

## **The Role of Experts in Class Certification in U.S. Antitrust Cases**

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In the United States, whether you represent Plaintiffs or Defendants in antitrust class actions, your litigation efforts are going to be supported, and potentially thwarted, by a variety of experts. Throughout the course of a purported class action litigation, your experts might opine on myriad issues, including those relevant to class certification, the merits of the claims, damages, and settlement. This discussion is limited to the role of experts at the procedural point in the litigation in which the presiding judge is determining whether the case should be permitted to proceed as a class action.

To set the stage for our discussion, in order to be able to pursue claims on behalf of a class in federal court in the United States, plaintiffs must make a motion, pursuant to Federal Rule of Civil Procedure 23, to certify the class. A class will be certified if the plaintiffs can establish, by a preponderance of the evidence, each of the following:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition, if the plaintiffs are seeking damages on behalf of the class members, which is the case in most antitrust class actions, the plaintiffs must show, also by a preponderance of the evidence, the predominance of class issues over individual issues, and the superiority of the class procedure for resolving plaintiffs' claims. Fed. R. Civ. P. 23(b).

It used to be the case in the United States that the motion practice associated with the certification of classes was largely the province of the lawyers, who argued to the court that the

requisite factors were satisfied, or not, depending on which side of the “v.” the lawyer found herself. It was not uncommon that discovery regarding class certification issues was bifurcated from discovery on the merits of the case, with the class certification discovery (1) preceding the merits discovery, (2) occurring very early in the litigation, and (3) being substantially limited to only those issues relevant to the court’s class certification determination.<sup>1</sup> To be sure, it was always the case that defendants opposed plaintiffs’ motions for class certification challenging, for example, the representative nature of the named plaintiffs or the commonality of claims as they pertained to the proposed class members, but when class certification motions were filed early in the case and were resolved on a limited evidentiary record, they required minimal, if any, participation by experts. That is no longer the practice.

In 2011, the Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*, in which it suggested that trial courts should be considering the substantive merits of the underlying claims in resolving class certification motions, and should be applying *Daubert*-type<sup>2</sup> analyses to expert testimony proffered in support of, and in opposition to, those motions. 131 S. Ct. 2541, 2551-52 (2011). In 2013, in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, the Supreme Court reined in its suggestion in *Dukes* by cautioning judges against “free-ranging merits

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<sup>1</sup> In 1974, the United States Supreme Court issued its decision in *Eisen v. Carlisle & Jacquelin*, in which the Court held: “There is nothing in either the language or history of [Federal] Rule [of Civil Procedure] 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” 417 U.S. 156, 158 (1974). Compare the language of present-day Fed. R. Civ. P. 23(c)(1)(A) (calling for a class certification decision “[a]t an early practicable time after a person sues or is sued as a class representative”) with the pre-2003 version of the same Rule 23(c)(1)(A) (calling for a class certification decision “as soon as practicable” after commencement of the purported class action litigation).

<sup>2</sup> *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579, 593-94 (1993) (courts should assess whether an expert’s methodology (1) consists of a testable hypothesis, (2) has been peer reviewed, (3) has an acceptable rate of error, (4) is replicable, and (5) is generally accepted). See also Fed. R. Evid. 702 (codifying *Daubert*).

inquiries at the certification stage” and commending courts to consider merits issues “only to the extent [ ] that they are relevant to determining whether the Rule 23 prerequisites for class certification [have been] satisfied.” 133 S. Ct. 1184, 1194-95 (2013).

### **Judge as Gatekeeper**

This shift toward requiring district courts to consider the merits of a case as they pertain to class certification issues, and to subject experts’ opinions on class certification issues to *Daubert*-type analyses, has resulted in the role of experts in the certification of classes becoming increasingly more prominent, while the review of their opinions has simultaneously become subject to increasingly greater scrutiny. A judge must act as a gatekeeper in order to assess whether those experts’ opinions should be considered or relied upon by the court in its determination of whether a case should be certified as a class action.<sup>3</sup>

Given that whether a case is certified as a class action can, and often does, have a dispositive impact on whether the underlying claims will be pursued,<sup>4</sup> the appropriateness of this increased reliance on, and concomitant scrutiny of, experts at the class certification stage should be critically evaluated. Since class certification issues are resolved by a judge, without input from a jury, it is the opinion of this author that this more prominent role of experts at the certification stage is warranted. Judges are sufficiently experienced to accord expert opinions with appropriate weight and to consider those portions of the opinions that not only pertain to the class certification analysis, but are also well-grounded in fact and the economic theories that are

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<sup>3</sup>See, e.g., *Amgen*, 133 S. Ct. at 1194-95; *Dukes*, 131 S. Ct. at 2551-52.

<sup>4</sup>See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.2d 305, 310 (3d Cir. 2008). See also Fed. R. Civ. P. 23 Advisory Committee Note to 1998 Amendments.

most often relevant in antitrust cases.<sup>5</sup> In this way, the experts' opinions can be a valuable aid to the judiciary in their evaluation of class certification issues.

### **Battle of the Experts**

In modern U.S. antitrust litigation, the most critical question at the class certification stage is often whether the claimed antitrust injury, and resulting damages, are susceptible of class-wide proof. The seemingly straightforward question, "whether the antitrust injury claimed by the class is subject to class-wide proof," has embedded within it numerous factual and theoretical issues. It is on these issues that the battle between the experts is frequently waged.<sup>6</sup>

Class certification is intended to occur relatively early in a litigation. That timing raises an evidentiary issue for the plaintiffs because, most often, discovery is not complete at the time of the submission of the class certification motion papers. Is it sufficient to certify a class if plaintiffs can show that there is a robust, valid, peer reviewed method of calculating damages

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<sup>5</sup> See e.g., *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 231-33 (2d Cir. 2006) (affirming district court's weighing of competing expert opinions in resolving market definition and market power issues in conjunction with resolution of class certification motion); *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 190-91 (D.N.J. 2003) (rejecting challenge of expert's opinion proffered in support of class certification when the challenge went to the ultimate merits of the case); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 384 (S.D.N.Y. 1996) (granting class certification despite defendants' challenge of plaintiffs' expert's methodology, holding that it is the jury's province to weigh competing experts' opinions).

<sup>6</sup> See, e.g., *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 814-19 (7th Cir. 2012) (analyzing expert testimony offered to establish that purported class members had been similarly impacted by defendants' alleged conduct); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.2d at 310-11 (discussed *infra* at 6-7); *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 220-22 (M.D. Pa. 2012) (assessing competing expert opinions regarding class-wide antitrust injury and finding that plaintiffs' expert established proof of class-wide injury by a preponderance of the evidence); *In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 220-31 (E.D. Pa. 2012) (evaluating competing expert opinions on the issue of common antitrust impact in order to conclude that plaintiffs' expert opinion was based on a sound methodology and was sufficiently reliable and robust to support certification of the class); *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 531-32 (M.D. Fla. 1996) (rejecting challenge of plaintiffs' expert opinion on common impact based on defendants' expert's disagreement with the conclusions of plaintiffs' expert).

that theoretically can be applied,<sup>7</sup> or do class plaintiffs actually have to apply that method in a reliable way on admissible evidence with persuasive results in order to have their class certified?<sup>8</sup> The latter could be difficult, as a practical matter, if defendants have not yet produced in discovery the data from which damages would be calculated, or if defendants have provided only a preliminary (and perhaps incomplete) set of data. From the defendants' perspective, such data is often very commercially sensitive and there is significant, well-justified reluctance to produce that information to any third party, especially if that third party is a competitor as is often the case in antitrust litigation, even under the umbrella of a court-endorsed protective order.

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<sup>7</sup> See, e.g., *Behrend v. Comcast*, 655 F.3d 182, 200-03 (3d Cir. 2011), *certiorari granted in part*, 133 S. Ct. 24 (2012), *judgment rev'd on other grounds*, 133 S. Ct. 1426 (2013); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 20-25, 26-29 (1st Cir. 2008); *Blades v. Monsanto*, 400 F.3d 562 (8th Cir. 2005); *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 216-20 (3d Cir. 2002); *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. at 207-13; *In re Flonase Antitrust Litig.*, 284 F.R.D. at 234-35; *In re Bromine Antitrust Litig.*, 203 F.R.D. 403, 414-15 (S.D. Ill. 2001).

There are numerous decisions that pre-date *Dukes* and *Amgen* that conclude that *Daubert*-like analyses are inappropriate at the class certification stage. See, e.g., *In re Se. Milk Antitrust Litig.*, No. 2:08-MD-1000 (JRG), 2010 WL 3521747, at \*10-11 (E.D. Tenn. Sept. 7, 2010) (finding expert testimony sufficient at class certification stage without conducting a *Daubert* analysis, and holding that if expert evidence fails a subsequent *Daubert* analysis, class can be decertified or modified); *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 397-401 (S.D. Ohio 2007) (subjecting plaintiffs' class certification expert opinion to a review less rigorous than *Daubert*); *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 76-77 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir. 2001) (evaluating class expert to determine whether his opinion was "so flawed" as to be inadmissible); *In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 25-29 (N.D. Ga. 1997) (postponing *Daubert* analysis, and concluding that expert's method was reasonable, probative, and relied on evidence common to the class members); *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. at 531-32 (plaintiffs only need to have a "colorable method" of proving common injury); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D. Minn. 1995) (assessing only whether the expert's method is "so insubstantial as to amount to no method at all"). These authorities should be viewed with substantial skepticism given the intervening *Dukes* and *Amgen* Supreme Court decisions suggesting that this superficial review is no longer sufficient.

<sup>8</sup> The Supreme Court accepted *certiorari* in 2012 in *Comcast v. Behrend* to decide whether expert testimony offered on class certification issues must be supported by admissible evidence. 133 S. Ct. 24. The Supreme Court, however, declined to reach that issue and decided that case on other grounds. 133 S. Ct. 1426.

Courts continue to vacillate over exactly what the plaintiffs need to establish at the class certification stage by way of proof regarding antitrust injury and damages.

*In re Hydrogen Peroxide Antitrust Litigation*, an antitrust conspiracy case in which the plaintiffs were seeking to certify a class of direct purchasers of the chemicals manufactured by defendants, provides a useful case study of these dynamics. 552 F.3d at 307. We know that in order to certify a class, plaintiffs must demonstrate that the class members must each have “suffered the same injury.” *See, e.g., Dukes*, 131 S. Ct. at 2551. Plaintiffs need not, however, prove those damages in order for the class to be certified. *See, e.g., Amgen*, 133 S. Ct. at 1197. Nevertheless, an expert’s opinion must be more than sound in theory; it must match the facts that plaintiffs offer in support of certification. *See, e.g., Comcast*, 133 S. Ct. at 1435.

In *Hydrogen Peroxide*, the court started its analysis with the conclusion that “the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits -- including disputes touching on elements of the cause of action.” 552 F.3d at 307. Predominance was the issue that was relevant on appeal; the court had to assess whether “antitrust impact [was] capable of proof at trial through evidence that [was] common to the class rather than individual to its members.” *Id.* at 311-12. The opinions of the expert economists proffered on this key issue were deemed to be “irreconcilable” one with the other. *Id.* at 314.

In order to resolve this battle of the experts, the district court applied a *Daubert* and Federal Rule of Evidence 702 screen and found both experts’ opinions satisfied these screens and thus, were admissible. *Id.* at 315 n.13. The district court went on to conclude that plaintiffs had, therefore, satisfied the Rule 23 predominance requirement because plaintiffs’ two alternative economic theories (the market analysis and the pricing structure analysis) “would likely be independently sufficient” at the class certification stage. *Id.* at 315. The district court held that

the differences of prices for the various chemical grades that were highlighted by defendants' expert were related to the concentrations of the chemicals and thus, "did not preclude common proof of antitrust impact." *Id.* The district court also found that evidence of defendants' high combined market shares and high barriers to entry supported plaintiffs' expert's opinion. *Id.* Ultimately, the district court concluded that "plaintiffs would be able to show antitrust impact on all purchasers merely by showing that defendants kept list prices that were artificially high because of their conspiracy." *Id.* The district court deemed it unnecessary for plaintiffs' expert to show that either methodology would work to prove impact and damages; it was sufficient that both methodologies were reliable. *Id.*

The Court of Appeals, however, vacated the district court decision, finding that it erred as a matter of law by not "weigh[ing] the relative credibility of the parties' experts." *Id.* at 322. The Court of Appeals remanded the class certification decision back to the district court with instructions to (1) determine whether plaintiffs' plausible economic theory of class-wide impact was susceptible to proof at trial through admissible evidence common to the class, and (2) resolve the dispute between the experts on this point, based on the relevant evidence available to the court at the class certification stage. *Id.* at 325. In essence, the Court of Appeals accepted the defendants' argument that the district court applied too lenient a standard of review with respect to its analysis of the experts' dueling opinions. "The evidence and arguments a district court considers in the class certification decision call for rigorous analysis. [Plaintiffs'] assurance to the court that [they] intend[ ] or plan[ ] to meet the requirements is insufficient." *Id.* at 318.

### **Practice Point Take-Away**

Although it is true that at class certification the appropriate scope of the inquiry into experts' opinions and the facts on which they rely is not precisely clear, judges have proven adept at separating the experts' wheat from the chaff in their resolutions of class certification motions. Thus, a wise practitioner will submit her expert's class action opinions, methodology and conclusions to a full *Daubert* analysis, and confirm that they are supported by admissible relevant evidence, before proffering them. Better to be safe than sorry!