The Evolving Standards for Class Certification in Antitrust Cases

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Historically, the U.S. courts have held a presumption in favor of class treatment in antitrust cases; as such, class certification has been widely viewed as an inevitability. Over the past decade, however, the courts have revisited the requirements for class certification laid out in Rule 23 of the Federal Rules of Civil Procedure and have further defined the "rigorous analysis" needed to substantiate a motion for class certification.

In particular, the circuit courts—and the Supreme Court, in its decisions in *Wal-Mart Stores, Inc. v. Dukes et al.* and *AT&T Mobility LLC v Concepcion et ux.*—have opened the door to more rigorous qualitative and quantitative assessments of plaintiffs' proposed common methodology for analyzing classwide impact, and of merits-related issues that bear upon the requirements of Rule 23. This emerging consensus reflects an added burden for plaintiffs and an opportunity for defendants to short-circuit cases that are either not amenable to classwide treatment or without merit.

We sought to determine how plaintiffs' and defendants' strategies are changing in the wake of recent decisions on class certification requirements. Our analyses suggest that plaintiffs' strategies are highly responsive to these decisions, affecting the jurisdiction in which they file antitrust class action complaints and the content of such complaints. We found the defendants' strategies less amenable to systematic analysis since those filings often are not publicly available. However, we were able to identify several strategic opportunities afforded to both plaintiffs and defendants by the emerging consensus about the rigorous analysis needed to establish that Rule 23 requirements have been met. We will discuss these opportunities in the following pages, as well as the enhanced role of the expert in advancing the discussion about rigorous analysis and merits-related issues at the class certification stage.

HOW THE "RIGOROUS ANALYSIS" STANDARD HAS EVOLVED

Interpretations of the requirements for class certification set forth in Rule 23 have evolved over time and are often traced back to the Supreme Court's 1974 decision in *Eisen v. Carlisle & Jacquelin*.[1] In *Eisen*, the Court ruled 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." Despite the fact that the decision in *Eisen* pertained to the question of whether a defendant could be taxed with the cost of providing notice to the putative class, it had a significant effect on courts' interpretation of the requirements for class certification; courts interpreted *Eisen* to suggest that preliminary inquiries of merits were not needed or appropriate for the class certification process.[2] However, in a subsequent decision in *General Telephone Company of the Southwest v. Falcon* (1982),[3] the Supreme Court held that district courts must conduct a "rigorous analysis" to determine whether the prerequisites of Rule 23 have been satisfied. These rulings presented a challenge for courts: How does a court conduct a rigorous analysis without conducting a preliminary inquiry of the merits of the case, particularly when the merits inform the factual and legal issues that must be common under the requirements of Rule 23?

The juxtaposition between *Eisen* and *Falcon* has, over the years, resulted in courts applying divergent standards for class certification.[4] Legal practitioners have noted that, in antitrust cases, most courts invoked *Eisen* and limited the role of merits in the class certification phase.[5] Courts also held that the elements of antitrust claims were particularly well-suited for class treatment. That is, the questions of common proof and injury seemed to focus on the behavior of the defendants and not on the members of the class. The courts therefore presumed in favor of class certification.[6]

Soon after the *Eisen* decision, the Third Circuit codified this presumption in what became known as the "*Bogosian* shortcut." According to the court's decision in *Bogosian v. Gulf Oil Corp.* (1977), if a nationwide conspiracy could be proven, "an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price."[7] Even if the effects of the conspiracy varied across regions, "it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage."[8]

As a result of the application of the *Bogosian* shortcut (or a similar presumption in favor of class certification), courts often required little more than a superficial showing or vague promise from plaintiffs that a "common method" could be developed that could estimate classwide impact. The courts gave little to no consideration to conflicting expert testimony regarding the requirements of Rule 23 and merits-based issues and refused to engage in or adjudicate a "battle of the experts." For example, according to the court in *In re Cardizem CD Antitrust Litigation* (2007), "[t]he Court's inquiry is limited to whether or not the [plaintiffs' expert's] proposed methods are so insubstantial as to amount to no method at all …. The fact that the defendants' expert disagrees with the methodology and conclusions propounded by [plaintiffs' expert] is not reason to deny class certification."[9]

Other courts—primarily in the Fourth, Fifth and Eleventh circuits—have rejected a broad presumption of common impact and applied the rigorous analysis required by *Falcon* in determining whether the requirements of Rule 23 have been met.[10]

Despite inconsistencies in courts' standards for class certification, a consensus has begun to emerge among the circuit courts, placing greater emphasis on the need for a rigorous analysis of the class certification factors. For example, decisions in *Szabo v. Bridgeport Machines, Inc.* in the Seventh Circuit (2001),[11] *Gariety v. Grant Thornton LLP* in the Fourth Circuit (2004),[12] and *In re Initial Public Offering Securities Litigation* in the Second Circuit (2006)[13] stress that, in rendering decisions regarding class certification, district courts should review the merits insofar as they concern issues relevant to Rule 23 requirements.[14, 15] As a result, merits have secured a foothold in the class certification phase of cases in these jurisdictions.

The evolving standards and role of merits in class certification were further bolstered by revisions to the requirements for the class certification decision in 2003. Prior to these revisions, Rule 23(c)(1) required

the district court to render a decision on class certification "as soon as practicable" after the filing of the action and held that a class certification decision "may be conditional."[16] The 2003 amendments revised 23(c) to require that a decision on certification be made "at an early practicable time," acknowledging that "[t]ime may be needed to gather information necessary to make the certification decisions."[17] The amendments also deleted the provision that a class certification may be conditional, maintaining that "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."[18] These minor wording changes to Rule 23 significantly altered the tenor of the requirements for class certification decisions and removed many of the shortcuts and presumptions that had previously guided the class certification process.

THE END OF PRESUMPTIONS IN ANTITRUST CASES: *HYDROGEN PEROXIDE*

The Third Circuit had long been seen as a jurisdiction in which "district courts generally called a knock-out for plaintiffs before the defense's first punch was thrown."[19] In its December 30, 2008, decision in *Hydrogen Peroxide*, however, the Third Circuit reversed the (at least perceived) trend of favoring plaintiffs seeking class certification and clarified district courts' responsibilities in assessing the suitability of a claim for class treatment. Specifically, the court ruled that:

> In deciding whether to certify a class under Fed. R. Civ. P. 23, the district court must make whatever factual and legal inquiries necessary and must consider all relevant evidence and arguments presented by the parties …. First, the decision to certify a class calls for findings by the court, not merely a "threshold showing" by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence. Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action. Third, the court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it.[20]

In effect, the Third Circuit's opinion reflected a complete rejection of the *Bogosian* shortcut, as well as any presumption in favor of certifying classes in antitrust cases. Commentators have asserted that the Third Circuit's decision in *Hydrogen Peroxide* is distinguished among its predecessor cases by the degree to which it clarified the district court's role in assessing disputed facts at the class certification stage.[21] In particular, they have stressed that "[t]he core of the decision is that the district court must consider and resolve the issues raised by the economic analysis as offered by the defendants' and plaintiffs' experts."[22]

The shift toward a more stringent interpretation of the requirements for class certification has important economic and strategic implications for the parties involved. Specifically, from the defendants' perspective, the ability to resolve meritless litigation and other cases for which an assessment of the facts are not amenable to classwide consideration may result in significant cost savings. It is widely recognized

that the decision whether to certify a class has a strong bearing on the outcome of a case: Whereas the certification of a class often "turns a $200,000 dispute … into a $200 million dispute … and may induce a substantial settlement even if the customers' position is weak,"[23] a decision against the certification of a class "may sound the 'death knell' of the litigation on the part of plaintiffs."[24] From the plaintiffs' perspective, however, the increased role of merits in the class certification phase may weigh heavily against the public interest, potentially requiring that plaintiffs establish the merits of their case prior to the conclusion of merits discovery and again in later phases of the litigation.[25]

HOW PLAINTIFFS' STRATEGIES ARE CHANGING

To assess the degree to which *Hydrogen Peroxide* and similar case law have affected plaintiffs' strategies, we first examined antitrust class action cases filed in U.S. Federal District Civil Courts since January 2000. As depicted in the table below, over the past decade, the Ninth, Third, and Second circuits cumulatively have accounted for 69% of the antitrust class action filings in the United States. The proportion of new case filings fluctuated significantly across circuits over time. For example, in 2000, 13% of antitrust class actions were filed in the Ninth Circuit, and 34% were filed in the Second Circuit. By 2010, 40% of antitrust class actions were filed in the Ninth Circuit, and 16% were filed in the Second Circuit. This fluctuation in case filings among the jurisdictions seems highly correlated with the decisions rendered in those jurisdictions. For example, in 2006, 22% of antitrust class actions were filed in the Second Circuit; in 2007, however, after the *IPO* decision, new filings fell to 4%. This suggests that plaintiffs are highly reactive to new case precedent and have adjusted their strategies accordingly.

Table 1
Antitrust Class Action Cases Filed by Circuit and Year[1]
2000-2010

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Total
All Federal District Courts	407	299	257	204	303	387	600	669	765	375	200	4466
9th Circuit	53	21	32	32	60	87	227	439	175	106	80	1312
	13%	*7%*	*12%*	*16%*	*20%*	*22%*	*38%*	*66%*	*23%*	*28%*	*40%*	*29%*
3rd Circuit	34	116	110	48	58	129	117	58	220	91	13	994
	8%	*39%*	*43%*	*24%*	*19%*	*33%*	*20%*	*9%*	*29%*	*24%*	*7%*	*22%*
2nd Circuit	139	89	51	52	89	70	129	28	98	16	32	793
	34%	*30%*	*20%*	*25%*	*29%*	*18%*	*22%*	*4%*	*13%*	*4%*	*16%*	*18%*
7th Circuit	13	3	5	10	13	22	34	15	88	39	8	250
	3%	*1%*	*2%*	*5%*	*4%*	*6%*	*6%*	*2%*	*12%*	*10%*	*4%*	*6%*
11th Circuit	21	4	14	10	7	10	7	21	68	47	29	238
	5%	*1%*	*5%*	*5%*	*2%*	*3%*	*1%*	*3%*	*9%*	*13%*	*15%*	*5%*
6th Circuit	5	18	5	5	17	19	21	19	39	16	7	171
	1%	*6%*	*2%*	*2%*	*6%*	*5%*	*4%*	*3%*	*5%*	*4%*	*4%*	*4%*
4th Circuit	61	4	19	12	13	7	7	13	3	15	14	168
	15%	*1%*	*7%*	*6%*	*4%*	*2%*	*1%*	*2%*	*0%*	*4%*	*7%*	*4%*
D.C. Circuit	8	18	6	3	7	17	36	24	5	7	1	132
	2%	*6%*	*2%*	*1%*	*2%*	*4%*	*6%*	*4%*	*1%*	*2%*	*1%*	*3%*
8th Circuit	12	4	3	5	11	8	5	17	30	18	12	125
	3%	*1%*	*1%*	*2%*	*4%*	*2%*	*1%*	*3%*	*4%*	*5%*	*6%*	*3%*
1st Circuit	41	9	8	14	1	6	6	13	12	3	2	115
	10%	*3%*	*3%*	*7%*	*0%*	*2%*	*1%*	*2%*	*2%*	*1%*	*1%*	*3%*
5th Circuit	12	8	2	7	5	4	4	8	21	13	1	85
	3%	*3%*	*1%*	*3%*	*2%*	*1%*	*1%*	*1%*	*3%*	*3%*	*1%*	*2%*
10th Circuit	8	5	2	6	22	8	7	14	6	4	1	83
	2%	*2%*	*1%*	*3%*	*7%*	*2%*	*1%*	*2%*	*1%*	*1%*	*1%*	*2%*

Notes:
[1] Cases classified as "Antitrust Class Action" based on the definition of CourtLink, and sorted by total.
[2] Percentages in italics represent the share of total antitrust class action cases for that year which were filed in the specified circuit.
Source: CourtLink.

Indeed, the effect of *Hydrogen Peroxide* on plaintiffs' strategies seems evident in the data. In 2008, for instance, the highest percentage of antitrust class actions (or 29% of all filings) was in the Third Circuit. But by 2010, the Ninth, Second, Eleventh, and Fourth circuits, respectively, had more filings than the Third Circuit.

A review of antitrust class action complaints also suggests that plaintiffs are responsive to the increased focus on merits. Recent complaints filed in the Third Circuit have included allegations based on economic principles and an overview of the industry and market conditions that, plaintiffs argue, facilitate anticompetitive activity and common impact.[26] Similar strategies seem to be reflected in antitrust class complaints filed in other jurisdictions.[27] Such strategies do not yet appear to be ubiquitous, and the veracity and completeness of the allegations regarding the economics of the relevant industries and markets are unknowable without further information. However, a cursory review of recently filed complaints suggests that plaintiffs are beginning to anticipate the increased focus on merits in determining whether classwide treatment of the claims is appropriate. Increased discovery may also occur before

plaintiffs file motions for class certification, thus affecting the amount of evidentiary support available and the time at which such motions are filed.

In a legal environment requiring a "rigorous analysis" to justify class certification, plaintiffs are likely best served by anticipating merits-based arguments in the class certification phase. This might include proposing classes that have a higher likelihood of common impact and may be better suited to classwide assessment, and establishing the economic context that demonstrates how all proposed class members may have been impacted by the alleged conduct. Given the increased burden of proof, plaintiffs may want to seek counsel on the economic framework and the discovery materials needed to justify class certification.

HOW DEFENDANTS' STRATEGIES MAY CHANGE

Despite researchers' efforts to systematically assess shifts in defendants' strategies, any empirical analysis will be confounded by the very nature of those strategies—that is, defendants' strategies are necessarily responsive to plaintiffs' claims and, therefore, will probably be highly nuanced. It is even more difficult to determine how and whether defendants have engaged experts to exploit the increased relevance of merits in the class certification stage, because many expert declarations are filed under seal.

That said, the increasing prominence of merits assessment and the role of expert testimony in the class certification phase of antitrust cases has been perceived by many as a boon to defendants and may provide opportunities for defendants to short-circuit those cases that are without merit or unsuitable for class treatment.

Increasingly, the courts are insisting that plaintiffs 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.[28] Thus, defendants would likely be better served by engaging an expert at the class certification stage, rather than later in the process, to test the viability of the methodology being proposed by plaintiffs and to determine whether the questions and evidence necessary to show injury and causation are, in fact, common among proposed class members.

Typically, plaintiffs will attempt to use economic theory to justify their assertion of common impact—arguing, for example, that all purchasers face the same supply and demand conditions and that demand for the product is inelastic; that the product is a homogenous "commodity" with no economically reasonable substitutes; and that the anticompetitive conduct could not be constrained by competition (for example, as a result of barriers to entry). Consequently, plaintiffs may conclude that the alleged anticompetitive effect on one customer would imply an anticompetitive effect on all customers. They may propose a common methodology based on a regression analysis to help isolate the average impact of the alleged antitrust violation.

From an economic perspective, there is an important distinction between proving impact and proving *common* impact. Further, while regression analysis is a useful tool to help isolate the *average* impact of an alleged antitrust violation, the mere specification of a regression does not establish that common impact can be established using common proof. Instead, "economic theory and empirical evidence suggest that antitrust violations are likely to result in a range of impacts—from none for some plaintiffs to significant impact for others."[29]

To assess whether the allegations are amenable to classwide consideration and whether the requirements of Rule 23 have been met, defendants' experts can take a two-pronged approach that includes both qualitative and quantitative analyses. In the qualitative exercise, the expert can assess the alleged antitrust violation within the context of *Bell Atlantic Corp. v. Twombly* (2007),[30] as well as actual industry and market experiences, to determine whether it is likely that an alleged antitrust violation occurred and whether injury would be common to the proposed class members.[31] The quantitative exercise can test the methodology proposed by plaintiffs to determine: (1) whether estimates of impact are consistent across subgroups within the proposed class (macrocommonality); and (2) whether regression estimates of impact are relevant to individual members within subgroups of the proposed class (microcommonality).[32]

Other factors relevant to the assessment of the proposed methodology might include the availability of data, the ability to ascertain proposed class members, and the existence of a common basis against which to measure impact (for example, a benchmark period). Ultimately, as a result of *Hydrogen Peroxide* and other case law advancing the standards for class certification, defendants are now in a better position to challenge the certification of a class based on an economic assessment of the merits.

Apart from the decision about *when* to engage an expert, defendants are also faced with other important issues—in particular, the enhanced scrutiny of experts' qualifications and methodologies; the implications for discovery requirements; and the ramifications of raising merits arguments at an early stage in the litigation.

Expert Scrutiny. While the potential rewards of involving an expert earlier in the process are increasing, so are the risks. It will be even more important for defendants to engage experts with a strong "brand," who employ scientifically valid and strong methods in their analysis for the "battle of the experts." For example, the district court in *Hydrogen Peroxide* improperly dismissed the testimony of the defendants' expert and instead relied on a "threshold showing" by plaintiffs' expert. The Third Circuit stated that "[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis *Rule 23* demands ... Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court—no matter whether a dispute might appear to implicate the 'credibility' of one or more experts, a matter resembling those usually reserved for a trier of fact."[33] In fact, in the recent opinion rendered in *Wal-Mart v. Dukes*, the Supreme Court suggested that the assessment of expert testimony and whether it met the standards for admission under Federal Rule of Civil Procedure 702 and *Daubert* is a factor that should be considered at

the class certification stage.[34] The Court weighed plaintiffs' expert's opinion in determining that "we can safely disregard what he has to say."[35]

Discovery Requirements. The trend toward more rigorous analyses founded potentially in merits arguments will also likely yield increased demands for merits-related discovery. As a result of the 2003 amendments to Rule 23, federal courts are required to enter class certification orders "at an early practicable time."[36] This gives courts the flexibility to delay ruling on class certification until after merits-related discovery has taken place. However, prolonged periods of discovery may pose significant costs to defendants—an important consideration for those who are weighing the potential benefits of focusing on merits earlier.

Settlement Strategy. The pressure for defendants to settle under unfavorable terms will be higher if the class is certified. Meanwhile, plaintiffs may be motivated to settle early under potentially unfavorable terms if it seems unlikely that the class will be certified. The potential benefits of raising merits arguments during the class certification stage are ultimately contingent on the strength of the claims, but an earlier discussion of the merits may represent a significant gamble. That is, if merits arguments are raised at the class certification stage, and the class is certified by the court, defendants may find themselves in a weak negotiating position for settlement, as they will have "shown their cards." This potential risk can be mitigated if the scope of the expert's assignment in the class certification phase is limited to the context of the Rule 23 requirements—that is, to analyses that would assess the macrocommonality and microcommonality of the proposed class. Other merits-related arguments can be tabled for a future stage in the litigation, should the class be certified.

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The courts' interpretations of class certification requirements have been changing continuously over the past four decades. While largely seen as a boon to defendants, both parties are faced with challenges and opportunities. Understandably, plaintiffs seem to have reacted more readily to these changes, leaving some districts and becoming more active in others. With the enhanced requirements for a "rigorous analysis" for class certification, plaintiffs' strategies may be bolstered by structuring smaller, well-defined classes and establishing the economic framework that would justify their claims of common impact and assessment.

However, the recent shift toward an earlier review of merits in antitrust class certification cases also presents a significant opportunity for defendants to short-circuit cases that are either not amenable to classwide treatment or without merit. In particular, defendants would likely be better served by engaging an expert at the class certification stage, rather than later in the process, to test the viability of the methodology being proposed by plaintiffs; and to determine whether the questions and evidence necessary to show injury and causation are, in fact, common among proposed class members. Given the challenges inherent in these opportunities—increased scrutiny of experts, earlier and more extensive

discovery requirements, and increased risk that might bear on settlement strategies—defendants will need to tailor their strategies to maximize the potential benefits and minimize the risks.

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[1] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

[2] Lees G, Tulumello A, Nierlich G, Withburn M, Chorba C, "Class Action Litigation," *Bureau of National Affairs, Inc*. April 24, 2009.

[3] *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982).

[4] See, e.g., Klonoff, Robert H., "Antitrust Class Actions: Chaos in the Courts," 11 Stan. J.L. Bus & Fin 1 (2005).

[5] See, e.g., Simmons, Ian, Alexander P. Okuliar, and Nilam A. Sanghvi, "Without Presumptions: Rigorous Analysis in Class Certification Proceedings," *Antitrust*, Vol. 21, No. 3, Summary 2007, pp. 61-68.

[6] See, e.g., *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231 (E.D.N.Y. 1998) ("Because of the important role that class actions play in the private enforcement of antitrust actions, courts resolve doubts in favor of certifying the class.")

[7] *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. Pa. 1977)

[8] *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. Pa. 1977)

[9] *In re Cardizem CD Antitrust Litigation*, 200 F.R.D. 326 (E.D. Mich. 2001). See also, e.g., *In re Playmobil Antitrust Litigation*, 35 F. Supp. 2d 231, 247 (E.D.N.Y. 1998) ("the battle of the experts is properly left for the trier of fact to determine"); and *In re Potash Antitrust Litigation*, 159 F.R.D. 682, 697 (D. Minn. 1995) ("The certification stage of this litigation is not, however, the proper forum in which to resolve this battle [of the experts]").

[10] See, e.g., *In re Relafen Antitrust Litigation*, 218 F.R.D. 337 (D. Mass. 2003) ("Consistent with its duty to conduct a 'rigorous analysis,' the Court applied no presumption here, but rather assigned to the direct purchaser plaintiffs the analogous burden of demonstrating that common evidence of overcharges would predominate.") See also, *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. S.C. 1977); and *Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. Ala. 1978).

[11] *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675, 676 (7th Cir. 2001).

[12] *Gariety v. Grant Thorton LLP*, 368 F.3d 356, 366 (4th Cir. 2004).

[13] *In Re: Initial Public Offering Securities Litigation* No. 05-3349 (2nd Cir. Dec. 5, 2006).

[14] Similarly, in *Blades v. Monsanto*, the Eighth Circuit affirmed the district court's finding that plaintiffs' expert "did not show that injury could be proven on a classwide basis with common proof," noting 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." *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. Mo. 2005).

[15] For a more in-depth discussion of the recent trends in antitrust class certification requirements, see, e.g., Evans, David S., "The New Consensus on Class Certification: What it Means for the Use of Economic and Statistical Evidence in Meeting the Requirements of Rule 23," *Antitrust Chronicle*, 2010, vol. 1; and Simmons, Ian, and Alexander P. Okuliar, "Rigorous Analysis in Antitrust Class Certification Rulings: Recent Advances on the Front Line," *Antitrust*, Fall 2008.

[16] See, e.g., Fed. R. Civ. P. 23 Advisory Committee Note to Subdivision (c) (2003).

[17] See, e.g., Fed. R. Civ. P. 23 Advisory Committee Note to Subdivision (c) (2003).

[18] See, e.g., Fed. R. Civ. P. 23 Advisory Committee Note to Subdivision (c) (2003).

[19] Levin, Christine C., and Michael I. Frankel, "*In re Hydrogen Peroxide Antitrust Litigation*: The Third Circuit Recognizes That Defendants—And Not Just Plaintiffs—Should be Heard on Rule 23 Class Certification," *Class Action Litigation Report*, February 27, 2009. See also, Simmons, Ian, Alexander P. Okuliar, and Nilam A. Sanghvi, "Without Presumptions: Rigorous Analysis in Class Certification Proceedings," Antitrust, Vol. 21, No. 3, Summary 2007; Hawthorne, Donald, and Margaret Sanderson,

"Rigorous Analysis of Economic Evidence on Class Certification in Antitrust Cases," *Antitrust*, Fall 2009; and "Third Circuit Levels Playing Field for Defendants Opposing Class Certification," *Dechert On Point*, January 2009, Issue 31.

[20] *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 307 (3d Cir. Pa. 2008)

[21] See, e.g., Ripley, Richard A., and Mark J. Glueck, "*In re Hydrogen Peroxide Antitrust Litigation* Bleaches Clean the Class Certification Standard," *The Antitrust Source*, February 2009, pp. 1-7; Funk, Katherine I., "Toward Judicial Realism: The Evolution of Rule 23," *Global Competition Policy*, May 2009, Release One; Klein, Jeffrey S., Nicholas J. Pappas, and Patricia Wencelblat, "Courts Must Resolve 'Battle of the Experts' Before Class Certification," *New York Law Journal*, August 3, 2009; and Rajski, Sarah, "In re Hydrogen Peroxide: Reinforcing Rigorous Analysis for Class Action Certification," *Seattle University Law Review*, Vol. 34, Winter 2011, pp. 577-611.

[22] Godek, Paul E., and Janusz A. Ordover, "Economic Analysis in Antitrust Class Certification: *Hydrogen Peroxide*," *Antitrust*, Fall 2009, pp. 62-65.

[23] *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. Ind. 2001).

[24] *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 162 (3d Cir. N.J. 2001).

[25] See, e.g., Meriwether, Ellen, "Rigorous Analysis in Certification of Antitrust Class Actions: A Plaintiff's Perspective," *Antitrust*, Vol. 21, No. 3, Summer 2007.

[26] Compare, e.g., the class action complaint filed in *Hydrogen Peroxide* to that filed in *Orangeburg Milling Company, Inc. et al. v. Premier Chemicals, LLC et al.* (Class Action Complaint, *Finch Pruyn and Company, Inc. v. Atofina Chemicals, Inc. et al.*, February 11, 2005; and Complaint – Class Action, *Orangeburg Milling Company, Inc. et al. v. Premier Chemicals, LLC et al.*, U.S. Dist. Ct. (D. NJ), 2:10-cv-05943-DRD-MAS, November 15, 2010.)

[27] See, e.g., the complaints filed in: *In re: Refrigerant Compressors Antitrust Litigation* (Sixth Circuit); *Eve Berkson et al. v. JPMorgan Chase & Co., et al.* (Second Circuit); *Isaac Industries, Inc. et al. v. E.I. Dupont De Nemours and Company, et al.* (Fourth Circuit); *Kleen Products LLC et al. v. Packaging Corporation of America, et al.* (Seventh Circuit); and *In re Fresh and Process Potatoes Antitrust Litigation* (Ninth Circuit).

[28] See, e.g., *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 questions, 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.")

[29] Cremieux, Pierre, Ian Simmons, and Edward A. Snyder, "Proof of Common Impact in Antitrust Litigation: The Value of Regression Analysis," *George Mason Law Review*, Vol. 17, No. 4, pp. 939-967, 956.

[30] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

[31] The Supreme Court in *Twombly* further justifies an early examination of the merits of an antitrust case, noting that "because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." As such, the mere claim of an antitrust violation does not necessarily mean that it occurred; an argument well-suited for an expert. *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (May 2007).

[32] For a detailed description of the macro-commonality and micro-commonality tests, see Cremieux, Pierre, Ian Simmons, and Edward A. Snyder, "Proof of Common Impact in Antitrust Litigation: The Value of Regression Analysis," *George Mason Law Review*, Vol. 17, No. 4, pp. 939-967.

[33] *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 323, 324 (3d Cir. Pa. 2008). Similar statements regarding the focus on the "battle of the experts" have been made in other jurisdictions. See, e.g., *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005); and *West v. Prudential Sec., Inc.*, 282 F.3d 935 (7th Cir. Ill. 2002).

[34] "The parties dispute whether [plaintiffs' expert's] testimony even met the standards for the admission of expert testimony under Federal Rule of Civil Procedure 702 and our *Daubert* case, see *Daubert v. Merrell*

Dow Pharmaceuticals, Inc., 509 U. S. 579 (1993). The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings … We doubt that is so…" (footnote omitted). *Wal-Mart Stores, Inc. v. Dukes*, 2011 U.S. LEXIS 4567 (U.S. June 20, 2011).

35 *Wal-Mart Stores, Inc. v. Dukes*, 2011 U.S. LEXIS 4567 (U.S. June 20, 2011).

36 See, e.g., Fed. R. Civ. P. 23 Advisory Committee Note to Subdivision (c) (2003).