

Without Presumptions: Rigorous Analysis in Class Certification Proceedings

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Courts increasingly – and in our view correctly – are weighing evidence on merits-related fact issues and scrutinizing expert evidence to rule on class certification in antitrust cases, insisting that the plaintiff submit a methodology that works reliably in the market context of the case to show classwide impact and injury with proof that is common to each class member.¹

Traditionally, antitrust defendants have found it difficult to defeat class certification, particularly for claims alleging horizontal conspiracies under Section 1 of the Sherman Act. We attribute this difficulty in part to what we call the “curse of the per se” rule: at the class certification phase in cartel cases the court’s mindset has been heavily influenced by the *Socony-Vacuum* rule² that a price-fixing conspiracy is per se unlawful.

Two implications of the per se rule tend to “bleed” into the class certification inquiry: First, because courts repeatedly have condemned horizontal conspiracies to fix prices and allocate markets as lacking any redeeming justification and as presumptively anticompetitive,³ courts find it difficult not to presume as well that such alleged conduct has caused all customers to suffer anticompetitive harm. Second, because the defendants’ alleged unlawful agreement in and of itself violates the per se rule and evidence of such an agreement often applies to all putative class members, allegations and evidence that the defendants agreed – that is, that they possessed a “conscious commitment designed to achieve an unlawful objective”⁴ – often shapes the court’s mind into thinking that common issues predominate under Fed. R. Civ. P. 23 on all elements of the plaintiff’s per se claim. The curse of the per se rule is particularly difficult for defendants to shake at the class certification stage if one or more defendants have entered a guilty plea in related criminal proceedings.

Simply put, defendants have had a difficult time at the class certification phase confining the influence of the *Socony-Vacuum* rule to its appropriate place, which establishes liability for defendants who are part of a conspiracy to commit a per se offense even if the defendant did not engage in any overt conduct in furtherance of the conspiracy. The rule says nothing about the requirements under Section 4 of the Clayton Act (Section 4) for a private damage recovery, but this important distinction frequently has been overlooked.

Section 4 permits an award of treble damages and attorney fees to any “person” “injured” in his “business or property” “by reason of anything forbidden in the antitrust laws.”⁵ The statute focuses on injury caused by (“by reason of”) an antitrust violation (the Section 1 offense), which evinces classic tort principles of injury and damages flowing from and proximately caused by a violation of substantive law. These distinct elements – injury and causation – each warrant close scrutiny at the class certification phase. The plaintiff must show that each element can be proven with evidence that is common to all members of the alleged class regardless of whether common evidence may predominate on the separate issue under Section 1 of whether some or all of the defendants conspired to commit a per se offense.⁶ Although courts often claim to examine the Section 4 elements separately in ruling on class certification, too often they been influenced

by allegations of a per se claim under Section 1 to presume common impact and injury, and thus to grant certification.

The question of whether a price-fixing class includes injured and non-injured class members is a critical issue that has received insufficient judicial scrutiny. This issue is critical because a trial of claims on behalf of a class that includes injured and non-injured class members confronts the trier of fact with a Hobson's choice that may violate principles of due process: if the court or jury rejects the claim based on evidence that some class members were not injured, the claims of the remaining class members who did suffer injury will be extinguished and subject to res judicata. Conversely, if the court or jury finds that all class members have suffered injury despite evidence that some did not, the defendant's rights may be violated. Due process principles provide that every litigant has the "opportunity to present his case and have its merits fairly judged."⁷ This guarantee includes the right to present a defense to each and every claim, even in the context of a class action, and yet that cannot be done as to the absent class members who suffered no injury.⁸

The Seventh Amendment also guarantees that any civil claim placing more than twenty dollars in controversy that is heard against a defendant will be adjudicated under a procedure which preserves "the substance of the common-law right of trial by jury" and contains those aspects of the jury trial process "which are regarded as fundamental, as inherent in and of the essence of the system"⁹ The Rules Enabling Act also provides that Rule 23, as a rule of procedure, cannot be a vehicle to "abridge," "enlarge," or "modify" "any substantive right."¹⁰ Under the scenario described above, a "trial for one" is not a "trial for all" and the Hobson's choice that confronts the court or jury either will abridge or enlarge substantive rights of some class members. And it is no answer to these issues to suggest that the court may, after a trial on the merits, conduct a series of mini trials or use a special master to determine who was or was not injured:

Plaintiffs also suggested that this issue could be resolved through a "claims procedure" that would be implemented after the class certification process. This argument is meritless. The amount of premiums paid, if any, is relevant to a determination of impact, an essential element of a price-fixing claim, and is not merely an assessment of the amount of damages, which may be properly ascertained at a later time. It is clear that this determination cannot be made on a class-wide basis, but would involve a fact-intensive inquiry unique to each potential class member.¹¹

To avoid these problems, courts should conduct class certification proceedings in a manner akin to that used for preliminary injunction motions. The court should consider fact evidence and expert testimony offered on each Rule 23 issue and each element of class claims, and decide whether it is more likely than not that plaintiffs will be able to prove each element of their prima facie case using cognizable common proof for the class and a reliable methodology under *Daubert*.

Eisen, Falcon, and Lower Court Confusion

Federal courts have long struggled to reconcile confusing Supreme Court pronouncements on class certification standards. Due to the admonition in *Eisen v. Carlisle-Jacquelin* that courts should not engage in a preliminary inquiry on the merits at the class certification phase, many courts limit their analysis of class issues to the four corners of the pleadings.¹² Other courts take direction from the later ruling in *General Telephone Co. of the Southwest v. Falcon*, which requires a rigorous analysis of all requirements of Rule 23.¹³ In the past several years, more federal courts have gravitated towards the second line of cases, applying a more rigorous and fact-based standard for class certification. This trend is long overdue and, given the high stakes involved, it signals a welcome shift toward a balanced examination of class certification in antitrust cases.

Eisen and Falcon: Divergent Directives from the Supreme Court. Rule 23 requires a class plaintiff seeking money damages to demonstrate six factors in support of class certification: the Rule 23(a) factors of numerosity, commonality, typicality, and adequacy; and the Rule 23(b)(3) requirements of predominance and superiority.¹⁴ Although the Rule places the burden of proof on plaintiffs, it offers no guidance on the applicable standard.

In the 1970s and 1980s, the Supreme Court stepped into this void in an attempt to define the quantum of proof needed by plaintiffs seeking to certify a class. In *Eisen*, the Court reviewed a decision under Rule 23(e) in which a lower court considered which party should bear the cost of class notice. To resolve the issue, the lower court held a hearing on the merits and found that the defendants were likely to lose the case at trial. On this basis, the Court ruled that the defendant should pay ninety percent of the cost of class notice. The Supreme Court expressed concern that a hearing could be prejudicial to the parties, noting that “nothing in either the language or history of Rule 23 ... gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”¹⁵

Eisen had an immediate impact, with many lower courts interpreting it broadly to bar any proceedings in which the court would engage in fact finding or weigh the law and facts on the merits of a case to rule on class certification.¹⁶ Seemingly in response, the Court softened its language four years later in *Coopers & Lybrand v. Livesay*, noting that “[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims.”¹⁷ *Livesay* did not have its seemingly intended effect, and most lower courts continued to apply *Eisen* to limit their class action analysis to the pleadings, perhaps with superficial consideration of limited extrinsic evidence, such as expert reports.¹⁸

The Court returned to the issue in 1982 in *Falcon*:

Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff’s claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification questions ... [A]ctual, not presumed conformance with Rule 23(a) remains ... indispensable.¹⁹

The Court held that a class action “may only be certified if the trial court is satisfied, *after a rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied.”²⁰ While *Falcon* dealt specifically with Rule 23(a), lower courts view it as also applying to Rule 23(b).²¹

The Supreme Court did not expressly overrule *Eisen*, and perhaps for this reason the decision in *Falcon* had the unintended effect of further muddying the waters. For the past twenty-five years, courts have struggled to harmonize the facially contradictory rulings in *Eisen* and *Falcon*: how does a court conduct a “rigorous analysis” of class certification elements without engaging in a “preliminary inquiry” about the often identical factual and legal issues that bear on the merits of the case? Unfortunately for defendants, until recently most courts have resolved this dilemma by engaging at best in a diluted and superficial review of facts pertinent to Rule 23 requirements and by ultimately certifying classes, particularly in antitrust cases.²²

Resolving the Eisen/Falcon Dilemma: The Disparate Paths of Lower Courts. THE *EISEN* PATH. Many courts interpreted the admonition in *Eisen* to require a class certification standard similar to the one courts use in analyzing a Rule 12(b)(6) motion to dismiss. Thus, for example, the Seventh Circuit for years followed the logic that “in ruling on a class certification, the question is whether plaintiff is asserting a claim which, *assuming its merit*, will satisfy the requirements of Rule 23”²³

These courts rarely considered anything beyond the pleadings, although at times they engaged in a quick study of extrinsic evidence and walked a line “somewhere between the pleading and the fruits of discovery.”²⁴ This rationale evolved into a line of cases in which courts looked past the pleadings to expert testimony and limited additional anecdotal evidence, but gave only superficial consideration to this evidence, particularly the expert reports.²⁵ Often, the mere existence of a plaintiffs’ report was enough to justify certification, and if the parties’ experts disagreed, the court refrained from weighing conflicting evidence and granted certification.²⁶

THE *FALCON* PATH. In a second line of cases, courts engaged in a truly “rigorous analysis” of merits-related facts and legal principles pertinent to class action elements, ultimately leaning heavily towards the Supreme Court’s language in *Falcon*. In *Windham v. American Brands, Inc.*²⁷ and *Alabama v. Blue Bird Body Co.*,²⁸ both antitrust cases, the Fourth and Fifth Circuits, respectively, rejected the notion that courts should err in favor of certification. These circuits were the first to resolve what later became the *Eisen/Falcon* dichotomy by carefully dividing the inquiry into legal and factual issues underlying predominance, commonality, and other Rule 23 elements, from *Eisen*’s forbidden tangential inquiry into the plaintiff’s likelihood of success on the merits.²⁹ Over the last several years, the approach taken in these circuits has influenced courts in other circuits, and now there is a discernible trend to re-evaluate the limitations of *Eisen* and engage in a truly “rigorous analysis” of whether the plaintiff has submitted evidence to prove the class action elements.

The Eisen/Falcon Dichotomy in the Antitrust Arena. Courts historically have lightened the arguably slight burden on plaintiffs seeking to certify a class in antitrust cases, effectively presuming that certification is warranted or at a minimum erring in favor of certification.³⁰ Courts explain this presumption on the basis that the elements of most antitrust claims under Section 4 of the Clayton Act – (1) an antitrust violation, (2) an antitrust injury, and (3) the fact of

damages³¹ – are subject to common proof because the proof focuses on the behavior of defendants, not members of the class, and on the relatively uniform injury supposedly created by most antitrust violations, particularly price increases above a competitive level. Courts often have applied a presumption in per se price-fixing cases.³²

Led by the Third Circuit’s decision in *Bogosian*,³³ most courts until recently considered antitrust cases to be particularly well suited for private prosecution as class actions. *Bogosian* reasoned that class members can prove injury “by demonstrating, through generalized proof, that the competitive [price] for groups of or for individual class members existed at least over a range, the highest point of which was less than the [price] actually paid.”³⁴ Courts have applied this “*Bogosian* short-cut” often to find that the plaintiff can prove impact and injury on a classwide basis.³⁵

Courts employing this approach often undertake little to no analysis of expert opinion.³⁶ For example, the *Potash* court noted that “[i]n assessing whether to certify a class, the Court’s inquiry is limited to whether or not the proposed methods are so insubstantial as to amount to no method at all.”³⁷ Similarly, in *New Motor Vehicles Antitrust Litigation*, plaintiffs’ experts offered vague promises of “standard” statistical models and an alternative “benchmarking” analysis to show damages on a classwide basis. The court acknowledged that it was “certainly ... not overwhelmed by the plaintiffs’ offer of damage calculation models” and noted potential problems with the models, but still ruled that common issues predominated and certified the class.³⁸ In effect, plaintiffs often have obtained favorable class certification rulings simply by reciting the mantras “yardstick,” “benchmark,” “before and after approach,” and/or “multiple regression analysis.”³⁹

When faced with competing expert views, courts have acknowledged the conflict but often decide that they cannot or will not engage in a “battle of the experts.” For example, in the *Carbon Black* litigation, the court “considered these divergent views” but concluded that “to the extent that this discussion involves a battle of the experts, it [is] not appropriate for the Court to determine which expert is more credible at this time.”⁴⁰

In contrast, three courts of appeals – the Fourth, Fifth, and Eleventh – steadfastly refuse to apply a broad presumption of common injury, but until recently theirs was the minority view. As noted by the Fifth Circuit in *Robinson*, “There are no hard and fast rules ... regarding the suitability of a particular type of antitrust case for class action treatment.”⁴¹

Harmonizing *Eisen* and *Falcon*: A New Trend in Certification Analysis

Recent Consideration of Merits Issues for Class Certification. Building on the approach of the Fourth, Fifth and Eleventh Circuits, in what arguably was the catalyst for more rigorous analysis, the Supreme Court in 1997 affirmed decertification of a class in *Amchem Products v. Windsor* and ruled that lower courts must take a “close look” at the predominance and superiority factors in Rule 23(b)(3).⁴² *Amchem* also revived attention on the Rules Enabling Act in interpreting Rule 23.⁴³ The ruling prompted almost every court of appeals to review its class certification standards and procedures, interpreting *Eisen* to permit some inquiry into merits issues that bear directly on Rule 23 elements.⁴⁴ This trend accelerated after the standard in Rule 23 for ruling on

class certification was changed in 2003 from “as soon as is practicable” to “at an early practicable time.” Importantly, the Advisory Committee comments to the rule change advocate that courts engage in a meaningful inquiry into the facts:

Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. *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.*⁴⁵

Today, the First, Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits have ruled clearly in favor of a more rigorous analysis of class certification, even if this analysis intersects with merits issues. The First Circuit was the first to allude to this new mode of analysis in 2000,⁴⁶ and the court firmly restated its support of a rigorous analysis in 2005:

[W]hile *Eisen* prohibits a district court from inquiring into whether a plaintiff will prevail on the merits at class certification, it “does not foreclose consideration of the probable course of litigation,” as contemplated by *Falcon* ... a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.⁴⁷

In 2001, Judge Easterbrook, writing for the Seventh Circuit in *Szabo v. Bridgeport Machines, Inc.*, held 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.”⁴⁸ The Eighth Circuit in 2005 likewise concluded in *Blades v. Monsanto* that “in ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case, [including] the resolution of expert disputes concerning the import of evidence.”⁴⁹

More recently, in *In re Initial Public Offerings Securities Litigation (IPO)*, the Second Circuit conducted what arguably is the most comprehensive review to date of the law on this issue and rejected the reasoning of its earlier decisions, including *Caridad* and *Visa Check*.⁵⁰ The court explicitly disavowed the view that plaintiffs can prevail on class certification by making only “some showing” that the Rule 23 requirements were met (the view espoused in *Caridad*), or by showing that the plaintiff’s proposed methodology “was not fatally flawed” (the view espoused in *Visa Check*). The court foreshadowed this shift in an antitrust case, *Heerwagen v. Clear Channel Communications*, in which it held that the district court did not err by comparing the weight to be accorded to conflicting expert testimony, because that inquiry was “sufficiently independent of the merits to justify weighing the evidence.”⁵¹ The *IPO* court went even further in ruling that:

- (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, even 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.⁵²

Even the Third Circuit, historically considered pro-plaintiff, appears to be aligning itself with other circuits on this issue, particularly with respect to securities cases. The court in its 2001 decisions in *Newton* and *Johnston* rejected certification and articulated a standard comporting with *Szabo* and the emerging majority standard that requires a rigorous analysis.⁵³

The Fourth and Fifth Circuits, already in the vanguard in articulating the standard of proof for class certification, further strengthened the standard they employ after the 2003 amendments to Rule 23, denouncing lax “standards of proof” and blind reliance on pleading allegations in ruling on class certification.⁵⁴ As the Fifth Circuit wrote in 2005, “The plain text of Rule 23 requires the court to ‘find,’ not merely assume, the facts favoring class certification.”⁵⁵

Several important district court opinions in the Ninth and Tenth Circuits echo these sentiments in rulings where the courts denied class certification while still paying lip service to *Eisen*. In *Medical Waste Services*, the court denied class certification when plaintiffs offered only “conclusory allegations” and “assumptions of liability” without establishing that classwide evidence could be used to prove their claims. Similarly, in *NCAA*, the court denied class certification based on a substantive analysis of flaws in methodology even though the court stated that plaintiffs’ expert only had to demonstrate that his methodology was not “fatally flawed.” Given this trend in the district courts, the Ninth and Tenth Circuits may have the opportunity to revisit this issue soon.⁵⁶

The trend towards more rigorous analysis encompassing the merits is evident in antitrust cases, including *Blades*, *Heerwagen*, *Robinson*, *Medical Waste Services*, and *NCAA*. Nevertheless, some courts continue to apply a more lenient standard favoring antitrust plaintiffs, bolstering their reasoning with dicta from *Amchem* that “[p]redominance is a test readily met in certain cases alleging ... violations of the antitrust laws.”⁵⁷ This approach reflects the continued influence of the *Socony-Vacuum* rule, causing courts to use the presumption of anticompetitive effect on which the per se rule is based to obscure the distinct issues of whether classwide injury and damages under Section 4 of the Clayton Act can be shown with common proof.

The Third Circuit's 2002 opinion in *In re Linerboard*, illustrates this problem. The court ignored its earlier opinions in securities cases denying class certification based on a more rigorous standard and instead cited *Bogosian* to affirm a grant of class certification based on a "belt and suspenders" approach: The court endorsed reliance on the *Bogosian* shortcut – the "belt" – and accepted at face value the proffered expert methodologies regarding common proof of impact and damages – the "suspenders."⁵⁸

As *Linerboard* shows, even when expert testimony is "considered," class certification in antitrust cases historically has been granted as long as the plaintiffs' expert proposes to use some generally accepted methodology for showing common impact and damages. The district court conducted little to no analysis of whether the methodology actually would demonstrate classwide impact and injury in the particular market context at issue, yet the Third Circuit concluded:

[T]he 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 utilized supporting data, including charts and exhibits, to authenticate their professional opinions that all class members would incur such damages.⁵⁹

Recent Developments in Analysis of Expert Testimony. The Third Circuit recently granted interlocutory review of class certification rulings in *In re Hydrogen Peroxide* and *Plastic Additives*. The court may (and should) use these cases to revisit the standard that district courts should apply in scrutinizing expert evidence on whether and how impact and injury will be proven on a classwide basis, which persists as the central question plaguing courts ruling on class certification in antitrust cases.

In recent years, many courts have exhibited greater willingness to test the viability of methodologies that experts propose to show classwide impact and injury using common proof, and are increasingly skeptical of plaintiffs' experts who offer only generalized and theoretical opinions that a particular methodology may serve this purpose without also submitting a functioning model that is tailored to 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: (1) 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.⁶⁰ 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 classwide injury with common evidence."⁶¹

Even if a plaintiff's expert has advanced a fairly specific model particular to the case, some courts have become emboldened to scrutinize how well the model actually works using actual market data. In *Freeland v. AT&T Corp.*, a putative consumer class of cellular telephones users claimed that the defendants illegally tied the sale of handsets to their wireless services. In

ruling on class certification, the district court engaged in a thorough analysis of the supplemental report submitted by plaintiffs' economic expert. The court found serious defects in the expert's proposed regression and benchmark analyses, which previously had been pointed out in connection with summary judgment proceedings in a related case.⁶² The court denied certification because the expert's regression analysis was so incomplete as to be inadmissible,⁶³ and the expert did not show that the alternative benchmark approach could demonstrate injury on a classwide basis.⁶⁴ *Freeland* illustrates that courts can make better and more case-specific assessments of expert methodology once the parties and their experts have greater access to merits-related discovery, and underscores an important interplay between class certification discovery and the degree to which courts may be able to scrutinize expert submissions on the issues of classwide impact and injury.

In *Rodney v. Northwest Airlines, Inc.*, in which the plaintiff alleged monopolization of multiple airline routes, the Sixth Circuit upheld the denial of certification. The district court looked behind the plaintiff's allegations and expert methodologies on classwide impact and injury, and credited rebuttal evidence of defendants' expert that, despite plaintiff's proposed use of "data screens," (that is, the use of basic regressions to earmark ostensibly injured class members) injury and damages could only be proven on a route-by-route basis.⁶⁵

Benefits of a Coherent Class Certification Standard

A number of reasons support the rigorous scrutiny of antitrust class certification motions, particularly whether common proof of classwide impact exists and whether expert testimony evinces a reliable methodology using that common proof.

First, courts frequently cannot reach a sound decision on class certification without making adequate findings on issues of law and fact that are central to the question of merits so long as those inquires relate to a Rule 23 issue. For example, the First Circuit aptly pointed out that "a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case."⁶⁶

Second, preventing trial courts from considering evidence at class certification impedes their ability to act as neutral arbitrators. For example, the Seventh Circuit remarked that "[c]ertifying classes on the basis of incontestable allegations in the complaint moves the court's discretion to the plaintiff's attorneys – who may use it in ways injurious to other class members, as well as ways injurious to defendants."⁶⁷

Third, considering class certification only superficially can violate the Rules Enabling Act by allowing Rule 23, a procedural rule, to impermissibly "abridge, enlarge, or modify" one of the parties' substantive rights. A cursory examination of an expert's proposed methodologies at class certification expands the possibility that the class will contain zero-impact class members who suffered no harm but yet are subsumed into a class. Inclusion of these class members can impact the substantive rights of defendants by forcing them to pay damages for some who were not harmed. Injured class members also may be harmed in that they may be denied any damage recovery if the court or jury, faced with the choice of an all or nothing award, may decline to find the defendants liable because the class is overinclusive.⁶⁸

Fourth, giving careful scrutiny to expert opinion – in particular to the methodologies proposed by plaintiffs’ experts and whether they would function with common proof – will conserve judicial resources and prevent erroneous grants of certification that raise settlement pressures on defendants. The *Methionine* case provides an excellent example of the concrete benefits that will result if courts “look under the hood” or “kick the tires” of expert opinions when determining whether a class should be certified. There, defendants raised several challenges to the plaintiff’s proposed methodology, including that the data plaintiff’s expert proposed to use was either unavailable or “would necessarily be inaccurate.”⁶⁹ Ultimately, both predictions turned out to be true. Plaintiff’s expert neither gathered the promised data nor performed his promised multiple regression analysis, and the court granted defendants’ motion for de-certification.⁷⁰ If more credence had been given to the issues defendants raised at the certification phase, costly motions practice and judicial resources could have been saved.

Fifth, under the 2003 amendments to Rule 23(c), courts no longer are required to certify a class “as soon as is practicable,” making more detailed class-related discovery and a hearing more viable. As the Advisory Committee observed, “Time may be needed to gather information necessary to make the certification decision.”⁷¹ *Freeland*, *Methionine*, and the other cases discussed above demonstrate that in many instances the earliest practicable time to determine class certification may be after significant merits discovery – or, at the least, relatively complete discovery on data issues – has occurred. This approach will allow courts to delay a decision on certification until later in the proceeding and to make a more informed ruling on class certification after taking the proposed methodology for a “test drive.”

Sixth, a preliminary decision on issues touching on the merits is not binding on the trier of fact and will not prejudice either party, just as with a preliminary injunction ruling, for which courts make factual findings that do not control merits determinations on summary judgment or at trial.⁷²

Practical Implications of the Trend

Many courts now permit additional merits-related discovery and engage in a more focused and fact-based analysis before ruling on class certification, but courts have not yet settled on a uniform standard of proof for class certification.

The Role of Daubert. Courts have expressed differing views on whether *Daubert* should be applied to expert testimony at class certification.⁷³ We see no conceptual difficulty with courts applying the *Daubert* standard to determine the admissibility of expert opinions at the class certification stage. Nor should *Daubert* rulings be the last word on whether certification is proper – the denial of a *Daubert* motion does not necessarily mean a grant of certification is justified. As in *Blades*, the court may determine that an expert opinion, although admissible, is entitled to little weight. As a practical matter, defendants should be cautious about reflexively moving to exclude expert testimony under *Daubert* at the class certification stage, as the court may infer incorrectly that defendants’ opposition to class certification hinges on exclusion of plaintiffs’ expert testimony.

Extent of Discovery. As the *Freeland* case illustrates, the trend towards more rigorous analysis will lead to better decisions about class certification, and a properly informed court is

much more likely to reach more accurate conclusions than one relying on presumptions and half-completed expert analysis. At some point, however, the cost of prolonged merits-related discovery will outweigh the benefits of a more accurate decision on class certification.

Under the previous “as soon as practicable” requirement of Rule 23(c), courts were effectively forced to rule prematurely on class certification in favor of one party or the other. The parties, not the court, should determine when they believe this cost-benefit analysis favors resolution of the class certification issue. If there is a difference of opinion between the parties on the timing of the resolution of the class certification issue, then the court should err on the side of ensuring that sufficient fact discovery relating to Rule 23 issues has occurred that will enable it to make whatever legal and factual determinations are necessary to resolving the class certification motion.

Proposed Standard of Proof. Courts and commentators have used or proposed several different standards of proof for Rule 23 decisions, ranging from the Rule 12(b)(6) standard now widely disfavored, to the Rule 12(b)(1) and 12(b)(2) standards use to resolve questions of jurisdiction, venue, and other preliminary matters and the Rule 56 summary judgment standard,⁷⁴ to the preliminary injunction standard that allows courts to make factual findings and decide whether it is more likely than not that the plaintiff will prevail on the merits.⁷⁵ Other commentators have advocated a “substantial possibility of success” standard.⁷⁶ The American Law Institute is considering recommending a standard of proof governing the resolution of class certification motions.

Of these options, the preliminary injunction standard is most consistent with the emerging trend toward a more rigorous and fact-based analysis for class certification rulings. Courts should have the discretion to direct some merit-related discovery and hold an evidentiary hearing before making a decision. In making whatever legal and factual findings are necessary to resolve the Rule 23 elements, the Courts will pay more than lip service to the required Rule 23 “rigorous inquiry.” The standard proposed above is fair to the parties, familiar to the courts and, importantly, ensures fidelity between Rule 23 and the Rules Enabling Act. It brings to mind Winston Churchill’s statement that “facts are better than dreams.”⁷⁷ Facts, too, are better than presumptions or assumptions – thoughts that the courts and litigants would do well to keep in mind in future class certification proceedings.

¹ *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) (“The nature of the evidence that will suffice to resolve a question determines whether the question is common or individual... If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the *same* evidence will suffice for *each* member to make a prima facie showing, then it becomes a common question.”) (emphasis added).

² *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 150, 223 (1940) (no overt act is required for a per se agreement to be condemned as an unlawful agreement and a combination formed for the purposes of fixing or stabilizing prices is per se unlawful).

³ *See, e.g., United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927).

⁴ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

⁵ 15 U.S.C. § 15.

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- ⁶ See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) (“Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.”); see also *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 678 (D. Kan. 2004) (“common issues do not predominate every horizontal price-fixing antitrust claim.”).
- ⁷ *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).
- ⁸ See, e.g., *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 489 n.21 (E.D. Pa. 1997), *aff’d sub nom. Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998).
- ⁹ *Colgrove v. Baffin*, 413 U.S. 149, 156-57 & n.11 (1973) (quoting *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935)).
- ¹⁰ 28 U.S.C. § 2072(b).
- ¹¹ *Blades v. Monsanto Co.*, 400 F.3d 562, 570 (8th Cir. 2005).
- ¹² 417 U.S. 156 (1974). See Robert Klonoff, *Antitrust Class Actions: Chaos in the Courts*, 11 STAN. J.L., BUS. & FIN. 1, 1 (2005) (noting disarray in the case law).
- ¹³ 457 U.S. 147 (1982).
- ¹⁴ FED. R. CIV. P. 23(a), (b)(3).
- ¹⁵ *Eisen*, 417 U.S. at 177.
- ¹⁶ See, e.g., *Shelter Realty Corp. v. Allied Maint. Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978).
- ¹⁷ 437 U.S. 463, 469 n.12 (1978) (quoting 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3911 N. 45 (1976)).
- ¹⁸ See, e.g., *Shelter Realty*, 574 F.2d at 661 n.15. Compare *Windham v. Am. Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977) (allowing an evidentiary inquiry), and *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 326-28 (5th Cir. 1978) (same) with *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977).
- ¹⁹ 457 U.S. at 160.
- ²⁰ *Id.* at 161 (emphasis added).
- ²¹ See, e.g., *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir. 2001).
- ²² See Klonoff, *supra* note 12.
- ²³ *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (internal quotation marks omitted); see also, e.g., *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999); *Koch v. Stanard*, 962 F.2d 605, 607 (7th Cir. 1992); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *Shelter Realty Corp.*, 574 F.2d at 661 n.15; *Kupfer v. Goodman*, No. CV-97-3894, 2000 U.S. Dist. LEXIS 7951, at *6 (E.D.N.Y. May 17, 2000). Even within these circuits, the standard was not always clear. Thus, for example, while Valdez recognized the truth of the pleadings, in *Stambaugh v. Kansas Department of Corrections*, 151 F.R.D. 664, 671 (D. Kan. 1993) (quoting *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988)), the district court wrote that it “may probe beyond the pleadings and consider the range of proof necessary to maintain the allegations” and that the “party seeking to certify a class ... [has] the ‘strict burden’ of proving each of the requirements of Rule 23.”).
- ²⁴ *Prof'l Adjusting Sys. of Am., Inc. v. Gen'l Adjustment Bureau, Inc.*, 64 F.R.D. 35, 38 (S.D.N.Y. 1974). See also, e.g., *In re Synthroid Mktg. Litig.*, 188 F.R.D. 287, 290 (N.D. Ill. 1999); *Jefferson v. Sec. Pac. Fin. Servs., Inc.*, 161 F.R.D. 63, 66 (N.D. Ill. 1995).
- ²⁵ See, e.g., *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292-93 (2d Cir. 1999).
- ²⁶ See, e.g., *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (concluding that plaintiff’s expert report was sufficient to support a finding of predominance so long as it “was not fatally flawed” and stating that a district court should confine its review to the pleadings and reports but “may not weigh

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- conflicting expert evidence or engage in ‘statistical dueling’ of experts.”); *see also In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153 (3d Cir. 2002).
- ²⁷ 565 F.2d 59 (4th Cir. 1977).
- ²⁸ 573 F.2d 309 (5th Cir. 1978).
- ²⁹ *Blue Bird Body*, 573 F.2d at 326-28; *Windham*, 565 F.2d 59.
- ³⁰ *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 258 (D.D.C. 2002) (stating that class actions play an important role in antitrust enforcement and therefore “courts tend to favor class certification when in doubt”). *See also, e.g., In re Plastic Cutlery Antitrust Litig.*, No. 96-CV-728, 1998 U.S. Dist. LEXIS 3628, at *4-*5 (E.D. Pa. Mar. 20, 1998); *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 239 (E.D.N.Y. 1998); *In re Citric Acid Antitrust Litig.*, Nos. 95-1092, C-95-2963 FMS, 1996 WL 655971, at *8 (N.D. Cal. Oct. 2, 1996).
- ³¹ *See, e.g., Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 675 (1982).
- ³² *Bogosian*, 561 F.2d at 455. *See also, e.g., In re Vitamins*, 209 F.R.D. at 251; *In re Plastic Cutlery*, 1998 U.S. Dist. LEXIS 3268; *In re Playmobil*, 35 F. Supp. 2d at 239.
- ³³ 561 F.2d 434 (3d Cir. 1977).
- ³⁴ *Nichols*, 675 F.2d at 678 (citing *Bogosian*, 561 F.2d at 455).
- ³⁵ *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. Civ A.03-10191-DPW, MDL NO. 1543, 2005 WL 102966, 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* Klonoff, *supra* note 12.
- ³⁶ *See e.g., In re Alcoholic Beverages*, 95 F.R.D. at 328 (further stating that “[a] damage formula may be appropriate here, as the plaintiffs suggest, but it is not necessary to find that such a formula would dispose of the damages question in order to conclude that common questions do predominate”).
- ³⁷ *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D. Minn. 1995). *See also, e.g., In re Northwest Airlines Corp.*, 208 F.R.D. 174, 219 (E.D. Mich. 2002); *In re Brand Name Prescription Drug Antitrust Litig.*, Nos. 94 C 987, 1994 WL 663590, at *5 (N.D. Ill. Nov. 18, 1994) (certifying class when “the putative class plaintiffs have come forward with seemingly realistic methodologies for proving damages on a class-wide basis”) (emphasis added).
- ³⁸ *In re New Motor Vehicles Antitrust Litig.*, 235 F.R.D. 127, 143-44, 145 n.63 (D. Me. 2006).
- ³⁹ *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 175 (E.D. Pa. 2007), *appeal pending*; *In re Plastic Additives Antitrust Litig.*, No. 03-2038, 2006 U.S. Dist. LEXIS 69105, at *33 (E.D. Pa. Sept. 1, 2006), *appeal pending*; *In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. Civ. 02-6030(WHW), 2006 WL 891362, at *13 (D.N.J. Apr. 4, 2006); *Nichols v. SmithKline Beecham Corp.*, No. CIV. A. 00-6222, 2003 WL 302352, at *7 (E.D. Pa. Jan. 29, 2003); *see also, e.g., In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 452 (D. Kan. 2006); *In re Rubber Chemicals*, 232 F.R.D. at 354; *In re Citric Acid*, 1996 WL 655791, at *7.
- ⁴⁰ *In re Carbon Black*, 2005 WL 102966, at *17 (alterations in original) (quoting *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 217 n.13 (E.D. Pa. 2001)). *See also, e.g., In re Rubber Chemicals*, 232 F.R.D. at 353; *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 384 (S.D.N.Y. 1996); *In re Potash*, 159 F.R.D. at 696.
- ⁴¹ *Robinson v. Texas Auto Dealers’ Ass’n*, 387 F.3d 416, 420-21 (5th Cir. 2004), *cert. denied*, 544 U.S. 949 (2005).
- ⁴² 521 U.S. 591, 615 (1997).
- ⁴³ *Id.* at 612.
- ⁴⁴ *See, e.g., In re Polymedica Corp. Sec’s Litig.*, 432 F.3d 1, 5-7 (1st Cir. 2005); *In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 32-40 (2d Cir. 2006) (*IPO*); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674-676 (7th Cir. 2001); *Blades v. Monsanto Co.*, 400 F.3d 562 (5th Cir. 2005).
- ⁴⁵ Fed. R. Civ. P. 23(c)(1)(A), 2003 advisory committee note (emphasis added).

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- ⁴⁶ Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000).
- ⁴⁷ *PolyMedica*, 432 F.3d at 6 (quoting *Waste Management Holdings*, 208 F.3d at 288).
- ⁴⁸ 249 F.3d at 676.
- ⁴⁹ 400 F.3d at 575.
- ⁵⁰ *IPO*, 471 F.3d at 41.
- ⁵¹ 435 F.3d 219, 233 (2d Cir. 2006).
- ⁵² *IPO*, 471 F.3d at 41-42.
- ⁵³ *Compare* *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167-69 (3d Cir. 2001) and *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 188-89 (3d Cir. 2001) with *In re Linerboard*, 305 F.3d 145 (3d Cir. 2002).
- ⁵⁴ *Unger v. Amedisys Inc.*, 401 F.3d 316, 320-23 (5th Cir. 2005); *see also* *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004) (concluding that “by accepting the plaintiffs’ allegations for purposes of certifying a class in this case, the district court failed to comply adequately with the procedural requirements of Rule 23”).
- ⁵⁵ *Unger*, 401 F.3d at 321. Just a few weeks ago, in the closely-watched securities class action of *Regents of the University of California v. Credit Suisse First Boston (USA), Inc.*, No. 06-20856, 2007 WL 816518 (5th Cir. Mar. 19, 2007), the Fifth Circuit condoned a review of facts beyond the pleadings and reversed a class certification order, citing to its own opinions and to *IPO*, *Gariety*, *Newton*, *Szabo*, and others. *See Regents of the University of California*, 2007 WL 816518, at *5.
- ⁵⁶ *In re NCAA I-A Walk-On Football Players Litig.*, No. C04-1254C 2006 WL 1207915 (W.D. Wash. May 3, 2006); *In re Med. Waste Servs. Antitrust Litig.*, CV-2:03MD1546, 2006 WL 538927 (D. Utah Mar. 3, 2006).
- ⁵⁷ *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1977).
- ⁵⁸ *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153 (3d Cir. 2002). 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*, No. 04-5871, 2006 WL 2382718, at *8 (E.D. Pa. Aug. 14, 2006); *In re Remeron End-Payor Antitrust Litig.*, No. 04-5126, 2005 WL 2230314, at *11 (D.N.J. Sept. 13, 2005).
- ⁵⁹ 305 F.3d at 153, 155.
- ⁶⁰ 100 Fed. Appx. 296, 299-301 (5th Cir. 2004), *aff’g* 215 F.R.D. 523 (E.D. Tex. 2003).
- ⁶¹ *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) (*affirming* *Sample v. Monsanto*, 218 F.R.D. 644 (E.D. Mo. 2003)).
- ⁶² *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 135-36, 144-45 (S.D.N.Y. 2006).
- ⁶³ *Id.* at 149 (observing that at least two significant variables had been omitted from the proposed regression analysis and that plaintiffs’ arguments for exclusion of those variables were unpersuasive).
- ⁶⁴ *Id.* at 151 (also rejecting plaintiffs’ use of average prices for handsets and reliance on the “presumption of impact”).
- ⁶⁵ *Rodney v. Northwest Airlines, Inc.*, 146 Fed. Appx. 783, 789 (6th Cir. 2005) (also rejecting the data screens as a proposed common method of showing antitrust injury). The Sixth Circuit also found plaintiff’s experts’ analysis substantively flawed with respect to market definition because they had not performed “a cross-elasticity analysis of whether bus or train travel is a reasonable substitute for flights on Northwest and Dr. Oster himself testified that he did not analyze whether ground transportation is a substitute for air transportation” or “whether connecting service is a substitute for non-stop service.” *Id.* at 788-89.
- ⁶⁶ *In re PolyMedica Corp. Secs. Litig.*, 432 F.3d 1, 6 (1st Cir. 2005).
- ⁶⁷ *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001).

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- ⁶⁸ See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (an ostensibly free choice that represents no choice at all).
- ⁶⁹ *In re Methionine Antitrust Litig.*, No. 00-1311, 2003 WL 22048232, at *2-*3 (N.D. Cal. Aug. 26, 2003). The court had denied plaintiff's first motion for class certification because it had not provided a "colorable" method of proving antitrust impact on a class-wide basis. *Id.* at *1.
- ⁷⁰ *Id.* at *3-*5.
- ⁷¹ FED. R. CIV. P. 23(c)(1)(A), 2003 advisory committee note.
- ⁷² *Gariety*, 368 F.3d at 366.
- ⁷³ Compare *Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 132 n.4 (2d Cir. 2001) (noting that a motion to strike expert testimony under *Daubert* "involves [an] inquiry distinct from that for evaluating expert evidence in support of a motion for class certification") with *Sannerman v. Chrysler Corp.*, 191 F.R.D. 441, 451 n.16 (E.D. Pa. 2000) (analyzing admissibility of plaintiff's expert testimony in support of class certification under *Daubert*).
- ⁷⁴ See, e.g., *Szabo*, 249 F.3d at 676-77.
- ⁷⁵ See, e.g., *Gariety*, 368 F.3d at 366-67; Robert G. Bone & David S. Evans, *Class Certification and Substantive Merits*, 51 DUKE L.J. 1251, 1278 (2002).
- ⁷⁶ Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 397 (1996); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 689 (1979).
- ⁷⁷ WINSTON S. CHURCHILL, *THE GATHERING STORM* 601 (Little Brown 1976).