purchaser model, the court opined,

After eight months of discovery, plaintiffs should have the data to formulate their regression analyses with more precision. If plaintiffs were having difficulty obtaining data from defendants or third parties or sorting through the data, they should have timely raised that issue....This class certification phase was set near the end of the discovery period to give plaintiffs time to gather data while leaving a short period after the decision to take follow-up merits discovery in light of the class definition.<sup>42</sup>

The district court also noted that the regression model of plaintiff's economist failed to address "other factors that would likely have an impact on prices," such that plaintiff had failed to meet its burden under Rule 23 "to provide a viable method for demonstrating class-wide injury based on common proof. Direct-purchaser plaintiffs' proffered econometric models are grossly lacking and do not suffice."<sup>43</sup>

Some district courts are focusing more on the reliability of the methodology the plaintiff's economist proposes to use for common proof of antitrust injury. The court in *Somers*<sup>44</sup> denied certification of an indirect purchaser class because it was persuaded by the defendant's economist that the regression models proposed by plaintiff's economist would be unreliable.<sup>45</sup> In this case, plaintiff's expert claimed he could create a regression model but had not created it, and defendant's economist provided "an extensive explanation of how the types of regression models proposed by [the Expert] cannot be reliably applied to the complex product and pricing dynamic underlying the claims in this case."<sup>46</sup>

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<sup>38</sup> *Natchitoches Parish Hosp. Ser. Dist. v. Tyco Int'l. Ltd.*, 247 F.R.D. 253 (D. Mass. 2008).

<sup>39</sup> *Id.* at 273-274 (internal citations omitted).

<sup>40</sup> *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478 (N.D. Cal. 2008).

<sup>41</sup> *Id.* at 496-97.

<sup>42</sup> *Id.* at 505-506.

<sup>43</sup> *Id.* at 497.

<sup>44</sup> *Somers v. Apple, Inc.*, 258 F.R.D. 354 (N.D. Cal. 2009).

<sup>45</sup> *Id.* at 358, (holding plaintiff failed to meet her burden of establishing "a reliable method for proving common impact on all purchasers of defendant's products throughout the chain of distribution.") (citation omitted).

<sup>46</sup> *Id.* at 360.

Where both sides agree on a methodology for antitrust injury, and the only dispute is whether the model shows no injury or damages to an entire class, the court will see the dispute as a merits issue and certify a class. This is what occurred in *Currency Conversion Fee*.<sup>47</sup>

Additionally, district courts now appear willing to closely examine evidence and opinions of economic experts regarding whether products and prices alleged in the antitrust class action complaint are standardized or differentiated. Reviewing recent case antitrust class certification opinions, one court summarized:

At times, the complexity of the defendants' distribution chain along with the varying products and purchasers involved have prevented broad certifications. Factors favoring certification have been price lists and commodity products as opposed to individually negotiated deals and customized products. No formula, however, will explain all the case law.<sup>48</sup>

The court then denied certification of a direct purchaser class in part based on a finding that "[t]he complex structure of defendants' chain of distribution and the particularized sales transactions associated with each sale of a GPU product present a significant barrier to certification."<sup>49</sup>

In another recent opinion, *Allied Orthopedic v. Tyco*,<sup>50</sup> the court denied certification of a direct purchaser class that alleged the manufacturer had engaged in predatory conduct on the ground that evidence suggested it was not a commodity market:

Plaintiffs' argument for a class-wide overcharge depends heavily on [the Expert's] conclusion that pulse oximetry consumers regard R-Cal compatible sensors as a commodity product and, as a result, make purchasing decisions primarily based on price. This is because, should consumers view Tyco-branded R-Cal and OxiMax sensors as *differentiated* from generic sensors, enhanced generic competition would not be expected to depress average prices of Tyco sensors nearly as much as Plaintiffs contend, if at all.... In fact, there is persuasive evidence that [the Expert] is mistaken and this may not be a commodity market, at least with respect to the entire class.<sup>51</sup>

Also reviewing the evidence and economists' opinions, the court in *Ready-Mixed Concrete*<sup>52</sup> reached a different result and certified an antitrust class. The court observed that plaintiff's economist was opining that concrete products are "commercially interchangeable" and that there existed standardized price lists whereas defendant's economist was pointing to one thousand distinct mixes and individual price negotiations.<sup>53</sup> Ultimately, the court concluded that "[b]ased on this evidence, Plaintiffs have successfully demonstrated with sufficient certainty that those who purchased ready-mixed concrete within the class period suffered damages as a result of an ongoing conspiracy to maintain prices."<sup>54</sup> Significantly, the court noted, "[a]lso supporting

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<sup>47</sup> In re Currency Conversion Fee Antitrust Litig., No. M 21-95, MDL No. 1409, 2010 WL 305448, at \*13 (S.D.N.Y. Jan. 22, 2010) ("because the parties essentially agree on a common methodology for proving injury-in-fact on a class-wide basis, common questions also predominate on the injury-in-fact prong of antitrust injury.").

<sup>48</sup> Graphics Processing, *supra* n. 40 at 489.

<sup>49</sup> *Id.* at 483 (emphasis in original).

<sup>50</sup> *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P.*, 247 F.R.D. 156 (C.D. Cal. 2007).

<sup>51</sup> *Id.* at 170-71.

<sup>52</sup> In re Ready-Mixed Concrete Antitrust Litig., 261 F.R.D. 154 (S.D. Ind. 2009).

<sup>53</sup> *Id.* at 170-71.

<sup>54</sup> *Id.* at 172.

Plaintiffs' showing of impact is Defendants' refusal to testify as to certain aspects of the conspiracy on Fifth Amendment grounds."<sup>55</sup>

Finally, with the increased scrutiny of plaintiff's class allegations, district courts are now realizing that a plaintiff economist's reliance on averages is insufficient to satisfy the requirement that there be common proof of actual antitrust injury to each class member. Denying certification of a class of nurses alleging an antitrust conspiracy by hospitals to suppress their wages, the court noted, "The first, and critical, flaw is [the plaintiff expert economist's] reliance on averages.... Measuring average base wage suppression does not indicate whether each putative class member suffered harm from the alleged conspiracy."<sup>56</sup> Similarly, the district court in *Graphics Processing*<sup>57</sup> held in denying certification of an indirect purchaser class that "[w]hile averaging may be tolerable in some situations, the record here shows that it has in fact masked important differences between products and purchasers."<sup>58</sup> The court found that by averaging certain products and purchases with one another instead of correlating disaggregated data for individual products and particular customers, plaintiff's economist "evaded the very burden that it was supposed to shoulder—i.e., that there is a common methodology to measure impact across individual products and specific direct purchasers."<sup>59</sup>

In sum, the majority of federal court of appeals now require trial courts to conduct a true "rigorous analysis" of whether Rule 23 requirements are met. In the antitrust class action context, this means courts will scrutinize economic analysis of plaintiff and defendant economists focusing, in particular, on whether the plaintiff has established that common evidence can be used to prove antitrust injury to each member of the alleged class. Courts now expect plaintiffs to present workable economic models based on reliable methodologies in connection with their motions for class certification. Courts are more likely to reject plaintiff claims of common impact that are based upon use of averages. If a defendant succeeds in convincing the court that products and prices at issue in the case are differentiated rather than standardized, there is a good possibility class certification will be denied. Defendants now stand a fair chance of defeating a class certification motion with the help of expert economists.

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<sup>55</sup> *Id.* at n. 19.

<sup>56</sup> Reed, *supra* n. 2.

<sup>57</sup> *Graphics Processing*, *supra* n. 40.

<sup>58</sup> *Id.* at 494.

<sup>59</sup> *Id.* at 493.