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I. INTRODUCTION

In recent years, the backdrop for antitrust class actions has increasingly been provided by technological innovation. Take the following hypothetical: Plaintiffs allege a conspiracy between providers of cell phone service resulting in the increase of cell phone plan prices over a six-year span, from 2006 to 2012. In 2006, when the conspiracy was alleged to take effect, there were 20 million consumers who had plans with calling and texting features. By 2012, 120 million people had cell phone service with plans that allowed for streaming, social networking, file sharing, internet, video chatting, etc. All 120 million consumers are now intended to be part of a putative 23(b)(3) class, but many of the new 100 million consumers would not have signed up but for the improvements and cost efficiency gains that had been made from 2006 to 2012.

Several conspiracy cases echo this fact pattern, in industries such as flash memory, portable electronics, graphics processing, and home entertainment.[2] In each case, the alleged class period encompasses a time in which a product has gained widespread-acceptance; this usually comes in tandem with improvements in technology and value for the product at issue. There are also cases in which this trend exists with an allegation of unilateral anticompetitive conduct, as opposed to joint conduct.[3]

However, it does not appear that any court has delved deeply into one aspect of class certification under 23(b)(3) in this context. Namely: What must a plaintiff show to establish commonality of impact across the *entire class*, regardless of when an alleged class member became part of the class? Can the 23(b)(3) predominance requirement be met where individualized proof is necessary to assess whether the alleged conduct had a common impact across the entire class? It is generally accepted that in traditional price pricing cases, in which the

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[2] *E.g.*, *In re Flash Memory Antitrust Litigation*, No. 07-0086, 2010 WL 2332081, *1-*3 (N.D. Cal. June 9, 2010) (manufacturers of flash memory conspired to fix prices during a period when sales increased thirty fold); *In re Graphics Processing Units Antitrust Litigation*, 527 F. Supp. 2d 1011, 1020 (N.D. Cal. 2007) (same, for GPUs); *In re Wireless Telephone Services Antitrust Litigation*, 385 F. Supp. 2d 403, 405-06 (S.D.N.Y. 2005) (consumers allege that wireless telephone service providers tied the sales of cellular phones to the sale of wireless telephone service starting in 1998); *In re Online DVD Rentals Antitrust Litigation*, No. 09–2029, 2011 WL 5883772 (N.D. Cal. Nov. 23, 2011) (alleging that all Netflix subscribers who used the service between 2005 and 2010 were harmed by the alleged agreement)

[3] *E.g.*, *Kloth v. Microsoft Corp.*, 444 F.3d 312, 317 (4th Cir. 2006) (indirect consumers allege that Microsoft used monopoly power in operating system market to deprive consumers of competitive alternative options since "late 1980s."); *Somers v. Apple, Inc.*, 258 F.R.D. 354, 356-57 (N.D. Cal. July 17, 2009) (indirect purchasers of iPods claimed that prices since their introduction were supracompetitive).

product at issue remains static over time, predominance is easily met because all of the class members were subject to some overcharge.[4] However, what about cases in which most or many of the purported members of the class would not be in the class at all but for improvements that had been made in the product at issue? In our hypothetical, are there a sizable number of class members who either signed up only for a data plan for internet use, or would not have gotten a cell phone at all but for improvements in service (3G, 4G, etc.)? Or in the case of flash memory, are there class members who would have bought other forms of portable storage had the price per bit for flash memory not declined as it did?

II. CASE HISTORY

Two Circuits have brushed up against these issues, although the more extensive analysis is outside the antitrust context. In *McLaughlin v. American Tobacco Company*, the plaintiff class alleged under RICO that but for the cigarette manufacturers' misleading advertisements about "light" cigarettes being healthier than "full flavored" cigarettes, the members of the class would have spent less on cigarette purchases.[5] The court held that to establish loss causation under RICO, the plaintiff class must show that the defendant's misrepresentations caused the plaintiffs to suffer economic loss without resort to individualized proof.[6] In finding that the plaintiffs could not do so, it held:

> [I]ndividuals may have relied on defendants' misrepresentation to varying degrees in deciding to purchase Lights; some may have relied completely, some in part, and some not at all. Thus, establishing the first link in the causal chain—that defendants' misrepresentation cause an increase in market demand—would require individualized proof, as any number of other factors could have led to this increase. If smokers purchased more light cigarettes and drove up demand for reasons unrelated to defendants' misrepresentation, plaintiff could not show that their economic injury was directly caused by defendants' fraud.[7]

The Court concluded that because of the need for individualized proof, loss causation could not be shown on a class-wide basis to satisfy predominance.[8] This holding was echoed in *Siegel v. Shell Oil Company*, where the putative class claimed under Illinois law that the defendant gas companies conspired to raise gas prices.[9] In analyzing causation, the Seventh Circuit found that "absent proof as to why a particular plaintiff purchased a particular brand of gasoline, Siegel cannot establish that the defendants' conduct caused him or her to make that purchase" and "whether or not a class member could have avoided the defendants' conduct is an individualized question of fact."[10]

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[4] *See, e.g., In re Urethane Antitrust Litigation*, 251 F.R.D. 629, 634 (D. Kan. 2008) ("As a rule, the allegation of a price-fixing conspiracy is sufficient to establish predominance of common questions."); *Lumco Indus., Inc. v. Jeld-Wen, Inc.*, 171 F.R.D. 168, 172 (E.D. Pa. 1997) (several federal district courts hold that "when a defendant is alleged to have participated in a nationwide price-fixing conspiracy . . . the predominance requirement of FED. R. CIV. P. 23(b)(3) will be satisfied.")

[5] 522 F.3d 215, 220 (2d Cir. 2008).

[6] *Id.* at 226.

[7] *Id.*

[8] *Id.* at 227.

[9] 612 F.3d 932, 933-34 (7th Cir. 2010).

[10] *Id.* at 936.

The Supreme Court's decision in *Bridge v. Phoenix Bond & Indemnity Co.*[11] put *McLaughlin*'s reading of RICO's reliance requirement into question. However, *McLaughlin*'s holding pertaining to loss causation, echoed by *Siegel*, would likely have application in the antitrust context to an impact inquiry. If there is a substantial portion of a class for whom a single methodology would not explain the impact of the alleged conduct, predominance is not likely to be met. For instance, in *McLaughlin* there may have been smokers of light cigarettes who smoked more because it was "en vogue" rather than because of the advertisements at issue. In our hypothetical, there may be cell phone service users who use it predominantly for data. In such a case, that consumer's alleged injury may need to be explained by a different methodology than for consumers who solely use cell phone service for calls.

Two of the cases referenced above alluded to these concepts in their class certification holdings. In *In re Flash Memory Antitrust Litigation*, the purported class sought to represent all indirect purchasers of flash memory during a time period in which sales increased thirty fold, and the cost of memory declined by 96 percent on a per bit basis.[12] The plaintiffs argued that because NAND flash memory prices had been fixed, they were entitled to a "presumption of [common] impact" at least for their competition claims under state law.[13] The court disagreed, finding that "the effects of Defendants' allegedly anticompetitive conduct cannot be assumed," where

> [t]here [were] numerous categories and types of NAND flash memory chips which have changed along with the state of technology during the class period, which extends a decade.[14]
>
> …adding to this complexity [were the] myriad types of products that incorporate NAND technology, such as flash memory cards, USB flash drives, flash-based digital media players, flash-based digital media players (such as the iPod nano, iPod shuffle, the iPod touch [as well as others . . .].[15]

The court denied certification, on this and other grounds. This analysis implies that in cases where the product at issue has undergone extensive innovation, a single class purporting to represent all purchases of such could run into these types of predominance problems.

The class certification decision in *Somers v. Apple, Inc.*, a case alleging unilateral conduct, provides a similar example.[16] The purported class encompassed indirect purchasers of iPods from 2003 to the present. The Sherman Act claims were fundamentally premised on consumers' inability to use iTunes with any other digital music player, thus preserving Apple's monopoly on digital music players. In assessing whether plaintiffs' proposed methodology could establish commonality of impact, the court found it significant that "there was no clear point [under plaintiffs' methodology] at which the effects of anticompetitive conduct would be felt in iPod

[11] 553 U.S. 639 (2008).
[12] 2010 WL 2332081, at *1.
[13] *Id.* at *13.
[14] *Id.* at *14.
[15] *Id.*
[16] 258 F.R.D. 354 (N.D. Cal. July 17, 2009).

pricing."[17] Given this, the problem was exacerbated by "the continual introduction of new and cheaper iPod models throughout the class period."[18] The court denied certification, primarily because the plaintiffs had not met their burden of "establishing a reliable method for proving common impact on all purchasers of Defendant's products . . ."[19] Evidently, purchasers of a 1 GB iPod in 2003 may have been impacted by the alleged conduct differently than purchasers of a 100 GB iPod in 2008.

II. SUB-CLASSES MAY BE NECESSARY

In order to evade these issues, it may be necessary to create subclasses for which different methodologies explain the impact of the alleged conduct on each subclass. In our cell phone hypothetical, the impact on consumers who signed up for plans which did not exist at the outset of the conspiracy, or who did not upgrade plans during the class period, may need to be explained by a different methodology. For example, an expert may need to explain how an alleged overcharge would be found for consumers who signed up at a plan at a given price and service level vs. those whose price increased while staying on the plan.

As the *Siegel* court found, different factors may apply to those who could avoid the overcharge or otherwise would not have purchased the service but for the investments that had been made to improve it. Although *Dukes v. Walmart* was predominantly decided on 23(a)(2) grounds, the Court's discussion makes clear that an in-depth analysis of Rule 23's requirements is necessary, even to the extent they overlap with the merits of the case. One might argue that so long as everyone within a class was impacted, predominance is satisfied, but if different groups require different methodologies to explain that impact, then a court is likely required to assess whether the proposed method is adequate.

A related matter that courts have delved into is their authority under Rule 23(c) to modify a proposed class to exclude certain members that could put a predominance finding at risk. In *In re K-Dur Antitrust Litigation*, the purported class seeking certification were direct purchasers of a branded drug claiming that the prices they paid were inflated due to a reverse payment settlement between the drug manufacturers which delayed generic entry.[20] The plaintiffs' economist identified three types of overcharges sustained by the class: (1) the "brand-generic" overcharge represented by the difference between the price paid for the branded drug and the lower price they would have paid for the generic; (2) the "generic-generic" overcharge represented by the difference between the prices paid for the generic and the price that would have been paid had generic entry occurred earlier; and (3) the "brand-brand" overcharge represented by the higher amounts paid by class members for the branded drug by reason of delayed generic entry."[21]

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[17] *Id.* at 360.

[18] *Id.* at 361.

[19] *Id.* Note that in the related case of *Apple iPod iTunes Antitrust Litigation*, No. 05-00037, 2011 WL 5864036 (N.D. Cal. Nov. 20, 2011), the court certified the class of direct purchasers and did not engage in the analysis described above.

[20] No. 01-1652, 2008 WL 2699390, at *1 (D.N.J. Apr. 14, 2008).

[21] *Id.* at *14 n.17.

In certifying the class, the court excluded class members who claimed a "brand-brand" overcharge for those who did not purchase the generic even after its entry.[22] The court found that the expert did "not provide any class-wide methodology for identifying the direct purchasers whose only basis for Class membership is the purported receipt of such [increased branded] discounts" and "the amorphous concept of 'increased discounts' in the Class definition would potentially undermine both the ability to ascertain the Class and to establish the fact of injury on a Class-wide basis through common proof."[23]

Surprisingly, this holding was made despite the court's "view . . . [that an] argument that impact is not class-wide involves merits-based disputes that should not be resolved at the class certification stage."[24] *Dukes* certainly puts such a view into question, and the court nonetheless found that it was required to identify this portion of the class for whom an acceptable impact methodology did not exist. Other courts have utilized its ability to modify a proposed class to satisfy predominance or to otherwise ensure that the proposed class is "sufficiently precise, objective and presently ascertainable."[25]

III. DEFER THE INQUIRY UNTIL A DETERMINATION ON THE MERITS OR COMPUTATION OF DAMAGES?

There may be a temptation to leave these issues for a determination on the merits of a case, or alternatively when damages are being determined. After all, if a sub-section of a class was not impacted by alleged conduct, that could doom the class as a whole because it may evidence a fundamental flaw in the proposed impact theory. Alternatively, even if the proposed theory holds true for some of the class, the remainder would not be encompassed by the ultimate damage award. Such an approach is consistent with the premise that on class certification, a plaintiff is not proving impact or damages, but rather is proposing a method for which both can be determined on a class-wide basis, even if for some members there was no impact or damages.

However, such an approach does not appear consistent with recent Rule 23 jurisprudence suggesting that a court must inquire into the merits of an action to the extent it overlaps with the Rule's requirements. In the case of a 23(b)(3) class alleging antitrust injury, the fact of impact would appear to be among the principal issues in determining whether common questions predominate. Given how much is at stake on class certification, a court may find it appropriate to delve deeply into these issues rather than waiting for a dispositive determination on the merits or upon a calculation of damages.

In this vein, courts may need to distinguish between two types of proposed impact methodologies offered at class certification: (1) those which *could* explain impact across an entire class even if the facts differ between subgroups, but may ultimately result in a finding that certain portions of the class were not impacted; and (2) those which *do not account* for facts which distinguish certain class members for purposes of an impact inquiry.

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[22] *Id.* at *18.

[23] *Id.* (modifying class and collecting cases).

[24] *Id.* at *18.

[25] *E.g.*, *Wolph v. Acer America Corp.*, 272 F.R.D. 477, 483 (N.D. Cal. 2011) (granting leave to amend the complaint to modify the class in accordance with the court's order).

As applied to our cell phone fact pattern, these two types would be defined as: (1) a single methodology which could explain the impact of the conspiracy on *both* early cell phone users as those who adopted the technology later (either in the earlier form or with added features) vs. (2) a methodology which merely presumes that late cell phone adopters were impacted the same way as those who were long-time users.

One could interpret this distinction as requiring a *Daubert* analysis within the court's Rule 23 inquiry. But given that the requirements of *Daubert* must be met in any case, this merely highlights the fact that an expert on class certification under these circumstances has a significant burden to meet. Rather than proving that impact occurred across the class, the expert must put forth a methodology that could explain the impact across the class without resort to individualized proof. In cases where the latter is not possible, then a party may need to resort to sub-classes where different methodologies apply to different groups.

IV. SHOULD COURTS VEER TOWARD REQUIRING SUB-CLASSES AS A POLICY MATTER?

Were courts to require plaintiffs to create sub-classes, particularly in cases where the class period encompasses a period of technological change, then it could decrease the incentive to bring such cases, even if they have merit. The counter is that where a particular sub-class has a meritorious case, it will have a sufficient number of members to provide sufficient incentive to bring action. For classes in which the impact theory is more tenuous, counsel can assess whether to take on such a class or leave it out of a case. Rule 23 may require such an approach in cases where subgroups are sufficiently distinct from each other to require a different impact analysis.

When cases have a factual backdrop of technological innovation, Plaintiffs will argue that the innovation does not excuse the commission of anticompetitive conduct, whereas Defendants will assert that the innovation itself evidences the lack of any competitive harm. The Rule 23 inquiry may be taking account of both of these concerns: Where the alleged anticompetitive conduct can only be tied to smaller groups, then sub-classes may be required, but where the innovation (and corresponding increase in output) is not as significant, then the conduct may have harmed the entire class.

V. CONCLUSION

The antitrust class action characterized by abundant innovation in a short time period provides a unique set of challenges. One may argue that in cases where an antitrust violation occurs, and then the alleged fruits of that violation are used promote technological innovation, that is the Defendant's problem because it is a consequence of the wrongful conduct. However, such an argument does not remove the burden carried by putative classes to satisfy all of Rule 23's requirements. Nor does it abate the court's responsibility to ensure that there is an acceptable methodology by which common impact can be shown across the entire class.

Output increases and technological innovation are among the prime goals of the antitrust laws, and if a party seeks to define a class that has been harmed despite these trends, it is its burden to define a common way by which that can be shown. It may require that subclasses be created such that different methodologies can be used to explain the impact of the alleged conduct and that, in such a case, the efficiencies of class adjudication are still maintained. While it may be easier to defer criticism of an impact methodology until damages are assessed at trial,

the recent trend argues against such an approach given how much is at stake at the certification stage.