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Private Enforcement of the U.S. Antitrust Laws Through Class Actions

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I. Class Actions Generally

1. Introduction.

A uniquely American procedural innovation, class actions are “representative suits on behalf of groups of persons similarly situated.”¹ When traditional procedural rules of joinder are impractical given the number of potentially similarly situated claimants, class actions permit the litigation or resolution of claims of numerous absent class members in a single lawsuit in which named “class representatives” serve as a proxy for the absent class members.² Class actions are intended to achieve: (1) judicial economy and efficiency; (2) protection of defendants from inconsistent obligations; (3) protection of the interests of absentees; (4) access to judicial relief for small claimants; and (5) enhanced means for private attorney general suits to enforce laws and to deter wrongdoing.³

Rule 23 of the Federal Rules of Civil Procedure governs the class certification process in the Federal Courts and binds all class members with any decision of the Court, whether or not the judgment is favourable to the class.⁴ Although the most common class action seeks the recovery of damages for the named representatives and for the absent class members, injunctive relief seeking disgorgement or the cessation of alleged illegal conduct is also quite typical.

a. The Eye of the Beholder: The Pros and Cons of the Class Action Device.

Advocates of class actions assert that they are efficient - *i.e.*, they aggregate a large number of individualised claims into one action, thus saving the time, money, and expense of having defendants litigate hundreds or thousands of separate individual lawsuits.⁵ Advocates also point out that class actions allow individuals who may have small claims to receive some redress for an injury the defendants caused, whereas their relatively small injury would otherwise not merit the time and effort of a lawsuit.⁶ A class action resolves the issue “that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”⁷ Allowing plaintiffs to collectively file a representative suit “solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labour.”⁸ This ensures that defendants who have presumably committed some wrongdoing are punished, thus deterring future misconduct.

Critics of the class action device emphasise the fundamental unfairness of and coercive nature associated with class actions. They point out that class members do not always receive

meaningful rewards from the litigation, generally only a small financial sum for their injuries (or as is frequent in product liability cases, a coupon for a good or service), whereas their lawyers can and often do reap millions of dollars in fees. Moreover, plaintiffs’ attorneys use leverage gained from filing a class-action lawsuit to “force large settlements, regardless of whether they were capable of bringing meritorious claims.”⁹ Allowing hundreds or thousands of claimants to aggregate their suits potentially exposes defendants to enormous liability, quickly increasing the pressure to settle. Thus, defendants frequently prefer to settle even cases lacking merit or for which there are significant defences available “rather than run even a miniscule risk of a catastrophic judgment.”¹⁰ The treble damages nature of antitrust class actions coupled with joint-and-several liability further intensifies the pressure to settle, irrespective of the merits of the case.

b. Exporting U.S. Class Actions Abroad.

U.S.-style class actions are gaining ground abroad, particularly in the European Union. In April 2008, the Commission of the European Communities published its “White Paper on Damages actions for breach of the EC antitrust rules.”¹¹ The White Paper recommended improved mechanisms for collective redress for injury in the form of representative actions by certified or designated public, consumer, or industry bodies or opt-in collective actions. Among other things, the White Paper proposed that Member States enact laws:

- Allowing more extensive discovery, under judicial control, to improve plaintiffs’ access to relevant evidence.
- Providing for the binding effect of any infringement decision finding a breach of Article 81 or 82 on EU national courts.
- Making a damages claim one of strict liability once the breach of Article 81 or 82 has been established.
- Providing for the introduction of a two-year limitation period for claims, starting from the date the infringement decision becomes final (*i.e.* any appeal period having expired).
- Providing for mechanisms for early settlement.
- Providing for cost payment for the prevailing party.
- The publication of guidance to assist in the calculation of damages and estimation of loss.

The White Paper also provided guidance to member states in the form of outlining basic methodologies for calculating damages. These proposals are based on the overriding objective that victims of effective cartel activity and monopolisation should be compensated for the losses they suffer and that procedures should exist to facilitate claims by and on behalf of individual consumers and small businesses. Hence, the emphasis is on collective redress and any element of multiple or punitive damages was rejected. In sharp contrast to U.S.-style class actions, the White Paper focuses

on private litigation as a means of compensation for wrongdoing, rather than a substitute for public enforcement, and it takes care to avoid undermining EU and national leniency programmes, which have proved highly successful. A number of White Paper proposals also echo the UK Office of Fair Trading's recommendations for further UK reform published late in 2007.¹²

The Commission has taken a unique approach to dealing with the issue of indirect purchasers—those not buying directly from a defendant—and the “pass-on” defence, which allows a defendant to argue that a plaintiff suffered no loss because it passed on the price overcharge to its own customers, the indirect purchasers. U.S. courts do not allow indirect purchaser claims and therefore severely restrict the pass-on defence.¹³ Anchoring itself on the compensation principle, the Commission favours allowing infringers to rely on the “pass-on” defence. Because of the increasing difficulty of proving loss the further down the plaintiff is on the distribution chain, the Commission suggests that indirect purchasers should be able to rely on a rebuttable presumption that the illegal overcharge was passed on to them in its entirety - this too constitutes a departure with U.S. Federal Antitrust law.

c. The Preclusive Effects of a Class Action.

The final and complete resolution of a class action creates bilateral restrictions on the parties. Defendants are bound by the doctrine of res judicata and plaintiffs' claims are fully extinguished.

Res judicata includes two concepts: “claim preclusion” and “issue preclusion” (also called collateral estoppel). Claim preclusion bars a lawsuit from being brought again regarding an event or issue that was the subject of a previous legal cause of action and where that action has been finally decided between the parties. More pertinent for our purposes, issue preclusion bars the re-litigation of issues of fact or law that have already been necessarily determined by a judge or jury as part of an earlier claim. Issue preclusion, therefore, will prevent a defendant from arguing in a second litigation an issue of fact or law that was decided previously.

Moreover, all of the plaintiffs' claims become extinguished once a verdict is reached or a settlement is approved. This has constitutional, due-process implications for both sides. If, for example, the class was under-inclusive - that is, the class was defined too narrowly as to exclude individuals who should receive recompense for injuries the defendants caused, then the extinguishing of claims for plaintiffs in a damages class action would deny these plaintiffs their right to litigate their claims. Conversely, if the class definition was overly broad, defendants have been put in the position of having to compensate individuals who were not injured by their conduct. This implicates the defendant's rights to due process because by definition the defendant will not have had the opportunity to impeach the claim of an absent class member who suffered no injury or damages.

2. Rule 23 Prerequisites.

a. Rule 23(a): the Core Prerequisites.

Rule 23 details the prerequisites for the certification of a class. There are four requirements under subsection (a) commonly referred to as: numerosity; commonality; typicality; and adequacy. Furthermore, subsection (b) requires plaintiffs seeking monetary damages to show two additional elements: predominance; and superiority. Each is described in turn below.

i. **Numerosity.**

“Numerosity” requires that the proposed class have a sufficiently large number of plaintiffs to make it impracticable to otherwise prosecute the case.¹⁴ Factors courts look to when evaluating numerosity are: (1) “the judicial economy that will arise from

avoiding multiple actions; (2) the geographic dispersion of members of the proposed class; (3) the financial resources of those members; (4) the ability of the members to file individual suits; and (5) requests for prospective relief that may have an affect on future class members.”¹⁵ Using these factors, some courts interpret the lower limit to be at least forty class members, although other courts require slightly more, e.g., sixty plaintiffs,¹⁶ while still others have allowed fewer.¹⁷

While there is rarely an upper limit on numerosity, at least one court refused to certify a class because it contained too many plaintiffs. In *In re Managed Care Litigation*, a Florida district court rejected plaintiffs' attempt to certify a class of 145 million people, stating that it would be “unmanageable.”¹⁸ This case is an extreme and though a class of over a hundred million persons or claims may exceed the limit, plaintiff classes in the tens of thousands and even millions are not uncommon in the United States.

ii. **Commonality.**

“Commonality” requires that all class members share at least one common question of law or fact.¹⁹ Commonality can and often is satisfied when for example the defendant allegedly conspired with its competitors to raise the prices of the product it sells as to all class members.²⁰ Like numerosity, commonality represents a low bar for most proposed classes and is rarely the death knell for class certification. However, fraud cases tend to be susceptible to a court's finding a lack of commonality. In *Moore v. Paine Webber, Inc.*, for instance, the court stated that, because the allegations consisted of separate and varied misrepresentations to each class member, the question of whether these misrepresentations constituted fraud were not uniform across the entire class.²¹

iii. **Typicality.**

“Typicality” requires that the claims of the representative plaintiffs are typical of the claims of the class as a whole. Typicality is similar to commonality, as the U.S. Supreme Court noted when it said that the “commonality and typicality requirements of Rule 23(a) tend to merge.”²² One court recently explained that “commonality refers to the group characteristics of the class as a whole, while typicality refers to individual characteristics.”²³

Courts usually find typicality if “the claims of the named plaintiffs arise from the same practice or course of conduct that [gave] rise to the claim of the proposed class members.”²⁴ Thus, for example in *Daffin v. Ford Motor Co.*, the court found typicality where “Daffin's claim is typical of the class because the class members' theory is that Ford breached its express warranty by providing vehicles with defectively designed throttle body assemblies, causing Daffin and other class members to receive vehicles worth less than the vehicles that conform to the promises allegedly contained in the warranty agreement.”²⁵

Courts often find typicality lacking when a unique or special defence exists that could extinguish the named putative representative's claim but not the claims of other class members.²⁶ Courts also find lack of typicality where the facts underlying the named plaintiff's injury differ from those of the class members.²⁷ Historically, this standard has not been difficult for plaintiffs to overcome as courts do not require complete uniformity of claims.

iv. **Adequacy.**

“Adequacy” examines whether the representative plaintiffs will “fairly and adequately protect the interests of the class.” Adequacy of representation is important because it provides the “lynchpin to securing preclusive effect of the class proceeding as to absent members.”²⁸ The adequacy inquiry involves two subparts: (1) determining whether there are any “substantial conflicts of interest between the representatives and the class; and (2) examining whether the representative will adequately prosecute the action.”²⁹

Although courts' analysis usually focus on economic conflicts, other courts have read this prohibition broadly, asking whether the defendant's conduct harmed some class members while at the same time benefiting others.³⁰

For instance, in *Grimes v. Fairfield Resorts, Inc.*, the Court of Appeals for the Eleventh Circuit held that this type of conflict existed where the defendant had allegedly altered the plaintiffs' timeshare arrangement in various properties. The change allowed plaintiffs to use their timeshare at locations not operated by the defendant. The plaintiffs argued that this policy change diminished the value of the timeshare program they had contracted for, but the district court recognised that some plaintiffs in the purported class actually prefer this flexibility. Thus, the Court of Appeals affirmed the lower court's denial of class certification because of this inherent conflict between the putative class representative and class members.³¹

Other cases examine whether the named plaintiffs have "abdicated their role in the case beyond that of furnishing their names as plaintiffs" which may result in the attorneys acting as the *de facto* class representative.³² This would be prohibited and would likely require a court to find adequacy lacking.

b. Rule 23(b).

i. **Predominance.**

"Predominance" requires a court to find that common questions of law and fact "predominate" over individual questions.³³ "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."³⁴ Thus, if a jury could ask the same question for each class member in deciding a question of law - whether each plaintiff was injured for instance - then that question is said to "predominate." If, however, that same inquiry would require an assessment on a case-by-case basis then those issues do not predominate and may prove fatal to class certification.³⁵ The primary battleground for class certification is normally over predominance, because it places the largest burden on plaintiffs, who must establish that they can produce *common proof* at trial to demonstrate the prima facie elements of a claim for each individual plaintiff. The guiding principle is that a trial for **one** must effectively be a trial for **all**.³⁶

Common additional impediments to a court's finding predominance besides an individualised injury assessment include: variations in state law, where a class purports to represent class members under different state laws;³⁷ proximate causation, especially in physical injury cases like asbestos or tobacco litigation;³⁸ and, the need for plaintiffs to prove that they individually relied on the defendant's representations in fraud actions.³⁹

ii. **Manageability of Class.**

Rule 23(b)(e)(D) requires courts to ensure that the proposed class action is manageable. One example of this requirement in play is *In re Paxil Litigation*.⁴⁰ There, the plaintiffs sued a drug manufacturer in California court but under the laws of 50 different states claiming tortious injuries from the sale of the defendant's drug. Realising that the variety in the state laws posed a problem, the plaintiffs proposed twelve separate sub-classes and a two-stage trial. But the court was not persuaded that these alterations would render the class controllable for the judge or understandable for a jury.⁴¹

c. Rule 23(b) - Limited Fund Classes & Injunctive Classes.

As noted above, in addition to the so-called "damages" class action under Rule 23(b)(3), there are two other circumstances contemplated by Rule 23 that allow representative actions - limited fund class actions and injunctive class actions. Both these class actions under these subsections must also meet the prerequisites of Rule 23(a). Importantly, neither class members in a limited fund

class action nor in an injunctive class action may opt-out of these cases, nor do they have a right to receive notice of the class certification.⁴²

Rule 23(b)(2) allows for injunctive or declaratory relief where "the party opposing the class has acted or refused to act on grounds that apply generally to the class." Rule 23(b)(1) provides for a class action where allowing multiple, separate actions to proceed risks exhausting a defendant's limited fund that would be available to compensate all plaintiff class members.⁴³ This occurs most frequently when the defendant is insolvent or is no longer engaged in its trade or business.⁴⁴ This type of class action has become much less common since the Supreme Court placed certain restrictions on its application in 1999.⁴⁵

d. Rule 23(f) - Appeals of Class Certification Decisions.

In late 1998, the United States Supreme Court amended Rule 23 to allow for interlocutory review of class certification orders. Rule 23(f) places the discretion of granting a review of a class certification order at the Courts of Appeals. Until this amendment, parties could ask only for a review of a class certification orders pursuant to limited circumstances. This amendment allows the interlocutory appeal of a decision granting or denying class certification; it is not an appeal as of right, rather whether the appeal will be heard is consigned to the discretion of the Court of Appeals.⁴⁶ Whereas before this amendment, a granting of class certification would put enormous pressure on a defendant to settle the case - defendants would not often risk the substantial and often crippling damages award in a jury trial if they could otherwise settle a class-certified case - this amendment allows parties to challenge a game-ending order without running the risk of having to go to trial.

e. Rule 23(g) - The Appointment of Class Counsel.

Rule 23(g) governs the appointment of counsel for the plaintiff class. In sum, "a court that certifies a class must appoint class counsel" and must consider: the work counsel has completed in investigating claims; counsel's experience in handling complex litigation, including class action litigation; counsel's familiarity of the relevant law; and, the resources counsel will commit to the representation.⁴⁷ Furthermore, the court may consider other factors in appointing class counsel, including counsel's ability to "fairly and adequately represent the interests of the class," or may include restrictions or limitations on the award of attorney's fees.⁴⁸

f. Contact with Class Members Before a Class is Certified.

Generally, defendants' counsel may communicate with putative class members in the ordinary course of business, including settlement negotiations. They may not, however, "give false, misleading or intimidating information, conceal material information or attempt to influence the decision about whether to request exclusion from a class certified under Rule 23(b)(3)."⁴⁹ This would include sending notices to potential class members that had the effect of extinguishing those members' rights,⁵⁰ or instructing them that joining in the class action would negatively impact an on-going business arrangement.⁵¹ Courts, therefore, may carefully limit these communications by balancing the parties' free speech rights with the court's need to protect would-be class members.⁵²

g. Settlement of Class Actions.

i. **Notice and Opt-outs.**

In contrast to the limited fund and injunctive class actions under Rule 23(b)(1) and (b)(2), damages class actions require the plaintiffs to receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."⁵³ Moreover, only damages class actions certified under 23(b)(3) allow for plaintiffs to opt-out of the class action and either file their own suit(s) or let their claims

expire.⁵⁴ If these class members fail to respond and opt-out, they are automatically bound to the litigation's result as a member of the class.⁵⁵

With respect to the certification of so-called "settlement" classes, the Supreme Court has cautioned that a putative class created only for settlement purposes (rather than for litigation) must nevertheless be examined in the same manner as a class sought for litigation purposes.⁵⁶ Put another way, although the "manageability" requirement is arguably relaxed, a court being asked to certify a settlement class must subject the proposed class to the requirements of Rule 23, just as it would have to do so were the motion for class certification contested by the defendant(s). This situation arises when a defendant reaches a settlement agreement with a putative class plaintiff - that is, the court has not addressed whether class certification is appropriate. The defendant, in order to safeguard its interests in only litigating the same claims once, does not oppose the plaintiff's class certification motion. Thus, the court would certify a class action, which would then be almost immediately settled. This protects the interests of the defendant as all claims are extinguished unless individual plaintiffs opt-out.

3. The Class Action Fairness Act.

The most significant recent development in U.S. class action law is the recent passage of the Class Action Fairness Act of 2005 ("CAFA"), which expanded the jurisdiction of federal courts to include large lawsuits and mass actions that would otherwise have remained in state courts across the country. CAFA creates federal court jurisdiction over putative class actions where the aggregate amount in controversy exceeds \$5 million, and in which any one of the members of the class of plaintiffs is a citizen of a U.S. state different from any one defendant. This latter requirement is called "minimal diversity of citizenship." An exception applies if at least two-thirds of the members of the proposed plaintiff class and the defendants are citizens of the state in which the action was originally filed. The federal court also has jurisdiction where one party is a foreign state or a citizen or subject of a foreign state and the adverse party is a citizen of a state.

As a recent commentator noted, this legislation denotes a Congressional effort to reduce the number of class actions filed in state courts, especially in jurisdictions long-known for their lax class certification standards. Before CAFA, plaintiffs would frequently file nationwide class actions in state courts located in rural areas where judges would give class certification motions a perfunctory analysis. To a greater extent than before CAFA's enactment, plaintiffs now are filing suit directly in U.S. District Courts; those actions are thus subject to the rigorous requirements of Rule 23 and its case law.⁵⁷

II. Certification of Antitrust Class Actions

1. Courts' Historical Inclination To Favour Certification.

Most courts historically have favoured certification of antitrust class actions and noted that "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws."⁵⁸ They reached this conclusion because proof of a *conspiracy* is a common question thought to predominate over the other issues of the case.⁵⁹ Some courts have made the observation that horizontal price-fixing cases may be especially well-suited to class treatment because they can present many common issues.⁶⁰ Some courts have allowed certification where the plaintiffs presented economic evidence that

the price structure in an industry is such that "nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which . . . was higher . . . than the range which would have existed . . . under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations . . . as to the extent of damage."⁶¹

Many courts over the years adopted a pro-plaintiff approach, granting class certification to plaintiffs who had presented evidence of an antitrust violation, but who had offered little or even no evidence of causation or injury. In the last five years, the antitrust class law has been punctured with some notable victories by defendants, with courts requiring more rigorous evidence that proof of causation and injury will be common to all members of the class.

a. Early Decisions.

The Supreme Court opened the door to an arguably pro-plaintiff view in *Eisen v. Carlisle & Jacquelin*,⁶² a securities case in which the Court held it improper to conduct a preliminary inquiry into the merits of the plaintiffs' claims at the class certification stage.

i. **The "Bogosian Short-cut" to Proof of Class-wide Injury.**

Led by the Third Circuit in *Bogosian*,⁶³ some courts have applied *Eisen* in the antitrust context to reduce the burden on plaintiffs seeking to certify a class. *Bogosian*, an independent service station dealer, sought to certify a class of dealers allegedly harmed when Gulf, Exxon, and other major oil companies required them to enter exclusive gasoline supply contracts. According to the court, as long as plaintiffs could prove the existence of a conspiracy among the oil companies that affected prices, "an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchase at the higher price."⁶⁴ As a result, even if the conspiracy had different effects in different regions, "it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage."⁶⁵ The court presumed class-wide impact even as it acknowledged the possibility that different plaintiffs had been affected differently by defendants' conduct. Many courts have applied what has become known as the "Bogosian short-cut" to grant class certification based on "generalised proof"⁶⁶ of impact and injury.⁶⁷

Other courts applying *Eisen* relied exclusively on the pleadings to find class-wide harm. For example, the Second Circuit at one point interpreted *Eisen* to prohibit any inquiry into the merits at the class certification stage.⁶⁸ Instead, courts had to rely exclusively on the complaint, and accept all allegations as true.⁶⁹ This of course gave plaintiffs an enormous advantage, even though a minority of courts were sceptical of this approach, saying, "It should take more than *ipse dixit* to make a class."⁷⁰

Still other courts, like the Seventh Circuit, employed an intermediate approach, considering both the pleadings and some extrinsic evidence to decide class certification.⁷¹ According to the Seventh Circuit, "The pleadings are expected to be of assistance, but more information may be needed."⁷² Although "some discovery may be appropriate," the court emphasised the *Eisen* requirement that it not conduct a preliminary inquiry into the merits.⁷³ This cursory review of evidence, "somewhere between the pleading and the fruits of discovery,"⁷⁴ does impose some burden on plaintiffs. However, the failure to require more rigorous proof left defendants at a disadvantage in class certification proceedings.

ii. **Early Exceptions Requiring More Rigorous Proof.**

The Supreme Court retreated from its stance in *Eisen* in *Coopers & Lybrand v. Livesay*.⁷⁵ There, the Court explained that "the class

determination generally involved considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."⁷⁶ Going even further four years later in *General Telephone Company of the Southwest v. Falcon*, the Court held that class certification motions should be subjected to a "rigorous analysis," noting that "sometimes it may be necessary for the court" to look "behind the pleadings before coming to rest on the certification question."⁷⁷ *Falcon* was not a full retreat from *Eisen*, however, as the Court declined to reject the practice of deciding class certification based solely on the pleadings, explaining that "sometimes the issues are plain enough from the pleadings."⁷⁸

The Fourth and Fifth Circuits were quick to adopt this more rigorous standard by considering both legal and factual issues to decide whether certification was warranted. In *Alabama v. Blue Bird Body Co.*, the Fifth Circuit analysed the available evidence - the deposition of an alleged conspirator - to determine that the localised structure of the industry meant that plaintiffs would be unable to prove a single, nationwide conspiracy, making certification of a nationwide class inappropriate.⁷⁹ The Fourth Circuit declined to certify a class of tobacco sellers alleging anticompetitive activity in tobacco auctions after undertaking a thorough review of the market.⁸⁰ The panel noted with approval that the district court had "illustrate[d] and pinpoint[ed]" the difficulties of calculating damages.⁸¹ In recent years, courts have increasingly adopted the Fourth and Fifth Circuits' approach.

2. The New Trend to More Rigorous Analysis

i. Recent Decisions Requiring More Rigorous Analysis.

In what would signal a push to truly rigorous analysis of the class certification factors, the Supreme Court in 1997 affirmed decertification of a class in *Amchem Products v. Windsor* and reminding courts to take a "close look" at the predominance and superiority factors in Rule 23(b)(3).⁸² The *Amchem* decision prompted courts to review their class certification standards and procedures and to interpret *Eisen* more along the lines of the Fourth and Fifth Circuits and permit some inquiry into merits issues that bear directly on Rule 23 elements.⁸³ This trend accelerated in 2003 when Rule 23 was changed to allow more flexibility in the timing of class certification, going from "as soon as is practicable" to "at an early practicable time." The Advisory Committee to the Federal Rules of Civil Procedure made it clear that the change was in part designed to allow courts a meaningful opportunity to inquire into the facts for class certification: "In this sense it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making a certification decision on an informed basis."⁸⁴

Today, the majority of federal circuit courts engage in a genuinely rigorous class certification analysis, even to the extent this analysis intersects with merits issues. The First, Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits all now permit an inquiry into the merits of an antitrust claim. Likewise, several district court cases in the Ninth and Tenth Circuits may signal a move in those circuits to more rigorous analysis.⁸⁵

The most important and sweeping recent opinion on this issue came from the Second Circuit in *In re Initial Public Offerings Securities Litigation ("IPO")*, in which it rejected the reasoning of its earlier decisions.⁸⁶ The Court stated:

(1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23

requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.⁸⁷

Even the Third Circuit appears to be less consistent in its application of the *Bogosian* short-cut and sometimes allows an inquiry into the merits - although the review of the merits is often perfunctory, as in the 2002 case of *In re Linerboard*.⁸⁸ There, the court paid lip service to rigorous analysis while endorsing reliance on the *Bogosian* short-cut and accepting at face value the plaintiffs' expert methodologies for common proof of impact and damages.⁸⁹ Thus even though the court purported to scrutinise expert evidence, it ultimately conducted little to no analysis of whether the expert's methodology actually would work to demonstrate class-wide impact and injury. Nonetheless, the Third Circuit concluded:

the District Court did not err in determining that plaintiffs showed that they could establish injury on a class-wide basis. Plaintiffs produced affidavits of expert witnesses . . . who effectively utilised supporting data, including charts and exhibits, to authenticate their professional opinions that all class members would incur such damages.⁹⁰

Other courts continue openly to be more lenient in favour of antitrust plaintiffs, relying on dicta from *Amchem* that "predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws."⁹¹ Arguably this approach reflects the continued influence the *per se* rule has on courts' thinking about common issues at class certification, causing courts to confuse the distinct issues of whether a Sherman Act Section 1 *per se* unlawful agreement exists and can be shown with common proof with the Clayton Act Section 4 issues of whether injury and damages can be shown with common proof. After all, an agreement may have been struck but it may not have been effective, much less effective on the entire putative class or for the entire putative class period (common proof is defined as proof that would dispose of a material element of a claim for all class members).

ii. Recent Developments in Scrutinising Expert Testimony.

Many courts are currently more willing to test whether plaintiff experts' proposed method to prove impact and injury with common evidence will actually work (the Third Circuit's decision in *Linerboard* notwithstanding), and are more and more likely to discount methodologies that are only general or theoretical in nature and that ignore the market facts in the case at hand.

For example, in *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, the Fifth Circuit affirmed a denial of class certification where plaintiffs' expert: (i) proposed using the "yardstick" method to calculate damages on a class-wide basis but acknowledged that he had not found an industry comparable to the one at issue; (2) did not explain how he would model certain factors in his multiple regression analysis; and (3) did not persuade the court that the necessary data was available.⁹² Similarly, the Eighth Circuit in *Blades* affirmed denial of class certification where an "expert suggested five potential benchmarks for measuring damages" that

plaintiffs “argue[d] could be used also to prove injury,” but did not show that this “method . . . could work to prove class-wide injury with common evidence.”⁹³

Conclusion

The class certification juncture in an antitrust case provides opportunities and pitfalls for the opposing parties. For plaintiffs, mastering a robust showing as to how they intend to demonstrate class-wide injury is critical to their success and must generally be accomplished with an expert submission that denotes more than simply a promissory note resting on generalised methodologies, but rather reflects the realities of the market place in issue and the record before the court. Plaintiffs, particularly in cases for which one or more guilty pleas have been entered in corresponding criminal proceedings, do their utmost to trumpet that the equities require the certification of a class. This trumpeting can obscure the fact that private plaintiffs often assert claims far broader than the theories expressed in guilty pleas. For defendants, defeating class certification can effectively end the litigation; even a partial victory at class certification can jettison considerable exposure. Facts of how the marketplace actually operates, rather than theories, are what defendants must marshal in their effort to show the lack of predominance and without which any class trial would be unmanageable. They would do well to heed Winston Churchill's admonition that facts are better than dreams.

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Endnotes

- ALBA CONTE AND HERBERT B. NEWBERG, 1 NEWBERG ON CLASS ACTIONS (“Newberg”) §1:1 (4th ed. 2002).
- Id. at §§ 1:2, 1:6.
- Id. at § 1.6; JOHN J. COUND, ET AL., CIVIL PROCEDURE (“Cound et al.”) 701 (8th ed. 2001).
- Fed. R. Civ. P. 23; Newberg at §1:10. With respect to state law claims, most state court procedural rules are modeled after, or are analogous to, Fed. R. Civ. P. 23.
- See, e.g., *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 473 (5th Cir. 1986).
- Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 388, 344 (7th Cir. 1997)).
- Id.
- Id.
- John H. Beisner & Charles E. Borden “Expanding Private Causes of Action: Lessons from the U.S. Litigation Experience” Institute for Legal Reform, September 1, 2005, at <http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1034>.
- Id. at 22-23.
- See “White Paper on Damages actions for breach of the EC antitrust,” available at http://ec.europa.eu/comm/competition/antitrust/actions_damages/files_white_paper/whitepaper_en.pdf.
- http://www.oft.gov.uk/shared_oftr/reports/comp_policy/oft916resp.pdf; see <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/515&format=HTML&aged=0&language=EN&guiLanguage=en>
- See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).
- See *DeMarco v. Nat'l Collector's Mint, Inc.*, 229 F.R.D. 73, 80 (S.D. N.Y. 2005); *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); Fed. R. Civ. P. 23(a)(1); Cound et al. at 703; Newberg at § 3:3.
- See *Ansari v. New York Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y. 1998);

- Robidoux v. Celani*, 987 F.2d 931 (2d Cir. 1993).
- See *Polich v. Burlington N. Inc.*, 116 F.R.D. 258, 261 (D. Mont. 1987) (noting that sixty class members is required in order for the presumption of numerosity to be met).
- See *Harik v. Calif. Teachers Ass'n*, 326 F.3d 1042, 1051 (9th Cir. 2003) (interpreting Supreme Court precedent to require only fifteen class members); *Novella v. Westchester County, New York Carpenters' Pension Fund*, 443 F. Supp. 2d 540 (S.D.N.Y. 2006) (certifying class of twenty-four members).
- See 209 F.R.D. 678 (S.D. Fla. 2002).
- Fed. R. Civ. P. 23(a)(2) (“there are questions of law or fact common to the class”); see, e.g., *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986).
- See, e.g., Newberg at § 3:10.
- See 306 F.3d 1247 (2d Cir. 2002); *Fotta v. Trs. of the UMW Health & Ret. Fund of 1974*, 319 F.3d 612 (3d Cir. 2003) (holding commonality lacking because law required plaintiff to prove “wrongfulness,” which was inherently an individual question).
- General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982).
- Chang v. United States*, 217 F.R.D. 262, 269 (D.D.C. 2003).
- Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001).
- 458 F.3d 549, 552 (6th Cir. 2006).
- See, e.g., *Beck v. Maximus*, 457 F.3d 291 (3d Cir. 2006); *Dunnigan v. Metro. Life Ins. Co.*, 214 F.R.D. 125 (S.D.N.Y. 2003).
- In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 209 F.R.D. 323 (S.D.N.Y. 2002).
- 1 *McLaughlin on Class Actions* § 4:26 (2007) (citing *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 333 F.3d 763, 768 (7th Cir. 2003)).
- Grimes v. Fairfield Resorts, Inc.*, 2007 U.S. App. LEXIS 1958, at *6 (11th Cir. 2007).
- Id. at *11.
- Id. at *2-12.
- Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987) (internal citations omitted).
- Fed. R. Civ. P. 23(b)(3) (“questions of law or fact common to class members predominate over any questions affecting only individual members”).
- Amchem Prods.*, 521 U.S. at 623.
- Compare *Pickett v. IBP Inc.*, 182 F.R.D. 647 (M.D. Ala. 1998) (individual damages assessment makes class action untenable) with *In re Magnetic Audiotape Antitrust Litig.*, 2001 U.S. Dist. LEXIS 7303 at *25 (S.D.N.Y. June 1, 2001) (per se rule that individualised damages assessment does not prove fatal to class action status).
- Wente v. Georgia-Pacific Corp.*, 712 S.W.2d 253, 257 (Tex. App. 1986) (noting that commonality asks whether the “questions which when answered as to one class member are answered as to all class members”) (emphasis in original); see *Castano v. Am. Tobacco Co.*, 84 F.3d 7334, 749 (5th Cir. 1996).
- See, e.g., *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002).
- Ball v. Union Carbide Corp.*, 385 F.3d 713, 727-28 (6th Cir. 2004)
- Compare *Gunnells v. Healthplan Serv.*, 348 F.3d 417 (4th Cir. 2003) (reliance prevents finding of predominance) with *Schnall v. Amboy Nat'l Bank*, 270 F.3d 205, 217 (3d Cir. 2002) (reliance does not preclude predominance in Truth in Lending Act lawsuits).
- 212 F.R.D. 539 (C.D. Cal. 2003).
- Id. at 541-546.
- Fed. R. Civ. P. 23(c)(2).
- Fed. R. Civ. P. 23(b)(1). Other class actions can be brought under this section if inconsistent results that would “establish incompatible standards of conduct” for the defendant.
- See generally *Baker v. Wash. Mutual Finance Group, LLC*, 193 Fed. Appx. 294 (5th Cir. 2006) (defendant ceased operations).
- Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).
- Fed. R. Civ. P. 23(f) Advisory Committee note.
- Fed. R. Civ. P. 23(g)(1)(A).

48. *Id.*
49. *Manual For Complex Litigation*, Fourth § 21.12 (2004) (citing *Gulf Oil v. Bernard*, 452 U.S. 89 (1981)).
50. See *Cobell v. Norton*, 212 F.R.D. 14, 20 (D.D.C. 2002).
51. Cf. *Hampton Hardware v. Cotter & Co.*, 156 F.R.D. 630, 634-35 (N.D. Tex. 1994).
52. See *Gulf Oil*, 452 at 101-02; *Rankin v. Board of Ed. of Wichita Public Schools*, 174 F.R.D. 695, 697 (D. Kan. 1997 (prohibiting defendants from communicating with putative class members on the topic of the litigation));
53. Fed. R. Civ. P. 23(c)(2)
54. *Id.*
55. *Id.*
56. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).
57. John Beisner and Richard Rose, "The Impact of CAFA on Aggregated Litigation", American Bar Association, Business Litigation Committee (Winter 2007) at 1.
58. *Amchem Prods.*, 521 U.S. at 625. In the antitrust class action context, plaintiffs are required to present common proof of the prima facie elements of a private claim for damages: (1) a violation of the antitrust laws, (2) each plaintiff suffered an injury or impact caused by the antitrust violation, and (3) a measure of damages. See *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 532 (6th Cir. 2008); *Deiter v. Microsoft Corp.*, 436 F.3d 461, 467 (4th Cir. 2006); *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005). *Newberg* at § 4:25.
59. *In re Urethane Antitrust Litig.*, No. 04-1616-JWL (D. Kan. July 29, 2008); 7AA Charles Alan Wright, et al., *Federal Practice & Procedure* § 1781, at 228 (3d ed. 2005).
60. See, e.g., *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105-08 (2d Cir. 2007) (reversing lower court decision that common issues did not predominate over individual questions of injury); *Cohen v. Chilcott*, 522 F. Supp. 2d 105, 116 (D.D.C. 2007) ("Antitrust actions involving allegations of price-fixing have frequently been found to meet the predominance requirement in class certification analysis."); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 695 (D. Minn. 1995) (observing that "because the gravamen of a price-fixing claim is that the price in a given market is artificially high, there is a presumption that an illegal price-fixing scheme impacts upon all purchasers of a price-fixed product in a conspiratorially affected market.").
61. *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151 (3d Cir. 2002); see *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).
62. 417 U.S. 156, 177-78 (1974).
63. 561 F.2d 434 (3d Cir. 1977).
64. *Bogosian*, 561 F.2d at 455.
65. *Id.*
66. See *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 678 (5th Cir. 1980).
67. See, e.g., *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 352 (N.D. Cal. 2005); *In re Carbon Black Antitrust Litig.*, No. CivA.03-10191-DPW, MDL NO. 1543, 2005 WL 1029666, at *15 & n. 16 (D. Mass. Jan. 18, 2005); *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 268, 272 (D. Minn. 1989); *In re Alcoholic Beverages*, 95 F.R.D. 321, 327 (E.D.N.Y. 1982); see generally Robert Klonoff, *Antitrust Class Actions: Chaos in the Courts*, 11 *Stan. L. J. Bus. & Fin.* 1 (2005).
68. See *Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978).
69. *Id.*
70. See Prof'l. Adjusting Sys. of Am., Inc. v. Gen'l Adjustment Bureau, Inc., 64 F.R.D. 35, 38 (S.D.N.Y. 1974).
71. See *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890 (7th Cir. 1981).
72. *Id.* at 895.
73. *Id.*
74. See Prof'l. Adjusting Sys. of Am., 64 F.R.D. at 38.
75. 437 U.S. 463 (1978).
76. *Id.* at 469.
77. 457 U.S. 147, 160-61 (1982).
78. *Id.*
79. 573 F.2d 309 (5th Cir. 1978).
80. *Windham v. Am. Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977).
81. *Id.* at 70.
82. 521 U.S. at 615 (1997).
83. See, e.g., *In re Polymedica Corp. Sec's Litig.*, 432 F.3d 1, 5-7 (1st Cir. 2005); *In re Initial Pub. Offerings Sec's Litig.*, 471 F.3d 24, 32-40 (2d Cir. 2006); *Szabo v. Bridgeport Mach's, Inc.*, 249 F.3d 672, 674-676 (7th Cir. 2001); *Blades v. Monsanto Co.*, 400 F.3d at 562; *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984) (adopting the Fifth Circuit's pre-circuit split rule).
84. Fed. R. Civ. P. 23(c)(1)(A) advisory committee 2003.
85. *In re Graphics Processing Units Antitrust Litig.* No. C 06-07417, (N.D. Cal. July 18, 2008), *In re NCAA I-A Walk-On Football Players Litig.*, 2006 WL 1207915 (W.D. Wash. May 3, 2006); *In re Medical Waste Servs. Antitrust Litig.*, CV-2:03MD1546 (D. Utah March 3, 2006).
86. *IPO*, 471 F.3d at 41.
87. *IPO*, 471 F.3d at 41.
88. *Compare Newton*, 259 F.3d at 167-69; *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 188-89 (3d Cir. 2001), with *In re Linerboard*, 305 F.3d at 145.
89. 305 F.3d at 153. The Third Circuit followed *Linerboard* with another similar decision in *In re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516 (3d Cir. 2004), although as the Court notes, *Warfarin* dealt with a distinguishable "settlement" class, rather than a litigation class. District courts in the Third Circuit have tended to follow the Third Circuit's more liberal treatment of antitrust class actions. See, e.g., *Meijer v. 3M*, 2006 WL 2382718, *8 (E.D. Pa. 2006); *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314, *11 (D.N.J. 2005).
90. 305 F.3d at 153, 155.
91. *Amchem*, 521 U.S. at 615.
92. 100 Fed. Appx. 296, 299-301 (5th Cir. 2004) (affirming 215 F.R.D. 523 (E.D. Tex. 2003)).
93. 400 F.3d at 575 (affirming *Sample v. Monsanto*, 218 F.R.D. 644 (E.D. Mo. 2003)).

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