

# Rigorous Analysis in Antitrust Class Certification Rulings: Recent Advances on The Front Line

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**L**AWYERS RARELY DEMUR WHEN GIVEN the opportunity to comment on the future path of the law, and we are no exception. In a Summer 2007 article in this Magazine, we observed that

[c]ourts 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.<sup>1</sup>

Now, in this article, we focus on three main themes below to show how court decisions over the past year largely confirm this trend:

- Courts are increasingly likely to weigh expert evidence and require that experts actually apply a proposed methodology to a sample set of the case-specific facts.
- Courts' heightened scrutiny of expert testimony is raising the bar for indirect purchaser claims and other antitrust claims that rely on novel or complex expert analysis of impact.
- These trends do not necessarily favor defendants, but rather shows that courts are taking account of the high stakes presented by antitrust class certification motions and the concomitant need for a robust factual record rather than one laced with presumptions.

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## The Rigorous Analysis Trend Continues, with Notable Exceptions

### *The New Majority: A Preliminary Inquiry into the Merits Is Necessary to a Rigorous Analysis of Class Certification.*

Courts have wrestled for years with how to reconcile the Supreme Court's admonition in *Eisen v. Carlisle & Jacquelin*,<sup>2</sup> to avoid a preliminary inquiry on the merits at the class certification phase, with the Court's instruction in *General Telephone Co. of the Southwest v. Falcon*,<sup>3</sup> to conduct a "rigorous analysis" of Rule 23 factors. As we wrote in Summer 2007, most federal courts of appeals over the past several years have resolved this tension by inquiring into the merits of some aspects of the plaintiff's case in ruling on class certification.<sup>4</sup>

The harmonization trend has continued apace this past year, with many courts amplifying and refining their positions on the merits inquiry that is required for an appropriate, rigorous analysis of Rule 23 factors. The Second, Fourth, Fifth, and Seventh Circuits require district courts to make specific findings of fact for class certification in antitrust cases.<sup>5</sup> The Ninth Circuit now has articulated a similar requirement, issuing an emphatic opinion in *Dukes v. Wal-Mart* late last year that "courts are not only 'at liberty to' but *must* 'consider evidence which goes to the requirements of Rule 23 even [if] the evidence may also relate to the underlying merits of the case.'"<sup>6</sup> Although not an antitrust case, *Dukes* is important because the court clarifies vague and contradictory statements in prior decisions of the Ninth Circuit directing district courts both to accept the substantive allegations of the complaint as true and, where necessary, to look beyond the pleadings.<sup>7</sup> Courts reviewing antitrust certification questions this year immediately seized on the *Dukes* standard for guidance.<sup>8</sup>

The First and Eighth Circuits also support merits inquiries but do not demand findings of fact in every case, instead instructing district courts to consider the merits when presented with material fact disputes or novel or complex injury arguments.<sup>9</sup> As the First Circuit wrote this year: "[W]hen a Rule 23 requirement relies on a novel or complex theory as to injury, as the predominance inquiry does in this case, the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed."<sup>10</sup>

***The New Minority: Doctrinal Disarray but Possible Convergence.*** In a minority of circuits, notably the District of Columbia and Third Circuits, courts apparently have resisted the trend toward requiring greater fact-based scrutiny of merits issues to resolve the *Eisen/Falcon* dichotomy.<sup>11</sup> For example, last year the D.C. federal district court in consecutive months issued two opinions articulating vague—and facially different—class certification standards.

In October 2007 Judge Kollar-Kotelly certified a class in *Meijer, Inc. v. Warner Chilcott Holdings Co. III*, stating:

The Court will not—and cannot—make a preliminary inquiry into the merits of Plaintiffs' claim in determining whether to certify the class . . . . Nevertheless, "the class

determination generally involves considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiff’s cause of action’ and the Court is required to conduct a “rigorous analysis” of the Rule 23 requirements. . . . Therefore, while the Court accepts the substantive allegations in Plaintiffs’ Amended Complaint as true, “it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.”<sup>12</sup>

The court noted the D.C. Circuit’s minority stance on merits inquiries, and concluded, in somewhat circular fashion, that: “[t]he Court does not decide whether to adopt the standard for class certification motions operative in other circuits. Instead, the Court avoids any inquiry into the merits of Plaintiffs’ claims that is not required to resolve the instant motion for class certification . . . .”<sup>13</sup>

The next month Judge Leon certified a similar class of generic drug purchasers in *In re Nifedipine Antitrust Litigation* after eschewing fact-based scrutiny in more definite terms, stating that, in ruling on class certification: (1) “courts are *not* to consider the underlying merits of the plaintiff’s claim and must accept as true the allegations as set forth in the complaint”; (2) the court “must refrain from . . . indulging in a duel ‘between opposing experts’”; and (3) the “plaintiffs need only present a ‘colorable method by which they intend to prove impact on a predominantly common basis.’”<sup>14</sup>

Although both judges granted class certification and thus reached similar results, the differing ways that each addressed the *Eisen/Falcon* dichotomy suggests further guidance by the D.C. Circuit is warranted on this issue.

The Third Circuit’s panel decisions in recent years show a similar need for doctrinal clarity on the *Eisen/Falcon* dichotomy. Some panels have permitted inquiry into merits issues, others have relied on the “*Bogosian* short-cut” to presume common impact among class members, and the panel in *Linerboard* used a hybrid “belt and suspenders” approach to expert analysis, stating that, “in addition to relying on the *Bogosian* short cut, [the court] credited the testimony of plaintiffs’ experts, opinions that were supported by charts, studies and articles from leading trade publications.”<sup>15</sup> The recent decision of another panel in *American Seed v. Monsanto* (discussed below), is a further step by the Third Circuit to distinguish *Bogosian* and forge a new path between the old presumption of impact and the more demanding merits-based analyses that a majority of circuits have used in recent antitrust class action rulings. Pending appeals of antitrust class certification rulings may provide further opportunities for the court to address the *Eisen/Falcon* dichotomy.<sup>16</sup>

The approach of the D.C. Circuit and Third Circuit to the *Eisen/Falcon* dichotomy appears to reflect a predisposition in favor of class certification, which may promote forum shopping by plaintiffs’ class counsel. The Supreme Court has not accepted review of a class certification ruling for over a decade following the decision in *Amchem*, but a circuit split is opening on the *Eisen/Falcon* dichotomy, and the time may be

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right for the Court to provide further guidance on how to reconcile its directive that lower courts take a “close look”<sup>17</sup> at predominance and superiority under Rule 23(b)(3), with dicta that “[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws.”<sup>18</sup>

**Kicking the Tires: Courts Now Want to See Methodologies in Action**  
***The End of Expert Promissory Notes: The New Majority Position.*** Several decisions this past year applied more rigorous analysis of expert submissions on class certification, with some courts even reversing class certification rulings under an abuse of discretion standard because the lower court relied on expert opinions grounded too heavily on presumptions and promises. Perhaps the most noteworthy decision in this group is *In re New Motor Vehicles Canadian Export Antitrust Litigation*,<sup>19</sup> in which the court vacated certification of a class for antitrust damage claims under state law, citing the need for a more complete examination of plaintiffs’ “novel and complex” theory of common impact on indirect purchasers.<sup>20</sup>

The plaintiffs alleged that car manufacturers restricted the flow of cheaper “gray market” cars from Canada to the United States, using a variety of vertical and horizontal restraints, including refusal to honor warranties for Canadian cars, discouraging dealers from installing domestic gauges on Canadian cars, and mandating “no export” clauses in sales agreements between dealers and consumers. The plaintiffs alleged that automakers used these restraints to artificially limit the supply of gray-market imports from Canada, that this supply restraint allowed them to increase the manufacturer’s suggested retail price (MSRP) and the dealer invoice price in the United States, and that these MSRP and dealer invoice prices are a baseline for, and thus caused an increase in, actual retail prices to consumers.

As the First Circuit observed, “plaintiff’s theory of antitrust impact operates in two stages. In the first stage, the horizontal conspiracy allowed the manufacturers to maintain artificially inflated national MSRPs and dealer invoice prices within the United States. In the second stage, the higher official pricing resulted in higher purchase prices paid by individual consumers.”<sup>21</sup> The court applied an abuse of discretion standard to reverse certification of damages classes under indirect purchaser statutes in twenty-three states and the District of Columbia, noting:

This standard has teeth: An abuse occurs when a court, in making a discretionary ruling, relies upon an improper factor, omits consideration of a factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them. An abuse of discretion also occurs if the court adopts an incorrect legal rule.<sup>22</sup>

The First Circuit faulted the district court for failing to strike a proper balance on the *Eisen/Falcon* dichotomy:

[W]eighing whether to certify a plaintiff class may inevitably overlap with some critical assessment regarding the merits of the case. . . . It would be contrary to the “rigorous analysis of the prerequisites established by Rule 23 before certifying a class” to put blinders on as to an issue simply because it implicates the merits of the case.<sup>23</sup>

The court ruled that the grant of class certification was an abuse of discretion due to a lack of “a more thorough explanation of how the pivotal evidence behind plaintiff’s theory can be established.”<sup>24</sup> The court focused in particular on the progress of discovery and expert analysis following the grant of class certification:

[A]t the time of class certification, more work remained to be done in the building of plaintiffs’ damages model and the filling out of all steps of plaintiffs’ damages model and the filling out of all steps of plaintiffs’ theory of impact. Time has now passed: it is almost two years since the district court’s May 12, 2006 order, and all discovery was scheduled to be completed by March 3, 2008. The plaintiffs should now have the evidence they need to put their best foot forward, and they have had additional time to work out their models and formulas. The district court should now have a complete record before it from which to test the viability of plaintiffs’ novel theory for proving common impact.<sup>25</sup>

The court focused as well on expert evidence in support of the plaintiffs’ two-part model for classwide proof of anti-competitive impact and injury. The plaintiffs first had to show how they would prove that a combination of the alleged vertical restraints and the alleged horizontal conspiracy described above caused the supply of Canadian vehicles in the United States to be artificially lowered and as a result caused an increase in MSRPs and dealer invoice prices. The plaintiffs also had to show that higher MSRPs and dealer invoice prices caused higher retail prices on a classwide basis, even though consumers and dealers may engage in individual negotiations over retail prices. The court invoked the “rigorous analysis” standard to rule that the plaintiffs’ expert must have more data and a more complete model to warrant class certification:

Under this circuit’s approach, in our view, a searching inquiry is in order where there are not only disputed basic facts, but also a novel theory of legally cognizable injury. Plaintiffs cannot make their case without common proof of causation, and they can only prove causation through common means if their novel theory is viable; that viability in turn depends on their ability to establish—whether through

mathematical models or further data or other means—the key logical steps behind their theory. . . . The court’s ability to probe into the viability of plaintiffs’ proffered theory and to formulate some predictions as to how key issues in this novel and complex case would develop was hampered, however, by the incomplete record at the time, as well as by the fact that plaintiffs’ expert had not yet fully formulated all aspects of his analysis.<sup>26</sup>

The Second Circuit issued an equally important class certification ruling in *Cordes & Co. Financial Services v. A.G. Edwards & Sons, Inc.*,<sup>27</sup> admonishing district courts to “kick the tires” of expert analysis at the class certification stage. As we discussed in our 2007 article, in *In re Initial Public Offering Securities Litigation*,<sup>28</sup> the court denied class certification by taking the bold step of discarding its earlier decisions, adopting a rigorous analysis of merits issues, and specifically disavowing its ruling in *Visa Check* that an expert report could “sustain a plaintiff’s burden so long as it is not ‘fatally flawed.’”<sup>29</sup>

In *Cordes*, the Second Circuit defined and provided context in the *IPO* decision. The plaintiffs in *Cordes* alleged (1) that financial underwriters conspired to charge all corporations using certain equity underwriting services a fee equal to 7 percent of the proceeds of initial public offerings, (2) that over 90 percent of relevant issuers paid such a fee in transactions led or co-managed by the same group of defendants, (3) and that co-management provided access to information on other defendants’ fee amounts.

The parties’ experts disagreed as to whether classwide impact could be established with common proof. The plaintiffs’ expert propounded a formula “for deriving the but-for fee [the amount each plaintiff should have paid, “but-for” the conspiracy] by (1) establishing a benchmark fee from a set of prices paid in temporal or geographic isolation from the conspiracy, and (2) applying a multiple regression analysis to isolate the ‘explanatory variables’ that influence the benchmark fee.”<sup>30</sup> The defendants’ expert countered that

any determination of whether a particular member of the purported issuer class has been injured by the clustering or alleged “standardization” of gross spreads would require an individualized factual analysis about whether, absent such alleged standardization, the issuer would have paid a gross spread of less than 7% for IPO net proceeds, the same or equal to the proceeds the issuer actually received as a result of its offering.<sup>31</sup>

The Second Circuit vacated the district court’s denial of certification and rejection of plaintiffs’ expert submission, instructing the district court to push the experts to conduct dry runs of their models using the facts of the case:

If the plaintiffs’ single formula can be employed to make a valid comparison between the but-for fee and the actual fee paid, then it seems to us that the injury-in-fact question is common to the class. Otherwise, it poses individual ones. The district court did not determine which expert is correct. We leave this question for it to resolve on remand.<sup>32</sup>

The Second Circuit's message is clear: district judges must roll up their sleeves and dive into the econometric models offered by experts to understand and evaluate the prospect of the model's success when applied to the facts in the case. Anything short of this is an abuse of discretion and subject to remand.<sup>33</sup> District courts in the Second Circuit are taking note, as illustrated by the recent denial of certification in *Fleischman v. Albany Medical Center*,<sup>34</sup> and district courts in other circuits have followed the approach required under *Cordes*.<sup>35</sup>

***Continued Confusion in Minority Circuits with Signs of a Shift in the Third Circuit.*** Cases like *New Motor Vehicles* and *Cordes* represent the leading edge of the move to subject expert submissions to additional scrutiny at the class certification phase. But the Third Circuit continues to blaze its own trail in seeking a middle ground between the *Bogosian* shortcut and the majority position in other circuits, as most recently seen in *American Seed Co. v. Monsanto*.<sup>36</sup>

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The plaintiffs in *American Seed* alleged that Monsanto monopolized certain U.S. corn seed markets. Monsanto produced a "foundation seed" that could be combined with other seeds to produce hybrid seed. Monsanto produced its own hybrid seed and licensed corn-seed "traits" (e.g., parasite or herbicide resistance) to other seed companies. Plaintiffs alleged that Monsanto unlawfully required licensees of its corn-seed traits to accept exclusive-dealing obligations that penalize them for licensing traits from Monsanto's competitors. They further alleged that Monsanto entered into unlawful "bundling" agreements by requiring wholesale corn-seed customers to sell a minimum percentage of Monsanto products within any particular line of corn seeds or face monetary penalties on all Monsanto corn seed products that they sell. The plaintiffs sought to certify a national class of all direct purchasers, and separate classes of direct purchasers in Iowa and Minnesota.

The Third Circuit affirmed the denial of certification of each proposed class, focusing on shortcomings in the plaintiffs' expert evidence. The court built upon *Linerboard* by interpreting it to require "that a putative class's presumption of impact under *Bogosian* be supported by some additional

amount of empirical evidence."<sup>37</sup> The Third Circuit has made similar statements in the past, but the decision in *Linerboard* appeared to pay mere lip service to this requirement. In *American Seed*, the court actually evaluated the expert's analysis and denied certification due to the expert's failure to apply the proffered analysis to the facts in the case:

Plaintiffs have not provided any actual data for the court's review as to the "factual setting of the case," against which to evaluate these formulas. Dr. Kamien cites absolutely no factual authority in his declaration in support of his theory of common injury and damages . . . . There is no indication that Dr. Kamien conducted at least a preliminary study of the market . . . . Dr. Kamien's submissions are not supported by charts, studies, and articles from leading trade publications . . . .<sup>38</sup>

### **Rigorous Analysis as a Growing Obstacle to Indirect Purchaser Classes**

***The Pass-Through Issue.*** A widely known problem for indirect purchaser cases, particularly in industry settings with multiple complex distribution channels, is that "proof . . . is intrinsically more complex, because the damage model must account for the actions of innocent intermediaries who allegedly passed on the overcharge."<sup>39</sup> The recent requirement by some courts that economists go beyond theoretical sketches and apply their methodologies to facts in the case is raising the bar for indirect purchaser claims at the class certification stage, in particular on the issue of common proof of impact. Plaintiffs' economists are struggling to devise compelling ways to show how they can overcome the causal break represented by intermediaries that do not "pass through" or "pass on" an alleged anticompetitive overcharge to a plaintiff due to competitive constraints that the intermediaries confront. Courts have significantly narrowed the scope of indirect purchaser classes, and some have denied certification outright where plaintiffs cannot give adequate assurances that a trial for one class member would effectively be a trial for all.

***Historical Treatment of Indirect Purchaser Claims.*** The recent trend against certification of indirect purchaser damages classes harkens back to courts' prevailing attitudes about the claims in the 1980s and '90s, after the Supreme Court ruled in *Illinois Brick Co. v. Illinois*,<sup>40</sup> that indirect purchaser damages claims under federal antitrust law are generally barred due in part to problems with proving anticompetitive impact on indirect purchasers. In response, many states passed repealer statutes expressly allowing private indirect purchaser damage claims under state antitrust laws,<sup>41</sup> and the Supreme Court held in 1989 that recovery under these statutes is permissible.<sup>42</sup>

From that time until the late 1990s, most federal courts reviewing state indirect purchaser claims perceived problems with classwide proof in indirect purchaser cases and were reluctant to certify such classes, noting that "the issues common to the class did not predominate over individual issues, as required by Rule 23(b)(3)."<sup>43</sup> The tide began to turn with the D.C. Circuit's 2001 ruling that Microsoft had unlawful-

ly monopolized the personal computer operating system market.<sup>44</sup> The *Microsoft* case spawned numerous class actions under state antitrust laws for indirect purchasers of computer hardware and software, and state courts in most of these cases certified such classes, perhaps propelled by the government's victory over Microsoft.<sup>45</sup>

**Raising the Bar on Indirect Purchaser Classes.** Several important decisions over the past year, including *New Motor Vehicles* and *American Seed*, reflect a move away from the *Microsoft* line of cases, with courts either refusing to certify or vacating certification of indirect purchaser classes where plaintiffs' experts proffering opinions on common proof of impact either (1) resisted or tried to explain away application of their proposed methodology to the nuanced facts of an indirect purchaser case, (2) relied on foundational assumptions to show impact to direct purchasers or pass-through by intermediaries, or (3) denied or assumed away the complexity and breadth of the pertinent distribution channels.

An excellent example is *In re Graphics Processing Units Antitrust Litigation*, in which the district court recently certified a limited class of direct purchasers, denied certification of a much broader class of direct purchasers, and denied certification of a class of indirect purchasers of graphics processors, which are microchips found in many personal computers and numerous other electronic products.<sup>46</sup> The plaintiffs offered reports of two experts to support certification. The district court noted at the outset:

The complex structure of defendants' chain of distribution and the particularized sales transactions associated with each sale of a GPU product present a significant barrier to certification. Antitrust decisions have been mixed in determining whether certification is warranted where complex chains of distribution with highly varying purchasers and products are involved. The Ninth Circuit has yet to speak.<sup>47</sup>

The court surveyed class certification rulings of other courts and relied heavily on the reasoning in *Dukes v. Wal-Mart*<sup>48</sup> to conclude that the expert reports in support of the direct purchaser class were deficient because the expert omitted variables that would "have a significant impact on demonstrating common impact across the class."<sup>49</sup> The court rejected the expert's explanation that he possessed limited information and that the model would improve during discovery:

In fact, at several points throughout his reply report, [the expert] contends that a more acceptable model will be developed as this case further progresses . . . [His] belief that the "vast bulk of discovery" has yet to occur is wrong. In this case, formal discovery will close in a little over a month . . . Direct-purchaser plaintiffs' proffered econometric models are grossly lacking and do not suffice.<sup>50</sup>

The court also ruled that the expert reports in support of certifying an indirect purchaser class relied too heavily on presumptions and promises: "Our plaintiffs cannot proceed on a mere presumption that impact on direct purchasers is proven by market data or that it will be proven by direct-purchaser plaintiffs at trial. Even if this order had certified an

entire, massive class of direct purchasers, indirect purchasers would still carry a burden all their own, for the former might settle out and leave the latter holding a bag of presumptions."<sup>51</sup> The court nonetheless considered the indirect purchaser expert's analysis and assumed *arguendo* that the direct purchaser expert had succeeded in his effort. The court still rejected the indirect purchaser expert report because each alternative the expert offered required individual inquiries to determine injury-in-fact for putative class members, whether the method was estimating the "relationship between the retail prices paid by end-users and wholesale prices charged by Defendants" or a "step-by-step" approach in which the expert estimates pass-through rates for different levels of each distribution channel.<sup>52</sup>

The growing reluctance to certify indirect purchaser classes has even reached district courts in the normally plaintiff-friendly Third Circuit. In *In re OSB Antitrust Litigation*, the court denied certification of a class of home buyers as indirect purchasers who allegedly overpaid for oriented strand board (OSB) purchased through multiple distribution channels.<sup>53</sup> The plaintiffs originally sought to certify two different classes: a damages class under the antitrust laws of twenty-one states, and a nationwide class for injunctive relief under federal law. The court denied certification of indirect purchaser damages classes for three states, because the plaintiffs had not designated individual class representatives, and for three additional states for which putative representatives were both end users and resellers of OSB, on the basis that these purchasers were not capable of adequately representing end users.

Of importance here is the court's analysis in rejecting proposed damages classes for seven additional states for which putative representatives were home buyers, while certifying a class of OSB end-use purchasers in the remaining eight states. The court declined to rely on the *Bogosian* short-cut for indirect purchaser claims and instead considered facts beyond the complaint's allegations: "Although I may not consider whether Plaintiffs will prevail on the merits, I may look beyond the four corners of the Amended Complaint if Plaintiffs' allegations are unsupported, or even rebutted, by a well-developed record."<sup>54</sup> The court also refused to presume injury, particularly with respect to the home-buyer plaintiffs: "[P]laintiffs here will similarly have great difficulty in establishing classwide impact, especially with respect to those class members who claim that an increase in Defendants' OSB prices increased the price of homes that included very small amounts of OSB. In these circumstances, it is inappropriate to presume classwide impact."<sup>55</sup>

The court concluded that the plaintiffs would not be able to prove classwide impact using common proof for a single class of indirect purchasers in these states. The court rejected the indirect purchaser home-buyer classes, reasoning that the expert report in support of these classes did not consider the data or variables necessary to be probative of whether an increase in the defendants' OSB prices actually caused an increase in the plaintiffs' home prices. The court granted

certification of eight separate subclasses in each of the remaining states for indirect purchasers of OSB, rather than homes in which OSB was installed. The court noted that the plaintiffs' expert had evaluated price and cost data for these indirect purchasers, including data from various manufacturers, distributors, and retailers, to show that resellers in the various distribution channels had passed through nearly 100 percent of alleged overcharges to end users who purchased OSB. The court concluded that this level of analysis was sufficient to show that impact on members of each subclass was susceptible of common proof.

State courts have also begun to impose a higher level of scrutiny on class certification in indirect purchaser cases, relying on recent developments in federal antitrust cases. For example, state courts in Vermont and Massachusetts recently denied certification of indirect purchaser classes in cases challenging alleged conduct by Honeywell to monopolize a putative market for "round-shaped home thermostats."<sup>56</sup>

Plaintiffs in *Fagan v. Honeywell* and *Wright v. Honeywell* encountered an industry structure with numerous channels and multiple levels of distribution for the sale of home wall-mounted thermostats. Each channel presented its own difficulties for common proof of impact.<sup>57</sup> The defendant argued that it was likely, indeed often the practice, that intermediaries would absorb the cost of an alleged overcharge, even assuming common impact to the direct purchasers at the top of the distribution channels.<sup>58</sup> For example, contractors would absorb alleged overcharges on a thermostat to remain competitive with other contractors, particularly given the small price of the thermostat compared to the total cost of a home heating and cooling system.<sup>59</sup> The plaintiffs' expert offered several approaches to proving impact, including comparing wholesale and retail profit margins on "round thermostats" and other thermostats, and by assuming complete or nearly complete pass-through at each level of distribution based on prevailing economic theory.<sup>60</sup> He also argued that as a factual matter Honeywell had set prices to direct purchasers in a way that prices to end-users would be uniform across channels.<sup>61</sup>

Both courts acknowledged the need to consider merits issues, to rigorously analyze expert reports, and to evaluate application of the experts' methods to the facts. Both judges found that assumptions of uniform pricing on which plaintiffs' expert relied were baseless, and noted that after looking under the hood of the expert's proposed methodology, it was highly unlikely that the expert could offer common proof of impact.<sup>62</sup> As the Massachusetts court reasoned:

The plaintiffs' expert has offered a theory, with citations to scholarly literature providing support for the theory in a general sense, but with relatively little direct reference to the particular facts presented. The defendant's expert has focused on the particular facts presented, and concluded that the theory offered cannot accomplish the task. The Court credits that conclusion. On this record, the Court is not persuaded that the plaintiffs have provided information suffi-

cient to enable the Court to form a reasonable judgment that the alleged conduct of Honeywell has caused similar injury to all or virtually all members of the proposed class.<sup>63</sup>

### Tactical Lessons from the Rigorous Analysis Trend

As the decision in *Cordes* illustrates, the move to more rigorous analysis at the class certification stage and the higher expectations for expert evidence on class certification issues, do not necessarily represent a lopsided victory for the defense. In fact, courts undertaking a more rigorous analysis have taken extra precautions to accommodate plaintiffs' experts and maintain a level playing field. For example, in *Natchitoches Parish Hospital Service District v. Tyco International, Ltd.*,<sup>64</sup> the court refrained from prematurely denying certification despite concerns with the plaintiffs' expert analysis:

The preliminary nature of Prof. Elhauge's analysis, however, is troubling. He has not rendered even a preliminary opinion based on preliminary evidence that Tyco's conduct has in fact violated the antitrust laws and resulted in antitrust injury. Rather, he has outlined a general methodology: maybe-I'll-try-this-or-maybe-I'll-try-that. Some courts have denied certification where the experts simply relied on a theory of "presumed impact" . . . Here, however, Prof. Elhauge does not even argue that there is presumed impact. Instead, Prof. Elhauge argues that any methodology would be classwide, even though he does not yet have an opinion as to whether there is an anticompetitive impact.<sup>65</sup>

The court allowed the plaintiffs' expert to complete his review of discovery and deferred a final decision until after reading those revised reports.<sup>66</sup> Courts in other recent decisions have certified classes after applying a rigorous analysis and considering the merits of plaintiffs' claims insofar as they bear on a criterion for class certification.<sup>67</sup>

These recent class certification rulings, and courts' heightened scrutiny of expert evidence on class certification, afford important lessons on how best to prepare for and advocate positions on class certification:

- Plaintiffs should give careful consideration to the timing of class certification motions, and may need to delay filing to allow the discovery record to take shape.
- Plaintiffs must work closely with experts to assure that they offer a workable methodology using common proof on classwide impact, supported if possible with some application to case facts, particularly in indirect purchaser cases.
- Plaintiffs should make greater use of subclasses to break putative classes into digestible form and size, rather than seeking certification of the broadest class imaginable to gain an advantage in settlement negotiations or in the hopes of large damage and fee awards.
- Defendants should be less reactive in class certification discovery, and use discovery to provide their experts with information and data needed to understand the business and show how business arrangement, complex distribution channels, and/or multiple levels of demand may undermine plaintiffs' theories of common impact.

- Defendants should provide guidance to courts on how to focus a rigorous analysis of merits-related issues and facts, as many district courts are still unsure of the correct standards and methods.
- Defendants should identify and provide factual support for specific grounds to challenge plaintiffs' expert evidence, including grounds that are based on merits issues and case facts, rather than rely on general *Daubert* challenges.

## Conclusion

Recent court rulings on class certification in antitrust cases support our predictions in 2007 that courts will resolve the *Eisen/Falcon* dichotomy by engaging in more detailed scrutiny of merits-based issues and case facts at the class certification stage. This trend requires that experts focus and apply

their methodologies to case facts, in particular to show how common proof can be used to prove impact and injury to class members. Courts and parties have and will continue to balance such rigorous analysis with the need for discovery to support expert analysis early in the case, and parties must adjust their tactics accordingly. Indirect purchasers in particular have faced greater burdens to show how common proof can be used to prove impact across broadly defined classes, resulting either in narrower class definitions or denial of certification.

These trends are not a “defense-side” victory by any means. As *Cordes* shows, the playing field is now level, both allowing and requiring parties in antitrust class actions to advocate their positions on class certification using pertinent merits issues and actual applications of expert methodologies to case facts. ■

<sup>1</sup> Ian Simmons, Alexander P. Okuliar & Nilam A. Sanghvi, *Without Presumptions: Rigorous Analysis in Class Certification Proceedings*, ANTITRUST, Summer 2007, at 61.

<sup>2</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

<sup>3</sup> 457 U.S. 147 (1982).

<sup>4</sup> Simmons, Okuliar & Sanghvi, *supra* note 1, at 63–65.

<sup>5</sup> See, e.g., *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008) (citing other decisions).

<sup>6</sup> *Dukes v. Wal-Mart*, 509 F.3d 1168, 1177 n.2 (9th Cir. 2007) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992)).

<sup>7</sup> *Compare Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975), with *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992).

<sup>8</sup> See, e.g., *Fleury v. Richemont North America, Inc.*, No. C05-4525, 2008 U.S. Dist. LEXIS 64521, at \*34 (N.D. Cal. July 3, 2008); *In re Micron Technologies, Inc.*, 247 F.R.D. 627, 633 (D. Idaho 2008).

<sup>9</sup> *New Motor Vehicles*, 522 F.3d at 24; *Blades v. Monsanto Co.*, 400 F.3d 562, 566–67 (8th Cir. 2005).

<sup>10</sup> 522 F.3d at 26.

<sup>11</sup> See, e.g., *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 299 n.4 (D.D.C. 2007) (“The Court does not decide whether to adopt the standard for class certification motions operative in other circuits. Instead, the Court avoids any inquiry into the merits of Plaintiffs’ claims that is not required to resolve the instant motion for class certification, and notes that that resolution does not involve significant factual disputes.”); *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 368 (D.D.C. 2007) (relying on *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 256 (D.D.C. 2002), and *In re Lorazepam Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001), to forbid any consideration of the merits and reasoning that the complaint is to be taken as true for class certification).

<sup>12</sup> *Meijer*, 246 F.R.D. 293, 299 (D.D.C. 2008) (citations omitted).

<sup>13</sup> *Id.*

<sup>14</sup> *Nifedipine*, 246 F.R.D. 365, 368–69 (D.D.C. 2008) (citations omitted).

<sup>15</sup> *Compare Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168–69 (3d Cir. 2001) (“In reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action.”), and *Johnston v. HBO Film Mgmt.*, 265 F.3d 178, 188–89 (3d Cir. 2001) (same), with *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 152–53 (3d Cir. 2002) (affirming grant of class certification based on determination that district court had used a “belt and suspenders rationale to support its conclusion”); see also *Behrend v. Comcast Corp.*, No. 03-cv-6604, 2007 WL

2972601, at \*2 (E.D. Pa. Oct. 10, 2007) (certifying class of Chicago cable customers who subscribed to video programming services other than basic cable, similar to a Philadelphia class that the court certified in May 2007). The decision in *Behrend* reflects the hybrid approach of panel decisions in the Third Circuit, in which the court “has recognized the utility, and often the necessity, of looking beyond the pleadings at the class certification stage of litigation,” but also that “in determining whether a class will be certified, the substantive allegations of the complaint must be taken as true,” and that “the interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action.” *Id.* (citations omitted). *Danvers Motor Co. v. Ford Motor Co.*, 543 F.3d 141 (3d Cir. 2008), *rev’g Danvers Motor Co. v. Ford Motor Co.*, Civ. Action No. 232197, 2007 U.S. Dist. LEXIS 7262 (D.N.J. Jan. 31, 2007) (reversing certification of class of car dealers claiming that Ford violated Robinson-Patman Act through tiered pricing program; reflecting hybrid approach to class certification by noting that, even allowing for assumption of injury, plaintiffs’ allegations still presented numerous individual issues that would require “mini-litigations”). Many courts have declined to certify classes in Robinson-Patman Act cases due to the individualized nature of proof of competitive injury. See, e.g., *Mad Rhino Inc. v. Best Buy Co.*, Civ. Action No. 03-5604, 2008 U.S. Dist. LEXIS 8619 at \*25–\*26 (C.D. Cal. Jan. 14, 2008) (noting difficulties in certifying a class due to variations among plaintiffs and their locations).

<sup>16</sup> See, e.g., *In re Plastic Additives Antitrust Litig.*, Nos. 07-2159 & 07-2418 (3d Cir. filed Apr. 10, 2007 & Apr. 26, 2007); *In re Hydrogen Peroxide Antitrust Litig.*, No. 07-1689 (3d Cir. filed Feb. 13, 2007).

<sup>17</sup> *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997).

<sup>18</sup> *Id.* at 625.

<sup>19</sup> *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008).

<sup>20</sup> *Id.* at 29–30.

<sup>21</sup> *Id.* at 11.

<sup>22</sup> *Id.* at 17 (internal quotations omitted).

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

<sup>24</sup> *Id.* at 29.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 25–26.

<sup>27</sup> *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91 (2d Cir. 2007).

<sup>28</sup> *In re Initial Public Offering (IPO) Sec. Litig.*, 471 F.3d 24, 32–40 (2d Cir. 2006).

- <sup>29</sup> *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 conflicting expert evidence or engage in 'statistical dueling' of experts.").
- <sup>30</sup> *Cordes*, 502 F.3d at 97.
- <sup>31</sup> *Id.* at 106.
- <sup>32</sup> *Id.* at 107.
- <sup>33</sup> The Second Circuit echoed this view more recently in *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 230 (2d Cir. 2008), a RICO class action brought by smokers.
- <sup>34</sup> *Fleischman v. Albany Med. Ctr.*, No. 06-cv-765, 2008 WL 2945993 (N.D.N.Y. July 28, 2008) (McAvoy, J.).
- <sup>35</sup> See, e.g., *Columbus Drywall & Insulation v. Masco Corp.*, No. 04-cv-3066, 2007 WL 2119022 (N.D. Ga. July 20, 2007); *Spa Universaire v. Qwest Commc'ns Int'l*, No. 02-cv-1977, 2007 WL 2694918, at \*13 (D. Colo. Sept. 10, 2007). In *Columbus*, the court denied certification of a settlement class of independent residential insulation contractors on a claim of price manipulation of fiberglass insulation, reasoning that, in determining whether the plaintiff has met its burden to establish each of the prerequisites for class certification under Rule 23, the court "may not inquire whether plaintiffs adduced sufficient evidence to prevail on the merits of their antitrust claims," but "must conduct a 'rigorous analysis' of plaintiffs' proffered arguments" and "may look beyond the pleadings to evidence generated in discovery regarding the class certification issue." *Id.* at \*8.
- <sup>36</sup> *Am. Seed Co. v. Monsanto Co.*, 271 Fed. App'x 138 (3d Cir. 2008). See also *Teva Pharms. v. Abbott Labs.*, No. 03-cv-120, 2008 WL 3849696, at \*8-\*10 (D. Del. Aug. 18, 2008) (relevant inquiry is not whether plaintiffs have asserted "proper" or "correct" methodology but rather whether proffered methodology can be shown on a classwide basis; concluding that direct and indirect purchaser plaintiffs' intended use of scholarly economic literature, governmental studies, and empirical evidence is sufficient to meet that burden); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535-36 (6th Cir. 2008) (holding that "even where there are individual variations in damages, the requirements of Rule 23(b)(3) are satisfied if the plaintiffs can establish that the defendants conspired to interfere with the free-market pricing structure"; relying on reasoning of Third Circuit in *Bogosian* in holding "it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate.").
- <sup>37</sup> *Am. Seed*, 271 Fed. App'x at 141 ("[U]nder our caselaw a putative class must, in accordance with *Linerboard*, support a presumption of impact with an analysis of the relevant data.").
- <sup>38</sup> *Id.*
- <sup>39</sup> William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 ANTITRUST L.J. 1, 12 (1999).
- <sup>40</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).
- <sup>41</sup> Page, *supra* note 39, at 1.
- <sup>42</sup> *California v. ARC America Corp.*, 490 U.S. 93 (1989).
- <sup>43</sup> William H. Page, *Class Certification in the Microsoft Indirect Purchaser Litigation*, 1 J. COMPETITION L. & ECON. 303 (2005).
- <sup>44</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).
- <sup>45</sup> See, e.g., *In re Graphics Processing Units (GPU) Antitrust Litig.*, MDL 1826, No. C06-7417, 2008 WL 2788089 (N.D. Cal. July 18, 2008) (decision and order) (Alsup, J.) (discussing history of these cases).
- <sup>46</sup> *Id.*
- <sup>47</sup> *Id.* at \*6.
- <sup>48</sup> *Dukes v. Wal-Mart*, 509 F.3d 1168 (9th Cir. 2007).
- <sup>49</sup> *In re Graphics Processing Units (GPU) Antitrust Litig.*, 2008 WL 2788089, at \*21.
- <sup>50</sup> *Id.* at \*22.
- <sup>51</sup> *Id.* at \*29.
- <sup>52</sup> *Id.* at \*30.
- <sup>53</sup> *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253425 (E.D. Pa. Aug. 3, 2007).
- <sup>54</sup> 2007 WL 2253425, at \*2.
- <sup>55</sup> *Id.* at \*7.
- <sup>56</sup> *Fagan v. Honeywell Int'l*, No. 04-4903-BLS2, slip op. (Mass. Super. Ct. Feb. 5, 2008); *Wright v. Honeywell Int'l*, No. 201-11-04-Oeoc, slip op. (Vt. Super. Ct. May 15, 2008).
- <sup>57</sup> See, e.g., *Fagan*, slip op. at 16-18.
- <sup>58</sup> See, e.g., *Fagan*, slip op. at 27.
- <sup>59</sup> See, e.g., *id.* at 19; *Wright*, slip op. at 13.
- <sup>60</sup> *Fagan*, slip op. at 24.
- <sup>61</sup> *Id.* at 25.
- <sup>62</sup> *Fagan*, slip op. at 13; *Wright*, slip op. at 11-12.
- <sup>63</sup> *Fagan*, slip op. at 28.
- <sup>64</sup> *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, 247 F.R.D. 253 (D. Mass. 2008).
- <sup>65</sup> *Id.* at 273.
- <sup>66</sup> *Id.* at 274.
- <sup>67</sup> See, e.g., *In re Pressure Sensitive Labelstock Antitrust Litig.*, MDL No. 1556, 2007 WL 4150666, at \*16 (M.D. Pa. Nov. 19, 2007) (certifying class after applying rigorous analysis and considering merits); *Anderson Contracting v. Bayer AG, et al.*, No. CL 95959 (Iowa Dist. Ct. Mar. 19, 2007), slip op. (certifying indirect purchaser class); *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 557-59 (W.D. Wash. 2008) (certifying class after evaluating two theories of liability and rejecting one but accepting the other as a possibly meritorious claim, nonetheless noting that "the court's role at this stage in the litigation is not to decide the merits of Plaintiffs' claims. . . . And the court is not convinced that such a theory would be rejected . . .").

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