5. Antitrust Class Actions

Antitrust Law

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Topics

- What is a class action?
- What is the role of class actions in antitrust litigation?
- What criteria must a putative class action satisfy to be certified?
- What requirements for class certification are most vulnerable to attack in putative antitrust class actions?
- What is the role of economic evidence in antitrust class actions?
- What are the mechanics of class action settlements?
- How are class actions financed?

Class Actions

- Usual rule for claim preclusion (res judicata)
  - An entity will be bound by a judgment only if the entity —
    - was a party to the action or in privity with a party to the action, *and*
    - was subject to the personal jurisdiction of the court[1]
- Class action exception—
  - permits one or more representative plaintiffs
  - to aggregate in a single lawsuit
  - the claims of similarly situated persons not parties before the court, *and*
  - to bind both the representatives and the represented persons with any resulting judgment (favorable or unfavorable)
- Theory
  - Congruence of interests among the members of the class *and*
  - Adequate representation by the named plaintiff
  - Substitutes for individual control[2]

[1] Hansberry v. Lee, 311 U.S. 32, 40 (1940); Pennoyer v. Neff, 95 U.S. 714 (1878).
[2] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625-26 & n.20 (1997); *Hansberry*, 311 U.S. at 41-43.

Public Policy for Party/Privity Exception

- Aggregates small claims to provide incentive to litigate[1]
  - Provides a means of aggregating small claims where the individual incentives to litigate are too small to justify individual actions
  - Provides redress for the injured parties who otherwise would not have practical access to the courts
  - Deters wrongdoing by the defendant by internalizing the costs that the wrongdoer imposes on its victims
- Promotes judicial economy[2]
  - Avoids multiple actions on essentially the same claim, so that class members, defendants, and the court all are spared the costs and burdens of multiple actions.
- Protects against conflicts in judicial resolutions
  - Assures that the defendant's obligations, if any, will be consistent across class members

[1] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997).
[2] General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 155 (1982).

Antitrust Class Actions

- Significance
  - Fixture of modern private antitrust litigation
    - Outside of criminal prosecution, the class action is the antitrust challenge that defendants fear the most
    - Overcomes "small claims" problems, especially in consumer cases
    - Reduces search costs and information asymmetries problems among class members
    - Spreads notoriously high costs of antitrust litigation over multiple claimants
      - Voluminous discovery
      - Economic and industry expert costs
      - Extensive motion practice
    - Once aggregated, the potential recovery is often large enough to attract not only representation but also financing from plaintiffs' lawyers
  - Promotes dual public purposes of the antitrust laws[1]
    - Provide compensation to those injured by antitrust violations
    - Create "private attorneys general" whose presence will deter future antitrust violations

[1] Hawaii v. Standard Oil Co. of Calif., 405 U.S. 251, 261 (1972).

Adequacy of Representation

- Theory
  - Congruence of interests among the members of the class *and*
  - Adequate representation by the named plaintiff
  - Substitutes for individual control
    - The idea is that–at least in principle–the class representatives would make the same decisions as the absent class members reasonably would have made had they been parties to the action will be made by the named class plaintiffs and class counsel
- Source of requirement
  - Constitutional due process
  - Policy embodied in the law of procedure
  - Inherent discretion of the court in the exercise of the judicial power
- Rules: Class representative—
  1. Must be a member of the class it seeks to represent
  2. Must be a vigorous representative in advocating the interests of the class
  3. Must not have interests that are antagonistic to the interests of other class members

Absent Class Members

- Bound by class action judgment
  - Receive whatever benefits, if any, resulting from litigation, *but*
  - Precluded from pursuing their individual claims against the defendants in a subsequent lawsuit
- Not parties to litigation
  - Neither parties nor in privity with a named plaintiff by virtue of their class membership
  - *But* may appeal adverse judgment as if a party (without intervening)
- No requirement for personal jurisdiction
  - Need not be subject to the personal jurisdiction of the court in order to be bound by the class action judgment
- Likely to have—
  - No say in the choice of class counsel
  - No individual contact with class counsel notwithstanding an apparent attorney-client relationship between them
  - No input into class counsel's strategy for the litigation, including settlement

Economics of Class Actions

- Lawyer-financed
  - Antitrust class actions are almost always financed by law firms operating on judicially recognized contingency fee principles
    - Drives antitrust class action litigation almost exclusively to actions that have the potential for substantial damage awards
  - Attractive litigation attributes
    - Factually and legally simple (to reduce costs)
    - Easy to evaluate (to make a return on investment more predictable)
    - High payoff in the event of success (to compensate for risk in financing litigation)

Economics of Class Actions

- Implications for antitrust class actions
  - Almost always are grounded in simple per se claims
  - Almost contain a claim of horizontal price-fixing
    - The per se rule applies
    - Proof of liability is among the simplest in antitrust law, *and*
    - Aggregate damages can be enormous even if class members individually sustain only negligible injuries
  - Rarely used to challenge mergers, price discrimination, or non-per se violations (such as non-price vertical restraints)
    - Proof is usually complex
    - Litigation costs are likely to be higher
    - The outcome is less predictable
  - Rarely used in actions where the restraint is something less than industry-wide
    - Split practice complicates proof
    - Limits aggregate damages

FRCP 23

- FRCP 23 governs class actions in federal court
  - 1938—Originally adopted as part of the original FRCP
    - Origin in long-standing equity practice as a device to prevent a multiplicity of suits
    - Because the 1938 revisions also eliminated the distinction between law and equity and created a single civil action, class actions became available in actions for damages as well as equitable relief
    - But technicalities of the rule all but eliminated it in practice
  - 1966—Completely rewritten in essentially modern form
    - Redefined the classes in terms of the nature of the underlying cause of action and the relief sought
    - Clarified the binding effect of resulting judgments whether or not favorable to the class
    - Specified new prerequisites to the maintenance of a class action to ensure adequate representation of the class by the named plaintiffs
    - Provided for certain forms of notice to class members
    - Provided an unusually large role for courts in—
      - The qualification of law suit as a class action
      - The conduct of the litigation
      - In any settlement or dismissal of the class action

FRCP 23

- Amendments
  - 1997—Added a new Section 23(f) to provide for permissive interlocutory appeals of class certification decisions
  - 2003—Amended to improve the class action administration
  - 2007—Amended as part of the general restyling of the Civil Rules
    - These changes are intended to be stylistic only

Requirements for a Class Action

1. Must have a well-defined class that—
2. Satisfies each of four requirements of FRCP 23(a)
   a. Numerosity
   b. Commonality
   c. Typicality
   d. Adequacy of representation
3. PLUS falls into one of the three FRCP 23(b) categories:
   a. Rule 23(b)(1) class
      - Inconsistent adjudications establishing incompatible standards, *or*
      - Adjudications that would be dispositive of the interests of similarly situated persons
   b. Rule 23(b)(2) class for injunctive relief
   c. Rule 23(b)(3) class for damages

1. Well-Defined Class ("Ascertainability")

- Necessary in order to—
  1. Identify those entities that will be bound by any final judgment
  2. Test whether the Rule 23 requirements are satisfied
  3. Provide sufficient notice to absent class members when required
- Requirements
  - Must be sufficiently precise so that an entity's inclusion or exclusion can be ascertained by reference to objective criteria using reasonable effort
  - MCL: Class definition must be "precise, objective, and presently ascertainable"[1]
- Example of a class definition: *Ready-Mix Concrete*

> All individuals, partnerships, corporations, limited liability companies, or other business or legal entities who purchased ready-mixed concrete directly from any of the Defendants or any of their co-conspirators, which was delivered from a facility within the Counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Monroe, Morgan, or Shelby in the State of Indiana, at any time from July 1, 2000 through May 25, 2004, but excluding Defendants, their co-conspirators, their respective parents, subsidiaries, and affiliates, and federal, state, and local government entities and political subdivisions.

[1] Manual for Complex Litigation (Fourth) § 21.222. The manual is prepared by the Federal Judicial Center.

1. Well-Defined Class ("Ascertainability")

- Mechanics of defining the class
  - The complaint
    - A named plaintiff seeking to represent a class must allege a class definition and factual allegations sufficient to make plausible that the alleged class satisfies the requirements of Rule 23
    - If amended complaints are filed, the named plaintiff may change the definition of the alleged class
  - The motion for class certification
    - As a matter of practice, the alleged class does not bind the named plaintiff in its motion for class certification
    - Named plaintiffs frequently alter the complaint's class definition—typically narrowing the class—in the class certification motion
      - Indeed, although no common, there are cases in which the plaintiffs narrowed their the class definition in their *reply* in support of class certification to obviate objections made by defendants in their class opposition papers[1]
  - Class certification order
    - Must "must define the class and the class claims, issues, or defenses"[2]

[1] *See, e.g.*, *In re* Aluminum Warehousing Antitrust Litig., 336 F.R.D. 5, 24 (S.D.N.Y. 2020).
[2] Fed. R. civ. P. 23(c)(1)(B).

1. Well-Defined Class ("Ascertainability")

- "Administrative feasibility"
  - While ascertainability is an implied requirement of Rule 23, circuits are increasing rejecting *administrative feasibility* as part of ascertainability
    - "Administrative feasibility" means that the court must have a *practical* means of identifying whether a given person is a member of the class
    - *Query*:
      - Administrative feasibility in this context appears to address whether there is a practical means of proving membership in the class; ascertainability more generally addresses whether the class is defined by objective criteria.
      - *WDC*: Objective criteria is necessary to ensure due process in barring claims. If administrative feasibility only goes to proof of whether objective criteria are satisfied, then the allocation of the burden of proof should handle any constitutional problem

1. Well-Defined Class ("Ascertainability")

- "Administrative feasibility"
  - Circuit split
    - Accepts administrative feasibility as a necessary part of ascertainability
      - *First Circuit: In re* Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015)
      - *Third Circuit*: Byrd v. Aaron's Inc., 784 F.3d 154, 162-63 (3d Cir. 2015)
        - Carrera v. Bayer Corp., 727 F.3d 300, 307-08 (3d Cir. 2013) (requiring putative class representatives prove that the identification of class members will be "a manageable process that does not require much, if any, individual factual inquiry") (internal quotation marks omitted)
      - *Fourth Circuit*: EQT Prod. Co. v. Adair, 764 F.3d 347, 358-59 (4th Cir. 2014)
    - Rejects administrative feasibility as an independent requirement
      - *Second Circuit:* In re Petrobras Sec., 862 F.3d 250, 267 (2d Cir. 2017)
      - *Sixth Circuit*: Rikos v. Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015)
      - *Seventh Circuit*: Mullins v. Direct Digital, LLC, 795 F.3d 654, 662 (7th Cir. 2015)
      - *Eight Circuit*: Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 995-96 (8th Cir. 2016)
      - *Ninth Circuit*: Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1124 n.4 (9th Cir. 2017)
      - *Eleventh Circuit*: Cherry v. Dometic Corp., 986 F.3d 1296, 1302-04 (11th Cir. 2021)
      - *D.C. Circuit (district courts only)*: In re McCormick & Co., Inc., Pepper Prod. Mktg. & Sales Practices Litig., 422 F. Supp. 3d 194, 242 (D.D.C. 2019)

1. Well-Defined Class ("Ascertainability")

- "Administrative feasibility"
  - Example: *Briseno v. ConAgra Foods, Inc.*[1]
    - In 2017, the Ninth Circuit found that no separate "administrative feasibility" exists in Rule 23.
    - *Alleged class definition*: "All person who reside in [certain named states] who have purchased Wesson Oils within the applicable statute of limitations periods established by the laws of their state of residence . . . "
    - *Defendants*: Class certification must be denied because no administratively feasible way to identify class members since consumers typically do not save their grocery receipts and so would not be able to reliably identify themselves as class members.
      - NB: This objection goes to the administrative feasibility of providing proof of class membership, not to whether the class is objectively defined
    - *Ninth Circuit*: Rejected separate administrative feasibility requirement: To the extent concerns arise about the identification of class members, those concerns are subsumed in Rule 23's superiority analysis, which considers whether the class is defined clearly with objective criteria and is manageable.[1]

[1] *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017).
[2] *Id*. at 1124 n.4, 1127

2. FRCP 23(a)(1): Numerosity

- General rules
  - Requires that the class must be so numerous that joinder of all members is impracticable
    - Does not require that joinder is impossible
    - Only requires that joinder of all class members would pose a strong litigation hardship or inconvenience in the particular circumstances of the case
    - No absolute numerical thresholds
      - But classes with 40 or more putative members typically meet the requirement with no other showing of difficulty of joinder
        - Some circuits rebuttably presume numerosity with putative classes of 40 or more[1]
      - Class with 20 or fewer members almost always rejected because joinder is deemed practible
      - Classes with between 20 and 30 members mixed, but frequently rejected
  - Establishes the need for the class action device
    - Without a multiplicity of potential parties there is no need to employ a representative action

[1] *See, e.g.*, *In re* Modafinil Antitrust Litig., 837 F.3d 238, 250-51 (3d Cir. 2016); Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995); *In re* Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 202 (S.D.N.Y. 2018) *see also* Mulvania v. Sheriff of Rock Island Cty., 850 F.3d 849, 859 (7th Cir. 2017) ("While there is no magic number that applies to every case, a forty–member class is often regarded as sufficient to meet the numerosity requirement.").

2. FRCP 23(a)(1): Numerosity

- General rules
  - Joinder
    - One means by which additional persons become parties to an existing action
    - FRCP 19: Compulsory joinder of "necessary" parties
      - Requires joinder of parties whose presence in the case is necessary, for example, if—
        - Absence would prevent the court from giving complete relief to the existing parties
        - Absence would prevent impair that person's ability to protect its interests
        - Absence could subject an existing party to a substantial risk of duplicative damages or inconsistent injunctive relief
      - Court may order joinder of necessary parties
        - Subject to personal jurisdiction and venue requirements
        - If a necessary party cannot be joined, then court must consider whether the action should proceed or be dismissed
    - FRCP 20: Permissive joinder
      - Court may permit joinder of other persons if—
        - As a putative plaintiff, they (a) assert a right to relief jointly, severally, or in the alternative arising out of the same transaction or occurrence, and (b) there is a common question of law or fact to all plaintiffs in the action
        - As a putative defendant, they (a) have asserted against them a right to relief jointly, severally, or in the alternative arising out of the same transaction or occurrence, and (b) there is a common question of law or fact to all defendants in the action

2. FRCP 23(a)(1): Numerosity

- General rules
  - Considerations whether joinder is impracticable[1]
    - Judicial economy
    - Claimants' ability and motivation to litigate as joined plaintiffs
    - Financial resources of class members
    - Geographic dispersion of class members
    - Ability to identify future claimants
    - Whether the claims are for injunctive relief or for damages
    - Requests for relief that could affect future class members
    - Knowledge of the names and existence of potential class members
    - Whether potential class members have already joined in other actions

Most important factors

- Application to antitrust cases
  - Almost never contested by defendants

[1] For a good discussion, see *In re* Modafinil Antitrust Litig., 837 F.3d 238, 249-60 (3d Cir. 2016). See also *In re* Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 202 (S.D.N.Y. 2018) (noting some additional factors).

2. FRCP 23(a)(2): Commonality

- General rules
  - Requires that "there are questions of law or fact common to the class"[1]
    - One question of law or fact common to the class is sufficient
    - Commonality is the "glue" which holds the class together and makes it meaningful to try the claims of class members in a single action
      - Key to judicial efficiency
    - Looks to whether the claims of the putative class members as a whole are cohesive
    - Does not require that common questions predominate individual questions
    - Permits some variation in the details of individual claims
      - Especially on damages sustained

[1] Fed. R. Civ. P. 23(a)(2).

2. FRCP 23(a)(2): Commonality

- The *Wal-Mart* problem
  - The Rule 23(a)(2) "language is easy to misread, since '[a]ny competently crafted class complaint literally raises common 'questions.'"[1]
    - "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."[2]
  - **Rule**: Post-*Wal-Mart*, commonality is present only if —
    1. the putative class members suffered the "same injury" under the plaintiffs' theory of the case,
    2. the common question is important in the sense that the "determination of its truth or falsity will resolve an issue that is central to the validity" of the class claims to redress that injury, *and*

KEY → 3. the common question is capable of resolution on a classwide basis at trial.[3]

  - Older cases
    - State that it is *sufficient* for commonality if—
      - there are shared legal issues notwithstanding divergent factual predicates, *or*
      - when there is a "common core of salient facts" or a "common nucleus of operative facts" notwithstanding a request for different legal remedies within the class
    - *Query*: Is this sufficiency rule still intact after *Wal-Mart*?

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011) (citation omitted).
[2] *Id*. at 350 (citation omitted).
[3] *Id*. (observing that what matters for the commonality inquiry "is not the raising of common 'questions' . . . but rather the capacity of a classwide proceeding to generate common answers").

2. FRCP 23(a)(2): Commonality

- Application to antitrust cases
  - Typical "common questions" in a price-fixing action:
    - Whether defendants and their co-conspirators engaged in a conspiracy to raise, fix and maintain prices at supracompetitive levels
    - The duration and extent of defendants' alleged conspiracy
    - Whether each defendants was a participant in the conspiracy
    - Whether defendants' conspiracy violated Section 1 of the Sherman Act
    - Whether defendants took affirmative steps to conceal their conspiracy
    - The effect of defendants' alleged conspiracy upon prices actually charged to the putative class members
  - Other frequent common questions in other types of antitrust cases:
    - The definition of the relevant markets
    - Whether the defendants had market power in the relevant market
    - Whether the defendants engaged in the same anticompetitive conduct toward the putative class members
    - Whether the defendants' conduct violated the antitrust laws
  - Almost never contested by defendants

2. FRCP 23(a)(3): Typicality

- General rules
  - Requires that "the claims or defenses of the representative parties must be typical of the claims or defenses of the class"
  - Purpose
    - Ensures that the interests of the named plaintiff align with the interests of the class members *and*
    - Named plaintiff's claims have the same essential characteristics as the claims of the class as a whole and suffer the same type of injury, *so that*
    - Class representatives will work to the benefit of the entire class when pursuing their own individual goals in the litigation

    Aligns with adequacy of representation

2. FRCP 23(a)(3): Typicality

- General rules
  - Central inquiry
    - Whether the named plaintiff has the *incentive* to prove all the elements of the cause of action which would be presented by the individual members of the class if they had initiated their own individual actions and so adequately represents the class
  - *Usual rule*: Named plaintiff's claims and defenses are typical if they—
    1. arise from the same event, practice, or course of conduct that forms the basis of the claims of the class as a whole, *and*
    2. are predicated on the same legal or remedial theory
  - Factual differences
    - Strong presumption that typicality is satisfied when the allegation is that the defendants engaged in a common illegal scheme with respect to all members of the class
    - Differences that usually will not defeat typicality—
      - Purchases across defendants or over time compared to other putative class members
      - Damages sustained by individual putative class members

2. FRCP 23(a)(3): Typicality

- Application in antitrust cases
  - Rarely contested where named plaintiff—
    1. is a member of the putative class
    2. has constitutional and prudential standing to pursue its individual claims
    3. has claims that are predicated on a legal theory generally applicable to the claims of absent class members, *and*
    4. is not subject to any unique defense
  - Named plaintiff in a price-fixing action need not—
    - purchase from all of the alleged co-conspirators
    - purchase in precisely the same way as absent class members

2. FRCP 23(a)(3): Typicality

- Application in antitrust cases
  - Differences in state law in indirect purchaser actions
    - A number of courts have held that the slight variations that exist in the antitrust laws of various states do not make the named plaintiff's claims under the law of one state atypical[1]
  - Standing in indirect purchaser actions
    - Some courts have held that for each claim under a state law, a named plaintiff must exist with Article III standing to bring that particular claim[2]
      - For, for example, a putative class action invoking Minnesota antitrust law must have a named plaintiff with Article III standing to bring an individual claim under the Minnesota law

[1] *See, e.g.*, *In re* Namenda Indirect Purchaser Antitrust Litig., No. 115CV6549CMRWL, 2021 WL 509988, at *11 (S.D.N.Y. Feb. 11, 2021); *In re* Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., 335 F.R.D. 1, 29-30 (E.D.N.Y. 2020) (certifying a class of end-payor plaintiffs whose claims arose from the antitrust laws of more than thirty states); *In re* Nexium (Esomeprazole) Antitrust Litig., 297 F.R.D. 168, 176 (D. Mass. 2013) (certifying a class of end payors whose claims arose under the antitrust laws of twenty-six states); *but see In re* Capacitors Antitrust Litig., No. 17-MD-02801-JD, 2020 WL 6462393, at *6 (N.D. Cal. Nov. 3, 2020) (finding material differences and denying class certification).

[2] *See, e.g.*, *In re* Capacitors Antitrust Litig., 154 F. Supp. 3d 918, 923-27 (N.D. Cal. 2015); *accord In re* Glumetza Antitrust Litig., No. C 19-05822 WHA, 2021 WL 352059, at *2 (N.D. Cal. Feb. 2, 2021); *In re* Hard Disk Drive Suspension Assemblies Antitrust Litig., No. 19-MD-02918-MMC, 2020 WL 6270948, at *4 (N.D. Cal. Oct. 23, 2020) *In re* Packaged Seafood Prod. Antitrust Litig., 242 F. Supp. 3d 1033, 1095 (S.D. Cal. 2017).

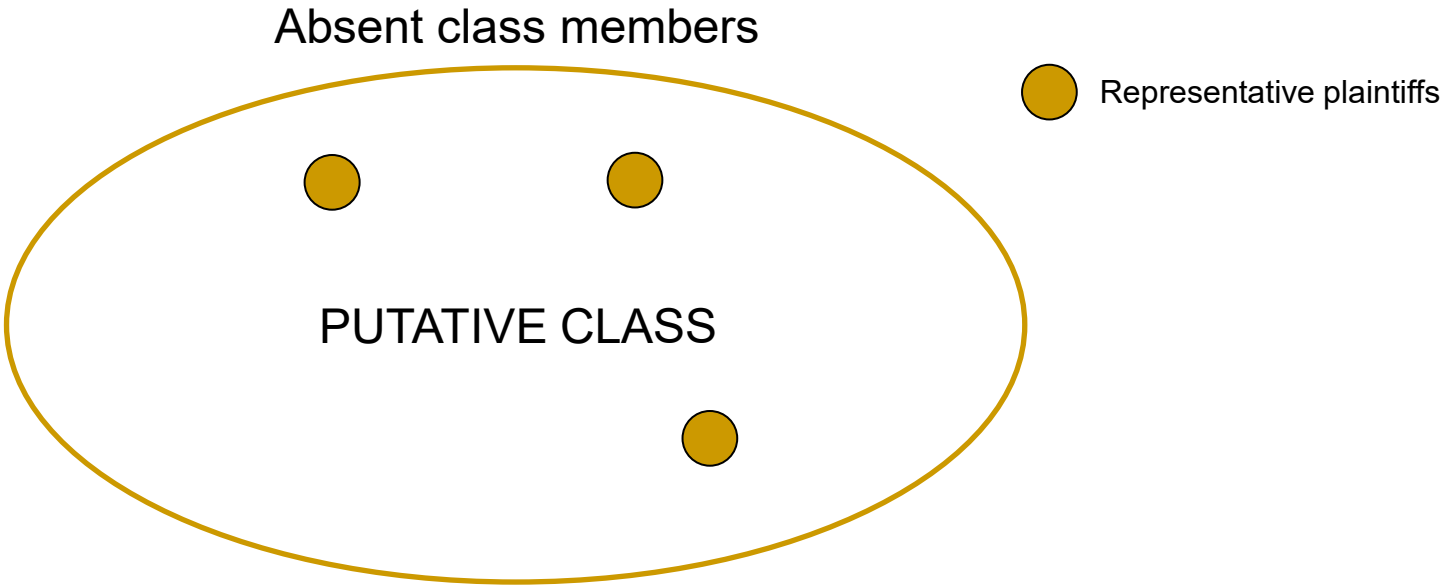
2. FRCP 23(a)(3): Typicality

- Application in antitrust cases
  - *Example*: Typicality requirement satisfied even through named plaintiff—
    - did not purchase from all of the alleged co-conspirator defendants,
    - purchased only one of the five products alleged to be subject to price fixing,
    - purchased only $4632 of the product from one defendant, while other customers purchased millions of dollars of the product from the same defendant, *and*
    - made only a one-time spot purchase while other class members negotiated yearly supply agreements or tolling arrangements[1]
  - *Counterexample*: Typicality requirement not satisfied when—
    - Named plaintiffs included only individuals and small businesses that purchased small numbers of computers, but the class also included large enterprise customers, which purchased larger volumes and different types of computers and which often negotiated multiyear purchase agreements for bundles for products and services, and so purchased in a "different competitive landscape" that the named plaintiffs[2]

[1] *In re* Bromine Antitrust Litig., 203 F.R.D. 403, 411 (D.C. Ind. 2001).
[2] *In re* Intel Corp. Microprocessor Antitrust Litig., No. CV 05-485-LPS, 2014 WL 6601941,at *11-12 (D. Del. Aug. 6, 2014).

2. FRCP 23(a): Commonality and Typicality

Commonality: Do the class members share a common question of law or fact? Goes to the *cohesiveness* of the class members as a group.



Typicality: Are the claims and defenses of the representative plaintiffs typical of those in the class as a whole? Goes to whether the named plaintiffs have the *incentives* to prove the elements of the claims of the absent class members.

2. FRCP 23(a)(4): Adequacy of Representation

- General rules
  - Requires that the *representative parties* "will fairly and adequately protect the interests of the class"
    - Focus is on uncovering *conflicts of interest* between named parties and the class they seek to represent
    - Given the binding effect of a final judgment in a class action, adequacy of representation is required by due process[1]
    - Must be continuous throughout the litigation
    - Named plaintiff acts as a fiduciary to absent class members in the prosecution of the class claims
  - Adequacy of class counsel
    - Prior to the 2003 amendments, adequately of class counsel was an element of the Rule 23(a)(4) adequacy of representation requirement
      - So pre-2003 cases will discuss adequacy of class counsel along with adequacy of the named plaintiffs in the Rule 23(a)(4) analysis
    - The 2003 amendments moved adequacy of class counsel into a new subsection 23(g), which governs both the substantive and procedural requirements in appointing class counsel

[1] Hansberry v. Lee, 311 U.S. 32 (1940).

2. FRCP 23(a)(4): Adequacy of Representation

- General rules
  - Named plaintiff requirements
    1. Must be a member of the class it seeks to represent
    2. Must be a vigorous representative in advocating the interests of the class, *and*
       - But requires only a "minimal degree of knowledge" about the case[1]
    3. Must not have interests that are antagonistic to the interests of other class members
       - Operationally, the absence of conflicts with absent class members is the most frequently litigated Rule 23(a)(4) issue
       - But only "fundamental conflicts" will defeat adequacy of representation[2]
       - Moreover, unlike the usual non-class action case, the named representatives do not control or instruct class counsel
         - Class counsel have a fiduciary obligation to the class as a whole and cannot act contrary to interest of the class even if instructed by a named plaintiff

[1] *See, e.g.*, *In re* Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, 272 (3d Cir. 2020); In re Capacitors Antitrust Litig., (No. III), No. 17-MD-02801-JD, 2018 WL 5980139, at *10 (N.D. Cal. Nov. 14, 2018) ("While some of the corporate designees may have made deposition statements that reflected a rather general understanding of the litigation, none were so 'startlingly unfamiliar with the case' that they vitiated the possibility of serving as a class representative.") (citation omitted).
[2] *See Suboxone*, 967 F.3d at 272.

2. FRCP 23(a)(4): Adequacy of Representation

- General rules
  - Typical adequacy findings:

> Second, [monopolization defendant] Reckitt's claim that Burlington [the named plaintiff] has ceded control of this litigation to class counsel, and that this creates a risk of conflicts, does not render Burlington an inadequate representative. Reckitt cites no precedent from this Court for its argument that a class representative must "control" the litigation. Indeed, we have observed that "it is counsel for the class representative and not the named parties ... who direct and manage [class] actions. Every experienced federal judge knows that any statements to the contrary [are] sheer sophistry." *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 292 (3d Cir. 2010) (alterations and omission in original) (quoting *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 n.9 (3d Cir. 1973)). Moreover, Burlington is not a disengaged representative. *The record shows that Burlington is aware of its role as a fiduciary, understands the basis for the claimed injury, has an incentive to recover its proportionate share of damages, monitors the litigation, produced documents, and has the requisite interest in and knowledge about the case to satisfy the adequacy requirement*.[1]

[1] *See, e.g.*, *In re* Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, 273 (3d Cir. 2020) (emphasis added).

2. FRCP 23(a)(4): Adequacy of Representation

- Separate class solutions to Rule 23(a)(4) problems
  - To avoid antagonistic interests, any fundamental conflict must be addressed with a "structural assurance of fair and adequate representation for the diverse groups and individuals" among the plaintiffs[1]
  - To achieve this structural solution, courts must create homogenous subclasses under Rule 23(c)(4)(B) to ensure that each group of class members has separate named representative(s) and subgroup counsel that are dedicated to protecting the interest of the respective subclass members
- Class action settlements
  - Adequacy must be determined independently of the general fairness review of the settlement
  - The fact that the settlement may have overall benefits for all class members is not determinative of adequacy, since there remains the question of the allocation of the benefits among class members

[1] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997); *see* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999).

2. FRCP 23(a)(4): Adequacy of Representation

- Common problem areas
  - Failure of the named plaintiff to vigorously prosecute the action
  - Abandonment of particular remedies to the detriment of some or all putative class members
    - Claim or issue preclusion may prevent class members from pursuing foregone remedies in a subsequent action
  - Intraclass conflicts
    - Pitting a named representative against some absent class members (or absent class members against each other)
    - With potentially antagonistic class members being represented by the same class counsel
  - Collusive settlements
    - Named plaintiffs–and the named plaintiffs' counsel–attempt to use the class action as leverage to obtain a settlement favorable to themselves but unfavorable to absent class members
    - That is, in return for a settlement favorable to themselves, the named plaintiffs will champion a class settlement that provides absent class members will little or no relief but exhausts their claims

2. FRCP 23(a)(4): Adequacy of Representation

- Application in antitrust cases
  - Some other possible problem areas
    - Former franchisee with no on-going business relationship with a defendant seeks to represent a class containing current franchisees with continuing business relationships with the defendant
    - Named plaintiff advocates a legal theory or a particular measure of damages that disadvantages some members of the class relative to other members
    - Named plaintiff seeks a form of relief not likely to be favored by some members of the class
  - Usually not problems
    - Named plaintiff is a competitor with absent class members
    - Named plaintiff purchases different products, different mixes of products, different amounts, or over different time periods than some of the absent class members
    - Named plaintiff did not purchase from each of the named defendants
    - Named plaintiff differs in its strategy in approaching the litigation from some absent class members

2. FRCP 23(a)(4): Adequacy of Representation

- *Example*: *In re* Payment Card Interchange Fee and Merchant Discount Antitrust Litigation[1]
  - Background
    - Class action representing 12 million merchants that challenged Visa and MasterCard network rules prohibiting merchants from imposing surcharges on cred card transactions or from steering customers to a card with lower fees
    - After nearly ten years of litigation, parties agreed to a settlement that released all claims in exchange for disparate relief to each of two classes:
      - A Rule 23(b)(3) covering merchants that accepted Visa and/or MasterCard from January 1, 2004, to November 28, 2012, which would receive up to $7.25 billion
      - A Rule 23(b)2) class covering merchants that accepted (or will accept) Visa and/or MasterCard from November 28, 2012 onwards forever, which would receive injunctive relief
    - Two classes represented by the same counsel

[1] No. 12-4671-cv(L) (2d Cir. June 30, 2016)..

2. FRCP 23(a)(4): Adequacy of Representation

- *Example*: *In re* Payment Card Interchange Fee and Merchant Discount Antitrust Litigation[1]
  - Second Circuit: Vacated settlement for inadequate representation

> "The conflict is clear between merchants of the (b)(3) class, which are pursuing solely monetary relief, and merchants in the (b)(2) class, defined as those seeking only injunctive relief. The former would want to maximize cash compensation for past harm, and the latter would want to maximize restraints on network rules to prevent harm in the future."[1]
>
> "Moreover, many members of the (b)(3) class have little to no interest in the efficacy of the injunctive relief because they no longer operate, or no longer accept Visa or MasterCard, or have declining credit card sales. By the same token, many members of the (b)(2) class have little to no interest in the size of the damages award because they did not operate or accept Visa or MasterCard before November 28, 2012, or have growing credit card sales. Unitary representation of separate classes that claim distinct, competing, and conflicting relief create unacceptable incentives for counsel to trade benefits to one class for benefits to the other in order somehow to reach a settlement."[2]
>
> "Class counsel stood to gain enormously if they got the deal done. The (up to) $7.25 billion in relief for the (b)(3) class was the '[l]argest[]ever cash settlement in an antitrust class action. For their services, the district court granted class counsel $544.8 million in fees. The district court calculated these fees based on a graduated percentage cut of the (b)(3) class's recovery; thus counsel got more money for each additional dollar they secured for the (b)(3) class. But the district court's calculation of fees explicitly did not rely on any benefit that would accrue to the (b)(2) class, and class counsel did not even ask to be compensated based on the size or significance of the injunctive relief."[3]

[1] Slip op. at 23, No. 12-4671-cv(L) (2d Cir. June 30, 2016). [2] *Id*. at 24. [3] *Id*. at 24-25 (internal citations omitted).

Rule 23(b)

- Requirement
  - In addition to satisfying the four elements of Rule 23(a), recall that every federal class action must fall into one of the three FRCP 23(b) categories
  - Rule 23(b)(1) class—Separate actions create a risk of either:
    - Inconsistent adjudications establishing incompatible standards on the defendant, or
    - Adjudications that would be dispositive of the interests of similarly situated persons
  - Rule 23(b)(2) class
    - Defendant has acted in ways generally applicable to the class, so that
    - final injunctive relief is appropriate for the class as a whole
  - Rule 23(b)(3) class
    - Questions of law or fact common to the class predominate over individual questions, and
      - *General rule*: Common issues predominate in proving an antitrust violation when the focus is on the defendants' conduct and not on the conduct of the individual class members.
    - Class action is superior to other means of adjudicating the claims

Rule 23(b)

- Difference in applications
  - Rule 23(b)(1) and Rule 23(b)(2) class actions
    - Designed for cases in which the class–whether or not certified as such–must stand or fall together because of the indivisible interests of the class members in the outcome of the litigation
      - Driven by the notion that rights that must stand or fall together should be tried together—a rule of necessity
    - No mandatory right to notice of the class action or right to opt out of the class
    - Although court may order notice and opt-out opportunity in its discretion[1]
  - Rule 23(b)(3)
    - Designed for cases:
      - in which there may be differences in the treatment of individual class members
      - but where there is sufficient commonalities in the issues to make a single trial of the common issues efficient—a rule of judicial efficiency and convenience
    - Given the differences, however, Rule 23 provides for a mandatory right to—
      - Reasonable class-wide notice of class certification
      - Individual notice where possible with reasonable diligence
      - Opt out of the class and not be bound by any class judgment

[1] Fed. R. Civ. P. 23(c)(2)(A).

Rule 23(b)(1) Class Actions

- Separate actions create a risk of either:
  1. *Rule 23(b)(1)(A) actions*: Inconsistent adjudications establishing incompatible standards on the defendant
     - Usually arises when multiple actions are likely to result in incompatible injunctions or declaratory judgments, some requiring to defendant to do one thing and others requiring the defendant to do something inconsistent
     - Risk that injunctions or declaratory judgments in different actions might impose different but compatible obligations on the defendant is not a basis
     - Rarely used in antitrust cases
       - Rule 23(b)(1)(a) antitrust class actions, to the extent they exist, are older sport league cases seeking declaratory judgments
       - Injunction cases today are almost always brought as Rule 23(b)(2) class actions
  2. *Rule 23(b)(1)(B) actions*: Adjudications that would be dispositive of the interests of similarly situated persons
     - Typically "limited fund" cases
       - Cases where the defendant's conduct (allegedly) injured a group of similarly situated victims
       - But where the defendant is likely to become judgment proof after victories by the first plaintiffs to obtain an individual judgment, leaving the remaining victims without relief
     - Burden is on the plaintiff to show the "limited fund" nature of the case
     - Infrequently used in antitrust cases

Rule 23(b)(1) Class Actions

- No mandatory right to notice and opt-out opportunity
  - Court may provide in its discretion as part of its powers to manage the class action

Rule 23(b)(2) Class Actions

- Standard
  - Defendant has acted in ways generally applicable to the class, so that
  - final injunctive relief is appropriate for the class as a whole

Rule 23(b)(2) Class Actions

- Design
  - Crafted with civil rights cases in mind
  - Intended for cases in which class-wide injunctive or declaratory relief is appropriate, without any tailoring for individual class members[1]
    - May require the plaintiffs to specify the relief sought in some detail at the class certification stage in order to permit the court to test whether the Rule 23(b)(2) requirements are satisfied[2]
    - Rule 23(b)(2) does not authorize class certification when
      - each individual class member would be entitled to a different injunction or declaratory judgment against the defendant," *or*
      - "when each class member would be entitled to an individualized award of monetary damages."[2]

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011) ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted.") (internal quotation marks omitted).
[2] *Id*. at 360-61.
[3] *See., e.g.*, Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC, 763 F.3d 1280 (11th Cir. 2014) (affirming denial of Rule 23(b)(2) class certification in a tying arrangement class action where the named plaintiff failed to identify exactly the dimensions of the injunction it was seeking and to show that this injunction would provide relief to every member of the class); *In re* EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., No. 17-MD-2785-DDC-TJJ, 2020 WL 1873989, at *59 (D. Kan. Feb. 27, 2020) (denying Rule 23(b)(2) certification for plaintiffs' failure to specific relief sought in adequate detail); *In re* Processed Egg Prod. Antitrust Litig., 312 F.R.D. 124, 170 (E.D. Pa. 2015) ("The Court could not presently draft such an order because Plaintiffs have failed to specifically articulate the injunctive relief they seek.").

Rule 23(b)(2) Class Actions

- No mandatory right to notice and opt-out opportunity
  - Court may provide in its discretion as part of its powers to manage the class action
- *Query*: "Claim splitting" in rule 23(b)(2) class actions
  - What preclusive effect, if any, does an injunction-only class action have on class members' ability to bring subsequent damages claims?[1]
    - *Usual rule against claim splitting*: "[A]a final judgment on the merits generally precludes a plaintiff from bringing a new lawsuit raising issues that could have been litigated in the first suit, but were not."[2]
  - In the class action context, courts are split:
    - *Majority rule*: Usual rule does not apply to class actions[3]
    - Some courts have explicitly reserved the right for class members to seek monetary damages in subsequent actions[4]

[1] For cases discussing the issue, see, for example, *In re* Processed Egg Prod. Antitrust Litig., 312 F.R.D. 124, 166-67 (E.D. Pa. 2015), and *In re* Skelaxin (Metaxalone) Antitrust Litig., 299 F.R.D. 555, 578-79 (E.D. Tenn. 2014). *See also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 364 (2011) (raising question of whether a rule 23(b)(2) action could have preclusive effects).

[2] *In re* Vitamin C Antitrust Litig., 279 F.R.D. 90, 114 (E.D.N.Y.2012).

[3] *See, e.g.*, Gooch v. Life Investors Ins. Co. of Am., 672 F.3d 402, 428 n. 16 (6th Cir. 2012); Hiser v. Franklin, 94 F.3d 1287, 1291 (9th Cir. 1996).

[4] *See, e.g.*, *Vitamin C*, 279 F.R.D. at 115-16.

Rule 23(b)(2) Class Actions

- Application in antitrust cases
  - Rare as the primary basis
    - Primarily antitrust labor cases
    - Some indirect purchaser injunctive actions
  - Courts sometimes split certifications in some antitrust cases, with
    - the injunctive relief portion certified under Rule 23(b)(2), *and*
    - the damages portion certified under Rule 23(b)(3)
  - Courts will deny certification when some class members may be harmed by the injunction
    - *Example*: A manufacturer gives lump-sum loyalty discounts in order to foreclose its competitors. OEMs may keep or use to lower the price of their products. If OEMs chose different strategies, an injunction to prohibit lump-sum discounts may harm some indirect customers that purchased from an OEM that passed on its discount, even if the manufacturer's strategy overall raised prices.[1]

[1] *See In re* Intel Corp. Microprocessor Antitrust Litig., No. CV 05-485-LPS, 2014 WL 6601941, at *20 (D. Del. Aug. 6, 2014) (denying Rule 23(b)(2) certification).

Rule 23(b)(2) Class Actions

- Defendant classes
  - Although rarely used, Rule 23 permits a plaintiff to sue a representative defendant for relief against a defendant class.
    - Rule 23(a) provides: "One or more members of a class may sue *or be sued* as representative parties on behalf of all members only if . . . ." (emphasis added)
    - All of the requirements of Rule 23 apply equally to defendant classes as they do to plaintiff classes
    - The few defendant class actions that are brought are typically under Rule 23(b)(2) for injunctive relief generally applicable to all defendant class members

Rule 23(b)(2) Class Actions

- Examples of antitrust defendant class actions
  - Associations and their members or affiliates
    - CBS v. ASCAP, 400 F. Supp. 737, 741 n.2 (S.D.N.Y. 1975), *rev'd and remanded*, 562 F.2d 130 (2d Cir. 1977), *rev'd and remanded*, 441 U.S. 1 (1979)
    - Monument Builders of Pa., Inc. v. American Cemetery Ass'n, 206 F.R.D. 113, 114 (E.D. Pa. 2002)
    - *See In re* New Motor Vehicles Canadian Export Antitrust Litig., 307 F. Supp. 2d 136, 141 & n.7 (D. Me. 2004) (suggesting possibility of a defendant class)

Rule 23(b)(3) Class Actions

- Design
  - The only Rule 23(b) category that includes actions whose primary purpose is the recovery of compensatory money damages
    - "Rule 23(b)(3) is an "'adventuresome innovation' . . . framed for situations 'in which class-action treatment is not as clearly called for.'" [1]
  - Allows class certification in a much wider set of circumstances but with greater procedural protections
  - Foundations are convenience and judicial efficiency, not necessity
- Differences with Rule 23(b)(1) and 23(b)(2) classes
  - Absent class members in (b)(1) and (b)(2) classes do not, as a matter of right, have a right to notice or the opportunity to opt out of the class
    - The court, in its discretion, may order notice and provide an opt-out opportunity
  - Absent class members in (b)(3) classes are entitled to reasonable notice of the pendency of the action and right to opt-out of the class

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362 (2011) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614-15 (1997)).

Rule 23(b)(3) Class Actions

- Two requirements
  1. *Predominance of common questions*: Questions of law or fact common to the class predominate over any questions affecting on individual members
     - Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation"[1]
     - Requires common or "classwide" proof to dominate at trial over individualized proof with respect to the essential elements of the class claims taken as a whole
       - *Key*: The question at the class certification stage is to the extent to which the individual elements of each class member's claim *is capable of proof at trial* through evidence that is common to the class rather than individual to its members.
       - Plaintiffs' burden at the class certification stage is not to prove each element of the claim, although in order to prevail on the merits each class member must do so
       - Predominance does not preclude individual evidence at trial—it just precludes class certification if classwide proof does not predominate
     - *Practical rule*: Proof is classwide if each class member could use the proof in an individual claim on the merits to establish the element in question[2]
  2. *Superiority*: Class action is superior to other means of adjudicating the controversy

[1] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997).
[2] *In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 192 (3d Cir. 2020).

Rule 23(b)(3) Class Actions

- Application in antitrust cases
  - Almost all antitrust class actions are brought as Rule 23(b)(3) actions
  - Primary focus on the *predominance* inquiry
    - Recall that predominance requires common or "generalized proof" to dominate at trial over individualized proof with respect to the essential elements of the class claims taken as a whole
      - "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof."[1]
      - "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."[2]
    - In almost all antitrust cases, a finding of predominance will lead to a finding that a class action is the superior vehicle for adjudicating the controversy
    - Some superiority challenges, but almost never successful when predominance requirement is satisfied

[1] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (internal quotation marks and citation omitted).
[2] *Id*. (internal quotation marks and citation omitted).

Rule 23(b)(3) Class Actions

- Application in antitrust cases
  - The predominance analysis requires court to predict what the specific issues will be at trial and what evidence will be presented in order to determine whether common or individual issues predominate[1]
  - Courts disaggregate the predominance analysis into three elements:[2]
    1. The existence of a violation
    2. "Impact" = Proximate cause/fact of injury/prudential standing
    3. Damages
  - General rules
    - Class certification should be denied in antitrust cases if common questions do not predominate on both the existence of the violation and impact (taken separately)
    - Since existence of the violation typically depends on the defendants' conduct and not the individual circumstances of class members, it is almost always provable through common proof

[1] *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 20 (1st Cir. 2008); *accord In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 190 (3d Cir. 2020); Costello v. BeavEx, Inc., 810 F.3d 1045, 1059 (7th Cir. 2016).
[2] *See In re* Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, 270 (3d Cir. 2020); *see generally* Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809-10 (2011) (observing that the predominance inquiry must begin "with the elements of the underlying cause of action").

Rule 23(b)(3) Class Actions

- Application in antitrust cases
  - Named plaintiffs' theory of the case
    - The predominance question ultimately is whether the plaintiffs' proof of their theory of the case will depend predominantly on classwide proof or individualized proof at trial
    - *Query*: May a defendant challenge class certification by coming forward with evidence that the plaintiffs' theory of the case is factually wrong?
      - If so, does this require that the named plaintiffs show by a preponderance of the evidence that their theory is sustainable?

Rule 23(b)(3) Class Actions

- Antitrust predominance analysis
  1. Existence of a violation
     - Common proof predominates when the defendants have engaged in a common course of allegedly unlawful conduct toward the putative class members (e.g., fixing prices)
       - Whether the defendants violated the law is almost always a common question subject to generalized proof
       - Some courts find that the predominance element is satisfied simply by the allegation of a common price-fixing conspiracy
     - Since the existence of a violation goes to what the defendants did, then common proof will predominate over individualized proof as long as the class is defined in a way that the putative class members would individually have claims against the defendants with respect to the challenged conduct
       - "Indeed, if each class member pursued its claims individually, the class member would have to prove the same antitrust violations using the same documents, witnesses, and other evidence."[1]

[1] Dial Corp. v. News Corp., 314 F.R.D. 108 (S.D.N.Y. 2015), *amended*, No. 13CV6802, 2016 WL 690895 (S.D.N.Y. Feb. 9, 2016)

Rule 23(b)(3) Class Actions

- Antitrust predominance analysis
  1. Existence of a violation (con't)
     - Almost never contested by defendants
       - Sometimes defendants will argue that there were multiple conspiracies and not an overarching conspiracy, so that different putative class members would be injured (if at all) by different conspiracies
       - But the question of whether there is an overarching conspiracy is a common question, so as long as the plaintiffs can demonstrate a method of common proof to show an overarching conspiracy at trial predominance will be satisfied
     - Good illustrations
       - *In re* Capacitors Antitrust Litig., (No. III), No. 17-MD-02801-JD, 2018 WL 5980139, at *4-*5 (N.D. Cal. Nov. 14, 2018)

Rule 23(b)(3) Class Actions

- Antitrust predominance analysis
  2. "Impact"
     - Impact = existence of antitrust injury in fact + proximate cause
     - Typically the main battleground in antitrust class certification
       - Impact question: In the but-for world—i e., where defendants did not commit the alleged violation—would the defendants have charged lower prices to the class members?
       - Predominance question: Can impact be proved through classwide proof?[1]
       - Named plaintiffs typically rely heavily on expert economic testimony to show a classwide means of proving impact

[1] *See, e.g.*, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252-53 (D.C. Cir. 2013) ("Common questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact. "); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311-12 (3d Cir. 2008).

Rule 23(b)(3) Class Actions

- Antitrust predominance analysis
  2. "Impact" (con't)
     - A critical distinction:

> Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.[1]

     - The "Bogosian short cut"[2]
       - Historically, some courts applied a rebuttable presumption that an illegal price-fixing scheme impacts all purchasers
       - This presumption has been significantly undermined by recent cases
       - Now courts require some additional evidence of class-wide impact[3]

[1] *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311-12 (3d Cir. 2008).
[2] Bogosian v Gulf Oil Co., 561 F.2d 434, 455 (3d Cir. 1977); *accord In re* Linerboard Antitrust Litig., 305 F.3d 145, 151 (3d Cir. 2002).
[3] *See, e.g.*, American Seed Co., Inc. v. Monsanto Co. 271 F. App'x 138, 140-41 (3d Cir. 2008).

Rule 23(b)(3) Class Actions

- Antitrust predominance analysis
  2. "Impact" (con't)
     - Proof of impact using regression analysis
       - Plaintiffs often used regression analysis of prices in their proof of impact
       - This requires some care, however, since regression analysis will only estimate *average prices*.
         - Say, for example, the plaintiff's expert economist uses regression analysis to estimate the "but for" price that would have been charged in the absence of the challenged restraint, and opines that the difference between this average price and the higher average price actually paid by class members demonstrates impact on a classwide basis
         - BUT, for example, if some class members actually paid a price lower than the "but for" average price for the class as a whole, the regression analysis cannot be used to show that these class members sustained impact
         - Typically, the burden is on the defendants to produce evidence that shows that may be faulty in the classwide proof of impact for at least some class members. The named plaintiff then has the burden of persuasion of showing the efficacy of the proof by a preponderance of the evidence in light of the defendant's evidence.[1]
     - Good illustrations
       - *In re* Capacitors Antitrust Litig., (No. III), No. 17-MD-02801-JD, 2018 WL 5980139, at *5-*8 (N.D. Cal. Nov. 14, 2018)

[1] For an illustration, see *In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 192-94 (3d Cir. 2020) (vacating class certification order).

Rule 23(b)(3) Class Actions

- Antitrust predominance analysis
  3. "Damages"
     - Hornbook law
       - Recall different judicial attitudes on fact of injury (impact) and amount of damages
       - That damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat Rule 23(b)(3) class certification[1]
         - *Query*: What does an "individual basis" mean? Individually but using a common formula? What if there is no formula?
       - In any event, proof of damages must still be considered in deciding whether questions susceptible to generalized proof outweigh individual issues
     - Individual questions can be minimized if not eliminated if there is a generally applicable formula for calculating damages
       - Typically addressed by plaintiffs' expert simultaneously with impact
         - In other words, if plaintiffs' expert uses a formulaic approach to impact, then that same approach will likely (by design) provide a method of estimating damages
       - Usually a common per unit overcharge multiplied by the number of units the class member purchased

[1] *See, e.g.*, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013).

Rule 23(b)(3) Class Actions

- Antitrust predominance analysis
  3. "Damages"
     - *Comcast* requirement
       - A model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury

> We start with an unremarkable premise. If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).[1]

       - *Comcast*
         - The plaintiff submitted four theories of antitrust impact. The district court rejected three of the theories as unsuitable for class action treatment and limited the class to the remaining theory.
         - The plaintiff also submitted regression model to determine a "but for" price and hence create a classwide formula for damages. The model, however, did not disaggregate the remaining operative theory of impact from the three rejected theories.
         - The Supreme Court, in a 5-4 decision, rejected the damages model as a method of classwide proof of damages

[1] Comcast v. Behrend, 569 U.S. 27, 35 (2013).

Rule 23(b)(3) Class Actions

- Antitrust predominance analysis
  3. "Damages"
     - "Aggregate damages"
       - Some courts—most notably the Third Circuit—are holding that—
         - a method of common proof of aggregate class-wide damages is sufficient to show predominance on damages, and
         - Leaving the allocation of individual damages to a post-trial court-approved plan of allocation among class members[1]
       - In *Suboxone*, the Third Circuit explained:

> [T]he Purchasers' model does not measure how Reckitt's [alleged monopolization] scheme harmed each class member and recognizes that there could be differences among the class members concerning the precise damages they suffered. Individualized determinations, however, are of no consequence in determining whether there are common questions concerning liability. Rather, we need be assured only that common issues predominate. Such is the case here because the Purchasers' theory of injury and damages is provable and measurable by an aggregate model relying on class-wide data. Although allocating the damages among class members may be necessary after judgment, "such individual questions do not ordinarily preclude the use of the class action device." Thus, the District Court correctly found that common issues predominate.[2]

[1] *See, e.g.*, *In re* Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, 271-72 (3d Cir. 2020); *In re* Modafinil Antitrust Litig., 837 F.3d 238, 262 (3d Cir. 2016).
[2] *Suboxone*, 967 F.3d at 272.

Rule 23(b)(3) Class Actions

- Antitrust predominance analysis
  3. "Damages"
     - Good illustrations
       - *In re* Capacitors Antitrust Litig., (No. III), No. 17-MD-02801-JD, 2018 WL 5980139, at *9 (N.D. Cal. Nov. 14, 2018)

Rule 23(b)(3) Class Actions

- Superiority
  - Requirement
    - Class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy"[1]
      - Class action must be the most "fair and efficient" method of resolving this case
    - Rule 23(b)(3) sets forth four nonexclusive factors to consider:
      - The class members' interests in individually controlling the prosecution or defense of separate actions;
      - The extent and nature of any litigation concerning the controversy already begun by or against class members;
      - The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
      - The likely difficulties in managing a class action.
    - Manageability
      - Is usually the primary focus of the superiority inquiry
      - But courts are reluctant to deny class certification on the sole ground that it would be unmanageable[2]

[1] Fed. R. Civ. P. 23(b)(3).

[2] *But see In re* Fresh Del Monte Pineapples Antitrust Litig., No. 1:04-md-1628 (RMB), 2008 WL 5661873 (S.D.N.Y. Feb. 20, 2008) (certifying direct purchaser class but denying certification to indirect purchaser class for lack of manageability).

Rule 23(b)(3) Class Actions

- Opt-outs
  - Rule 23(c)(2)(B)[1]
    - Requires when a Rule 23(b)(3) class is certified, the accompanying notice must state, among other things, that "the court will exclude from the class any member who requests exclusion"
    - This right is known as an "opt-out" right
  - Implications
    - Class member sthat opt out are no longer members of the class
      - They obtain no benefits from any success by the class in litigation or settlement
      - They are not precluded from bringing their own claims (either individually or in a class action of out-outs) against the defendants in the original action regardless of the result in that action
      - The statute of limitations is tolled for them from the date the original putative class action was filed until the date they were excluded from the class

[1] Fed. R. Civ. P. 23(c)(2)(B).

Rule 23(b)(3) Class Actions

- Opt-outs
  - Practice
    - Business calculus
      - Class members opt out when they think that they can obtain a greater recovery in subsequent "opt-out litigation"—either in settlement or by going to trial—than they can if they stayed in the original class action
      - Opt-outs may proceed individually or create their own class action of opt-outs from the original class action
    - Becoming more common
      - In the *Liquid Crystal Display (LCD) Panels* antitrust litigation, more than 75 companies—including Apple, Best Buy, Dell, Costco, and Kodak—opted out of a class action and pursued direct recovery through individual settlements and, for several plaintiffs, trials
      - In the *Interchange* antitrust case against Visa and MasterCard, roughly 8000 retailers opted out of the class

[1] Fed. R. Civ. P. 23(c)(2)(B).

Rule 23(b)(3) Class Actions

- Opt-outs
  - Practice
    - Major problem for the original class and defendants
      - As class members increasingly opt out, the benefits of settlement decrease to the defendants, since they will still have bear the costs and risks of defending the opt-out litigation
      - To mitigate this problem, the settlement agreement in the original class action may provide that the defendants will further compensate the original class to make up any per capita difference between the original settlement and a subsequent opt-out settlement

[1] Fed. R. Civ. P. 23(c)(2)(B).

Class Action Fairness Act (CAFA)

- Expansion of federal diversity to certain class actions[1]
  - Provides that federal district courts have original jurisdiction over any class action in which
    1. the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs,
    2. and—
       - any member of a class of plaintiffs is a citizen of a State different from any defendant;
       - any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
       - any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state, and
    3. the number of members of all proposed plaintiff classes in the aggregate is less than 100

[1] 28 U.S.C. §§ 1332(d)(2), 1332(d)(5)(2).

Class Action Fairness Act (CAFA)

- Expansion of federal diversity to certain class actions (con't)
  - Purpose
    - A primary purpose in enacting CAFA was to open the federal courts to corporate defendants out of concern that the national economy risked damage from a proliferation of meritless class action suits[1]
  - Prior to CAFA, federal courts had diversity jurisdiction over class actions only if:
    - *Complete diversity*: No named plaintiff could be a citizen of a state in which a defendant was also a citizen, and
    - *Amount in controversy*: Greater than $75,000 ((which could not be created by aggregating the claims of the named plaintiffs or the putative plaintiff class)
  - In practice, CAFA provides a means of removing a state court class action that the plaintiffs would prefer to keep in state court to federal court
  - *Limitations*: In some situations, courts—
    - Have discretion to decline exercising CAFA diversity jurisdiction[2]
    - Are required to decline exercising CAFA diversity jurisdiction[3]

[1] *See* Bell v. Hershey Co., 557 F.3d 953, 957 (8th Cir. 2009).
[2] 28 U.S.C. § 1332(d)(3).
[3] *Id*. 1332(d)(4).

Class Action Fairness Act (CAFA)

- Implications for antitrust class actions
  - Prior to CAFA, class actions alleging claims under state antitrust law—typically indirect purchaser claims after Illinois Brick—rarely could qualify for federal diversity jurisdiction—
    - Often lacked complete diversity
    - Almost always fell short of the amount in controversy requirement
  - After CAFA, fairly easy for class actions alleging state antitrust claims to qualify for diversity jurisdiction
  - After some state antitrust law plaintiffs may prefer to keep their action in state court, CAFA provides defendants a means to remove many of these actions to federal court
    - State plaintiffs sometimes will limit the class definition and/or limit the class period to avoid surpassing the $5 million CAFA amount in controversy threshold and so avoid be removed to federal court
    - A state indirect purchaser action removed to federal court is likely to be consolidated by the MDL Panel with the federal direct purchaser actions

Certification Record

- "Evidentiary proof"
  - Plaintiff bears the burden of showing "through evidentiary proof" that the requirements of Rules 23(a) and 23(b) are satisfied[1]
    - This means that the plaintiff "must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."[2]

[1] *See, e.g.*, Sali v. Corona Reg'l Med. Ctr., 889 F.3d 623, 631 (9th Cir. 2018).
[2] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (emphasis in original).

Certification Record

- "Admissible" evidence
  - *Query*: May the district court consider only admissible evidence in deciding whether to certify a class?
    - Yes: Fifth Circuit[1]
    - No: Ninth Circuit

> Applying the formal strictures of trial to such an early stage of litigation makes little common sense. Because a class certification decision "is far from a conclusive judgment on the merits of the case, it is "of necessity ... not accompanied by the traditional rules and procedure applicable to civil trials.'" Notably, the evidence needed to prove a class's case often lies in a defendant's possession and may be obtained only through discovery. Limiting class-certification-stage proof to admissible evidence risks terminating actions before a putative class may gather crucial admissible evidence. And transforming a preliminary stage into an evidentiary shooting match inhibits an early determination of the best manner to conduct the action.
>
> . . .
>
> Although we have not squarely addressed the nature of the "evidentiary proof" a plaintiff must submit in support of class certification, we now hold that such proof need not be admissible evidence.
>
> . . .
>
> Therefore, in evaluating a motion for class certification, a district court need only consider "material sufficient to form a reasonable judgment on each [Rule 23(a)] requirement." The court's consideration should not be limited to only admissible evidence.[2]

[1] Unger v. Amedisys Inc., 401 F.3d 316, 319 (5th Cir. 2005) ("[W]e hold that a careful certification inquiry is required and findings must be made based on adequate admissible evidence to justify class certification.").
[2] Sali v. Corona Reg'l Med. Ctr., 889 F.3d 623, 632 (9th Cir. 2018) (internal citation omitted).

Certification Record

- "Admissible" evidence
  - *Query*: Should the standard of evidentiary reliability approach admissibility the more discovery has been completed?
    - Courts holding that evidence in the certification record need not be admissible typically point to certification decisions being made prior to the close of merits discovery:

> As class certification decisions are generally made before the close of merits discovery, the court's analysis is necessarily prospective and subject to change, and there is bound to be some evidentiary uncertainty. Because a decision to certify a class is far from a conclusive judgment on the merits of the case, it is "of necessity . . . not accompanied by the traditional rules and procedure applicable to civil trials."[1]

[1] *In re* Zurn Pex Plumbing Prod. Liab. Litig., 644 F.3d 604, 614 (8th Cir. 2011) (internal citation omitted; quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974)).

Certification Record

- "Admissible" evidence
  - *Query*: Or should the court only accept inadmissible evidence when the evidence when the formal admissibility requirements it fails to satisfy are likely to be satisfied at trial?
    - *Example*: A failure to authenticate
  - Eight Circuit view:

> When conducting its "rigorous analysis" into whether the Rule 23(a) requirements are met, the district court need not dispense with the standards of admissibility entirely. The court may consider whether the plaintiff's proof is, or will likely lead to, admissible evidence. Indeed, in evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*. But admissibility must not be dispositive. Instead, an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage. This approach accords with our prior guidance that a district court should analyze the "persuasiveness of the evidence presented" at the Rule 23 stage.[1]

[1] *In re* Zurn Pex Plumbing Prod. Liab. Litig., 644 F.3d 604, 614 (8th Cir. 2011) (internal citation omitted; quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974).
[2] Sali v. Corona Reg'l Med. Ctr., 889 F.3d 623, 633-34 (9th Cir. 2018) (internal citations omitted).

Certification Standards

- Historical tendencies
  - Favor antitrust class actions, especially in horizontal price-fixing cases
    - Prerequisites for class certification are "readily met in certain cases alleging . . . violations of the antitrust laws"[1]
    - "[B]ecause of the important role that class actions play in the private enforcement of the antitrust statutes, courts resolve doubts about whether a class should be created in favor of certification."[2]
    - "Antitrust claims are well suited for class actions."[3]
    - Class actions "play a particularly vital role in the private enforcement of antitrust [laws]."[4]

[1] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625 (1997).
[2] *In re* Indus. Diamonds Antitrust Litig., 167 F.R.D. 374, 378 (S.D.N.Y. 1996).
[3] *In re* Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 238 (E.D.N.Y. 1998).
[4] *In re* Tableware Antitrust Litig., 241 F.R.D. 644, 648 (N.D. Cal. 2007).

Certification Standards

- Historical tendencies
  - "Rigorous analysis" requirement
    - Trial court may certify a class only after a "rigorous analysis" that each of the requirements of Rule 23 have been satisfied[1]
  - BUT countervailing qualifications swallow the rule:
    - View that courts must accept allegations in the complaint as true
      - *Eisen* said that courts did not have authority to conduct a preliminary inquiry into the merits[2]
      - Most predicate facts for class certification are also relevant to the merits
    - Need to show only there is a method of common proof, not make the proof
      - "At this stage in the proceedings, the Court only must find that plaintiffs have set forth a valid methodology for proving antitrust impact common to the class, not that they will prove it."[3]
    - View that impact could be presumed from the allegations of horizontal price-fixing[4]

[1] General Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982).
[2] Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177 (1974).
[3] *In re* Magnetic Audiotape Antitrust Litig., No. 99 CIV. 1580(LMM), 2001 WL 619305, at *6 (S.D.N.Y. June 6, 2001).
[4] *See* Bogosian v. Gulf Oil Co., 561 F.2d 434 (3d Cir. 1977).

Certification Standards

- Historical tendencies
  - Contributing factors
    - View that courts could not engage in weighing conflicting expert evidence ("battle of the experts")
      - Weighing of evidence committed to trier of fact
    - View that class actions were to be favored, so that the quantum of proof on the Rule 23 elements were corresponding weak
      - Second Circuit, for example, required only "some showing" of compliance with the Rule 23 requirements and accepted plaintiff's expert reports as long as they were not "fatally flawed"

[1] Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177 (1974).
[2] *In re* Magnetic Audiotape Antitrust Litig., No. 99 CIV. 1580(LMM), 2001 WL 619305, at *6 (S.D.N.Y. June 6, 2001).

Certification Standards

- Modern trends
  - Courts increasingly conducting preliminary examination of facts and not merely accepting complaint allegations as true[1]

    > "Class certification is an especially serious decision, as it 'is often the defining moment in class actions (for it may sound the "death knell" of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of the defendants).'"[2]

  - *Wal-Mart* (2011)
    - Makes clear that the party seeking certification must *affirmatively demonstrate* on the record that each requirement of Rule 23 is satisfied [3]
    - "Rigorous analysis" increasingly requiring:
      - Evidence (e.g., affidavits, documents, or testimony) sufficient to make a determination that each Rule 23 requirement has been met , and
      - Resolution of all legal or factual disputes relevant to Rule 23 by a preponderance of the evidence to make findings that each Rule 23 requirement is met or is not met

[1] *See, e.g.*, In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).
[2] *In re* Constar Int'l Inc. Sec. Litig., 585 F.3d 774, 780 (3d Cir. 2009) (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001)).
[3] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 (2011); *see In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244 (D.C. Cir. 2013).

Certification Standards

- Modern trends
  - Courts increasingly willing to weigh evidence (including expert evidence) to resolve factual disputes on Rule 23 requirements[1]
    - Obligation to make determinations on Rule 23 elements exists even if
      - the element is identical to a merits issue, or
      - The determination involves issues of credibility
    - But—
      - "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[2]
      - Factual findings are only preliminary and not binding on the merits

[1] *See, e.g.*, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 249 (D.C. Cir. 2013); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).
[2] Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194-95 (2013).

Certification Standards

- Modern trends
  - Courts of appeal increasingly requiring district courts that grant certification to make "findings"
    - Two types of findings:
      - Written findings that the requirement of Rule 23 have been satisfied
      - Written findings of the factual predicates of the findings that the Rule 23 requirements have been satisfied
        - BUT district court's findings, while conclusive with respect to class certification, do not bind the fact-finder on the merits
    - Basis
      - Arguably required by Rule 23 (especially in Rule 23(b)(3) class actions)
      - Necessary for appellate review
        - Some courts of appeal hold that the failure to provide findings and a reasoned analysis is grounds for summary reversal

Certification Standards

- Modern trends
  - Courts increasingly requiring plaintiffs to show predicate facts by a "preponderance of the evidence"[1]
    - That is, considering all materials in the class certification record, "the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23"[2]
    - *Query*: Is this the right standard?
      - Or should the standard be more like that in summary judgment: Has the plaintiff adduced sufficient evidence to permit the trier of fact to find the element satisfied?
      - For predominance: Has the plaintiff adduced sufficient evidence to show that each element of the violation for each class member can be proved by common proof?
  - Still not permitted
    - Analysis of the merits to determine whether the case is sufficiently meritorious to warrant class action treatment, or
    - In the language of Rule 23, whether the strength of the case on the merits makes class action treatment superior to other means of resolution

[1] *See, e.g.*, Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008); *In re* Currency Conversion Fee Antitrust Litig., MDL No. 1409, 2010 WL 305448 (S.D.N.Y. Jan. 22, 2010).
[2] *Hydrogen Peroxide*, 552 F.3d at 320.

Certification Standards

- No preclusive effect of certification factual findings on merits
  - The district court's findings, while conclusive with respect to class certification, do not bind the fact-finder on the merits[1]
    - In this sense, factual findings in a class certification proceeding are analogous to factual findings in a preliminary injunction proceeding

[1] *See, e.g.*, Alaska Elec. Pension Fund v. Flowserve Corp., 572 F.3d 221, 229 (5th Cir. 2009); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 24 (1st Cir. 2008); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 38 (2d Cir. 2006), *decision clarified on denial of reh'g* 483 F.3d 70 (2d Cir. 2007); Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004).

Expert Testimony in Class Certification

- Usually an essential part of the evidence on both sides on impact and damages
  - But impact can also be shown through nonexpert evidence
  - Indeed, sufficient lay evidence can carry the day on impact even if the expert testimony is rejected by the court

Expert Testimony in Class Certification

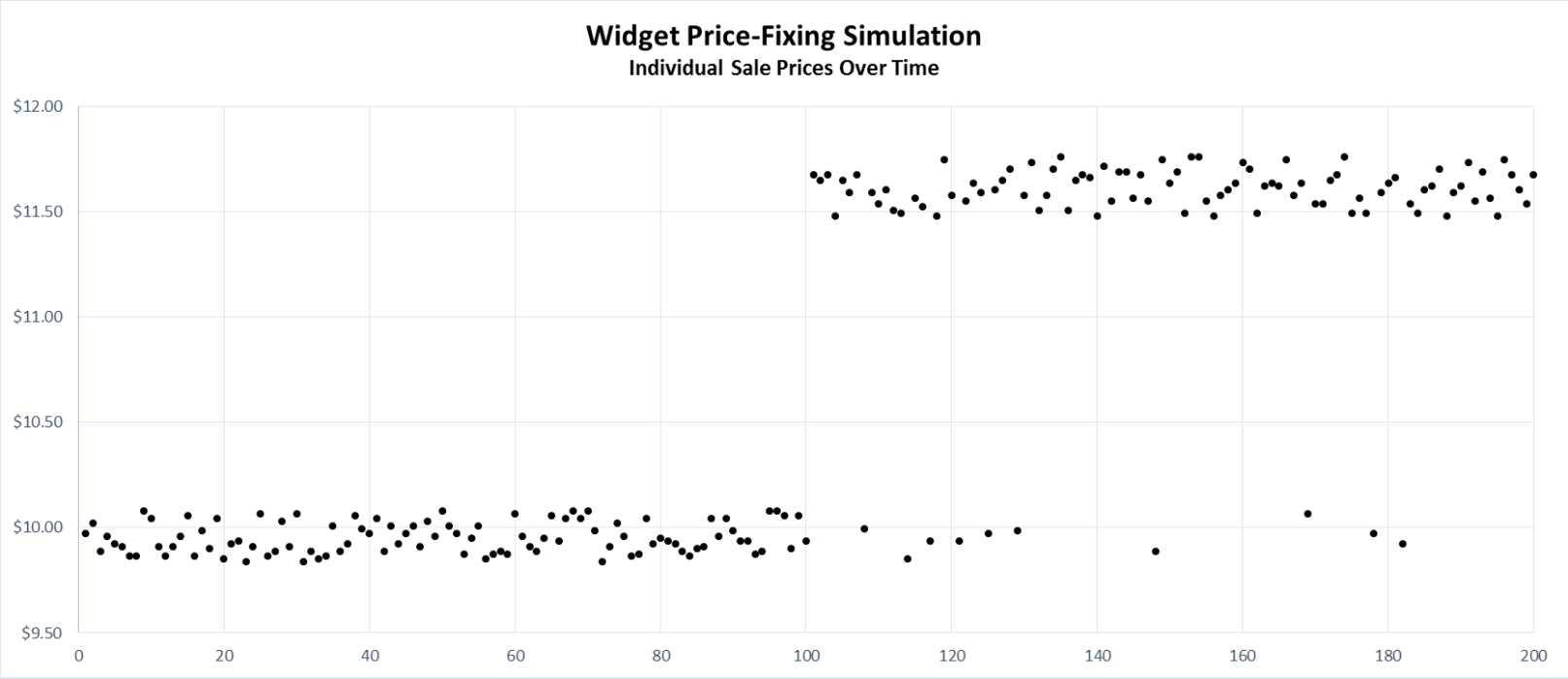
- Usual routine
  - Plaintiff's expert
    - Proposes a method of generalized proof
    - Usually appeals to standard damages methods (e.g., "before-and-after", yardstick)
    - In most cases, invokes regression analysis to take into account individual factors
      - Courts typically reject averaging techniques that suppress individual treatment (e.g., average overcharge to show impact or damages
  - Defendant's expert
    - Attacks reliability of plaintiff expert's evidence: May contend that—
      - Expert failed to show that proposed methods can provide common proof in the specific circumstances of the case
      - Expert applied methods too superficially to be reliable
    - Proposes own analysis to show that there is either—
      - No reliable classwide method of proof to show impact and damages and therefore individual questions predominate, *or*
      - A proper classwide analysis shows that there is no impact or damages (rarely used)

Expert Testimony in Class Certification

- Typical methods of common proof
  - "Before and after" models
    - Compares actual prices over time in the market before (or after) the alleged collusion with actual prices in the market during the collusive period
    - Assumes that prices in the collusive period in the absence of price-fixing can be estimated using the factors that determined the prices in the nonconclusive period
  - Yardstick models
    - Compares actual prices in the market with the alleged collusion with actual prices in a "comparable" market that did not experience the alleged collusion
    - Assumes that prices in the collusive market in the absence of price-fixing can be estimated using the factors that determined the prices in the nonconclusive market
    - *Key question*: How a pick a comparable nonconclusive market to act as the benchmark?

Expert Testimony in Class Certification

- *Example 1*: Before and after method applied to price fixing
  - Plaintiffs allege that defendant-manufacturers to conspired to raise the markup of widgets over the cost of goods sold (COGS) from 20% in the preconspiracy period to 40% in the postconspiracy period



Expert Testimony in Class Certification

- *Example 1*: Before and after method applied to price fixing (con't)
  - Given this theory and if we know the COGS for each sale, we can regress price against COGS in the nonconspiracy period to obtain an equation for the expected noncollusive price:

$$price_t = \alpha + \beta COGS_t + \varepsilon_t \text{ for } t = 1,...,100 \text{ (the alleged nonconspiratorial sales)}$$

$$E(price_t) = 0 + 1.2COGS_t \text{ (from running the regression equation)}$$

  - We can do the same for the conspiracy period:

$$price_t = \alpha + \beta COGS_t + \varepsilon_t \text{ for } t = 101,...,200 \text{ (the alleged conspiratorial sales)}$$

$$E(price_t) = -0.5871 + 1.4COGS_t \text{ (from running the regression equation)}$$

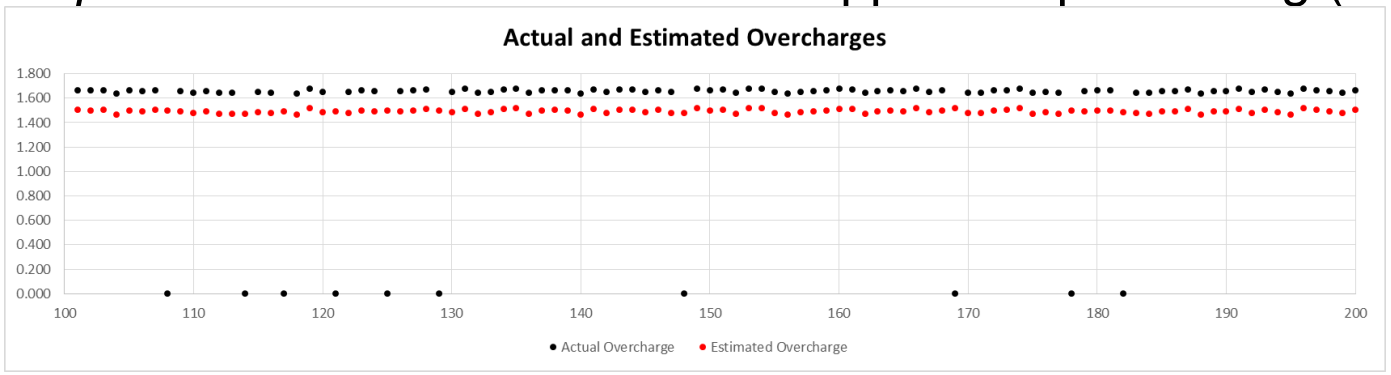
  - The difference between the expected conspiratorial price (using the first set of coefficients) and the expected nonconspiractorial price is the estimated overcharge on the sales in the conspiratorial period:

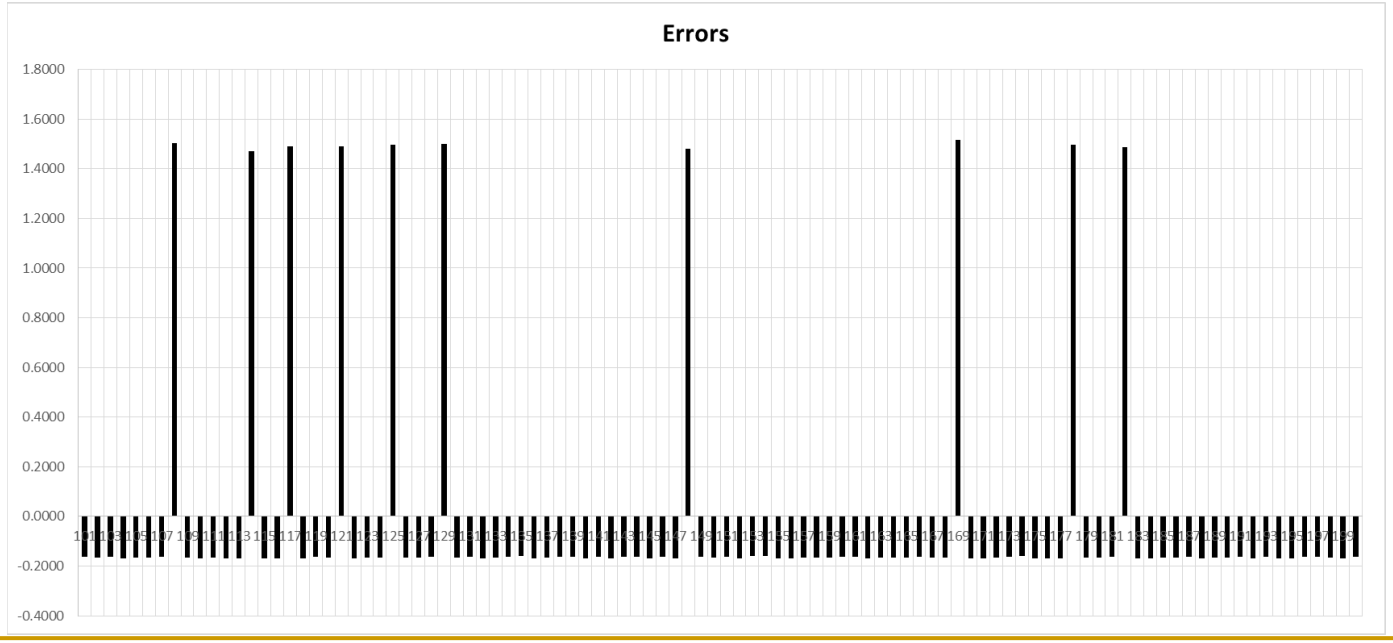
$$\begin{aligned} \mathrm{E}(\text{Overcharge}_t) &= (-0.5871 + 1.4COGS_t) - (1.2COGS_t) \\ &= -0.5871 + 0.2COGS \end{aligned}$$

    - With an average COGS = 8.3, this indicates a *positive* estimated overcharge of 1.5 (suggesting common impact)
    - The estimated overcharge equation also provides a classwide method of estimating individual damages for each class member

Expert Testimony in Class Certification

- *Example 1*: Before and after method applied to price fixing (con't)





Expert Testimony in Class Certification

- *Example 1*: Before and after method applied to price fixing (con't)
  - Conclusions
    - Although the average estimated overcharge is positive, the error analysis (and even visual inspection of the first chart) tells us that something is wrong
      - *Impact*: The putative class may contain members that did not suffer impact (i.e., were not individually damaged by the defendants' alleged antitrust violation)
      - *Damages*: Some putative class members have large excess estimated damages, while the damages of most putative class members are underestimated
    - Implications
      - Something is wrong with the economic technique, AND/OR
      - Something is wrong with the class
    - Solution
      - Economic technique is theoretically sound
      - Look to find a reason for the outliers and redefine the class to exclude them
        - The outliers may have entered into long-term contracts with their supplier during the preconspiracy period that protected them in the conspiracy period.

Expert Testimony in Class Certification

- *Example 2*: Before and after method applied to price fixing
  - Same as Example 1, except that we know only the prices, not the COGS for the individual transactions or that the conspiracy was a COGS markup
    - Example 1 was dramatically oversimplified
  - Need a different regression technique:

$$price_t = \alpha + \beta Dummy_t + \gamma Common\_factors_t + \varepsilon_t \text{ (for t = 1, ..., 200)}$$

where $Dummy_t = 0$ for t = 1, . . ., 100 (the nonconspiracy period)

$= 1$ for t = 101 . . ., 100 (the conspiracy period)

The *Dummy* variable picks up the *estimated average effect* of the conspiracy on price.

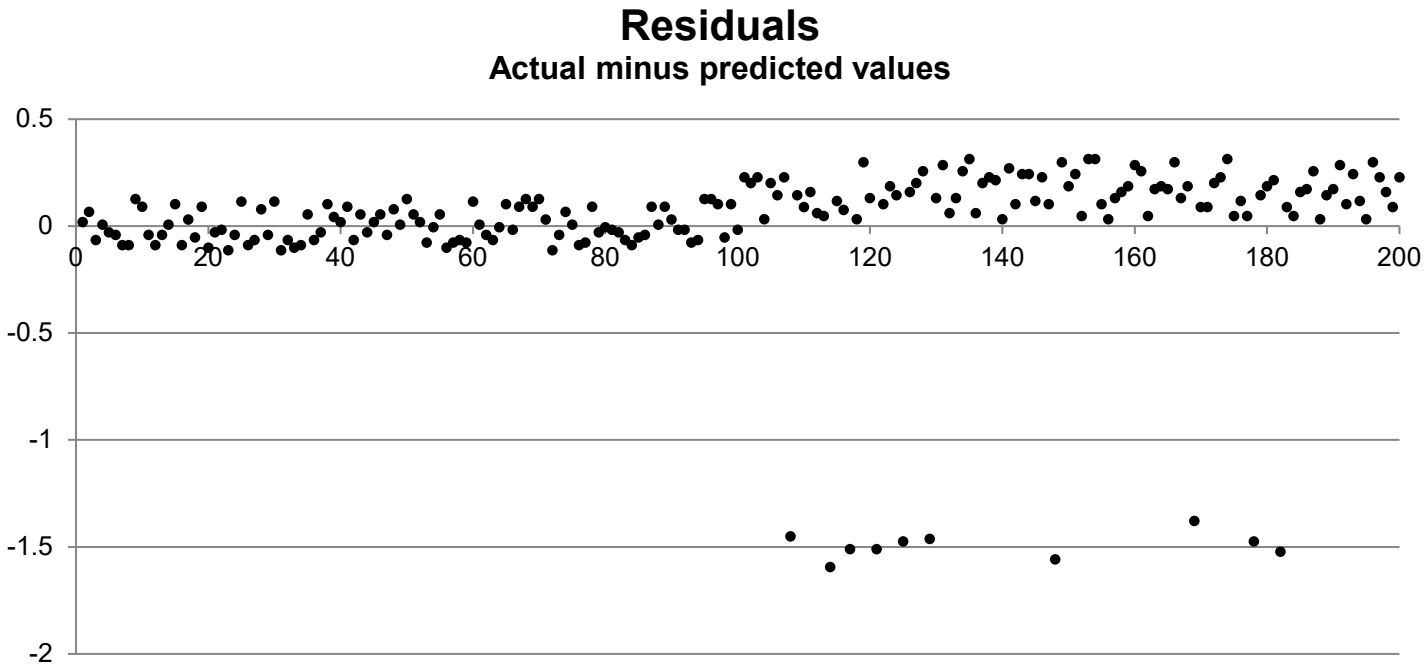
Running the regression (without the common factors):

$$E(price) = 9.95 + 1.50 Dummy + \gamma Common\_factors$$

So that the estimated average nonconspiratorial price is 9.95 and the estimated average conspiracy price is 11.45—again suggesting positive average impact.

Expert Testimony in Class Certification

- *Example 2*: Before and after method applied to price fixing (con't)



- Residuals are just another way at looking a errors
- Outliers again suggest that there is a problem in class definition
- Excluding the outliers from the class definition provides confirmation of common impact
- But even without the outliers, note the dispersion in the residuals. Is this technique "good enough" to provide a class-wide method for quantifying damages?
  - Almost certainly yes

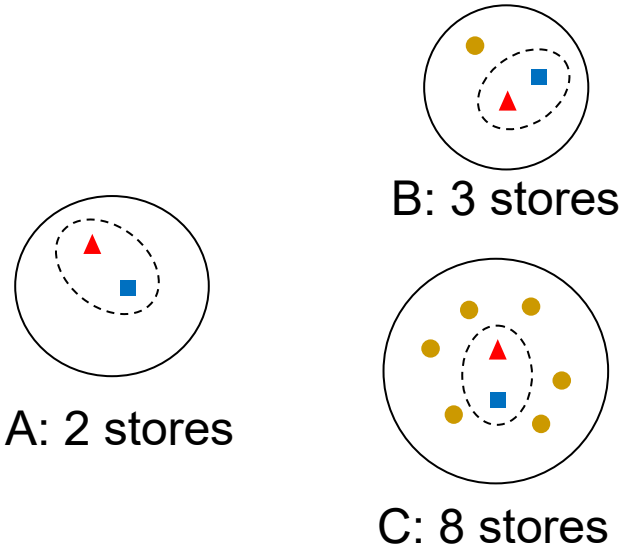
Expert Testimony in Class Certification

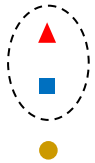
- Yardstick method applied to a merger
  - Run regression analysis of price against the number of stores across all three geographic areas

    $$p_i = \alpha + \beta n_i + O_i$$

    where

    p_i = price in area i
    n_i = number of stores in area I
    O_i = other things in the regression
  - Estimate coefficients and calculate predicted value t_i for the price in each area with one less competitor.
  - Then $t_i - p_i > 0$ shows impact and $t_i - p_i$ is the overcharge in each area





Merging firms

Third-party competitors
(all independent of each other)

Caution: This analysis is *very* simplistic and for illustration purposes only.

Expert Testimony in Class Certification

- Proving impact and damages formulaically—Questions
  1. Is it sufficient for plaintiffs to demonstrate that the average class member suffered harm according to a formula that analyzes a subset of transaction data, calculates an average overcharge from that subset, and then assumes that the average overcharge tainted all other transactions in the market?
     - In *Tyson Foods*, the Supreme Court held that if the statistically analysis would have been admissible and could have sustained a reasonable jury finding as to the question posed (here, the overcharge) as to each putative class member's claim, if brought as an individual action, then the statistical analysis is a permissible means of establishing the answer on a classwide basis in a class action[1]
       - The Thomas dissent agreed with the principle, although it disagreed as to its applicability in the case
       - The dissent also drew a distinction, common in antitrust law, between proof of liability and proof of the amount of damages: proof of liability should be relatively demanding, but once liability is established a lesser standard may apply to proof of the amount of damages so that a liable defendant is not allowed to escape payment of damages

[1] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1047 (2016).

Expert Testimony in Class Certification

- Proving impact and damages formulaically—Questions
  2. Given that the Rules Enabling Act states that Rule 23 cannot alter fundamental burdens of proof and standing requirements, can a court certify a class where most but not all class members suffered harm?[1]
     - The *Tyson Foods* Court ducked answering—
       - Since the petitioner abandoned the question of whether a class could be certified when it included uninjured members who had no legal right to damages, the Court did not address it[2]
       - That said, the Court did observe that since no distribution plan had been approved for the class, the question of whether a class could be certified when it contained members that could not prove they were injured was not ripe[3]
       - The Court also observed that it was important to ensure that uninjured class members "do not contribute to the size of any damage award and...cannot recover such damages"[4]
       - Most lower courts have held that the presence of a de minimis number of uninjured members will not preclude certification of the class, although the named plaintiff must show it has a means of isolating those uninjured members at trial.[5]

[1] *See* Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.").
[2] *Id*. at 1050. [3] *Id*. [4] *Id*. at 1049.
[5] *See In re* Nexium Antitrust Litig., 777 F.3d 9, 24-25 (1st Cir. 2015) (collecting authorities).

Expert Testimony in Class Certification

- *Daubert* and Rule 702 of the Federal Rules of Evidence
  - Background: Expert testimony as evidence
    - General rule
      - A witness may not testify to a matter on which the witness lack personal knowledge.[1]
    - *Exception*:
      - Rule 702 of the Federal Rules of Evidence permits expert opinion testimony at trial where the testimony is—
        - provided by someone who is "qualified" by knowledge, skill, experience, training, or education;
        - able to assist the trier of fact to understand the evidence or to determine a fact in issue (relevance);
        - based upon sufficient facts or data,
        - the product of reliable principles and methods, and
        - the result of proper application by the witness has applied the principles and methods reliably to the facts of the case[2]
      - Burden of proof
        - The party offering the expert opinion testimony must prove each of the rule 702 requirements by a preponderance of the evidence[3] (NB: The burden is to prove reliability, *not* correctness)

[1] Fed. R. Evid. 602.
[2] Amended in 2000 to incorporate the principles of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
[3] *See In re* Blood Reagents Antitrust Litig., No. 09-MD-2081, 2017 WL 3096168 (E.D. Pa. July 19, 2017).

Expert Testimony in Class Certification

- *Daubert* and Rule 702 of the Federal Rules of Evidence
  - Background: Expert testimony as evidence (con't)
    - Many courts group the Rule 702 requirements using three categories:
      1. Qualifications
         - Captures the requirement that the expert is someone who is "qualified" by knowledge, skill, experience, training, or education to testify on the subject matter
      2. Reliability
         - Captures the requirements that the testimony is
           - based upon sufficient facts or data,
           - the product of reliable principles and methods
           - the result of proper application by the witness has applied the principles and methods reliably to the facts of the case
         - The idea here is that "the expert's opinion must be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his or her belief."[1]
      3. Fit
         - Captures the requirements that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue
    - A motion to exclude expert testimony for failure to satisfy Rule 702 is commonly called a "*Daubert* motion"

[1] *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 (3d Cir. 1994); *accord In re* Blood Reagents Antitrust Litig., No. 09-MD-2081, 2017 WL 3096168, at *2 (E.D. Pa. July 19, 2017).

Expert Testimony in Class Certification

- *Daubert* and Rule 702 of the Federal Rules of Evidence
  - Expert testimony in class certification proceedings
    - Technically, there is no requirement that courts only consider matters admissible in evidence at trial in class certification
      - Rule 702 does not explicitly apply to class certification proceedings
    - Until recently, courts declined to resolve any conflicts between the plaintiffs' and defendants' respective experts, leaving the "battle of experts" to be decided by the trier of fact
      - Which rarely happened, since very few antitrust class actions are tried on the merits
    - But current case law requires courts in a certification proceeding to resolve expert disputes, even about the merits, if necessary to making a finding whether a Rule 23 requirement has been satisfied in the case
    - This raises the question of what standard expert testimony must satisfy in order to be included as part of the record in the certification proceeding

Expert Testimony in Class Certification

- *Daubert* and Rule 702 of the Federal Rules of Evidence
  - Expert testimony in class certification proceedings
    - Courts are increasingly requiring that experts be qualified and their testimony be reliable
      - Keep in mind that the testimony is on the ability of the plaintiff to present a reliable method of classwide proof of an element of the claim, *not* to prove the element
      - In *Wal-Mart*, the Supreme Court indicated in dictum that the district court must conduct some reliability assessment akin to a *Daubert* inquiry[1]
      - Several circuits have now indicated that *Daubert* applies at the certification stage[2]
        - "Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot 'prove' that the Rule 23(a) prerequisites have been met 'in fact,' nor can it establish 'through evidentiary proof' that Rule 23(b) is satisfied."[3]
      - Other courts have adopted a more nuanced approach: "[A] focused *Daubert* analysis which scrutinize[s] the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence."[4]

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354 (2011).
[2] *See, e.g.*, *In re* Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812 (7th Cir. 2012).
[3] *Blood Reagents*, 783 F.3d at 187; *see In re* Hyundai & Kia Fuel Econ. Litig., 881 F.3d 679, 692 (9th Cir. 2018)
[4] *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 613, 614 (8th Cir. 2011).

Expert Testimony in Class Certification

- *Daubert* and Rule 702 of the Federal Rules of Evidence
  - Expert testimony in class certification proceedings (con't)
    - Courts are increasingly requiring that experts be qualified and their testimony be reliable
      - Technically, what would seem to be required is a finding that the expert testimony proposed by the named plaintiffs as classwide proof will be admissible under Rule 702 when adduced at trial, not that it satisfied Rule 702 at the class certification stage
        - But this still begs of the question of how confident the court is that the expert testimony will in fact be admissible at trial
        - In Blood Reagents, the Third Circuit expressly rejected the lower court's reliance on expert testimony at the class certification stage that "could evolve" into admissible evidence at trial[1]

[1] *In re* Blood Reagents Antitrust Litig., 783 F.3d 183, 186 (3d Cir. 2015) ("[W]e believe *Behrend's* 'could evolve' formulation of the Rule 23 standard did not survive *Comcast*.").

Expert Testimony in Class Certification

- *Daubert* and Rule 702 of the Federal Rules of Evidence
  - Assessing the sufficiency of plaintiff expert's testimony
    - So what is required? Some possibilities (in ascending order of development)—
      - The mere identification of the technique to be employed (e.g., "before-and-after" method, using regression analysis) but without results[1]
      - Some examples of possible model specifications (e.g., some possible regression specifications), but without running the models
      - Actual runs of the model demonstrating the model's workability, but not resolving whether the expert's model actually provides an acceptable means of common proof on the merits[2]
      - Completed analysis ready for presentation at trial (although perhaps subject to further refinement)
    - Modern courts are increasingly requiring models to reach at least the third stage of development

[1] *In re* Ready-Mixed Concrete Antitrust Litig., 261 F.R.D. 154 (S.D. Ind. 2009) (finding that plaintiff's expert proposed a reliable method for showing common impact and damages and denying defendants' motions to exclude).
[2] *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82 (D. Conn. 2009) (rejecting defendants' criticism that the plaintiff expert's regression omitted key variables as a premature and unnecessary inquiry into the merits).

Expert Testimony in Class Certification

- Challenges to the named plaintiffs' expert testimony at certification
  - *Type 1 challenge*: The expert testimony is fundamentally flawed and therefore unreliable
    - If the expert testimony is unreliable, it cannot be used to establish that there will be a method of classwide proof at trial
    - This type of challenge requires resolution before the court may rely on the testimony in certifying the class, even if the resolution touches upon the merits of the case[1]
    - *Example*: Model detects impact for class members that undisputedly cannot have suffered antitrust injury[2]
    - *Example*: Model omits critical explanatory variable(s)

[1] *See In re* Evanston Northwestern Healthcare Corp. Antitrust Litig., 268 F.R.D. 56, 86-87 (N.D. Ill. 2010) (finding plaintiff failed to establish a reliable method of classwide proof of impact in light of defendants' expert challenge to plaintiffs' expert analysis).
[2] Rail Freight Fuel Surcharge, 725 F.3d at 254 ("[W]e have no way of knowing the overcharges the damages model calculates for class members is any more accurate than the obviously false estimates it produces for legacy shippers.").

Expert Testimony in Class Certification

- Challenges to the named plaintiffs' expert testimony at certification
  - *Type 2 challenge*: The expert testimony is not fundamentally wrong but should be rejected in light of the defendants' "superior" contravening analysis
    - If the plaintiff's expert makes out a prima face case that the element of claim in question can be shown by classwide proof, the court may rely on this testimony to certify the class and allow the jury to resolve the dispute when challenged methodology is employed to prove the merits at trial.[1]
    - *Example*: Model fails to include all statistically significant explanatory variables, although it includes the most important ones
  - *Query*: What is the dividing line between a Type 1 and a Type 2 challenge?
    - This is a particular problem in challenges to model specification (e.g., omitted variables, wrong variables): When is a model specification so fundamentally wrong that it lacks probative value?

[1] *See, e.g.*, Dial Corp. v. News Corp., 314 F.R.D. 108, 115-17 (S.D.N.Y. 2015); *In re* Cathode Ray Tube (CRT) Antitrust Litig., MDL No. 1917, 2013 WL 5391159, at *8 (N.D. Cal. Sept. 24, 2013).

Expert Testimony in Class Certification

- Challenges to the named plaintiffs' expert testimony at certification
  - *Example*: Currency Conversion Fee Antitrust Litigation[1]
    - Expert analyses
      - Plaintiff's expert concluded in that in the absence of a conspiracy banks would not have charged a fee—hence, class-wide impact
      - Defendant's expert concluded that the "but for" fee in a world without the conspiracy would be the same as the current fee—hence, no impact
    - Court
      - Since both expects used the same method the court found that impact could be resolved using class-wide proof
        - The common methodology involved comparing actual prices to those that would exist in a "but for" world without the alleged conspiracy, not the particular economic tools to determined the "but for" price
        - Not necessary to resolve which expert was correct, since it is only the method not the result that is in issue
          - The question on class certification is whether the plaintiff's methodology would prove common impact *if* it exists, not that common impact in fact exists
        - Also, court noted that it was irrelevant that different banks may have joined the conspiracy at different times (so that the timing of the overcharge and hence the class members affected might differ over time), since by joining the conspiracy each bank became jointly and severally liable for all of the conspiratorial damages, including the damages inflicted by the conspiracy prior to the bank's participation

[1] *In re* Currency Conversion Fee Antitrust Litig., MDL No. 1409, 2010 WL 305448, at *13 (S.D.N.Y. Jan. 22, 2010).

Class notice of class certification

- Only members of a Rule 23(b)(3) class have a right to reasonable notice of class certification and the opportunity to opt out of the class
  - The court has discretion to order reasonable notice and an opt-out opportunity for (b)(1) and (b)(2) classes (so-called mandatory classes)
- Rule 23(b)(3) notice must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"[1]

[1] Fed. R. Civ. P. 23(c)(2).

Class notice of class certification

- Means of notice
  - May variously include:[2]
    - Individual notice
      - Notice by first-class mail
      - Email notice
      - Mailed notice upon request
    - Publication notice
      - An informative settlement website
      - A telephone support line
      - An online campaign
      - Digital banner advertisements (google, Yahoo, Facebook, Instagram)
      - Sponsored search listings (Google, Yahoo and Bing)

[1] Fed. R. Civ. P. 23(c)(2).

[2] *See, e.g.*, *In re* Lithium Ion Batteries Antitrust Litig., No. 13MD02420YGRDMR, 2020 WL 7264559, at *17 (N.D. Cal. Dec. 10, 2020) (discussing settlement class notice).

Class notice

- Must state:
  - the nature of the action;
  - the definition of the class certified;
  - the class claims, issues, or defenses;
  - that a class member may enter an appearance through an attorney if the member so desires;
  - that the court will exclude from the class any member who requests exclusion;
  - the time and manner for requesting exclusion; and
  - the binding effect of a class judgment on members under Rule 23(c)(3)[1]

[1] Fed. R. Civ. P. 23(c)(2).

Special Problem: Constitutional Standing

- General requirement
  - Arises from the Article III case or controversy requirement
  - Threshold requirement in any case[1]
  - Has three "irreducible" elements:[2]
    - Injury-in-fact—an invasion of a legally protected interest that is
      - concrete and particularized, and
      - actual or imminent as opposed to conjectural or hypothetical
    - Causation
      - A causal connection between the injury and the challenged conduct, that is, the injury must be fairly traceable to the defendant's action
    - Redressability
      - It must be "likely" rather than "speculative" that a decision by the court in favor of the plaintiff will redress the plaintiff's injury

[1] Warth v. Seldin, 422 U.S. 490, 498 (1975).
[2] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Special Problem: Constitutional Standing

- Application in class actions
  - Named plaintiff
    - Must have constitutional standing as to its own individual claims[1]
    - Cannot rely on the standing of absent class members[2]
  - Query
    - Can a named plaintiff assert claims of absent class members under state statutes in jurisdictions where named plaintiff could not personally assert a claim?
    - *Example*: In an indirect purchaser class action in federal court, can a named plaintiff asserting a personal claim under Florida law assert a claim for absent class members under California law when the named plaintiff made no purchases subject to California law?
    - The emerging view
      - For each claim under a state's antitrust law, there must be at least one named plaintiff with Article III standing to assert that claim in the named plaintiff's individual capacity[3]

[1] Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40 n. 20 (1976).
[2] *Id*.
[3] See the cases cited in the slides on typicality.

Certification Order

- Timing
  - Court must determine "at an early practicable time" after the class action is filed
    - Prior to 2003, courts were required to decide class certification "as soon as practicable after commencement of an action"
  - The certification proceeding may be commenced by motion or sua sponte
- Contents
  - Must define the class and class claims, issues, or defenses[1]
  - Must appoint class counsel under FRCP 23(g)[2]

[1] Fed. R. Civ. P. 23(c)(1)(B).
[2] *Id*.

Certification Order

- "Amending" the class definition prior to class certification
  - Mechanics
    - Courts usually allow named plaintiffs to narrow the definition of the class in—
      - Amended complaints
      - The motion for class certification
    - Changes to expand the definition of the class can be treated more skeptically[1]
- Amending the class definition after class certification
  - May be amended at any time before final judgment[2]
    - Application timely whenever the factual developments within the litigation change in a way that the original certification unsound
    - Certified class may be decertified
    - Class definition may be changed

[1] *See, e.g.*, *In re* Capacitors Antitrust Litig., No. 17-MD-02801-JD, 2020 WL 6462393, at *4 (N.D. Cal. Nov. 3, 2020) (denying class certification).
[2] Fed. R. Civ. P. 23(c)(1)(C); *see* Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978) ("[A] district court's order denying or granting class status is inherently tentative.").

Certification Order

- Particular issues or subclasses
  - Court may limit action to particular issues[1]
  - Court may create subclasses with their own named representatives and own class counsel[2]
    - Employed to avoid typicality and adequacy of representation problems

      > Subclasses must be created when differences in the positions of class members require separate representatives and separate counsel.[3]

    - Each subclass must individually satisfy the Rule 23(a) and 23(b) requirements
    - Subclasses can be created after an initial grant of class certification if intraclass conflicts arise
- Class counsel
  - Certification order must appoint class counsel under FRCP 23(g)[3]
  - Interim class counsel, if one has been appointed, almost also are appointed class counsel

[1] Fed. R. Civ. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues.").
[2] *Id*. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.").
[3] Manual for Complex Litigation (Fourth) § 21.23 (2004).
[4] Fed. R. Civ. P. 23(c)(1).

Class Counsel

- Court must appoint class counsel[1]
  - "Class counsel must fairly and adequately represent the interests of the class."[2]
- Mandatory factors court must consider:[3]
  - The work counsel has done in identifying or investigating potential claims in the action;
  - Counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
  - Counsel's knowledge of the applicable law; *and*
  - The resources that counsel will commit to representing the class
  - NB: Court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class
- Multiple applicants
  - Court must appoint the qualifying applicant "best able to represent the interests of the class"[4]

[1] Fed. R. Civ. P. 23(g)(1). [2] *Id*. 23(g)(4). [3] *Id*. 23(g)(1)(C). [4] *Id*. 23(g)(2).

Class counsel

- Fiduciary duties
  - Class counsel owes a fiduciary duty to the class as a whole
  - *Query*: Class counsel also represents the named plaintiff in its individual capacity. Does class counsel owe a heightened fiduciary duty to the named plaintiff?
    - For example, does class counsel have an obligation to obey an instruction from the named plaintiff to reject a settlement that class counsel believes is in the best interest of the class as a whole?
  - *Rule*: Class counsel owes a duty to the class as a whole and not to any individual member of the class (including the named plaintiff)[1]
    - *Corollary*: Class counsel does not owe a particular duty to any group comprised of class members, such as class representatives, distinct from the duty owed to the class
    - "To hold otherwise would threaten one of the defining purposes of class actions—the consolidation of claims into one suit where a class of plaintiffs may speak with one voice."

[1] For an extended treatment, see Medical & Chiropractic Clinic, Inc. v. Oppenheim, 981 F.3d 983, 991 (11th Cir. 2020).
[2] *Id*. at 991.

Appeal

- Interlocutory appeals[1]
  - "Inherently interlocutory"
    - Orders granting or denying class certification are "inherently interlocutory" and hence not immediately reviewable under 28 U.S.C. § 1291[1]
  - Permitted by 1997 FRCP amendments
    - Before 1997, interlocutory appeals could only be brought when the district court certified the appeal under 28 U.S.C. § 1292(b) (very rare)
    - Most cases settled, so that there was little incentive or ability to bring an appeal as a matter of right after final judgment
  - May appeal either grant or denial of class certification
  - Petition must be filed within 14 days of court order
  - Certification is in the discretion of both the district court *and* the court of appeals
    - District court must certify the petition
    - Court of appeals must accept petition
  - Appeal does not automatically stay lower court proceedings

[1] Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 (1978); *accord* Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1706 (2017).
[2] Fed. R. Civ. P. 23(f).

Appeal

- Interlocutory appeals (con't)
  - Today, interlocutory appeals are rarely accepted
  - Three situations have emerged where appeals may be accepted:[1]
    1. *Death knell*: When the decision to certify is "questionable" and sounds the "death-knell" for the case on the merits, where the pressures for the defendant to settle are compelling independently of the merits of the plaintiffs' claims
    2. *Fundamental unsettled issue*: When the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review
    3. *"Manifest error"*: When the certification decision is "manifestly erroneous"
  - Voluntary dismissal with reservation of right to revive
    - Some plaintiffs, when denied the opportunity for an interlocutory appeal of the denial of class certification, have stipulated to a voluntary dismissal of their claims "with prejudice," but reserved the right to revive their claims should the court of appeals reverse the district court's certification denial.
    - Such a dismissal does not qualify as a "final decision" within the meaning of Section 1291 and therefore cannot be appealed under that section[2]

[1] *See In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 250 (D.C. Cir. 2013).
[2] Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1707 (2017).

Appeal

- Final appeals
  - Decision on certification may also be appealed as a matter of right after a final judgment
    - But these are very rare, since few antitrust class actions are tried to a final judgment on the merits[1]
  - Trend is to permit unnamed objectors may appeal as a matter of right without formally intervening[2]

[1] For an exception, see *In re* Urethane Antitrust Litig. (Dow Chem. Co. v. Seegott Holdings, Inc.), 768 F.3d 1245 (10th Cir. 2014).
[2] Devlin v. Scardelletti, 536 U.S. 1, 14 (2002) (Rule 23(b)(1); Fidel v. Farley, 534 F.3d 508, 512-13 (6th Cir. 2008) (Rule 23(b)(3)); Churchill Village, L.L.C., 361 F.3d 566, 572 (9th Cir. 2004) (same).

Appeal

- Standard of review
  - Abuse of discretion
    - When, as in class certification, decision turns on a variety of case-specific facts, *abuse of discretion* in light of the requirements of Rule 23 is the proper standard of review
      - District court is vested with discretion to make a decision of its choosing with certain bounds
      - District court's factual findings entitled to deference
      - Not subject to reversal within those bounds even if a reviewing court would have made a different decision or if the district court equally within its discretion could have found the other way
    - An abuse of discretion occurs when the trial court—
      - Adopts an incorrect legal rule
        - Review of proper legal rules is de novo and without deference
      - Relies upon a factor not legally cognizable under a proper legal rule
      - Omits consideration of a factor entitled to substantial weight under the rule
      - Makes a clear error in weighing the factors, *or*
      - Rests its conclusions on clearly erroneous factual determinations

Settlements and Dismissals

- Settlement classes
  - Settlements in class actions often occur before a class has been certified
    - A class that is first certified after a proposed class settlement is called a "settlement class"
  - A settlement class has to satisfy the Rule 23 requirements
    - But since there will be no trial, manageability concerns are not present
  - Incentives
    - Plaintiff
      - Make the class as large as possible to maximize the class recovery (the "settlement fund") (which, as we shall see later, is likely to maximize class counsel's attorneys' fees)
    - Defendant
      - While the defendant wants to minimize the size of the class when it faces a possible loss at trial, it wants to maximize the size of the class for claim preclusion purposes once a settlement amount is reached
    - Obviously, there is some room for bargaining
      - The parties may agree to increase the size of the proposed class and the settlement fund, but decrease the amount each class member will receive

Settlements and Dismissals

- Settlement classes
  - Relation to direct action plaintiffs
    - In an increasing number of cases, individual private actions will be filed by putative class members alongside a class action
    - If the class action settles, the settlement will bar a pending individual action unless the private plaintiff had opted out of the class in the prior litigation[1]
      - Rule 6(b)(1) of the Federal Rules of Civil Procedure provides:

> When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
>
> (B) on motion made after the time has expired if the party failed to act because of excusable neglect.[2]

[1] *See In re* Processed Egg Prods. Antitrust Litig., 130 F. Supp. 3d 945, 949-50 (E.D. Pa. 2015) (but granting motion to extend time for individual private plaintiff to opt out of the class were its failure was the result of excusable neglect).
[2] Fed. R. Civ. P. 6(b)(1).

Settlements and Dismissals

- Settlement amounts
  - WDC: My impression—based on casual impressions and not an formal analysis—is that antitrust class actions often settle at 10% to 20% of claimed single damages (or 3.3% to 6.6% of trebled damages)
    - A survey of 71 settled cartel cases found—
      - An unweighted average settlement of 37% of claimed single damages
      - A sales-weighted average settlement of 19% of claimed single damages[1]
  - Courts appear comfortable with these settlement percentages
    - Look at Judge Rogers said in approving class counsels' fees in *Lithium Battery*:

> Here, in light of the circumstances of the case, the *results achieved for the class are excellent*. Based upon IPPs' estimates, the common fund of the settlement equates to *11.7 percent of the single damages* a nationwide class would have sustained during the eleven-and-a-half-year class period. Further, the litigation entailed a great deal of risk and cost shouldered by counsel on a contingency basis for seven years.[1]

[1] John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less than Single Damages*, 100 Iowa L. Rev. 1997, 1998 (2015).
[2] *In re* Lithium Ion Batteries Antitrust Litig., No. 13-MD-02420 YGR (DMR), 2020 WL 7264559, at *20 (N.D. Cal. Dec. 10, 2020) (emphasis added).

Settlements and Dismissals

- Notice
  - Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal"[1]
  - Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and participate in the proceedings[2]
    - Must be presented in a neutral manner
    - Must describe the settlement fund and the plan of allocation
    - Need not detail the nature of objections
    - Need not analyze the expected value of the litigation is pressed to the merits

[1] Fed. R. Civ. P. 23(e)(1).
[2] Rodriguez v. West Publishing Corp., 563 F.3d 948, 962 (9th Cir. 2009).

Settlements and Dismissals

- Rule 23(b)(3) opt-out right
  - In an action previously certified under Rule 23(b)(3), the court "may" refuse to approve a settlement unless it affords a new opt-out opportunity for remaining class members[1]
    - Settling parties almost always provide for this right
- Court approval
  - "If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is *fair, reasonable, and adequate*."[2]
    - Not reasonable if a product of collusion
    - The parties seeking approval must file a statement identifying any agreement made in connection with the proposal[3]
  - Decision to grant or deny certification of a settlement class lies within the discretion of the trial court
    - Discretion should be exercised in light of the general policy favoring settlement

[1] Fed. R. Civ. P. 23(e)(4).
[2] *Id*. 23(e)(2).
[3] *Id*. 23(e)(3).

Settlements and Dismissals

- Court approval
  - Factors to consider
    - Procedural fairness
      - Conduct of the negotiations that led to the settlement
    - Substantive fairness
      - Complexity, expense and likely duration of the litigation
      - Reaction of the class to the settlement
      - Stage of the proceedings and the amount of discovery completed
      - Risks of establishing liability
      - Risks of establishing damages
      - Risks of maintaining the class action through the trial
      - Ability of the defendants to withstand a greater judgment
      - Range of reasonableness of the settlement fund in light of the best possible recovery
      - Range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation[1]

[1] *In re* Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 510 (E.D.N.Y. 2003), *aff'd*, 396 F.3d 96 (2d Cir. 2005). The litany varies in articulation from circuit to circuit.

Settlements and Dismissals

- Court approval (con't)
  - Factors to consider
    - Availability of treble damages
      - Courts do not traditionally factor treble damages into the calculus for determining a reasonable settlement value[1]
      - Courts generally assess fairness on how it compensates class members for putative actual injuries
      - In exceptionally strong cases, however, it may be appropriate for a district court to consider treble damages

[1] Rodriguez v. West Publishing Corp., 563 F.3d 948, 964 (9th Cir. 2009); *but see In re* Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 210 n. 30 (D. Me. 2003) (questioning rationale).

Settlements and Dismissals

- Emerging conflicts
  - If a conflict of interest emerges in the settlement proceedings with some but not all named plaintiffs, the court may rely on the nonconflicted named plaintiffs and approve an otherwise acceptable settlement[1]
- Objections[2]
  - Any class member may object to the proposal if it requires court approval
  - The objection may be withdrawn only with the court's approval
    - This is to prevent the class counsel or the defendant from "buying off" the objecting class member
- Interpretation
  - Settlement agreements are contracts and must be construed according to general principles of contract law
    - When interpreting unambiguous contracts, the terms must be afforded their plain meaning
  - The interpretation of a contract is a legal matter for the court

[1] *Rodriguez*, 563 F.3d at 961.
[2] Fed. R. Civ. P. 23(e)(5).

Settlements and Dismissals

- Appeal
  - Objectors may appeal the final approval of the settlement as a matter of right
    - In large class actions, multiple absent class members may raise objections and there may be multiple appeals from the order finally approving the settlement[1]
    - In some cases, the same objector may file more than one appeal in the same case
      - Typically, one against the final settlement approval and one against the award of attorneys' fees
  - Settlement approval reviewed for abuse of discretion
    - To be reviewed as a whole, not individually by component parts

[1] *See, e.g.*, Blessing v. Sirius XM Radio Inc., No. 1:09-cv-10035 (S.D.N.Y. Dec. 7, 2009) (12 separate appeals filed in the Second Circuit by different objectors); *In re* Online DVD Rental Antitrust Litig., No. 4:09-md-02029 (N.D. Cal. Apr. 13, 2009) (6 appeals filed in the Ninth Circuit by different objectors); *In re* TFT-LCD (Flat Panel) Antitrust Litig., MDL No. 1827, No. 3:07-md-1827 (N.D. Cal. Apr. 20, 2007) (5 objector appeals were filed from the July 11, 2012, partial settlement and 8 appeals were filed from the March 29, 2013, partial settlement).

Settlements and Dismissals

- Releases
  - Definition
    - A contract that estops the contracting plaintiff from bringing a “released” claim against the contracting defendant
  - Claims outside the settling action
    - Releases may cover claims not presented in the complaint, so long as the released conduct arises out of the same factual predicate as the settled conduct
      - This prevents class members from subsequently asserting claims relying on a different legal theory but predicated on the same facts
      - Query: What constitutes the same predicate facts?
  - Claims in the settling action
    - A release is not necessary for the claims in the case being settled, since, if the court enters the settlement as a final judgment, class members will be barred by res judicata (claim preclusion) in any future action against the settling defendant
      - Note: In non-class action cases, settlements may be achieved purely contractually, with the case being dismissed and no final judgment entered. In these situations, the defendant will need a release for the claims in the settling action as well as outside claims.

Settlements and Dismissals

- Releases
  - *Example*: Visa Check/Mastermoney[1]

    [T]he Released Parties shall be released and forever discharged from all manner of claims ... against the Released Parties ... that any Releasing Party ever had, now has or hereafter can, shall or may have, relating in any way to any conduct prior to January 1, 2004 concerning any claims alleged in the Complaint or any of the complaints consolidated therein, *including, without limitation, claims which have been asserted or could have been asserted in this litigation which arise under or relate to any federal or state antitrust, unfair competition, unfair practices, or other law or regulation, or common law, including, without limitation, the Sherman Act,15 U.S.C. § 1 et seq.* (emphasis added)

    - Visa Check/Mastermoney primarily involved a tying claims—merchants who wanted to accept a network's credit card must also accept its debit card—and included a grabbag of other legal theories, including price fixing.
    - Release operated against a putative class action brought by merchants in California alleging price fixing in the setting of interchange rates[2]
      - Both cases involved allegations of supracompetitive pricing in the rates charged to merchants in connection with the acceptance of a network's cards

[1] *In re* Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003), *aff'd*, 396 F.3d 96 (2d Cir. 2005).
[2] *Id*. at 513 (as against Reyn's Pasta Bella, LLC v. Visa U.S.A., 259 F. Supp. 2d 992, 997 (N.D. Cal. 2003), *aff'd*, 442 F.3d 741 (9th Cir. 2006)).

Compensating Class Counsel

- Class counsel are almost never compensated on an hourly basis by the named plaintiffs for their services
  - The named plaintiff can recover no more in a class action than it could in an individual action, and since pursuing class certification will significantly increase the costs of the litigation, there is no reason for the named plaintiff to be willing to shoulder the expenses of the litigation
  - Moreover, in the usual class action, the "small claims" nature of the litigation makes it economically irrational for the named plaintiff to bring suit even in its individual capacity
- Statutory fee-shifting typically not available
  - Class actions typically settle, and "reasonable attorneys' fees" under the Clayton Act are provided only for plaintiffs that "substantially prevail" on the merits
  - Consequently, a non-statutory means for compensating class counsel is necessary

Compensating Class Counsel

- The common law "common fund" doctrine
  - A plaintiff that creates a "common fund" that benefits a larger set of persons is entitled to offset its counsel fees and litigation expenses against the fund

> The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.[1]

    - Over time, this right to recover from the common fund has been extended to the plaintiff's attorney as well as the litigant itself
  - Essentially the exclusive method of compensating class counsel
    - Where a class action creates a common fund, court will award reasonable attorneys' fees from the fund
    - Moreover, recognizing the public policy behind class actions, courts will take into account the need to compensate class counsel in successful actions for the risk it assumed in prosecuting the action and advancing the litigation costs

[1] Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

Compensating Class Counsel

- Two methods of determining common fund attorneys' fees
  - *Percentage of recovery*: A fixed, reasonable percentage of the common fund
    - Clear trend in class actions in federal court for federal claims is to use this method
    - No set percentages to be used in the percentage of recovery calculations
      - Most fee awards found in the 20 to 30 percent range
      - Factors indicating a higher percentage:
        - Vigorously litigated for a protracted period of time,
        - Involved novel and complex issues
        - Presented a substantial risk of absolute non-payment
        - Prosecuted by class counsel of considerable reputation and past success who require higher percentage fee awards to be attracted to the case
      - Also, the larger the recovery of the class, the lower the percentage of the common fund to be awarded as attorneys' fees in light of the economies of scale in litigating the case
        - In cases where the common fund is between $100 and $200 million, fees usually range from 4 percent to 10 percent, with lodestar multipliers commonly between 1.35 and 2.99[1]

[1] *See In re* Cendant Corp. PRIDES Litig., 243 F.3d 722, 742 (3d Cir. 2001) (surveying cases).

Compensating Class Counsel

- Two methods of determining common fund attorneys' fees
  - *Lodestar method*: Hours reasonably expended by counsel multiplied by a hourly rate reasonable in the circumstances
    - This is the method used in awarding statutory attorneys' fees
    - Except that in common fund cases a multiplier may be used to compensate counsel for the risk in taking on the action

Compensating Class Counsel

- Standard governing court awards
  - *General rule 1*: Whatever the method, the fee award cannot exceed what is *reasonable* under the circumstances
    - What is reasonable is within the discretion of the trial court and will not be overturned on appeal in the absence of an abuse of discretion
  - *General rule 2*: Reasonableness requires that attorneys' fees should be awarded only for the common fund that the attorney created
    - Where class counsel was able to take advantage of extensive government investigation work, the fee should be based on only the additional value class counsel created[1]
  - Common methodology
    - Use percentage of recovery as primary method
    - Use lodestar method as a check for reasonableness

[1] *In re* First Databank Antitrust Litig., 209 F. Supp. 2d 96 (D.D.C. 2002) (crediting FTC's objection to fee petition).

Compensating Class Counsel

- When appointing class counsel
  - Court may to propose terms for attorney's fees and nontaxable costs (e.g., set up auctions)[1]
  - Court may include in the appointing order provisions about the award of attorney's fees[2]
- Final award must be approved by court
  - Procedure[3]
    - Claim for award of attorney's fees must be made by motion
    - Notice of motion must be served on all parties
      - Any motion by class counsel must also be "directed to class members in a reasonable manner"
    - Class members may object
    - Court may hold a hearing
    - Court must find facts and state its legal conclusions under FRCP 52(a)
    - Order awarding attorney's fees is appealable by those who bear the cost of payment (usually class members)

[1] Fed. R. Civ. P. 23(g)(1)(C). [2] *Id*. 23(g)(1)(D). [3] *Id*. 23(h).

Compensating Class Counsel

- Example: *NYC Bus Tour*[1]

NYC Bus Tour Attorney Fees, Expenses, and Class Distribution

Common fund	$19,000,000	
Attorney fee lodestar	$1,873,699	9.9%
Attorney fee award (1/3)	$6,333,333	33.3% ← Percentage of recovery
Multiplier (3.4)		
Litigation costs award	$863,629	4.5%
Notice/admin class cost award	$1,069,158	5.6%
Total awards	$8,266,120	43.5%
Total claims	$4,846,660	25.5%
242333 tickets @$20 per ticket		
Residual in common fund	$5,887,220	31.0%
To be distributed to the ATD and NYS AG		

Lodestar and multiplier →

[1] Order of Distribution, *In re* NYC Bus Tour Antitrust Litig., No. 1:13-cv-00711-ALC-GWG (S.D.N.Y. Sept. 21, 2015).

Compensating Class Counsel

Case	Settlement	Percentage of Recovery	Lodestar Multiplier
In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig., 991 F. Supp.2d 437(E.D.N.Y. 2014)	$5.7 billion	9.56% ($544.8 million)	3.4
In re Fasteners Antitrust Litig., No. 08–md–1912, 2014 WL 296954 (E.D. Pa. Jan. 27, 2014)	$15.55 million	33.33% ($5.85 million)	0.68[1]
In re Flonase Antitrust Litig., 291 F.R.D. 93 (E.D. Pa. 2013)	$35 million	33.33% ($11.655)	.67
In re Currency Conversion Fee Antitrust Litig., MDL No. 1409, 2012 WL 3878825 (S.D.N.Y. Aug. 22, 2012)	$49.5 million	18.25% ($9.034 million)	1.35
Park v. Thomson Corp., No. 05 Civ. 2931(WHP), 2008 WL 4684232 (S.D.N.Y. Oct. 22, 2008)	$13 million	15.6% ($2.0 million)	1.5
In re Currency Conversion Fee Antitrust Litig., 263 F.R.D. 110 (S.D.N.Y. 2009)	$336 million	15.25% ($51.25 million)	1.6

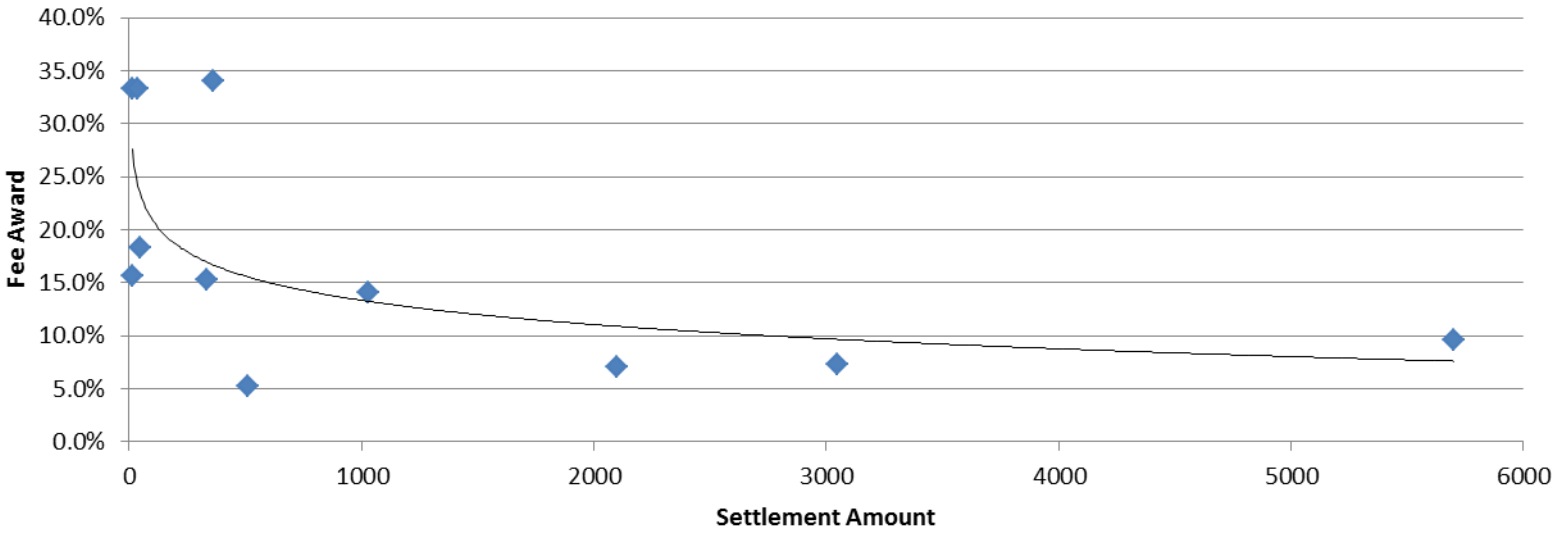
[1] Counsel reported it had lodestar of $8,540,668.80 in fees.

Compensating Class Counsel

Case	Settlement	Percentage of Recovery	Lodestar Multiplier
In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003), *aff'd*, 396 F.3d 96 (2d Cir. 2005)	$3.05 billion fund + reduction by 1/3 of debit card interchange fees (valued at $846 million)	6.5% ($220.2 million)	3.5
In re Monosodium Glutamate Antitrust Litig., 2003 WL 297276 (D. Minn. Feb. 6, 2003)		30% ($24,420,000)	Slightly less than 2
In re Vitamins Antitrust Litig. No. 99-197, MDL No. 1285, 2001 WL 856290 (D.D.C. July 16, 2001)	$359.4 million	34% ($123.2 million)	
In re Auction Houses Antitrust Litig., 2001 WL 170792 (S.D.N.Y. Feb. 22, 2001)	$512 million	5.2% ($27 million)	Not available
Shaw v. Toshiba America Information Systems, Inc., 91 F. Supp. 2d 942 (E.D. Tex. 2000)	$2.1 billion	7.0% ($147 million)	Not available
In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y. 1998)	$1.027 billion (all cash)	14% ($143.8 million)	

Compensating Class Counsel

Class counsel fee awards as a percentage of settlement amount



Data from prior slides (not a random sample)

Compensating Class Counsel

- Objectors
  - *Application*: The common fund created by objectors from which attorneys' fees would be awarded would be the *additional* recovery that resulted from the objector's efforts[1]
    - This includes both increases to the absolute size of the settlement fund and decreases in the award of attorneys' fees to class counsel
- Appeal
  - An attorneys' fee award in a class action is reviewed for abuse of discretion

[1] *See* Mirfasihi v. Fleet Mortgage Corp., 551 F.3d 682, 687-88 (7th Cir. 2008).