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ANTITRUST CLASS ACTIONS: MORE RIGOR, FEWER SHORTCUTS

By William Kolasky and Kevin Stemp*

A little more than a decade ago in 1997, the Supreme Court accurately summed up the then-current state of antitrust class action law in *Amchem Products, Inc. v. Windsor*,[1] when it wrote that the prerequisites for class certification are "readily met in certain cases alleging . . . violations of the antitrust laws." [2] In the dozen or so years since then, the courts of appeals—spurred by seemingly modest changes to Rule 23—have dramatically shifted the landscape. Today, as the Third Circuit's decision earlier this year in *Hydrogen Peroxide*[3] illustrates, the courts are taking a much harder look at whether antitrust claims are suitable for class action litigation.

In 1997, many district courts paid little more than lip service to the Supreme Court's instruction in *General Telephone Co. of the Southwest v. Falcone*,[4] that a class should be certified *only* "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 are met."[5] Instead, misled by the Supreme Court's seemingly conflicting language in *Eisen v. Carlisle & Jacquelin*[6] that Rule 23 does not "give[] a court authority to conduct a preliminary inquiry into the merits,"[7] many lower courts followed three shibboleths that artificially constrained the scope of the inquiry a district judge could undertake to determine whether the requirements of Rule 23 had been met:

- *First,* they embraced the proposition that in deciding a motion for class certification, "a court must accept as true the factual allegations contained in the complaint;"[8]
- *Second,* they interpreted *Eisen* to mean they should "not delve into the merits of plaintiffs' substantive claims in ruling upon such a motion;"[9] and
- *Third,* they resisted being drawn into a "battle of the experts," on the theory that only the trier of fact could determine what weight to give the experts' conclusions.[10]

Today, while similar statements can sometimes still be found in some district court opinions, these three once-widely accepted shibboleths have now been soundly rejected in most circuits. The most recent—and in some ways most remarkable—example is the Third Circuit's decision earlier this year in the *In re Hydrogen Peroxide Antitrust Litigation*.[11] In the past, the Third Circuit was generally viewed as one of the most plaintiff-friendly circuits in the country for antitrust class actions. Yet, this year, the Third Circuit expressly repudiated the notion that the prerequisites of Rule 23 are "readily met" in antitrust actions.[12] More generally, the Third Circuit—following the lead of its sister circuits—held that district courts may no longer accept as true all of the plaintiffs' substantive allegations in ruling on class certification, but must instead examine the evidence presented by both sides to determine whether Rule 23's requirements are met, even if that requires the court to examine issues that might also go to the merits of the plaintiffs' claims and to resolve expert disputes.

This article describes the demise of the three shibboleths that once governed antitrust class action law. It then examines how their demise has affected the success rate of plaintiffs in obtaining class certification.

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I. The Demise of the Old Shibboleths

The dramatic shift in antitrust class action law over the past decade began in 1998 with the adoption of Rule 23(f), giving the courts of appeals what the Advisory Committee notes described as "unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari."[13] Prior to the addition of 23(f), the courts of appeals could, as a practical matter, review a class certification decision only when the district court certified an interlocutory appeal under 28 U.S.C. § 1392(b). As a result, appeals from class certification decisions—especially from those granting certification—were rare.

As the potential exposure associated with large class actions grew, there came to be a growing recognition that, as the Advisory Committee noted, an order granting certification could often "force a defendant to settle rather than incur the cost of defending a class action and run the risk of potentially ruinous liability."[14] The Advisory Committee, therefore, recognized the need for the courts of appeals to take a more active role in developing more consistent and coherent standards for class certification. The courts of appeals have done exactly that, and in the process have moved to inject much greater rigor into the class certification process.

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The Seventh Circuit led the way in this new direction in 2001 with its decision in *Szabo v. Bridgeport Machines, Inc.*[15] Challenging the first shibboleth—that a district court, in ruling on class certification, must accept the truth of the plaintiffs' factual allegations—Judge Frank Easterbrook observed tartly that "The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it."[16] Judge Easterbrook reasoned that judges accept a complaint's factual allegations when ruling on motions to dismiss under Rule 12(b)(6) because such a motion only tests the legal sufficiency of a pleading; its factual sufficiency will be tested later by a motion for summary judgment and, if necessary, by trial. "By contrast, an order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premise."[17] The Seventh Circuit held that "[b]efore deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23."[18]

The next year, in another opinion by Judge Easterbrook, *West v. Prudential Securities, Inc.,*[19] the Seventh Circuit took on the other two class action shibboleths—namely, that a court should avoid getting into a "war of the experts," and should stay away from issues that implicate the merits of the plaintiffs' claim. Judge Easterbrook rejected both propositions, writing that they "amount to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert."[20] He added that, "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."[21]

In 2003, the Seventh Circuit's view that a district judge should not shy away from difficult factual and legal issues in deciding motions for class certification, even if those issues are intertwined with the merits of the dispute, received a boost from two further amendments to Rule 23. Prior to these amendments, Rule 23(c) required a district court to determine whether to certify a class "as soon as practicable after commencement of an action."[22] The 2003 amendments revised 23(c) to require instead that a certification determination be made "at an early practicable time."[23] In explaining the reasons for this change, the Advisory Committee notes explained that "[t]ime may be needed to gather information necessary to make the certification decisions."[24] The Committee added that, "Although an evaluation of the probable outcome on the merits is not properly part of the certification decisions, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial," and that this might include "controlled discovery

into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis."[25] The 2003 amendments further amended Rule 23(c) to delete the provision that a class certification "may be conditional."[26] The Advisory Committee explained this change by stating simply that, "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."[27]

Since these amendments, the courts of appeals have joined the Seventh Circuit in writing out of class action law the three shibboleths that had artificially constrained class certification decisions in the past. In so doing, the courts of appeals have injected far more rigor into the class certification process and have eliminated many of the shortcuts on which plaintiffs had previously relied to obtain certification. A brief tour of the circuits will show their near unanimity in this regard.

First Circuit. In *Tardiff v. Knox County,*[28] while affirming a grant of class certification, the First Circuit followed the Seventh Circuit in rejecting an argument by the plaintiffs that the allegations of the complaint must be accepted as true for purposes of class certification. The court wrote: "it is sometimes taken for granted that the complaint's allegations are necessarily controlling; but class action machinery is expensive and in our view a court has the power to test disputed premises early on if and when the class action would be proper on one premise and not another."[29]

The First Circuit again followed the Seventh Circuit in rejecting an argument that a court may not inquire into issues that are intertwined with the merits of the dispute in deciding a motion for class certification. Adopting what it described as "the majority view," the court held that "when class criteria and merits overlap, the district court must conduct a searching inquiry regarding the Rule 23 criteria."[30] The court went on to explain that what is required is "a searching inquiry into whether plaintiffs will be able to prove the pivotal elements of their theory at trial" using common evidence, adding that "[i]f there is no realistic means of proof, many resources will be wasted setting up a trial that plaintiffs cannot win."[31]

In 2008, the First Circuit again addressed "the question of how far a district court should go in testing the legal and factual premises at the class certification stage" in *In re New Motor Vehicle Canadian Export Antitrust Litigation.*[32] The court, once again, rejected the notion that courts should not wade into a battle of the experts in deciding class certification. Reversing a grant of class certification, the court held that the district judge should not have certified a class where the plaintiffs' expert had not yet shown that he had a methodology that could be used to prove antitrust injury with common evidence.

Second Circuit. The Second Circuit has struggled with these issues more than most other circuits, starting off in a direction that unduly constrained the scope of the review before making a midcourse correction with two decisions in 2006: *Heerwagen v. Clear Channel*[33] and *In re IPO Securities Litigation*.[34] Today, however, the Second Circuit has gone as far as any circuit in clarifying the scope of the "rigorous analysis" a district court must undertake to determine whether Rule 23's requirements are met.

The Second Circuit got off to a false start in two early 23(f) decisions: *Caridad v. Metro-North Commuter Railroad*[35] and *Visa Check/Mastermoney Antitrust Litigation.*[36] In *Caridad,* an employment discrimination case, the Second Circuit relied on the "no merits inquiry" language in *Eisen* to hold that class certification could be based on "some showing" that the challenged practice was causally related to a pattern of disparate treatment and that a "statistical report and anecdotal evidence" would be "sufficient to demonstrate common questions of fact . . . [r]egardless of their ultimate persuasiveness on the issue of liability."[37] This language led another panel in *Visa Check* to hold, in an opinion by Judge (now Justice) Sotomayor, that "a district court may not weigh conflicting expert evidence or engage in 'statistical dueling' of experts" at the class certification stage, but should limit its inquiry to satisfying itself that "the expert opinion is not so flawed that it would be inadmissible as a matter of law."[38]

In 2006, in *IPO Securities,* in an opinion by Judge Jon O. Newman (who had written the panel decision in *Caridad*), the Second Circuit revisited these issues, with the help of its earlier decision that same year in *Heerwagen v. Clear Channel. Heerwagen* was an attempted monopolization case brought by concertgoers alleging that Clear Channel was monopolizing the market for concert tickets. The Second Circuit affirmed the denial of class certification, holding that the markets for concert tickets were local and that a nationwide class could therefore not be certified because plaintiff would have to prove that Clear Channel had monopoly power in each local market. In so ruling, the court rejected an argument by the plaintiff that the court had improperly required her to meet Rule 23's predominance requirement by a preponderance of the evidence.

In *IPO Securities,* Judge Newman recognized that *Heerwagen* "marked a major shift away from the 'some showing' and 'not fatally flawed' language of *Caridad* and *Visa Check.*"[39] After carefully parsing the language of *Eisen,* and intervening decisions in other circuits, Judge Newman wrote that the Second Circuit "can no longer continue to advise district courts that 'some showing' of meeting Rule 23's requirements will suffice" or "that an expert's report will sustain a plaintiff's burden so long as it is not 'fatally flawed.'"[40] While Judge Newman did not go so far as to say that what are required are 'findings," the court held that where there are factual disputes in connection with Rule 23 requirements, "such disputes must be resolved with findings," and are subject to review under the "clearly erroneous" standard.[41]

Judge Newman then turned to what he called "the more troublesome issue" that "arises when the rule 23

requirement overlaps with an issue on the merits."[42] Reading *Eisen* "to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement," Judge Newman reasoned that "there is no reason to lessen a district court's obligation to make a determination that every rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue."[43] Referring to the Fourth Circuit's decision in *Garrity,* he explained that this does not usurp the role of the trier of fact because "the determination as to a Rule 23 requirement is made only for purposes of class certification, and is not binding on the trier of fact, even if that trier is the class certification judge."[44] Judge Newman closed his opinion by expressly repudiating dicta in earlier decisions "suggesting that a district judge may not weigh conflicting evidence," including expert testimony, in determining whether a Rule 23 requirement is met.[45]

In 2008, in *Teamsters Local v. Bombardier, Inc.*[46] the Second Circuit provided its district courts additional guidance as to burden of proof a plaintiffs must satisfy in order for a court to find that the requirements of Rule 23 are met. Noting that it had previously left open the question, the court wrote that "Today we dispel any remaining confusion and hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements."[47]

Third Circuit. Unlike the Second Circuit, the Third Circuit recognized in its earliest decisions under Rule 23(f) that the "rigorous analysis" required by *Falcone* necessarily required a searching inquiry into issues that might also go to the merits of the plaintiff's claims. In a securities class action, *Newton v. Merrill Lynch*,[48] the Third Circuit held in 2001 that "[a] class certification decision requires a thorough examination of the factual and legal allegations,"[49] and that this might, in some cases, "require courts to answer questions that are often enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[50] The court went on rule on two legal issues that went directly to the merits of plaintiffs' claims—namely, whether reliance and causation could be presumed. Holding that while reliance could be presumed, causation could not, the court held that common questions would not predominate and affirmed the district judge's denial of class certification. In *Johnston v. HBO Film Management, Inc.*,[51] also decided in 2001, the Third Circuit directly addressed "whether in making a class certification decision the court must take as true the allegations in the complaint where those allegations are unsupported, and in some instances rebutted, by a well-developed record."[52] Citing the Seventh Circuit's then-recent decision in *Szabo,* that court held that there was no such requirement and that it is "not only . . . appropriate, but also necessary, for the district court to examine the factual record underlying plaintiffs' allegations in making its certification decision."[53]

In its *Hydrogen Peroxide* decision earlier this year, the Third Circuit—like the Second Circuit in *IPO Securities*—attempted to further clarify the standards for class certification. In so doing, it eliminated any remaining doubt as to the demise of the old shibboleths on which class action plaintiffs used to be able to rely. *Hydrogen Peroxide* was an antitrust class alleging a worldwide conspiracy among hydrogen peroxide producers to fix prices and allocate customers. Like the Second Circuit in *IPO Securities*, the Third Circuit, in reversing a district court order granting class certification, conducted a thorough review of the evolving class certification standards in other circuits, as well as the purposes underlying the 1998 and 2003 amendments to Rule 23. Based on that review, the court, in an opinion by Chief Judge Scirica (who also wrote *Newton*), took dead aim at each of the old shibboleths. Based on that review, it announced three principles to guide a district court's class certification going forward:

- "First, the decision to certify a class calls for findings by the court, not merely a 'threshold showing' by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence."[54]
- "Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action."[55]
- "Third, the court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it."[56]

In addition, the Court in *Hydrogen Peroxide* also addressed the so-called "Bogosian short-cut"—a notion based on a 1977 Third Circuit decision, *Bogosian v. Gulf Oil Corp.*,[57] which many courts had read to support a finding that common questions predominated in antitrust price-fixing class actions on the theory a price-fixing conspiracy could be presumed to have a market-wide effect. The Third Circuit held that this "short-cut"—to the extent it had ever had any viability—could not survive the 2003 amendments to Rule 23:

> We emphasize that "[a]ctual, not presumed, conformance" with the Rule 23 requirements is essential. Applying a presumption of impact based solely on an unadorned allegation of price-fixing would appear to conflict with the 2003 amendments to Rule 23, which emphasize the need for a careful, fact-based approach, informed, if necessary, by discovery.[58]

In so ruling, the Third Circuit reaffirmed its previous ruling in an unpublished opinion, *Weisfeld v. Sun Chemical Corp.*,[59] that the so-called "Bogosian short-cut

. . . does not allow a court to presume antitrust injury because a *per se* violation occurred."[60] This is consistent with Supreme Court decisions squarely rejecting the contention that antitrust injury may be presumed in the case of a *per se* antitrust violation.[61]

Fourth Circuit. Like the Second Circuit, the Fourth Circuit in its early Rule 23(f) decisions initially adopted a relaxed view with respect to the type of analysis required by Rule 23. Thus, in 2001 in *Lienhart v. Dryvit Systems, Inc.*, the Fourth Circuit held that "[a] district court has broad discretion in deciding whether to certify a class."[62] Two years later, in *Gunnells v. Healthplan Serv., Inc.*, the court reinforced this message, instructing that district courts should give Rule 23 a "liberal rather than restrictive construction."[63]

In 2004, in *Gariety v. Grant Thornton LLP*,[64] the Fourth Circuit shifted its tone significantly, influenced in part by the 2003 amendments to Rule 23. Citing *Falcone*, the court reversed a grant of class certification, finding that the district court had not conducted a sufficiently "rigorous analysis," and should not have simply accepted the plaintiffs' allegations as true for purposes of certifying a class. In language that has since been widely quoted by other circuits, the court wrote that, "If it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order, frustrating the district court's responsibilities for taking a 'close look' at relevant matters."[65] Addressing *Eisen*, the court held that *Eisen* "simply restricts a court from expanding the Rule 23 certification analysis to include consideration of whether the proposed class is likely to prevail on the merits," but "does not require a court to accept plaintiffs' pleadings when assessing whether a class should be certified."[66] Again in language that has been widely followed by other circuits, the Fourth Circuit also rejected that argument that making findings on issues that are intertwined with the merits would usurp the responsibilities of the ultimate fact finder. The court pointed out that "the findings made for resolving a class certification motion serve the court only in its determination of whether the requirements of Rule 23 have been demonstrated," and "do not bind the jury [or the court] adjudging the merits" of the case.[67] Two years later, in *Thorn v. Jefferson-Pilot Life Insurance Co.*, the Fourth Circuit further distanced itself from its earlier decisions, acknowledging that "[t]o the extent the vision of liberality and flexibility set forth by the court in *Gunnells* conflicts with the Supreme Court's admonitions that we should pay 'careful attention' to Rule 23 by giving it a 'rigorous analysis,' we are, of course, bound to follow the Supreme Court."[68]

Fifth Circuit. Citing the Seventh Circuit's decision in *Szabo* and the Fourth Circuit's decision in *Gariety,* the Fifth Circuit in *Unger v. Amidisys, Inc.*[69] likewise squarely rejected the notion that a court must accept the plaintiffs' allegations as true for purposes of ruling on class certification. In language that has come to be widely quoted by other courts, the Fifth Circuit wrote that, [t]he plaintiff text of Rule 23 requires the court to 'find,' not merely assume, the facts favoring class certification."[70]

In a quartet of decisions in 2007,[71] the Fifth Circuit also squarely rejected the notion that a court may not look into issues intertwined with the merits of the dispute in ruling on class certification. In the last of these four decisions, *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, the court addressed the issue at length. Noting that "[t]here is widespread confusion on this point," the court attributed that confusion to "an outdated view that fails to accord this signal event of the case its due."[72] The court then used strong language to reject this "outdated view," writing that "[w]e cannot ignore the in terrorem power of certification, continuing to abide the practice of withholding until 'trial' a merit inquiry central to the certification decision."[73]

Sixth Circuit. The Sixth Circuit has not addressed these issues as directly as some other circuits, but it, too, has held that "[i]n analyzing the predominance requirements, courts [must] take care to inquire into the substance of the underlying claims" to determine what type of evidence will be needed at trial.[74] The Sixth Circuit has also held that "a court performing a 'predominance' inquiry under Rule 23(b)(3) may consider not only the evidence presented in the plaintiff's case-in-chief but the defendant's likely rebuttal evidence."[75] Applying these principles, the Sixth Circuit affirmed denial of class certification in an unpublished 2006 decision, *Rodney v. Northwest Airlines, Inc.*[76] In that case, the plaintiff accused Northwest of monopolizing the market for all non-stop scheduled flights into and out of each of Northwest's hub airports. Noting that establishing the relevant market is the first step in every monopolization case, the court affirmed denial of class certification both because it found that individual questions would predominate on the issue of inter-modal competition on each individual route and because proving that Northwest had monopoly power in each relevant market would also require a mini-trial on entry conditions on each separate route.

Eighth Circuit. The Eighth Circuit's 2005 decision in *Blades v. Monsanto*[77] is broadly consistent with the decisions of these other circuits. In it, the Eighth Circuit rejected all three of the old class action shibboleths. First, the court held that in order "[t]o determine whether common questions predominate, a court must conduct a limited preliminary inquiry, looking behind the pleadings."[78] Second, the court recognized that this inquiry "may require the court to resolve disputes going to the factual setting of the case," which may sometimes "overlap the merits of the case."[79] It cautioned, however, that a court should do so only to the extent necessary "to determine the nature of the evidence the plaintiff would

require" to prove its claim.[80] Finally, the Eighth Circuit held that "[t]his extends to the resolution of expert disputes concerning the import of evidence concerning the factual setting—such as economic evidence as to business operations or market transactions."[81]

Ninth Circuit. The Ninth Circuit held in its 2007 decision in *Dukes v. Wal-Mart, Inc.* that "courts are not only 'at liberty to' but *must* consider evidence which goes to the requirements of Rule 23 [] even if the evidence may also relate to the underlying merits of the case."[82] While the court went on to say that "it was appropriate for the [district] court to avoid resolving 'the battle of the experts,'" in the sense of deciding "whether the evidence ultimately will be persuasive to the trier of fact," it nevertheless subjected the expert's report to close examination to satisfy itself that "the district court did not abuse its discretion when it credited [his] analysis" in granting class certification.[83]

Tenth Circuit. In an early Rule 23(f) decision, *Shook v. El Paso County (Shook I)*,[84] the Tenth Circuit, in reversing denial of class certification, seemed to endorse the premise that "the court must accept the substantive allegations of the complaint as true" in ruling on a motion for class certification."[85] The court was careful to add, however, that the court should not "blindly rely on conclusory allegations which parrot Rule 23."[86] On remand, the district court again denied class certification.[87]

On appeal, in *Shook II*, the Tenth Circuit reconsidered its position and affirmed the denial of class certification.[88] While adhering to its view that "Rule 23 does not give 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," the court recognized that "there is not an impermeable wall between the substance of a cause of action and the decision to certify the class."[89] Reconciling these two principles, the court held that "while a district court may not evaluate the *strength* of a cause of action at the class certification stage, it must consider, without passing judgment on whether plaintiffs will prevail on the merits, . . .whether the requirements of Rule 23 are met."[90]

Earlier this year, in *Vallario v. Vandehey,*[91] the Tenth Circuit further distanced itself from its earlier decision in *Shook I*. Vacating a grant of class certification, the Tenth Circuit held that the district court—which had issued its ruling before *Shook II* and had relied instead on *Shook I*—had abused its discretion by basing its class certification ruling "on an unduly constrained view of the inquiry authorized by Rule 23."[92] The court reiterated that while "the merits of a movant's claims may not serve as the focal point of its class certification analysis, this does not mean that a district court is categorically prohibited from considering any factor, in conjunction with its Rule 23 analysis, that touches upon the merits of a movant's claims."[93] "To the contrary," the court wrote, "a court must ensure that the requirements of Rule 23 are met . . . through findings," even if those findings "overlap with issues on the merits."[94]

Eleventh Circuit. The Eleventh Circuit's decisions are consistent in holding that a district court, in ruling on class certification, cannot rely simply on the plaintiff's allegations: "Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues."[95] The Eleventh Circuit has likewise joined the other circuits in holding that "Although the trial court should not determine the merits of the plaintiffs' claim at the class certification stage, the trial court can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied."[96]

D.C. Circuit. The D.C. Circuit has rendered comparatively few decisions under Rule 23(f). It has, however, endorsed the unanimous view of the other circuits that while a court "may not . . . inquire into the strength or weakness of the merits" of a plaintiff's class action claim, the class determination "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," so that there is no bar to considering those issues to the extent necessary to determine whether Rule 23's requirements are met.[97]

II. The Effect of Rule 23(f)

The importance of Rule 23(f) in bringing greater coherence to class action law can be measured by examining the extent to which the courts of appeals reverse district court rulings on class certification. As Table 1 shows, in the ten years since Rule 23(f) was added, the circuit courts have granted 307 Rule 23(f) petitions for review. These petitions have been almost evenly split between appeals from grants of class certification and appeals from denials. Interestingly, however, the courts of appeals have reversed a much higher percentage of grants of class certification than they have denials—reversing (or vacating) 66 percent of grants, but only 25 percent of denials. As one might expect, the rate of reversal has declined somewhat over this ten-year period. As Tables 2 and 3 demonstrate, during the first five years, 1998-2003, the overall reversal rate was 47 percent, which declined to 37 percent in the last five years, 2005-present. The change is most noticeable in appeals from denials of class certification, where the reversal rate dropped from 24 percent to just 17 percent, whereas for grants, the reversal rate stayed nearly constant.

Tables 2 and 3 also show a market shift in the composition of Rule 23(f) appeals. Whereas in the first five years, appeals in which the petition to review was granted were split roughly evenly between grants and denials, in the last five years, nearly two-thirds of appeals have

been from denials. It is not possible to say with certainty that this shift is due to district courts denying class certification in a higher percentage of cases as a result of the increased rigor required by the courts of appeals, but it is certainly a reasonable hypothesis that would bear further study.

III. Opportunities and Challenges

For defense counsel, the important question is how to exploit the opportunities provided by the increased rigor the courts of appeal have injected into the class certification process. For plaintiffs' attorneys, the converse question is how to respond to the challenges created by this increased rigor.

The most obvious point is that both sides must now prepare for class certification as thoroughly as they would prepare for trial. Plaintiffs now have the burden of proving, by a preponderance of the evidence, that all of the requirements for certifying a class under Rule 23 are met. This includes, in the case of Rule 23(b)(3) classes, showing that common questions of law and fact predominate. Plaintiffs must also convince the court that they have a plan by which they could prove each element of their prima facie case through evidence that is common to the class, and not specific to each individual class member.

Conversely, defendants now have the opportunity to challenge the factual basis for the plaintiffs' allegations in support of class certification, even when those allegations overlap the merits of their claims. It behooves both sides, therefore, to develop as complete a factual record as possible on these issues, and to offer expert testimony as to whether the requirements of Rule 23 are met.

Table 1: Class Cert Appeals (1998-Present)					
	Affirm	**Reverse**	**Vacate**	**Total**	**% Affirmed**
Grant					
1st	3	1	3	7	43%
2d	3	2	6	11	27%
3d	4	2	7	13	31%
4th	1	2	2	5	20%
5th	9	16	10	35	26%
6th	7	2	3	12	58%
7th	7	5	6	18	39%
8th	0	3	1	4	0%
9th	12	4	5	21	57%
10th	2	1	1	4	50%
11th	4	10	8	22	18%
DC	0	0	0	0	-
Subtotal	52	48	52	152	34%
Deny					
1st	0	2	0	2	0%
2d	8	2	4	14	57%
3d	10	1	3	14	71%
4th	14	0	0	14	100%
5th	15	2	3	20	75%
6th	14	1	0	15	93%
7th	11	2	3	16	69%
8th	6	0	0	6	100%
9th	13	5	1	19	68%
10th	10	3	0	13	77%
11th	12	2	3	17	71%
DC	4	1	0	5	80%
Subtotal	117	21	17	155	75%
Total	169	69	69	307	55%
Overall Reversal Rate:					45%
Reversal Rate of Appeals from Denial of Class Cert:					25%
Reversal Rate of Appeals from Grant of Class Cert:					66%

Table 2: Class Cert Appeals (1998-2003)

	Affirm	Reverse	Vacate	Total	% Affirmed
Grant					
1st	1	0	0	1	100%
2d	1	0	1	2	50%
3d	2	0	1	3	67%
4th	1	1	1	3	33%
5th	6	11	4	21	29%
6th	0	1	2	3	0%
7th	3	3	5	11	27%
8th	0	1	0	1	0%
9th	9	2	4	15	60%
10th	1	1	0	2	50%
11th	2	9	5	16	13%
DC	0	0	0	0	-
Subtotal	26	29	23	78	33%
Deny					
1st	0	1	0	1	0%
2d	2	1	3	6	33%
3d	5	0	1	6	83%
4th	7	0	0	7	100%
5th	7	1	1	9	78%
6th	10	0	0	10	100%
7th	4	1	1	6	67%
8th	3	0	0	3	100%
9th	6	3	0	9	67%
10th	3	2	0	5	60%
11th	5	0	1	6	83%
DC	0	0	0	0	
Subtotal	52	9	7	68	76%
Total	78	38	30	146	53%

Overall Reversal Rate:	47%
Reversal Rate of Appeals from Denial of Class Cert:	24%
Reversal Rate of Appeals from Grant of Class Cert:	67%

Table 3: Class Cert Appeals (2005-Present)					
	Affirm	**Reverse**	**Vacate**	**Total**	**% Affirmed**
Grant					
1st	1	1	2	4	25%
2d	2	1	5	8	25%
3d	0	2	5	7	0%
4th	0	1	0	1	0%
5th	2	4	5	11	18%
6th	6	1	1	8	75%
7th	3	2	1	6	50%
8th	0	2	1	3	0%
9th	3	2	1	6	50%
10th	0	0	1	1	0%
11th	1	0	3	4	25%
DC	0	0	0	0	
Subtotal	18	16	25	59	31%
Deny					
1st	0	1	0	1	0%
2d	6	1	1	8	75%
3d	3	1	2	6	50%
4th	7	0	0	7	100%
5th	7	0	2	9	78%
6th	2	1	0	3	67%
7th	7	1	1	9	78%
8th	2	0	0	2	100%
9th	6	1	1	8	75%
10th	6	0	0	6	100%
11th	5	2	1	8	63%
DC	30	1	0	31	97%
Subtotal	81	9	8	98	83%
Total	99	25	33	157	63%
Overall Reversal Rate:					37%
Reversal Rate of Appeals from Denial of Class Cert:					17%
Reversal Rate of Appeals from Grant of Class Cert:					69%

ENDNOTES

1. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

2. *Id.* at 625.

3. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2009).

4. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982).

5. *Id.* at 161. *See also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997) (explaining that the Rule 23(b)(3) requirements demand a "close look") (citations omitted); Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) (stating that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'" (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963))).

6. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

7. *Id.* at 177.

8. Mayo v. Sears, Roebuck & Co., 148 F.R.D. 576, 579 (S.D. Ohio 1993); *accord In re* Catfish Antitrust Litig., 826 F. Supp. 1019, 1033 (N.D. Miss. 1993) ("In ruling upon a motion for class certification, the substantive allegations contained in plaintiffs' complaint are accepted as true."); Hardin v. Harshbarger, 814 F. Supp. 703, 706 (N.D. Ill. 1993) (explaining that "[i]n evaluating the motion for class certification, the allegations made in support of certification are taken as true, and we do not examine the merits of the case"); Shelter Realty Corp. v. Allied Maint. Corp., 574 F.2d 656, 661 n.15 (2d Cir. 1978) ("[W]e have previously held that it is proper to accept the complaint allegations as true in a class certification motion."); Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975) ("The [district] court is bound to take the substantive allegations of the complaint as true . . . ."), *cert. denied*, 429 U.S. 816 (1976).

9. *In re Catfish*, 826 F. Supp. at 1033; *accord In re* VMS Secs. Litig., 136 F.R.D. 466, 473 (N.D. Ill. 1991) ("On a motion for class certification, the court's inquiry is limited to whether the requirements of Rule 23 have been satisfied; the court shall not consider the merits of plaintiffs' claims."); Steinmetz v. Bache & Co., Inc., 71 F.R.D. 202, 204 (S.D.N.Y. 1976) ("[O]n this motion for class action determination, inquiry into the merits of plaintiffs' claim is foreclosed; the sole issue is whether the requirements of Rule 23 are met.").

10. *See In re* Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 247 (E.D.N.Y. 1998) ("As in most instances, the battle of the experts is properly left for the trier of fact to determine."); *accord In re* Sumitomo Copper Litig., 182 F.R.D. 85, 91 (S.D.N.Y. 1998) (finding that the expert's testimony's "deficiency is a matter to be ascertained by trial and not for a determination as to the appropriateness of class certification"); *In re* Indus. Diamonds Antitrust Litig., 167 F.R.D. 374, 384 (S.D.N.Y. 1996) ("We need not consider [the experts' affidavit] in detail, as it is for the jury to evaluate this conflicting evidence and to determine what weight to give to the experts' conclusions.") (citations omitted); *In re* Potash Antitrust Litig., 159 F.R.D. 682, 697 (D. Minn. 1995) (observing that "the certification stage . . . is not . . . the proper forum in which to resolve [a] battle [of the experts]" because plaintiffs only have to make a "threshold showing 'that what proof they will offer will be sufficiently generalized in nature that . . . the class action will provide a tremendous savings of time and effort'" (quoting *In re* Screws Antitrust Litig., 91 F.R.D. 52, 57 (D. Mass. 1981))); *In re* Catfish Antitrust Litig., 826 F. Supp. 1019, 1042 (N.D. Miss. 1993) (explaining that "[w]hether or not [plaintiffs' expert] is correct in his assessment of common impact/injury is for the trier of fact to decide at the proper time") (citations omitted)..

11. 552 F.3d 305 (3d Cir. 2009).

12. *See id.* at 321-322 (parenthetical quote).

13. Fed. R. Civ. P. 23 Advisory Committee Note to Subdivision (f) (1998).

14. *Id.*

15. 249 F.3d 672 (7th Cir. 2001).

16. *Id.* at 675.

17. Id.

18. Id.

19. 282 F.3d 935 (7th Cir. 2002).

20. Id. at 938.

21. Id.

22. Fed. R. Civ. P. 23 Advisory Committee Note to Subdivision (c) (2003).

23. Id.

24. Id.

25. Id.

26. Id.

27. Id.

28. 365 F.3d 1 (1st Cir. 2004).

29. Id. at 4-5.

30. In re New Motor Vehicles Canadian Export Antitrust Litigation, 522 F.3d 6, 24 (1st Cir. 2008).

31. Id. at 29.

32. 522 F.3d 6 (1st Cir. 2008).

33. 435 F.3d 219 (2d Cir. 2006).

34. 471 F.3d 24 (2d Cir. 2006).

35. 191 F.3d 283 (2d Cir. 1999).

36. 280 F.3d 124 (2d Cir. 2001).

37. Caridad, 191 F.3d at 292.

38. Visa Check, 280 F.3d at 135.

39. 471 F.3d at 37.

40. Id. at 40.

41. Id. at 40, 41.

42. Id. at 41.

43. Id.

44. Id.

45. Id. at 42.

46. 546 F.3d 196 (2d Cir. 2008).

47. Id.

48. 259 F.3d 154 (3d Cir. 2001).

49. Id. at 166.

50. Id. at 167 (internal citations omitted).

51. 265 F.3d 178 (3d Cir. 2001).

52. Id. at 177.

53. Id. at 189.

54. 552 F.3d 307.

55. Id.

56. Id.

57. 561 F.2d 434 (3d Cir. 1977).

58. 552 F.3d at 326.

59. 84 Fed. Appx. 257 (3d Cir. 2004).

60. Id. at 261.

61. See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341 (1990).

62. 255 F.3d 138, 146 (4th Cir. 2001).

63. 348 F.3d 417, 424 (4th Cir. 2003).

64. 368 F.3d 356 (4th Cir. 2004).

65. Id. at 365.

66. Id. at 365.

67. Id. at 366.

68. 445 F.3d 311, 318 at n. 8 (4th Cir. 2006).

69. 401 F.3d 316 (5th Cir. 2005)

70. Id. at 321.

71. Cole v. General Moters Corp., 484 F.3d 717 (5th Cir. 2007), Regents of University of California v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372 (5th Cir. 2007), Langbecker v. Electronic Data Systemps Corp., 476 F.3d 299 (5th Cir. 2007), Oscar Private Equity Investments v. Allegiance Telecom, Inc., 487 F.3d 261 (5th Cir. 2007).

72. 487 F.3d 261, 266 (5th Cir. 2007).

73. Id. at 267.

74. Rodney v. Northwest Airlines, Inc., 146 Fed. Appx. 783, 786 (6th Cir. 2005).

75. Id. 787.

76. 146 Fed. Appx. 783 (6th Cir. 2005).

77. 400 F.3d 562 (8th Cir. 2004).

78. Id. at 566.

79. Id. at 567.

80. Id.

81. Id. at 575.

82. 509 F.3d 1168, 1177 at n.2 (9th Cir. 2007) (internal quotations omitted, emphasis in original).

83. Id. at 1181.

84. 386 F.3d 963 (10th Cir. 2004).

85. Id. at 968.

86. Id.

87. Shook v. El Paso County, 2006 U.S. Dist. LEXIS 43882 (D. Colo. 2006).

88. 543 F.3d 597 (10th Cir. 2008).

89. Id. at 612 (internal citations omitted).

90. Id.

91. 554 F.3d 1259 (10th Cir. 2009).

92. Id. at 1267.

93. Id. at 1266.

94. Id. at 1266-67.

95. Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1266 (11th Cir. 2009).

96. Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1188 at n.15 (11th Cir. 2003).

97. Richards v. Delta Air Lines, Inc., 453 F.3d 525, 531 at n.5 (D.C. Cir. 2006).