THE Antitrust Practitioner

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# CURRENT ISSUES IN ANTITRUST CLASS CERTIFICATION, PART II

## EDITOR'S FOREWORD

This issue of *The Antitrust Practitioner* is the second of two on critical issues in the certification of class actions in antitrust cases under Rule 23 of the Federal Rules of Civil Procedure. In the first article, Jack Pace and Victoria Oswald examine seven recent decisions denying class certification, and show that the decisions, more than many others in recent years, have scrutinized assertions of classwide impact, the merits of plaintiffs' claims, and the bases of expert testimony. The authors characterize this trend as a "ripple," but one that moves the law of class certification closer to long-established principles.

In the second article, Laurie Webb Daniel examines the interaction of four key pretrial decisions in class action litigation: initial certification, the *Daubert* inquiry, appellate review of a certification order under Rule 23(f), and decertification. She shows that recent decisions do not require a full *Daubert* hearing before the initial decision on class certification, in part because the district court can later modify the certification order or decertify the class. Other decisions, however, suggest later decisions on motions to decertify may not be appealable under Rule 23(f), which permits appellate review "within 10 days of the [certification] order." Ms. Daniel argues that, taken together, these decisions may thwart the policies of Rule 23(f) by limiting appellate review of the certification decision to a stage at which the record is inadequate.

In the third article, Marc Ashley argues that the special characteristics of antitrust litigation may justify orders staying discovery or dividing discovery into stages focused on class certification and the merits. It may make sense, for example, to delay discovery until the resolution of a motion to dismiss for failure to state a claim, which might narrow the substantive issues. The costs of litigation to foreign defendants may also justify a separate track for jurisdictional discovery. More generally, Mr. Ashley argues that bifurcating discovery into class certification and merits phases can, in appropriate cases, serve the "interests of efficient and effective case management."

Once again, we welcome comments on *The Antitrust Practitioner*, as well as suggestions of topics for future issues. ◆

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## In This Issue



## NOTE FROM THE CHAIR

This issue of *The Antitrust Practitioner* continues with its focus on class action practice with three diverse views on issues of consequence to antitrust litigators. Our July 2006 issue began the discussion with thoughtful and provocative articles addressing the treatment of settlement classes, the relevance of downstream discovery to class certification determinations, class action practice in Canada, and a trend toward greater scrutiny of plaintiffs' reliance on presumption of common impact.

In this issue, Marc Ashley focuses on discovery in antitrust class action litigation, and makes the case that phased discovery promotes speedy and efficient prosecution of class actions by teeing up class certification issues that can affect the shape of a class and the scope of discovery on the merits. Jack Price and Victoria Oswald pick up on the discussion in the last issue, which suggested that class certification is proving more difficult for plaintiffs, and argue that there has been no paradigm shift in the courts, but the courts appear to be applying the requirements of Rule 23 more rigorously in some cases. Finally, Laurie Webb Daniel suggests that those courts that undertake less than a fulsome Daubert analysis at the class certification stage ("*Daubert* Lite") may unintentionally be limiting the ability to appeal from an adverse class certification determination. Each of the authors is to be congratulated for their contribution to the debate on these important issues. I know that in my practice I find myself turning to past issues of *The Antitrust Practitioner* as a resource, and I hope others do as well. We are grateful to the authors, and to Bill Page, for the timeliness and thoughtful analysis of their articles.

We are nearing the midpoint of the Section year, and I would like to invite and encourage your active participation in our programs. Earlier this year, Mark McCareins organized (along with the Trial Practice Committee) a fascinating Brown Bag on the trial of the laminates case. For those of you who participate in AT-Discussion, you will know that we started an online discussion of the Supreme Court argument in *Bell Atlantic v. Twombly*. We will be following that up with a Brown Bag on *Twombly* shortly after the New Year, led by Milton Marquis. John Schmidtlein is going to take the lead in organizing a teleseminar that will offer a practical, nuts and bolts guide to e-discovery, which we hope to present in February. Also beginning in January, we are going to circulate via the listserv a monthly update on civil practice and procedure developments. If you have thoughts or are involved in cases that have had recent decisions on practice or procedure issues, send an email to me or any of the vice chairs. Finally, we are sponsoring or co-sponsoring 3 programs at the Spring Meeting: i) Antitrust Litigation After the Class Action Fairness Act of 2005; ii) Beyond Trinko and Twombly: The Role of Private Consumer Actions in Detecting and Providing Remedies for Antitrust Violations; and iii) Class Certification: Is There a Trend Toward More Rigorous Analysis?

As always, we welcome your ideas and, more importantly, your involvement. Let us know what you would like to do, and we will gladly welcome you. ◆

*Paul Friedman*

# THE RECENT WAVE, OR RIPPLE, OF ANTITRUST CLASS CERTIFICATION DENIALS

*By: Jack E. Pace III and Victoria L. Oswald* *

For a long time, antitrust lawsuits and class certification (that is, grants of motions for class certification) went together like a Hollywood couple early in marriage, seemingly inseparable no matter how much you rooted against them. Indeed, in certain types of cases, such as those involving alleged horizontal price-fixing, some interested parties even perceived a "presumption" in the case law that class certification was appropriate. In the last few years, however, courts increasingly have been denying motions by plaintiffs to certify antitrust lawsuits as class actions. Plaintiffs in such cases thus have been required to proceed on behalf of only the named class representatives or not at all. In other words, the famous couple may be on the rocks.

What is behind this shift, if indeed there is one, away from the near automatic certification of antitrust cases as class actions? Is recent class certification doctrine, perhaps along with the Class Action Fairness Act of 2005 and its increased opportunities for defendants to remove cases to federal court, part of a greater pro-defendant movement in the federal courts?

With all due respect and sympathy for defendants seeking to ride a wave of class certification skepticism, this article suggests that the recent denials do not represent any dramatic shift in antitrust class certification doctrine. While the number and frequency of class certification denials in antitrust cases undoubtedly have increased in the last few years, the courts issuing these denials have been applying principles of Rule 23 jurisprudence that are not new. And, as noted below, courts have not forgotten how to certify classes in antitrust cases. However, these recent denials do appear to delve into the facts, and test plaintiffs' and their experts' contentions, to a greater degree than was typical before. As a result, while perhaps not representative of a doctrinal paradigm shift, these decisions appear to represent a more rigorous application of standard Rule 23 principles and offer new opportunities for future defendants opposing class certification.

*This article suggests that the recent denials do not represent any dramatic shift in antitrust class certification doctrine.*

This article briefly summarizes several of the key recent denials of class certification in antitrust cases and attempts to shed some light on what these cases do and do not mean for parties litigating class certification motions.

## Recent Class Certification Denials

### 1. *Blades v. Monsanto Co.*[1]

Early on in the recent string of class certification denials, the *Blades* action involved allegations by purchasers of genetically-modified corn and soybean seeds that seed manufacturers illegally fixed prices. The seeds at issue in the litigation were more valuable than "conventional" (not genetically-modified) seeds – that is, the corn seed killed insects without pesticides, and the soybean seed was resistant to herbicides, allowing for more efficient use of chemicals – so the seed manufacturers charged more for them than for conventional seeds. Plaintiffs argued that defendants conspired to fix the premium charged for genetically-modified corn and soybean seeds in violation of Sherman Act Section 1 and sought to certify nationwide classes of corn and soybean seed purchasers under Federal Rule of Civil Procedure 23(b)(3).

In support of their certification motion, plaintiffs argued that, despite variations in prices paid across the country, the court should "presume" that all class members paid too much as a result of defendants' alleged agreement (a rising tide floats all boats, after all) and that, therefore, classwide impact could be shown with common evidence.[2] Defendants responded that, among other things, variations in prices and local market conditions, along with discretionary discounting at the field level, meant that a non-trivial number of putative class members may not have been injured at all and that plaintiffs could not determine which purchasers were injured without evaluating individual purchases and determining non-con-

spiratorial, "but-for" prices in individual markets.[3]

The Eastern District of Missouri denied plaintiffs' class certification motion, and the Eighth Circuit affirmed, holding that:

> *(1) the market for seeds is highly individualized, requiring particularized evidence to determine the competitive price that would have prevailed in the locality of any individual farmer; (2) prices for GM seeds varied widely, and some farmers paid negligible premiums or no premiums at all for GM seeds, as compared with corresponding non-GM seeds; and (3) plaintiffs' expert did not show that the fact of injury could be proven for the class as a whole with common evidence.*[4]

The court further held that, despite plaintiffs' arguments to the contrary, it could not "presume" classwide impact. Relying on a recent class certification denial, outside the antitrust context, by the Seventh Circuit in *Szabo v. Bridgeport Machines, Inc.*,[5] the court held that the Rule 23 inquiry may require a court to look beyond the pleadings or weigh expert testimony – two things the plaintiffs argued should never happen – when doing so was necessary to assess and "resolve disputes" concerning the elements of Rule 23.[6]

The lower court and court of appeals decisions in *Blades* have inspired a number of recent decisions in the antitrust class certification context, including one recent decision involving similar markets for the sale of genetically-modified seeds. In *American Seed Co. v. Monsanto Co.*, the federal district court in Delaware relied on several of the detailed factual findings made by the *Blades* lower court and rejected the presumption of injury being proposed by plaintiffs' expert: "A legal presumption not grounded in fact . . . is not sufficient. The relevant market was thoroughly studied and previously deemed complex by the courts in *Sample* [the *Blades* lower court] and *Blades*. Plaintiffs' lack of underlying factual support for Dr. Kamien's proposed common damages formulas – even assuming they are indistinguishable from proof of common injury – is especially troublesome considering that precedent."[7]

### 2. *Freeland v. AT&T Corp.*[8]

Recently, on August 17, 2006, the Southern District of New York denied plaintiffs' motion for class certification in this case involving allegations that various wireless telephone service providers illegally tied the sale of handsets to the sale of cellular services by "locking" handsets so they could not be used on another provider's network. Plaintiffs sought to certify a class consisting of "[a]ll persons who have purchased wireless telephone services on handsets in the United States from any defendant [after] January 1, 1999."[9] The court, however, denied plaintiffs' motion, holding that plaintiffs failed to establish that two critical elements of their claims, antitrust injury and the showing of coercion necessary to a tying claim, could be proven with common evidence. In doing so, the court thoroughly tested the work of plaintiffs' expert and ultimately concluded that he failed to show that common issues predominated over individual issues in the analysis of whether plaintiffs were injured by the alleged conduct.

From the outset, the court made clear that its obligation to conduct a "rigorous analysis" under Rule 23 "applie[d] equally to the court's evaluation of expert evidence."[10] The court fulfilled this obligation by, among other things, taking plaintiffs' expert to task over certain variables not included in his regression analysis (which purported to show that average prices of cellular handsets were inflated above competitive levels as a result of defendants' conduct). Like the court in *Blades*, the *Freeland* court did not accept the expert's conclusions at face value; nor did it simply take the plaintiffs' word for it that certain variables were excluded from the expert's regression model for good reasons. Instead, the court examined each of the reasons offered by plaintiffs and found all of them to be unpersuasive. As a result, the court held that plaintiffs failed to satisfy their Rule 23 burden and denied their motion for class certification.[11]

Notably, in denying class certification, the *Freeland* court was called upon to address plaintiffs' argument that a "presumption of impact" relieved them of their obligation to explain how classwide inquiry could be proven with common evidence. Unlike the courts in *Blades* and several other recent cases described in this article, the *Freeland* court did not reject such a presumption outright, but instead held that such a presumption operated only in limited circumstances, *i.e.,* when plaintiffs could show that industry prices fluctuated within a range which, at any point on the scale, was higher than competitive levels. Plaintiffs failed to make such a showing, and the court refused to presume impact.[12]

### 3. *Valley Drug Co. v. Geneva Pharmaceuticals, Inc. (In re Terazosin Hydrochloride Antitrust Litigation)*[13]

Multiple plaintiffs brought federal and state antitrust claims against Abbott Laboratories and two generic manufacturers of Abbott's Hytrin® (terazosin hydrochloride), which is used in the treatment of hypertension and enlarged prostate. At issue were settlement agreements between Abbott and the two generic companies relating to patent litigation over generic versions of Hytrin. Plaintiffs claimed that the settlement agreements kept cheaper generic versions of terazosin off the market, prolonged Hytrin's exclusive position in the market, and resulted in higher prices to purchasers of terazosin.

Two regional pharmaceutical wholesalers (two out of a large group of plantiffs whose cases were consolidated by the Multi-District Litigation Panel) sought to certify a class of direct purchasers. Defendants opposed, arguing that, among other things, the named class representatives did not adequately represent the proposed class because other class members, such as national wholesalers, did not experience economic injury (and in fact might have benefited) from the absence of generic competition. Such was the case because certain distributors, which were putative members of the class, received lower margins on the sale of generic products than on higher priced, brand-name pharmaceutical products.

The district court certified the direct purchaser class, but the Eleventh Circuit reversed and ordered "downstream discovery" to determine whether a "fundamental" conflict existed between the class representatives and class members who may have benefited from the absence of generic terazosin.[14] Following post-remand discovery, the district court denied plaintiffs' renewed motion for class certification.[15] The court held that plaintiffs failed to carry their burden to show that none of the representative sample of national wholesalers gained a net economic benefit from the absence of generic terazosin in the market.[16] The district court found that (i) plaintiffs neither produced all the relevant data showing the extent to which class members actually benefited from generic competition nor proposed a cogent method or theory to analyze that data; (ii) plaintiffs' attempts to argue in general terms that wholesalers benefit from generic competition were legally insufficient; and (iii) plaintiffs' attempts to introduce signed waivers of conflict by twenty-three class members were insufficient where the class consisted of approximately 1,947 members.[17]

### 4. *Heerwagen v. Clear Channel Communications*[18]

Plaintiffs, on behalf of purchasers of rock concert tickets from defendants, claimed that defendants unlawfully monopolized and attempted to monopolize in violation of Section 2 by using their radio industry dominance to pressure artists to use defendants' concert promotion services. According to plaintiffs, these actions reduced competition in the concert promotion market and artificially inflated concert ticket prices.

The Southern District of New York denied plaintiffs' motion for class certification, and the Second Circuit affirmed. The Court of Appeals required plaintiffs to prove their monopoly claims with reference to a specific market and held that the relevant market was local and not national. The court found that there was little cross-elasticity of demand for live rock concert tickets between geographic areas: concertgoers were unlikely to go outside of their local geographic areas to attend concerts promoted elsewhere. Thus common proof regarding promotional activities across regions would not be capable of establishing impact on individual purchasers in local markets. The court also held that it was appropriate to look beyond the pleadings to evaluate whether Rule 23 was satisfied and acknowledged that, in doing so, there would be "overlap with the ultimate review on the merits." Similarly, the court held that it was not error for the district court to weigh expert testimony and engage in what the plaintiffs called a "battle of the experts" to the extent "the district court was resolving the sufficiently independent question of whether plaintiff had made a proper showing of predominance pursuant to Rule 23(b)(3)."[19]

### 5. *In re Public Offering Fee Antitrust Litigation & In re Issuer Plaintiff Initial Public Offering Antitrust Litigation*[20]

Plaintiffs brought this action on behalf of purchasers and issuers of securities offered in initial public offerings ("IPOs"). Plaintiffs alleged that defendants, underwriters of IPOs, violated Section 1 of the Sherman Act by colluding to fix the underwriting fees charged to issuers of IPOs. The court denied plaintiffs' motion for class certification on adequacy grounds with respect to

the issuer class and predominance grounds with respect to the purchaser class.[21] In doing so, the court rejected – or at least questioned seriously – plaintiffs' contention that courts should apply a presumption of classwide impact in horizontal price-fixing cases. The court held, "[i]f there is such a presumption as plaintiffs urge – and that is doubtful since injury or impact is a necessary element of a price fixing claim – then it does not apply here where an independent inquiry is required in the case of each member of the issuer class."[22] The court further held that, while it "may not weigh conflicting expert evidence or engage in 'statistical dueling of experts,'" it was appropriate to accept defendants' expert over plaintiffs' "because [defendants' expert] addresses the question before the Court – which is whether antitrust injury or impact can be proved by evidence common to the class."[23]

### 6. *In re NCAA I-A Walk-On Football Players Litigation*[24]

Students listed on NCAA Division I-A football pre-season practice rosters who did not receive full institutional financial aid scholarships challenged the NCAA by-law that limited the number of scholarships at member schools. NCAA Bylaw 15.5.5 imposed a limit of eighty-five full institutional financial aid scholarships per institution and, plaintiffs argued, illegally restricted competition in violation of Sections 1 and 2 of the Sherman Act.

The Western District of Washington denied plaintiffs' motion for class certification on adequacy and predominance grounds. As to the first basis, the court found that plaintiffs would need to "undercut" other class members' positions by arguing that they, and not the other class members, would have received a scholarship in the "but-for," competitive world. As a result, such class members had "inherently conflicting interests" that rendered them inadequate class representatives.[25] As to whether common issues predominated over individual issues, the court recognized that plaintiffs' argument relied on four key assumptions:

> *(1) Bylaw 15.5.5 actually limited the number of scholarships at all 117 Division I-A schools during the class period because they all awarded 85 scholarships each year; (2) all schools would add 20 scholarships if Bylaw 15.5.5 did not exist; (3) each member of the class would have received one of those scholarships; and (4) each member would have attended the same school even without the Bylaw 15.5.5 restrictions.*[26]

With respect to assumptions (3) and (4), the court held that individual inquiries would be necessary to determine, in the absence of the alleged misconduct, whether each class member would have received a scholarship and which school he would have attended.[27] Assuming impact, in other words, was about as appropriate as assuming a touchdown. Certainly it was no basis on which to certify a class.

### 7. *Rodney v. Northwest Airlines, Inc.*[28]

Plaintiffs moved to certify a class of Northwest Airlines ("Northwest") WorldPerks frequent flyer members who purchased and used fully refundable or unrestricted airline tickets from Northwest for nonstop travel on certain routes. Rodney alleged that Northwest's monopolistic control of passenger air travel from its three hubs injured customers classwide.

In affirming the district court's denial of class certification, the Sixth Circuit held that individual inquiries would be necessary to determine issues such as market definition, monopoly power, and antitrust injury – no small matters in a Section 2 case. For example, cross-elasticity analyses would be unique to each of the 74 relevant routes, so market definition could not be shown classwide with common evidence. Nor could monopoly power or antitrust injury be proven with common evidence, as the "data screens" plaintiffs proposed to identify monopolized routes would need to contend with – unsuccessfully, the court held – "voluminous individualized information for each specific route." Moreover, such data screens would need to be applied on a route-by-route basis to filter out injuries not caused by the alleged anticompetitive conduct, which of course would have defeated the purpose of certifying a class.[29]

* * * *

Finally, the cases described above are not the only recent examples of denials of class certification in the antitrust context. For similar reasons as those relied upon by the above courts, the Fifth Circuit and the federal district court in Utah recently have rejected attempts at certifying classes in antitrust cases.[30]

## Recent Class Certification Denials in Context

To deny class certification, the courts described above often needed to reject a number of arguments that antitrust plaintiffs' counsel had grown

accustomed to relying on for quite some time (and successfully). Those include the proposed presumption of impact, the prohibition on looking beyond the pleadings and into the merits of plaintiffs' claims, and forbidding a "battle of the experts." Rejecting these arguments also meant refusing to follow a large stack of cases, from courts around the country, accepting plaintiffs' arguments. And the stack indeed climbed high.[31]

But in refusing to follow this authority, these courts were not acting courageously, nor were the rationales for their decisions new. Rather, the bases for the holdings described above have been around for decades; these courts were applying principles established long ago. For example, nearly twenty-five years ago the United States Supreme Court declared in *General Telephone Co. of Southwest v. Falcon* that a class "may only be certified if the trial court is satisfied, after a **rigorous analysis**, that the prerequisites of Rule 23(a) have been satisfied."[32]

And even prior to the oft-cited *General Telephone* decision, courts of appeal were conducting "rigorous" analyses that would make the *Blades*, *Freeland,* and *Valley Drug* courts proud. In *Windham v. American Brands, Inc.*, for example, growers of flue-cured tobacco in South Carolina sought to certify a class in a case against tobacco companies and the Secretary of Agriculture involving allegations that defendants conspired to fix the price of flue-cured tobacco and monopolize the tobacco auction markets by means of percentage purchase agreements and collusive bidding.[33] In affirming the district court's denial of class certification, the Fourth Circuit refused to assume away its responsibilities and held that "where the issue of damages and impact does not lend itself to . . . a mechanical calculation, but requires 'separate "mini-trial(s)"' of an overwhelming large number of individual claims, courts have found that the 'staggering problems of logistics' thus created 'make the damage aspect of (the) case predominate,' and render the case unmanageable as a class action."[34]

Similarly, in *Alabama v. Blue Bird Body Co.*, the Fifth Circuit explicitly rejected a presumption of impact in antitrust class actions.[35] The state of Alabama sued manufacturers of bus bodies and Alabama distributors who allegedly conspired to fix prices through a system of rotating bids and accommodation bidding that artificially raised prices. Alabama sought to certify both state and national classes. In rejecting plaintiffs' class certification motion as to the national class, the court held that "'impact' is a question unique to each particular plaintiff and one that must be proved with certainty. . . . [C]ases do exist wherein generalized proof of impact would be improper."[36] Finding that buses are not homogenous products, but rather are designed to meet particularized specifications of purchasers, the court held that plaintiffs would be unable to show classwide impact with common proof.

***The good news is that several courts have proven willing to listen to defendants challenging the prior conceptual framework, presumptions and all.***

Likewise, in *In re Agricultural Chemicals Antitrust Litigation*, plaintiffs alleged that defendant chemical manufacturers conspired to fix the price of pesticides.[37] The court denied plaintiffs' class certification motion and criticized plaintiffs' expert for "merely assum[ing]" that each class member suffered damage. The court held that the localized nature of the market for agricultural chemicals made it almost impossible to determine competitive prices absent the conspiracy. As such, plaintiffs could not establish injury with common evidence.[38] More recently, in a non-antitrust case that has been relied upon by a number of courts denying class certification in antitrust cases, the Seventh Circuit in *Szabo v. Bridgeport Machines, Inc.* vacated a grant of class certification and recognized that nothing in Rule 23 "prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that Rule and exercise the discretion it confers."[39]

Moreover, further reason to temper any enthusiasm for a new era of class certification hostility is the simple fact that class actions continue to be certified in antitrust cases around the country with some regularity. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 235 F.R.D. 127 (D. Me. 2006); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166 (N.D. Cal. June 5, 2006); *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346 (N.D. Cal. 2005); *In re Currency Conversion Fee Antitrust Litig.*, No. 04 Civ. 5723 WHP, 2005 WL 2364969 (S.D.N.Y. Sept. 27, 2005); *In re Carbon Black Antitrust Litig.*, No. Civ. A. 03-

10191-DPW, MDL NO. 1543, 2005 WL 102966 (D. Mass. Jan. 12, 2005); *Bradburn Parent/Teacher Stores, Inc. v. 3M*, No. Civ. A. 02-7676, 2004 WL 1842987 (E.D. Pa. Aug. 18, 2004); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260 (D. Mass. 2004); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661 (D. Kan. 2004).

However, this is not to say that nothing has changed in the business of antitrust class certification. To the contrary, while class certification doctrine may not have been upended, the depth of analysis may be evolving.[40] In the recent class certification denials discussed above, the courts appeared to be more willing than their predecessors were to delve into the facts and evaluate such things as price variations, local market conditions, and other factors relevant to Rule 23 standards. The district and appellate courts in *Blades*, for example, reviewed a substantial amount of evidence on regional pricing methods, possible no-impact purchasers, and local competitors to help determine whether plaintiffs adequately had shown that common evidence could be used to show impact in all regions around the country. Similarly, the court in *Valley Drug* ordered discovery on not only the prices paid by class members, but also the prices paid by purchasers throughout the distribution chain to determine whether certain plaintiffs actually benefited from the alleged conspiracy – and therefore could not have been injured. In both cases the courts did not accept plaintiffs' arguments at face value but instead tested those arguments against the evidence developed during class certification discovery.[41] While neither court ruled on the underlying merits of plaintiffs' claims, the courts did look beyond the pleadings to the extent necessary to determine whether Rule 23 was satisfied.

## CONCLUSION

A closer look at recent class certification decisions in antitrust cases reveals some not-so-good (or at least disappointing) news and some good news for defendants. For antitrust defendants waiting for the class certification tide to turn in their favor, the not-so-good news is that they will need to keep waiting. We have not witnessed a doctrinal paradigm shift. We have not, in other words, seen a new "conceptual framework" replace an old one.[42]

The good news is that several courts have proven willing to listen to defendants challenging the prior conceptual framework, presumptions and all. These courts have shown an increasing interest in investigating the facts underlying class certification motions to determine whether common evidence really will answer all or substantially all questions of classwide injury vel non. Antitrust defendants **may** defeat class certification, and just seeing that in writing may be good news enough for defense counsel familiar with this fight.

To be sure, in the cases described above, the defendants took a significant amount of discovery on class issues and made substantial factual presentations – often in the context of evidentiary hearings devoted solely to class certification issues – attempting to show the predominance of individual issues. But if the cases described in this article stand for anything, they represent strong words of encouragement to future defendants willing to spend the time and energy to do the same.

**(Endnotes)**

* Jack E. Pace III and Victoria L. Oswald are associates in the New York office of White & Case LLP and members of the firm's Global Competition Group. Mr. Pace also is an Associate Editor of *Antitrust* magazine, which, like this publication, is published by the ABA's Antitrust Section. Mr. Pace and Ms. Oswald represented defendant Syngenta Seeds, Inc. in the *Blades* litigation discussed herein. White & Case also represented Geneva Pharmaceuticals, Inc. (now Sandoz Inc.) in the *In re Terazosin Hydrochloride Antitrust Litigation* also discussed herein, although the authors were not personally involved.

1 400 F.3d 562 (8th Cir. 2005).

2 *Id.* at 570.

3 *Id.* at 571.

4 *Id.* at 572.

5 249 F.3d 672, 677 (7th Cir. 2001) (Easterbrook, J.).

6 400 F.3d at 567, 575.

7 No. Civ. 05-535-SLR, 2006 WL 3276831, at *6-7 (D. Del. Nov. 13, 2006).

8 No. 04 CIV. 8653 (DLC), 2006 WL 2380410 (S.D.N.Y. Aug. 17, 2006).

9 *Id.* at *5.

10 *Id.* at *6.

11 *Id.* at *12-16, 23.

12 *Id.* at *18.

13 MDL No. 1317 (S.D. Fla.); 350 F.3d 1181 (11th Cir. 2003).

14 *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1193-95 (11th Cir. 2003).

15 *In re Terazosin Hydrochloride Antitrust Litig.*, 223 F.R.D. 666, 675 (S.D. Fla. 2004).

16 *See id.* at 674-75.

17 *See id.* at 674-77. It is worth noting that despite the district court's refusal to certify a class of direct purchasers, the court did later certify a class of indirect purchasers consisting of consumers and third party payers. The Eleventh Circuit accepted Defendants' Rule 23(f) petition to appeal this class certification decision, but the litigation was settled prior to oral argument.

18 435 F.3d 219 (2d Cir. 2006).

19 *Id.* at 228-29, 232-33.

[20] No. 98 Civ. 7890 (LMM), 00 Civ. 7804 (LMM), 2006 WL 1026653 (S.D.N.Y. Apr. 18, 2006).

[21] The court did not decide the motion to certify a class of purchasers seeking injunctive relief pursuant to Rule 23(b)(2). In that regard, the court requested letters from the parties regarding whether the purchaser class would wish to proceed to obtain solely declaratory or injunctive relief without any prospect of recovering damages themselves and without the assistance of an issuer class seeking treble damages, and addressing the *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147, 164 (2d Cir. 2001), test for determining if the relief sought is exclusively or predominantly injunctive or declaratory in nature. *See* 2006 WL 1026653, at *9-10.

[22] *Id.* at *7.

[23] *Id.* at *8.

[24] No. C04-1254C, 2006 WL 1207915 (W.D. Wash. May 3, 2006).

[25] *Id.* at *9.

[26] *Id.* at *11.

[27] *Id.*

[28] 146 Fed. Appx. 783 (6th Cir. 2005).

[29] *Id.* at 787-92.

[30] *See In re Medical Waste Servs. Antitrust Litig.*, No. 98 Civ. 7890 (LMM), 2006 WL 538927 (D. Utah Mar. 3, 2006); *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 Fed. Appx. 296 (5th Cir. 2004); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003).

[31] *See, e.g., In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002); *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566 (2d Cir. 1982); *Arden Architectural Specialties, Inc. v. Washington Mills Electro Minerals Corp.*, Nos. 95-CV-7574 CJS, 95-CV-7580 CJS, 2002 WL 31421915 (W.D.N.Y. Sept. 17, 2002); *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251 (D.D.C. 2002); *In re Northwest Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174 (E.D. Mich. 2002); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297 (E.D. Mich. 2001); *In re Plastic Cutlery Antitrust Litig.*, No. CIV. A. 96-CV-728, 1998 WL 135703 (E.D. Pa. Mar. 20, 1998); *In re Med. X-ray Film Antitrust Litig.*, No. CV-93-5904, 1997 WL 33320580 (E.D.N.Y. Dec. 26, 1997); *In re Polypropylene Carpet Antitrust Litig.*, 178 F.R.D. 603 (N.D. Ga. 1997); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493 (S.D.N.Y. 1996); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374 (S.D.N.Y. 1996); *In re Potash Antitrust Litig.*, 159 F.R.D. 682 (D. Minn. 1995); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019 (N.D. Miss. 1993); *In re Glassine & Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302 (E.D. Pa. 1980).

[32] 457 U.S. 147, 161 (1982) (emphasis added).

[33] 565 F.2d 59 (4th Cir. 1977).

[34] *Id.* at 68.

[35] 573 F.2d 309 (5th Cir. 1978).

[36] *Id.* at 327.

[37] No. 94-40216-MMP, 1995 WL 787538 (N.D. Fla. Oct. 23, 1995).

[38] *See id.* at *5-8; *see also Kenett Corp. v. Mass. Furniture & Piano Movers Ass'n Inc.*, 101 F.R.D. 313, 316 (D. Mass. 1984); *In re Elec. Weld Steel Tubing Antitrust Litig.*, 1980-81 Trade Cases (CCH) ¶ 63, 783 (E.D. Pa. 1980).

[39] 249 F.3d at 677.

[40] This trend also appears to have taken hold in the securities litigation context and potentially more broadly. In a recent decision by the Second Circuit Court of Appeals which broadly revisited that Circuit's standards for ruling on Rule 23 motions, the court set forth the following guidelines for class certification decisions: "(1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits." *In re Initial Public Offering Secs. Litig.*, No. 05-3349-cv, 2006 WL 3499937, at *15 (2d Cir. Dec. 5, 2006).

[41] One wonders whether a case like *In re Vitamins Antitrust Litigation*, 209 F.2d 251 (D.D.C. 2002), would have turned out differently following a closer look at the underlying facts. There, the court held, among other things, that the plaintiffs' expert's conclusion that "[i]t is highly probable that all U.S. purchasers of bulk vitamins (including premix) paid higher prices than they would have in the absence of the cartel" satisfied the plaintiffs' burden to show that common proof could establish impact on a classwide basis.

[42] *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 92-94 (The University of Chicago Press 1970) (1962). By contrast, think of *Matsushita/Brooke Group* in the area of exclusionary practices. ◆

# DOES THE NEW "*DAUBERT* LITE" TEST FOR CLASS CERTIFICATION EVISCERATE RULE 23(f) IN ANTITRUST CASES?

*Laurie Webb Daniel*[1]

An article in the last edition of *The Antitrust Practitioner* suggests a trend that requires plaintiffs to justify class certification in antitrust cases by proving class-wide impact through "a viable, well-constructed methodology, rather than simply stating that they intend to construct a formula" that will accomplish this result.[2] Expert testimony is ordinarily necessary for this inquiry. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and its progeny,[3] the Supreme Court has made clear that under Rule 702 of the Federal Rules of Evidence the district court must screen and exclude expert evidence that is unreliable or not adjusted to the facts of the case. A growing number of courts, however, have held that a full *Daubert* inquiry is not appropriate at the class certification stage.[4] These decisions reason that, because the district court has the power to decertify later after a plenary hearing if appropriate, the initial class certification analysis should ensure only that the expert opinion is not so flawed that it would be inadmissible as a matter of law.[5] Some cases suggest, however, that a later denial of a motion to decertify after a *Daubert* hearing is not appealable. Consequently, this paper argues that the "*Daubert* Lite" approach, combined with rulings foreclosing later appellate review, may eliminate the opportunity for a meaningful appeal of class certification in antitrust cases by delaying scrutiny of the evidence that is critical to class certification until after the time for appeal under Rule 23(f) has lapsed.

*This paper argues that the "Daubert Lite" approach, combined with rulings foreclosing later appellate review, may eliminate the opportunity for a meaningful appeal of class certification in antitrust cases by delaying scrutiny of the evidence that is critical to class certification until after the time for appeal under Rule 23(f) has lapsed.*

## Rule 23(f) Is Meant to Facilitate Appellate Review of Class Certification Rulings Where, As In Most Antitrust Class Actions, the Stakes Are High

Rule 23(f) of the Federal Rules of Civil Procedure gives courts of appeals the discretion to review an order granting or denying class certification if a petition for permission to appeal is filed within ten days of the order. Before Rule 23(f) was adopted in 1998, a party wishing to appeal class certification had to overcome the more stringent requirements imposed by the traditional rules governing interlocutory review. Unlike Rule 54(b) or 28 U.S.C. § 1292(b), Rule 23(f) does not require a preliminary certification for appeal by the district court. Further, as noted by the Advisory Committee, Rule 23(f) does not require the ruling to involve a controlling question of law as to which there is substantial ground for a difference of opinion.

The Advisory Committee note to Rule 23(f) explains that expansion of the opportunity to appeal an order granting or denying class certification is justified because such an order can, as a practical matter, sound the "death knell" for the litigation. The Committee observed that, regardless of the merits of the complaint, a plaintiff likely will abandon the case if not certified where the value of the claim is not worth pursuing on an individual basis. Conversely, it recognized that defendants often settle class actions after certification despite having strong defenses when the stakes are just too high to risk the uncertainties inherent in litigation.[6] In light of the treble damage penalty imposed by the antitrust laws, Rule 23(f) appears to be designed to allow meaningful interlocutory review of class certification in this type of litigation.

## Although Experts Are Critical To Class Certification In Antitrust Cases, Some Courts Allow Only A Limited *Daubert* Analysis At This Time

Plaintiffs have argued for years that antitrust cases are particularly well suited for class certification because proof of an antitrust violation usually will be identical for all class members. To win damages for an

antitrust violation, however, the plaintiffs must do more. They must prove that the illegal conduct actually caused injury to their business or property.[7] As pointed out by the court in *Bell Atlantic Corp. v. AT&T Corp.*, "where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance," and class certification should be denied.[8] Because of the need to prove class-wide impact, experts offering multiple regression analyses or other types of technical methodologies have become critical to class certification in antitrust cases.[9]

One would think that a *Daubert* analysis would be part of the class certification process whenever class certification depends on such expert evidence. In *West v. Prudential Securities, Inc.*, for example, the Seventh Circuit granted a Rule 23(f) appeal to reverse class certification of a securities case based on the "fraud on the market" doctrine because it found that the plaintiffs' expert failed to adequately test market factors.[10] The Seventh Circuit stressed that the district court has an obligation to scrutinize expert evidence at the class certification stage.

> *[T]he judge observed that each side has the support of a reputable financial economist (Michael J. Barclay for the plaintiffs, Charles C. Cox for the defendant) and thought the clash enough by itself to support class certification and a trial on the merits. That amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert. A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.*[11]

***The Seventh Circuit stressed that the district court has an obligation to scrutinize expert evidence at the class certification stage.***

Although experts are critical to class certification in antitrust cases, some courts allow only a limited *Daubert* analysis at this time. In *In re Visa Check/Mastermoney Antitrust Litigation*, the Second Circuit held that a district court faced with a motion to certify a class must ensure only that the basis of the expert opinion "is not so flawed that it would be inadmissible as a matter of law." The *Visa Check* court stressed that "a district court may not weigh conflicting expert evidence or engage in 'statistical dueling' of experts."[12] The Court summarized : "The question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive."[13] In reaching this outcome, the Second Circuit noted that a *Daubert* motion is typically not made until later stages in litigation, such as in association with a motion for summary judgment, a motion *in limine*, or at trial.[14] The Court also pointed out that the district court has the ability to modify its class certification order later if the formula for proving class-wide damage turns out to be inadequate to take care of individualized damage issues.[15]

Other circuits also have shied away from requiring a full *Daubert* analysis at the class certification stage. In an unpublished opinion, the Eleventh Circuit rejected a request for *de novo* review of a district court's ruling that a *Daubert* inquiry was unnecessary at the class certification stage.[16] In *In re Delta Air Lines,* the Sixth Circuit denied a Rule 23(f) petition where *Daubert* issues were raised.[17] Further, an increasing number of district courts have refused to subject expert evidence offered in support of class certification to a full-blown *Daubert* investigation. [18] These courts have adopted a "*Daubert* Lite" approach to class certification.

For example, in the pharmaceutical industry average wholesale price litigation, the district court found that "[t]he important question in a class certification context is whether after a sneak preview of the issues, the expert approach appears fundamentally flawed – an issue usually vetted more fully at a *Daubert* hearing based on a more detailed record."[19] Similarly, when the plaintiffs moved to certify an antitrust challenge to the NCAA limits on football scholarships, the district court "decline[d] the NCAA's invitation to embark on a full-fledged *Daubert* inquiry or an admissibility determination under the Federal Rules of Evidence at this stage of the litigation."[20] Citing *Visa Check*, the court stated that, for purposes of

class certification, "Plaintiffs' expert must only demonstrate that his methodology is not 'so fatally flawed as to be inadmissible as a matter of law.'"[21]

Several of these cases also rely on the approach articulated by the district court in *In re Polypropylene Carpet Antitrust Litigation,*[22] which was decided several years before the Second Circuit issued its opinion in *Visa Check*. The *Polypropylene Carpet* court found that it needed to examine just whether the proposed methodology will comport with the basic principles of econometric theory, will have any probative value, and will primarily use evidence that is common to all members of the proposed class.[23] The *Polypropylene Carpet* court then simultaneously certified the class and "postpone[d] a full analysis of the admissibility of Dr. Asher's study under *Daubert* until the study is completed."[24]

## Does the "*Daubert* Lite" Approach Thwart the Goals of Rule 23(f) By Postponing Scrutiny of Key Class Certification Evidence Until After the Appeal Time Has Expired?

The *Daubert* Lite approach assumes that the district court may revisit the issue of certification on a motion to decertify the class under Rule 23(c)(1)(C) after a full *Daubert* hearing. But some cases suggest that denial of such motion may not be appealable under Rule 26(f), even though it is only then that a meaningful judicial review is possible. Consequently, the *Daubert* Lite approach threatens the goals of Rules 26(f) by not requiring the district court to conduct an inquiry necessary to meaningful review at a stage at which review can occur.

To date, no appellate court has addressed the precise issue whether the denial of decertification following a *Daubert* hearing is appealable under Rule 23(f). Several Circuits, however, have addressed the applicability of Rule 23(f) to motions to modify class certification rulings in other contexts. Some of these decisions recognize the importance of a more fully developed record for meaningful review. In *Shin v. Cobb County Board of Education*, the Eleventh Circuit noted that it is good policy to defer a Rule 23(f) appeal until after the district court has had the chance to reassess its class certification order under Rule 23(c)(1)(C).[25] "Allowing a district court to reconsider its class certification decision before appeal may reduce the number of Rule 23(f) petitions and will permit the district court to reevaluate the order in the light of new or changing circumstances. *See* Fed.R.Civ.P. 23(c)." The *Shin* court addressed a motion for reconsideration filed within ten days of the initial class certification ruling; however, the same policy considerations support applying Rule 23(f) to orders addressing motions to modify or decertify a class after a plenary *Daubert* hearing. Simply put, appellate review will be more meaningful with a more developed record.

Indeed, when the Eleventh Circuit articulated its standards for granting a Rule 23(f) petition in *Prado-Steiman v. Bush*, it pointed out that a well developed record weighs in favor of taking the appeal.

> *Some cases plainly will be in a better pre-trial posture for interlocutory appellate review than others. As noted above, the propriety of granting or denying a class, as well as the proper scope of any class that has been granted, may change significantly as new facts are uncovered through discovery. Similarly, a limited or insufficient record may adversely affect the appellate court's ability to evaluate fully and fairly the class certification decision…. Accordingly, the decision on a Rule 23(f) petition may take into account such considerations as the status of discovery, the pendency of relevant motions, and the length of time the matter already has been pending.*[26]

As a practical matter, an appellate court cannot perform its job without an adequate record of the evidence and the district court's findings. Having a developed record is particularly important for an appeal that involves expert testimony. A critical aspect of the district court's role as "gatekeeper" in a *Daubert* proceeding is "the creation of 'a sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law.'"[27] "Without specific findings or discussion on the record, it is impossible on appeal to determine whether the district court carefully and meticulously reviewed the proffered scientific evidence or simply made an off-the-cuff decision to admit the expert testimony."[28] For these reasons, in some cases it makes sense to defer the Rule 23(f) appeal until after the district court has engaged in a full *Daubert* analysis. Then, the expert evidence underlying class certification will be fleshed out and appellate review of the class

certification decision will be more meaningful.

Yet, in *Gary v. Sheahan,* the Seventh Circuit held that an order denying a motion to decertify filed more than ten days after the certification order was nothing more than an untimely motion for reconsideration that falls outside the scope of Rule 23(f).[29] The Seventh Circuit found that Rule 23(f) allows "only one window of review" – unless the district court actually alters the class certification through a later motion.[30] It is worth noting that the decision in *Gary v. Sheahan* did not address a motion to decertify based on a changed record, as would be the case if a motion were filed after a full-blown *Daubert* hearing.

When the plaintiffs in *McNamara v. Felderhof* tried to appeal the denial of a "trial and case management plan" that responded to the district court's reasons for denying class certification, the Fifth Circuit, like the Seventh Circuit in *Gary,* rejected the petition as a time-barred motion for reconsideration.[31] The Fifth Circuit stated that, while Rule 23(c)(1)(C) authorizes the district court to modify a class certification ruling at any time, Rule 23(c)(1)(C) does not bear on the ten-day time limit imposed by Rule 23(f).[32] In rejecting the Rule 23(f) appeal in *McNamara*, the court did point out that the plaintiffs identified no new legal authority or changed circumstance. The *McNamara* ruling thus appears to reflect the view that parties should not be able to rely on Rule 23(c)(1)(C) to avoid the ten day appeal time imposed by Rule 23(f) where there are no new developments.

The Tenth Circuit, however, recently held in *Carpenter v. The Boeing Co.* that Rule 23(f) provides no avenue for review even when the motion at issue is based on new developments in the case.[33] According to the Tenth Circuit, "the need to avoid causing delay and disruption to the district court proceedings cautions against an appellate court's engaging in detailed inspection and analysis of the record to determine how new an argument is and whether the underlying evidence was reasonably available when certification was originally litigated."[34] Thus, while parties are entitled to seek decertification under Rule 23(c)(1)(C) based on changes in the factual record, the interlocutory appeal provisions of Rule 23(f) do not apply to the denial of such an motion in the Tenth Circuit unless the motion is made within ten days of the initial order.[35] If the *Carpenter* holding is applied in jurisdictions that take the "*Daubert* Lite" approach to class certification, it will foreclose any meaningful pre-judgment appellate review of the underpinnings of the class certification in antitrust cases – and thwart the policy embraced in Rule 23(f).

## CONCLUSION

The courts that have adopted a limited *Daubert* standard for class certification proceedings appear to take comfort in the district court's ability to modify class certification down the road.[36] This approach will not infringe on Rule 23(f) if a party can seek interlocutory review of the denial of a motion to decertify based on flaws in methodology exposed at the *Daubert* hearing. There is a problem, however, if Rule 23(f) is strictly interpreted to apply only to initial orders granting or denying class certification. Because of the "death knell" effect of class certification in many antitrust cases, such an approach in "*Daubert* Lite" jurisdictions likely would result in settlement without any meaningful appellate review of the underpinnings of the class certification. Such an approach would frustrate the stated policy embraced in Rule 23(f).

**(Endnotes)**

1 Ms. Daniel is the Chair of the Appellate Team of Holland & Knight LLP.

2 Gregory C. Cook and Charlton A. Rug, *Tightening Trends in Antitrust Class Certification,* The Antitrust Practitioner, ABA Section of Antitrust Law, Vol. 4 (July 2006).

3 *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S.579 (1993); *see also Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999).

4 *See, e.g., In re Visa Check/Mastermoney Antitrust Litigation,* 280 F.3d 124, 132 n.4 (2d Cir. 2001).

5 *Id.* at 141.

6 *See also West v. Prudential Securities, Inc.,* 282 F.3d 935, 937 (7th Cir. 2002) ("The effect of a class certification in inducing settlement to curtail the risk of large awards provides a powerful reason to take an interlocutory appeal.").

7 *See, e.g., Bell Atlantic Corp. v. AT&T Corp.,* 339 F.3d 294, 302 (5th Cir. 2003).

8 *Id.; see also Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 215 F.R.D. 523, 531 (E.D. Tex. 2003) ("Predominance and manageability may be destroyed solely by the complexity of determining damages when that determination does not lend itself to a mathematical calculation that can be applied to all the class members."), *aff'd,* 100 Fed.Appx. 296 (5th Cir. 2004).

9 *Id.* at 304; *see also Heerwagen v. Clear Channel Communications,* 435 F.3d 219, 231-233 (2d Cir. 2006) (discussing review standards applicable to expert evidence

at class certification stage); L. Elizabeth Chamblee, *Between "Merit Inquiry" and "Rigorous Analysis": Using Daubert to Navigate the Gray Areas of Federal Class Action Certification*, 31 Fl. St. U. L. Rev. 1041, 1041-42 (Summer 2004).

[10] *West,* 282 F.3d at 939-940.

[11] 282 F.3d at 938; *see also Bell v. Ascendant Solutions, Inc.,* 2004 WL 1490009 (N.D. Tex. 2004) (holding that a *Daubert* type analysis is not premature at the class certification stage where motion to certify securities case was based on expert testimony).

[12] *In re Visa Check/Mastermoney Antitrust Litigation,* 280 F.3d 124, 135 (2d Cir. 2001).

[13] *Id.*

[14] *Id.* at 132 n.4.

[15] *Id.* at 141.

[16] *Drayton v. Western Auto Supply Co.,* 2002 WL 32508918 (11th Cir. 2002); *see also Valley Drug Co. v. Geneva Pharmaceuticals, Inc.,* 350 F.3d 1181, 1186-87 (11th Cir. 2003) (noting the defendants' challenge to plaintiffs' expert's methodology, but declining to reach the question because court vacated the certification order on other grounds).

[17] *In re Delta Air Lines,* 310 F.3d 953, 961 (6th Cir. 2002).

[18] *See Turner v. Murphy Oil USA, Inc.,* 2006 WL 91364 *4 (E.D. Louisiana 2006) (following *Visa Check* and *In re Polypropylene Carpet* to hold in toxic tort case that only a "limited *Daubert* review" was necessary at the class certification stage); *Arnold v. Cargill Inc.,* 2006 WL 1716221 *5 (D. Minn. 2006) (stating that "[t]he application of the *Daubert* test, however, is somewhat limited at the stage of class certification); *LaBauve v. Olin Corp.,* 231 F.R.D. 632, 644 (S.D. Ala. 2005) (rejecting "full-blown *Daubert* investigation" at class certification); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc.,* 209 F.R.D. 159, 162 (C.D. Cal. 2002) (citing *Visa Check/MasterMoney* and *In re Polypropylene Carpet* as support for the conclusion that, when reviewing a motion for class certification in an antitrust case, "a lower *Daubert* standard should be employed at this stage of the proceedings").

[19] *In re Pharmaceutical Industry Average Wholesale Price Litigation,* 230 F.R.D. 61, 90 (D. Mass. 2005) (noting that the court retained the power to decertify under Rule 23(c)(4)(A) later "if plaintiffs' Phase II methodology does not survive a *Daubert* motion").

[20] *In re NCAA I-A Walk-On Football Players Litigation,* 2006 WL 1207915 *4 (W.D. Wash. 2006).

[21] *Id.* The district court, however, ultimately denied the motion to certify the class after finding that plaintiffs could not prove fact of injury on a class-wide basis and that individual issues relating to damages would predominate. *Id.* at *12-13.

[22] *See In re Polypropylene Carpet Antitrust Litigation,* 996 F.Supp.18, 26 (N.D. Ga. 1997).

[23] *Id.*

[24] *Id.* at n.6.

[25] *Shin v. Cobb County Board of Education,* 248 F.3d 1061, 1064. (11th Cir. 2001).

[26] *Prado-Steiman v. Bush,* 221 F.3d 1266, 1276 (11th Cir. 2000).

[27] *Dodge v. Cotter Corp.,* 328 F.3d 1212, 1223 (10th Cir. 2003) (quoting *Goebel v. Denver & Rio Grande W. R.R. Co.*; *See also City of Tuscaloosa v. Harcros Chems., Inc.,* 158 F.3d 548 (11th Cir. 1998) (finding an abuse of discretion to fail to create record suitable for appllate review of decision regarding reliability of expert testimony).

[28] *Id.*

[29] *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999).

[30] *Id.*

[31] *McNamara v. Felderhof,* 410 F.3d 277, 281 (5th Cir. 2005).

[32] *Id.*

[33] *Carpenter v. The Boeing Co.,* 456 F.3d 1183, 1190-91 (10th Cir. 2006).

[34] *Id.* at 1190.

[35] *See id.* at 1191 ("An order that leaves class-action status unchanged from what was determined by a prior order is not an order 'granting or denying class action certification.").

[36] *Gary v. Sheahan,* 188 F.2d 891 (7th Cir. 1999). ◆

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# THE SCOPE AND TIMING OF DISCOVERY IN ANTITRUST CLASS ACTION LITIGATION

*Marc D. Ashley**

## INTRODUCTION

Discovery in antitrust class actions is, in many respects, no different from that in any other type of class action litigation. In certain respects, however, discovery in antitrust class action litigation is fueled by unique considerations that dictate tactical decision-making on pivotal procedural matters. Class certification, which often decides the fate of a case, lies at the crux of these tactical decisions that shape the scope, timing and contours of discovery. Because no fixed certification "stage" exists in antitrust litigation, parties often jostle over the structure and sequencing of class and merits discovery. The scope of permissible discovery is theoretically as broad as the parties' construction of relevant issues, and discovery can proceed in wholesale fashion unless the court suspends it for particular aspects of the case. In practice, however, parties to antitrust class actions are confronted early in the proceedings with whether and how to stagger discovery phases.

Negotiation over the terms of both class and merits discovery is usually framed by the defendants' perceptions of the viability of the plaintiff's claims and proposed class. Plaintiffs in complex antitrust class actions often assert initial claims premised on relatively thin allegations, sometimes arising from the announcement of preliminary government investigations into possible antitrust violations, perhaps even with no attendant enforcement action. Such claims may be brought against numerous companies spanning the globe, alleging extended misconduct, on behalf of a diverse putative class of loosely related purchasers and products.

*This article examines the legal and practical considerations that may influence the parties' positions and the courts' resolution of issues raised by these motions.*

Despite the absence of a robust independent factual predicate, a plaintiff may seek sweeping and onerous merits discovery on liability issues before the complaint has passed legal muster and before the viability and dimensions of the putative class have been determined.[1] A plaintiff may even seek full-blown discovery before threshold jurisdictional issues are clarified. In such circumstances, the defendants will predictably object that the plaintiff's discovery approach will generate undue burden and (perhaps counterintuitively) unnecessary delay. Defendants often propose an alternative discovery program that they contend will be more efficient and orderly than prematurely unleashing full-blown discovery. If the parties fail to agree on a discovery schedule, motions to stay or phase discovery will often ensue. This article examines the legal and practical considerations that may influence the parties' positions and the courts' resolution of issues raised by these motions.

### Staying Discovery Pending Resolution of Motions to Dismiss

Defendants often argue that discovery should be stayed during the pendency of motions to dismiss, such as for failure to state a claim (including motions raising the statute of limitations) or for lack of personal jurisdiction. Although (unlike in securities litigation) a stay of discovery is not automatic in the wake of a motion to dismiss antitrust claims, it may be granted in appropriate circumstances where legal issues presented by a motion to dismiss are indeed amenable to resolution without discovery. Should discovery commence before dismissal motions are decided, defendants – particularly foreign defendants increasingly embroiled in U.S. class actions – may face a burden that could dwarf any discovery delay caused by waiting until such motions are decided.[2] The international character of antitrust litigation often mandates that defendant-specific jurisdictional discovery be conducted (if at all) on a separate track before even class certification can be addressed.

Motions to dismiss, even if granted only in part, may materially narrow the scale of a case. Before an antitrust class may be certified, motions to dismiss for failure to state a claim may strike certain allegations (or, at a minimum, highlight their deficiencies), motions based on the statute

of limitations may excise portions of the class period that predate the limitations period, and jurisdictional motions may prune foreign defendants from the case. Defendants will therefore often urge that substantial grounds for dismissal of the plaintiff's claims provide good cause for postponing the oppressive costs of large-scale discovery (the burdens of which may be heightened for defendants headquartered overseas or that have significant foreign operations), particularly where the plaintiff will suffer little or no undue prejudice.[3] A court may be persuaded to stay discovery altogether during the pendency of such motions because they may appear capable of eliminating or materially reshaping a plaintiff's claims.[4]

In the cause of making a full discovery stay (or staggered discovery schedule) more palatable to a court otherwise reluctant to slow or suppress discovery, defendants may offer to produce limited transactional and related data during the pendency of a motion to dismiss. Such data – which would not necessarily require review of discrete customer files and may be confined to the limitations period – would reflect the terms of transactions with class members during the class period and could additionally include, for example, price lists, market shares and corporate organization. In this way, through a spirit of compromise, production of useful, accessible, but limited information potentially relevant to both class and merits issues can mitigate any perceived delay caused by a discovery stay (or by a deferral of merits discovery).[5]

## Bifurcating Discovery Into Class Certification and Merits Phases

A full stay of discovery during the pendency of a dismissal motion is, of course, not the only procedural vehicle that can influence the timing of class and merits discovery. If a complaint survives the pleading stage, the defendants will often oppose certification if the putative class consists of varied purchasers of disparate products. In these circumstances, the defendants may propose bifurcating discovery of class-related and merits-related issues. The Manual for Complex Litigation recognizes that a carefully phased discovery schedule is consistent with the objectives of Rule 23. To rebut a plaintiff's likely contention that phased discovery would lead only to delay, defendants often contend that a bifurcated discovery schedule will shorten the litigation because any eventual merits discovery would likely be substantially streamlined. A sensible bifurcated discovery schedule, it is argued, can serve the twin goals of effective and efficient case management.[6]

*The Manual for Complex Litigation recognizes that a carefully phased discovery schedule is consistent with the objectives of Rule 23.*

### *Efficiency Advantages of Bifurcation*

Bifurcated discovery permits decisive (and potentially dispositive) pleading and certification issues to be resolved before exhaustive – and highly contentious – discovery on the substantive merits of plaintiff's allegations is begun. The apparent heterogeneity of a putative class may justify an initial discovery phase devoted exclusively to clarifying whether, for example, issues common to the class predominate over individual issues. If a court denies certification (or certifies a significantly narrowed class), the case may be quickly resolved through voluntary dismissal or settlement. Such efficient dispute resolution serves the interests of both parties and courts.

Even if a class is eventually certified, confining initial discovery to class issues will allow the court to tailor any subsequent merits-related discovery to issues that are actually relevant to the class, perhaps newly configured. By establishing through an initial class discovery phase the proper class membership and product markets, the parties can then address merits discovery that is demonstrably relevant. Defendants usually contend that circumscribed merits discovery vis-à-vis the certified class would be more efficient than unfettered and overbroad discovery related to products and purchasers that may ultimately be irrelevant.

A court's evaluation of a motion for phased discovery is typically guided by pragmatic considerations of economy and efficacy, such as potential unnecessary discovery burdens and (as discussed in the next section) the feasibility of distinguishing between class and merits issues.[7] Courts are usually sensitive to the fact that in modern antitrust class actions, which often entail the production of electronically stored information in far-flung places, conducting merits discovery simultaneously with elaborate certification proceedings may significantly delay resolution of potentially dispositive class issues. Such substantial discovery burdens should

certainly be justifiable before a court sees fit to impose them.

Therefore, in seeking to achieve a flexible balance between permissible and necessary discovery in class actions, courts generally consider whether a bifurcated discovery schedule will facilitate efficient proceedings under Rule 23.[8] Phased discovery may indeed concretely serve the interests underlying the 2003 amendments to Rule 23, which were designed in part to encourage expeditious but sufficiently deliberative resolution of class certification.[9] In service of this mandate, courts order phased discovery specifically to expedite the certification decision as well as to satisfy the Federal Rules' overall prescription for a "just, speedy, and inexpensive determination of every action."[10]

The burdens associated with extensive precertification merits discovery may be particularly acute for foreign defendants (and for plaintiffs alleging claims against them where recourse to foreign regimes such as the Hague Convention may be required). Certain defendants' elaborate corporate histories, which may render document retention spotty and therefore discovery responses particularly cumbersome and fragmentary, may likewise counsel in favor of shelving thorny merits discovery issues until certification is resolved. Phased discovery may also yield the collateral benefit of putting off prickly problems associated with grand jury witnesses called to testify in civil litigation.[11]

In rare circumstances, defendants may decide that, for tactical reasons, bifurcation should work in the inverse order such that merits discovery precedes class certification proceedings. If class certification seems inevitable, summary judgment may be the defendants' optimal means of disposing of the case. This strategy may be premised on apparent factual or legal weaknesses of the named plaintiff's claims, because only evidence relevant to a plaintiff's individual claims (as opposed to those of the putative class) is probative on a precertification summary judgment motion.[12] Of course, this aggressive strategy entails the risk of a relatively early adverse summary judgment ruling that may moot class certification and, indeed, effectively terminate the action.[13]

### *Distinguishing Class and Merits Issues for Discovery*

Because courts are generally discouraged from fully assessing the merits of a plaintiff's claims at the certification stage – though some "probing behind the pleadings" may be inevitable[14] – some degree of partition between class and merits issues is inescapable. If class certification does not hinge on the substantive merits of a plaintiff's claims, permitting merits discovery at the precertification stage may impede the decision on certification. A discovery schedule that promotes early determination as to the viability of the putative class (as well as the adequacy of the named plaintiffs) – particularly in jurisdictions that have adopted a somewhat more restrictive view of the extent to which courts may broadly inquire into the merits when deciding class certification[15] – may be especially attractive.[16]

The successful proposal and implementation of phased discovery, however, dictates that "class" and "merits" phases be distinguishable. The segregation of distinct class and merits discovery phases is feasible only if questions central to the certification decision (such as whether plaintiffs can adequately represent the purported class and whether their claims are susceptible to classwide proof) can be resolved independently of information likely to be derived only through discovery directed to the merits. That is, class certification issues can be resolved first only if the "merits" inquiry into the defendants' alleged misconduct – whether, for example, they actually illegally monopolized markets or conspired to fix prices, requiring discovery into their business plans or alleged conspiratorial communications – can legitimately be segregated and deferred as a factual matter. A court that concludes that class and merits issues are substantially intertwined will likely reject any artificial class/merits discovery distinction that "thwarts the informed judicial assessment" of class certification issues.[17]

Demarcating between class and merits issues, and insulating class- from merits-related discovery, is not always practicable, even when parties confer in good faith to clarify whether such (ideally bright) lines can be drawn.[18] Even when delineation is relatively straightforward, counsel are nevertheless likely to quibble over precisely where to draw the lines, adding an additional layer of intricacy to parties' routine negotiation over discovery requests. For example, parties may grapple over whether information relating to the defendants' capacity utilization falls into the "class" or "merits" discovery bucket. Haggling over a phased discovery proposal or, more specifically, over the boundaries of a murky class/merits

distinction, may prompt a plaintiff to seek to extract the defendants' stipulation to certain facts relating to class certification so that class issues can be narrowed expeditiously. Further cluttering the landscape, discovery proceedings in federal antitrust class actions must often be coordinated with separate counsel in parallel individual and state court actions to avoid duplication of effort. To foster as much consensus as possible, parties may be required to submit precertification discovery plans in accordance with Section 21.14 of the Manual for Complex Litigation.

A court generally receptive to phased discovery may limit initial discovery to clearly discernible class issues and, where particular line-drawing issues arise, permit concurrent "merits" discovery only to the extent that it is also obviously pertinent to class certification. Through this pragmatic approach, where class- and merits-based issues are not mutually exclusive, class discovery will not necessarily be enjoined merely because it touches upon merits-based issues.[19] Depending on a plaintiff's eagerness (motivated by settlement leverage or other strategic concerns) for prompt and unlimited merits discovery, such a blended approach to phased discovery may comport with the parties' usual focus on class certification as an early "stage" of antitrust litigation and, therefore, be agreeable to both sides.

When class and merits issues can be sufficiently disentangled, sequential discovery is particularly appropriate where the class certification decision (such as when a narrowed class is ultimately certified) may dramatically reshape the scope of subsequent merits discovery in any residual action. A deferral or stay of merits discovery may be manifestly warranted where defendants petition for appellate review of a class certification decision.[20] Thus, at any procedural stage at which the viability and breadth of the putative class have not yet been definitively settled, merits discovery may be subject to postponement, particularly where sizeable portions of such discovery may later be rendered moot or irrelevant.

### *Factors Disfavoring Bifurcation*

Despite the logic generally favoring phased discovery, some courts have declined to embrace proposed bifurcation viewed as self-serving, overreaching or unworkable. For example, phased discovery (as well as a broader discovery stay) was rejected in *In re Plastics Additives Antitrust Litigation*, distinguished by circumstances that made it particularly unappealing to the court. The *Plastics Additives* defendants did not move to bifurcate discovery until more than a year after the plaintiffs' consolidated complaint had been filed and nearly four months after the defendants' motions to dismiss had been decided; their proposal was seen as injecting additional delay in already protracted proceedings.[21] Moving for phased discovery soon after the filing of a complaint and before resolution (or even filing) of any motions to dismiss likely enhances the factors favoring bifurcation.[22] The defendants in *Plastics Additives* also did not delineate between "class" and "merits" issues to the court's satisfaction.[23] As discussed in the last section, defendants proposing bifurcation are well served to distinguish class and merits issues as transparently as possible.

In *Plastics Additives*, the likelihood that individual claims would persist even in the face of a denial of class certification similarly disfavored bifurcation. The court determined that individual claims were likely to proceed even if certification were denied because one defendant had already been granted leniency and agreed to cooperate with plaintiffs' counsel in the prosecution of claims against non-settling defendants, and all defendants had already been subpoenaed by the government.[24] Where there has been no indictment (or even immunity grant) and limited contact between defendants and regulatory authorities, individual plaintiffs are less likely to have sufficient incentive to pursue claims despite a denial of certification in the class action and, therefore, the logic in favor of bifurcating discovery is correspondingly more potent.

## CONCLUSION

Antitrust class actions frequently involve multiple defendants and expansive discovery. In an effort to spare parties from at least some of the burden and expense attendant to voluminous discovery, courts have in some instances stayed discovery pending motions to dismiss. More frequently, they have adopted phased discovery protocols that defer wide-ranging and potentially avoidable merits discovery until after the viability of the proposed class has been tested and confirmed. Bifurcated discovery schedules, when feasible, may help promote more efficient and systematic resolution of complex antitrust class actions that subject defendants to potentially crippling liability and courts' dockets to unwelcome congestion.

## ENDNOTES

* Mr. Ashley is a senior associate in the Litigation department at Shearman & Sterling LLP's New York office and a graduate of Harvard Law School. He is currently involved in the defense of two putative antitrust class actions.

1 Plaintiffs often seek to highlight liability for the court as an issue common to class members that is relevant to class certification issues under Federal Rule of Civil Procedure 23, and therefore worthy of class-related discovery. However, beyond a plaintiff's boilerplate assertion that the defendants' alleged antitrust violations affected all putative class members similarly, the precise factual circumstances of the defendants' alleged misconduct (*e.g.*, concerning conspiratorial meetings at which prices were allegedly fixed) are usually beyond the purview of the class certification analysis. Discovery relating to these facts consequently can readily be deferred until after the certification ruling.

2 *But see In re Vitamin C Antitrust Litig.*, No. MDL 06-1738 DGT/JO, 2006 WL 2252143, at *2 (E.D.N.Y. June 7, 2006) (rejecting Chinese defendants' appeal to both international comity and practicality in support of their application for stay of all discovery pending resolution of their motions to dismiss).

3 Courts certainly have the discretion to stay discovery pending resolution of motions to dismiss. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North Am. Co.*, 299 U.S. 248, 254-55 (1936); *see also Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) ("A court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.").

4 Courts indeed occasionally stay all discovery in circumstances where a well-founded motion to dismiss seems poised to dispose of a substantial portion of a case. *See, e.g., In re Initial Public Offering Antitrust Litig.*, No. 01 Civ. 2014 (WHP) (S.D.N.Y. May 22, 2002) (order staying discovery pending motion to dismiss antitrust price-fixing claims).

5 Another possible, and consequential, carve-out to a discovery stay may emerge where antitrust claims are precipitated by government investigations or enforcement actions. Parties may tussle over discovery of documents created in the normal course of a defendant's business that were provided to (or seized by) investigative authorities. Such documents, which if already produced to government authorities may be turned over to a civil plaintiff with relatively little burden (excepting privilege and responsiveness review), will likely go to the core of a plaintiff's case. The production early in litigation of such key information may largely render moot any debate over the proper scope and timing of additional discovery.

6 The Manual for Complex Litigation advises that "[d]iscovery relevant only to the merits delays the certification decision and may ultimately be unnecessary. . . . Generally, discovery into certification issues pertains to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof; discovery into the merits pertains to the strength or weaknesses of the claims or defenses and tests whether they are likely to succeed." Manual for Complex Litigation (Fourth) § 21.14 (2004).

7 As with respect to stays of discovery, decisions concerning the allowable scope of discovery at the class certification stage (and the phasing of discovery in particular) rest within the considerable discretion of the court and depend upon the specific circumstances of the individual case. Some class discovery may be merely permissible while other class discovery may be deemed indispensable. A district court's decision to limit class certification discovery in order to conserve the parties' resources, and to prevent a certification motion from becoming a platform for a trial on the merits, will be reviewed under an abuse-of-discretion standard. *See, e.g., In re Initial Public Offering Sec. Litig.*, No. 05-3349-cv, 2006 WL 3499937 (2d Cir. Dec. 5, 2006), at *15; *Heerwagen v. Clear Channel Commc'ns.*, 435 F.3d 219, 233-34 (2d Cir. 2006).

8 *See* Fed. R. Civ. P. 23(c)(1)(A); 5 James WM. Moore, *Moore's Federal Practice* § 23.81 (3d ed. 2006).

9 The new Rule 23(c)(1)(A) directs courts to make class certification determinations "at an early practicable time" instead of, as formerly, "as soon as practicable," thereby investing courts with additional discretion to control the timing of certification decisions. The Advisory Committee chose this language as an alternative to "when practicable," which could have "encourage[d] courts to delay deciding certification motions, leading to an unwarranted increase in precertification discovery into the merits of a class suit." Agenda F-18 Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 9-10 (Sept. 2002) (cited in Joshua B. Gray and Michelle H. Seagull, *Class Action Reaction: Amended Rule 23 Enhances Judicial Supervision in Class Litigation*, 18-SPG Antitrust 91, 92 (2004)). The Advisory Committee notes to the 2003 amendments to Rule 23 do caution against "an artificial and ultimately wasteful division between 'certification discovery' and 'merits discovery,'" which likely has led some courts to disfavor phased discovery and undervalue its potential benefits.

10 Fed. R. Civ. P. 1; *see also Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570-71 (11th Cir. 1992) ("To make early class determination practicable and to best serve the ends of fairness and efficiency, courts may allow classwide discovery on the certification issue and postpone classwide discovery on the merits.") (citing *Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982)); *Larson v. Burlington N. & Santa Fe Ry. Co.*, 210 F.R.D. 663, 666 (D. Minn. 2002) ("[Discovery] bifurcation is not only prompted by the showings required by [Rule 23], but also by the uniqueness of the putative class claim that the Plaintiffs have asserted. While, at this preliminary stage, we cast no projections as to the potential success of a certification Motion, the claim alleged by the Plaintiffs is potentially fraught with factual distinctions which could render certification problematic."); *Thomas v. Moore USA, Inc.*, 194 F.R.D. 595, 604 (S.D. Ohio 1999) (noting that the court would defer resolution of discovery dispute in

antitrust action until after ruling on class certification motion since "the scope of the parties' present discovery dispute will be narrowed significantly once the issue of class certification is resolved").

[11] An obvious potential downside to postponing merits discovery until after (sometimes lengthy) class certification proceedings is the increased staleness of information with regard to document preservation and witnesses' memories. Documents subject to preservation orders may still be inadvertently destroyed, and key witnesses may grow forgetful, change jobs or otherwise depart the scene.

[12] *See, e.g., Aguilera v. Pirelli Armstrong Tire Corp.,* 223 F.3d 1010, 1013 n.1 (9th Cir. 2000); *Novella v. Westchester County*, No. 02 Civ. 2192 (MBM), 2004 WL 1752820, at *1 n.1 (S.D.N.Y. Aug. 4, 2004).

[13] Although precertification summary judgment is obtained only as to the individual plaintiff and does not bind the class that might have been certified, it may, as a practical matter, be the death knell of any further litigation. In evaluating the prudence of an expedited summary judgment – as opposed to class certification – decision that may turn out unfavorably, antitrust defendants must also consider, on the flip side, the increased pressure to settle (particularly in light of trebled damages) that a ruling certifying a class carries in its wake.

[14] *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982); *see also Am. Seed Co. v. Monsanto Co.*, No. Civ. 05-535-SLR, 2006 WL 3276831, at *2 (D. Del. Nov. 13, 2006) ("the court must conduct a limited preliminary inquiry, looking beyond the pleadings, to determine whether common evidence could suffice to make out a prima facie case for the class"). Even when particular facts that underlie both class and merits issues are examined at the class certification stage, they should generally be assessed in light of whether they are susceptible to classwide common proof and not to determine the probability of the plaintiff's success on the merits. *See, e.g.*, *Heerwagen*, 435 F.3d at 232 (citing Charles A. Wright, Arthur R. Miller & Mary K. Kane, 7B *Federal Practice and Procedure* § 1798, at 223 (3d ed. 2005)).

[15] *See, e.g., In re Initial Public Offering Sec. Litig.*, 2006 WL 3499937, at *15; *Heerwagen*, 435 F.3d at 232; *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 134-35 (2d Cir. 2001); 5 *Moore's Federal Practice* § 23.84[2][b] (3d ed. 2006). The growing propensity of courts to ask a party seeking class certification for a viable "trial plan" under new Rule 23 may create some impetus to reconnoiter more deeply into merits territory sooner than before.

[16] *See, e.g.*, Manual for Complex Litigation (Fourth) § 21.14 ("in cases that are unlikely to continue if not certified, discovery into aspects of the merits unrelated to certification delays the certification decision and can create extraordinary and unnecessary expense and burden"); *In re Urethane Antitrust Litig.*, No. 04-MD-1616-JWL, 2006 WL 3000763, at *1 (D. Kan. Oct. 18, 2006); *In re Publication Paper Antitrust Litig.*, No. 3:04 MD 1631 (SRU) (D. Conn. March 15, 2005); *In re Pressure Sensitive Labelstock Antitrust Litig.*, No. 3:03 MDL 1556 (M.D. Pa. Apr. 15, 2004); *KK Motors, Inc. v. Brunswick Corp.*, No. 98 Civ. 2307, 1999 WL 246808, at *5 (D. Minn. Feb. 23, 1999); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 500 (S.D.N.Y. 1996).

[17] *See* Manual for Complex Litigation (Fourth) § 21.14; *In re Plastics Additives Antitrust Litig.*, No. 03 Civ. 2038, 2004 WL 2743591, at *3 (E.D. Pa. Nov. 29, 2004) ("*Plastics Additives*"); *cf. In re Vitamin C Antitrust Litig.*, 2006 WL 2252143, at *2-3 (adopting discrete class and merits discovery phases but with no interruption due to pendency of certification motion; "I see no reason why the parties and their counsel should be unable to conduct two types of discovery at the same time or why, during the period that a class certification motion is under review, they should do nothing at all to prepare for trial on the merits.").

[18] *See* Manual for Complex Litigation (Fourth) § 21.14 (advocating use of a specific and detailed precertification discovery plan under Rule 26(f)); *see also In re Hamilton Bancorp, Inc. Sec. Litig.*, No. 01 Civ. 0156, 2002 WL 463314, at *1 (S.D. Fla. Jan. 14, 2002) ("[a] more reasoned approach is for the Court to approve a detailed discovery plan which prioritizes 'class' related discovery, while not depriving a plaintiff or defendant from engaging in 'merits' discovery when facts and issues are inextricably intertwined").

[19] *See, e.g., In re Pressure Sensitive Labelstock Antitrust Litig.*, No. 3:03 MDL 1556 (M.D. Pa. Apr. 15, 2004) (order granting defendants' motion to bifurcate discovery in antitrust price-fixing action).

[20] *See, e.g., In re Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. 1, 6 (D.D.C. 2002) (granting stay of proceedings pending resolution of defendants' petition for interlocutory review of class certification; "proceeding headlong with discovery and other matters before this Court has the very real potential of unnecessarily wasting significant resources of all parties . . . and the Court, because two significant issues are currently pending before the Court of Appeals, one of which could dispose of this litigation while the other could substantially reshape it").

[21] *See Plastics Additives*, 2004 WL 2743591, at *2-3.

[22] *See, e.g.*, *In re Publication Paper Antitrust Litig.*, No. 3:04 MD 1631 (SRU) (D. Conn. March 15, 2005) (order granting defendants' motion for phased discovery).

[23] *See Plastics Additives*, 2004 WL 2743591, at *3.

[24] *See id.* at *1, 4. ◆