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Settlement practice from both a plaintiff & defense perspective

EXCERPTS

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§ 12.01 Introduction: a unique landscape for settlement

To paraphrase Winston Churchill, a negotiated settlement may be the worst form of resolving a significant private antitrust dispute, except for all of the others that have been tried from time to time. Trials occur, to be sure, but only for parties prepared for substantial expense and risk, often with a singularly perverse mix of uncertainty for future business practices and reputations, and for courts that are left with no alternative but the sacrifice of an extended block of trial time and other court resources. Additionally, antitrust cases often involve fact-swollen issues of market definition and antitrust injury, among others, that are ill-suited for disposition on summary judgment -- and the discovery path leading there can be so expensive and intrusive that it was noted by the Supreme Court as a consideration in the watershed Twombly opinion that raised
the bar in pleading requirements. Accordingly, familiar incentives for settlement of a major litigation are often more pronounced, for both sides, in the context of a private antitrust case.

However, the antitrust context also presents special complications. The seasoned litigator is well-prepared for the client’s usual threshold questions, such as “Will it be perceived as weakness if we broach the idea of settlement?” Discussing dispute resolution in an antitrust case, however, raises thornier issues. Consider, for example, an action brought by a competitor challenging alleged exclusionary conduct under Section 2 of the Sherman Act. The plaintiff likely seeks declaratory and injunctive relief concerning the defendant’s conduct. If such relief is an essential part of a resolution, then the parties’ settlement discussions will require scrupulous antitrust counseling. Even though the discussions themselves should be immunized from potential antitrust liability under the Noerr-Pennington doctrine, there is no such assurance of protection for the substance and effect of any agreement reached between competitors (or potential competitors) concerning conduct in the market post-litigation. Fortunately, the focus of both sides’ counsel should be aligned in this regard, at least insofar as they not invite a potential Section 1 claim against their respective clients based upon the settlement.

3 See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007) (“[I]t is one thing to be cautious about dismissing an antitrust case in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.” (citations omitted)).

4 See, e.g., Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc., 944 F.2d 1525, 1528 (9th Cir. 1991) (settlement discussions, including offers of settlement, constitute “conduct incidental to the prosecution of the suit” protected under Noerr-Pennington).
These same concerns also generally augur for confidentiality clauses concerning the terms of antitrust settlements reached between private parties (an option not available, but also generally not needed, in the class action context). Indeed, careful practitioners may choose an “off-the-record” agreement before proceeding with discussions -- i.e., that none of the participants will refer to the substance, or even the fact, of such discussions in any other forum (except under compulsion). Confidentiality also can take on special significance in the settlement dialogue itself, as it may be necessary to exchange highly sensitive price, cost, customer, market analysis, and business method information in order for the parties, their counsel, and perhaps even experts retained for the purpose of evaluating the claims to make a meaningful assessment. Businesspersons almost never are completely sanguine about the parameters of such an exchange, the restrictions on access to such information, and the prohibition against its use for any other purpose.

Overlaid on these special considerations are the complexities of an antitrust case, such as damages valuations, which may depend upon mountains of data subject to multiple interpretations, reduced (at great expense) to graphical summaries; parallel regulatory actions; legal and economic analyses of concepts like relevant markets, interchangeability, and exclusionary conduct; and, in cartel cases, complications associated with criminal investigations. Strategic questions also abound, including:

(1) When and how to initiate (and re-initiate) settlement talks;
(2) Whom to involve in the discussions;
(3) How to address joint defense agreement obligations, joint and several liability, third-party releasees, and issues implicating any co-defendants;
(4) Whether to coordinate with other actions or jurisdictions to obtain a “lasting” or “global” litigation peace; and

(5) If the case is a class action, how to prepare a battle plan for successful settlement class certification, preliminary and final approval of the proposed settlement as fair and adequate, effective notice, and provisions for potential opt-outs, among other considerations.

The answers to those questions vary from one antitrust case to the next. And a survey of the relevant case law and documentation is well beyond the scope of a single handbook chapter. In the pages that follow, though, we hope to provide some practical and generally applicable insights to reaching the “correct” settlement solutions.

§ 12.02 Windows of opportunity: when to engage in settlement discussions

5 Prefaced by the disclosure that both of the authors of this chapter were deeply involved on both sides of these matters, the decision in Judge Brock Hornby’s orders in In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197 (D. Me. 2003) and In re New Motor Vehicles Canadian Export Antitrust Litigation, No. MDL 1532, 2006 WL 623591 (D.Me. 2006), together with the briefing and settlement documentation in the cases, are an excellent educational starting point for virtually any issue in complex antitrust class action settlements.

6 The authors’ objective is to provide practical insights from their respective positions on, principally, the plaintiff and defense sides of the bar. Unless specifically noted, individual statements herein should not be assumed to represent a consensus perspective.
Most antitrust cases are both complex and prolix, usually measured in years rather than months. Typically, these cases involve sophisticated and experienced attorneys on both sides who vigorously and competently represent their clients’ respective interests. Nonetheless, even these talented attorneys sometimes overlook opportunities to achieve settlement, in whole or in part, at the earlier and mid-stages of litigation. For plaintiffs, an early settlement, even if partial, can help achieve some part of the litigation goal and advance the case as to remaining claims or defendants. For a settling defendant, an early resolution relieves it of the costs of protracted litigation and exposure to treble damages.

These “windows” of settlement opportunity generally occur at various inflection points in the litigation, which we review chronologically below.

12.02.1 Pre-complaint settlements

In special circumstances, antitrust disputes may be susceptible to settlement prior to the filing of a judicial complaint. This is particularly so in individual actions where the attendant publicity and disclosure obligations triggered by an antitrust complaint may serve as settlement catalysts, but not so much in class actions, which present special complications and considerations due to their representative nature. In individual antitrust actions, plaintiffs’ counsel often have a good idea of the harm attributable to the defendants’ conduct and the nature of relief that would effectively restore competition, and they will have an early assessment of their likelihood of prevailing at trial. When sophisticated defense counsel are involved and can evaluate risk and exposure, a meaningful dialogue may ensue.
In one scenario that arises from time to time, the potential defendants in a civil antitrust action are under investigation by the U.S. Department of Justice ("DOJ") or state attorneys general for anticompetitive conduct, typically conspiratorial in nature. In these circumstances, the DOJ’s “amnesty program,” which will remain in effect until at least 2020 pursuant to a recent extension of the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"), incentivizes conspirators to “turn state’s evidence” and cooperate with the governmental investigation. In exchange, the first self-reporting defendant receives amnesty from prosecution and reduced exposure to any subsequently filed civil antitrust suits, whether they be individual or class actions. In this scenario, the company procuring amnesty may be enticed to seek an early settlement of civil litigation, including any threatened litigation.

Pre-filing settlements in class actions, however, are particularly complicated. Courts have heightened concerns about possible settlement collusion, or that an early settlement may not have been reached through completely arms’ length negotiations.


8 The Supreme Court’s seminal decision in the Amchem case illustrates the uncertainty of pre-litigation settlements in class actions. In that case, the parties reached a massive settlement of actual and potential asbestos claims prior to filing the complaint. The same day the complaint was filed in federal district court, the case settled. While the case ultimately turned on the appropriateness of class certification where released claims and claimants were not known or determinable, the Supreme Court highlighted the fact that the settlement was achieved before a case was actually filed. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).
Objectors to the settlement often exacerbate such concerns by alleging collusion formally, or by alleging that the plaintiffs were not fully informed. Objections may also come from other plaintiffs asserting that the settling plaintiffs are not empowered to release claims and have no authority to enter into a settlement on behalf of a class where no court has previously approved the appointment of “Lead Counsel” to act on behalf of even a putative class.

Nonetheless, in the right circumstances, particularly large multi-defendant conspiracy cases, the monetary and non-monetary benefits that an early settlement affords class plaintiffs, including discovery cooperation, could outweigh the above considerations. An early partial settlement providing for discovery cooperation or voluntary disclosures could benefit the class down the road because it could advance, at an early stage, a plaintiff’s comprehension of the scope and facts of the underlying case. For the defendant, a pre-filing settlement may make smart business sense despite the obstacles to court approval, particularly where that defendant may be cooperating with governmental officials in any parallel investigation.

12.02.2 Settlement at the pre- and post-motion to dismiss or class certification stage

In light of the Supreme Court’s decision in Twombly, defendants’ motions to dismiss are no longer the long shots they once were perceived to be in many antitrust cases. Accordingly, sophisticated counsel now recognize that the uncertainties inherent in a motion to dismiss or the class certification process may also open a settlement “window.”
From a plaintiff’s perspective, motions to dismiss are no longer viewed as risk-free, nor can class certification motions appropriately be taken for granted. Defendants have increasingly used both *Twombly* motions and opposition to class certification to highlight deficiencies in case theory or problems in the application of Rule 23 treatment to particular cases. Obviously, the success of these attacks is directly tied to the facts of each case. Where there are numerous indictments in multi-defendant conspiracy cases, plaintiffs can likely take more comfort in their chances for success. By contrast, where private actions are brought without aid of a parallel governmental investigation or there are serious questions of market definition or measuring impact, defendants may feel more secure in their prospects of prevailing than plaintiffs’ counsel.

Accordingly, there is no “magic” time when the parties should consider initiating settlement discussions with the other side. When one party believes strongly that it will succeed in its motion or its opposition to a motion, a realistic settlement dialogue may not be possible. Conversely, where predicting an outcome of a motion to dismiss or for certification is more of a “coin toss,” all sides in a multi-party litigation should strongly consider engaging in settlement discussions.

Often, litigators are afraid that to even broach the subject of settlement with their opponent is a sign of weakness, which creates great reluctance to initiate such discussions. The plaintiff may be concerned about a perception that their case is somehow weak. Conversely, defendants may view even the act of raising settlement as a capitulation that will unrealistically raise plaintiffs expectations and “whet the appetite.”
12.02.3 Breaking the ice

As described elsewhere in this chapter, it is de rigueur for counsel and their clients to call upon the services of the extensive network of excellent professional mediators who have national reputations for helping parties settle complex litigation such as antitrust disputes. However, some members of the bar recall that, not so long ago, lawyer opponents could and would easily engage in settlement dialogue directly, without third parties.

It does not take much to “test the settlement waters.” Often, particularly if opposing counsel have a civil dialogue, inquiries can be made of the other side as to whether there is an interest in exploring settlement. One generally accepted approach is to start the dialogue by surveying the current litigation landscape and, importantly, acknowledging the uncertainties that both sides face. Often, these discussions will attempt to set a framework, or a general ballpark range of settlement terms, to see if the parties can get in the same “zip code” for starters. Other topics include whether to engage the services of a mediator, which parties should or could be included or excluded in discussions, and the role that clients should and will play in such discussions, including in-house counsel.

Uncertainty often informs a party’s determination of when to “break the ice.” Settlement dialogues sometimes begin when motions to dismiss are submitted but pending, motions for class certification with the attendant discovery are underway or submitted, or other moments of uncertainty have evolved in the existing litigation climate. For example, settlement dialogues can be triggered by developments in a parallel governmental investigation, or other relevant cases or matters.
In the context of class actions, decisions about initiating settlement discussions can be complicated by the requirement of Rule 23 approval. Courts in all federal circuits look to a shopping list of factors in considering whether to grant or deny final approval to a class action settlement under Rule 23. Antitrust class actions are particularly susceptible to analysis under the Grinnell factors or the Girsh factors. One factor that is easily satisfied, even with respect to settlements occurring at early stages of litigation, is that enough of the merits are “laid bare” for the parties to represent that they have made informed decisions about the propriety of settlement. Both parties must simply perform due diligence to satisfy themselves and the court, often through the use of informal or even formal discovery. The settling parties also should have little trouble demonstrating that they are reasonably knowledgeable about the risks of litigation and the rewards to the class for a resolution at a stage in the litigation where perhaps not a single deposition has been taken or even a single document produced.

One trend that seems to be emerging, however, is more careful consideration of the scope of settlements, particularly after passage of the Class Action Fairness Act of

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9 See City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975); In re Jiffy Lube Sec. Litig., 927 F.2d 155 (4th Cir. 1991); Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983); Mirfashi v. Fleet Mortgage Corp., 450 F.3d 745, 748 (7th Cir. 2006); Synfuel Tech., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 653 (7th Cir. 2006); Grunin v. Int’l House of Pancakes, 513 F.2d 114, 124 (8th Cir. 1975); Molski v. Gleich, 318 F.3d 937, 953 (9th Cir. 2003) (listing factors); In re New Motor Vehicles Canadian Exp. Antitrust Litig., MDL Docket No. 1532, 2011 U.S. Dist. LEXIS 40843 (D. Me. Apr. 13, 2011) (applying list of factors, but noting that First Circuit has not adopted a list). See also Jonathan R. Macey & Geoffrey P. Miller, Judicial Review of Class Action Settlements, N.Y.U. Law and Econ. Working Papers, Paper 104, Sept. 26, 2007.
2005 (CAFA). CAFA tends to put federal courts in the position of having to evaluate the settlement of multistate antitrust claims in addition to, or separate and apart from, the settlement of federal antitrust claims. Accordingly, courts seem more willing to allow settlements to proceed, even if reached at an early stage in the litigation, if other aspects of the settlement such as class definitions and scope of release are justified, and if the compensation bears a reasonable relationship to the risks of litigation and collectability.

12.02.4 Last call: settlements after close of discovery but before trial

It has been said that there is no easier time, yet no harder time, to settle cases than after the parties have completed discovery and are staring at a trial. Settlement should be more easily obtained at this stage because the parties and their lawyers have become fully educated on the strengths and weaknesses of their case and thus can recognize the risks of trial. In reality, however, settlements sometimes become more difficult to obtain at this phase because of the “emotional” disconnect between reality and inflated perceptions of a case’s strength.

Where experienced lawyers are able to make a reasonable evaluation of their respective cases, and are also able to engage in frank discussions with their counterparts, it is still possible (in this day and age of Alternative Dispute Resolution (ADR)) for lawyers or parties to come together and reach a settlement. It seems, however, that the trend in settlement is for parties to engage professional mediators to facilitate discussions and, hopefully, a resolution of the case.
Finally, one “wild card” in the late stage settlement process is the trial judge. Fundamentally, most courts try to encourage settlement. Some courts become fixated with settlement to avoid their scarce resources being tied up in long trials of complex matters. Practitioners should try to determine their respective courts’ approaches to settlement and whether the parties can realistically expect the opportunity to actually try their case on a reasonable schedule. This valuable information will certainly help guide and inform the settlement process.

§ 12.05 Class settlement considerations

Settlements in antitrust class actions raise the additional complication of court approval, to protect the rights of the absent class members whose claims may be resolved. The process for approval of a class settlement is generally well-established. There is a presentation of the proposed settlement to the court, generally on the plaintiffs’ motion, with a request for preliminary approval and certification of a settlement class as to the settling defendant(s); if that request is granted, appropriate notice is provided to class members of the terms of the proposed settlement, the timing of a final approval hearing, and the class members’ opportunity to object to or opt out of the proposed settlement; and, if final approval is granted, submitted claims are processed and any settlement proceeds disbursed according to a plan of distribution (generally, along with an award of attorneys’ fees and costs). The issues that arise along that road, however, are numerous.

12.05.1 Scope of claims settled and released
As noted, settling defendants want the broadest possible release to ensure that they will not have to face litigation of tangential claims in the future, but that desire must be tempered by the rights of absent class members whose claims will be extinguished. These competing interests raise substantive, procedural and practical issues, addressed below. How broad may a settlement release be without violating the due process rights of absent class members? What are the prospects of obtaining settlement class certification when the release covers a variety of claims under a number of jurisdictions’ laws? Will a defendant even be willing to settle for something less than “global peace”?

**12.05.1(a) Due Process Concerns.** Substantively, the scope of a settlement release may be quite broad. Several federal courts have held that settlements may release the claims that were actually brought in the litigation, those that were not brought, and even claims that *could not have been* brought. As discussed, the Supreme Court in *Matsushita* observed that “[i]n order to achieve a comprehensive settlement that would prevent litigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not even have

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10 See JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW & PRACTICE § 6.28, at 141 (5th ed. 2009) (“[A] settlement is ordinarily impractical unless it covers all claims, actual and potential, state and federal, arising out of the same transaction or conduct at issue.”); Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 106 (2d Cir. 2005) (“Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country.”).
been presentable in the class action."\textsuperscript{11} Accordingly, the Court held that a class settlement in state court may release claims within the exclusive jurisdiction of federal courts.\textsuperscript{12} Courts have widely followed this rule of law.\textsuperscript{13}

Courts do not permit the scope of a release in a representative class action, however, to be limitless. The settlement release must be limited to claims arising under the same set of facts as the instant action.\textsuperscript{14} This has been referred to as the “identical

\begin{itemize}
  \item Matsushita, 516 U.S. at 369.
  \item See, e.g., Grimes v. Vitalink Comm. Corp., 17 F.3d 1553, 1563 (2d Cir. 1994) (“[I]t is widely recognized that courts without jurisdiction to hear certain claims have the power to release those claims as part of a judgment.”); Reppert v. Marvin Lumber & Cedar Co., 359 F.3d 53 (1st Cir. 2004); but see In re New Motor Vehicles Canadian Exp. Antitrust Litig., MDL Docket No. 1532, 2011 U.S. Dist. LEXIS 40843, at *49-50 (D. Me. Apr. 13, 2011) (refusing to approve class action settlement that purported to release Hawaii state law antitrust claims arising under the same facts as the certified nationwide Sherman Act claim because the plaintiffs could not pursue the Hawaii claim without involvement of the Hawaii Attorney General).
  \item See Nat’l Super Spuds, Inc. v. N.Y. Mercantile Exch., 660 F.2d 9 (2d Cir. 1981). In reversing the district court’s order approving a settlement that purported to release claims of class members holding certain contracts that were not at issue in the litigated action, the Second Circuit stated:

\begin{quote}
We assume that a settlement could properly be framed so as to prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint but depending upon the very same set of facts. This is not such a case.
\end{quote}
\end{itemize}
factual predicate” doctrine. Thus, a settlement release in a price-fixing case may release any actual or potential antitrust-related claims of class members who bought the price-fixed product, including claims under federal and state antitrust statutes and state consumer protection and unjust enrichment laws -- claims which, in essence, could have been pled in the action. But the release generally should not and could not, for example, extinguish a class member’s product liability claims associated with a defect in the product.

Some courts also add a second limitation. Even if a particular claim arose from the identical factual predicate, the claim “will not be precluded where class plaintiffs have not adequately represented the interests of class members.” This does not mean that named plaintiffs have to bring every conceivable claim in order for that claim to be released through settlement. Instead, “adequate representation of a particular claim is determined by the alignment of interests of class members, not proof of vigorous pursuit of that claim.”

Thus, it is important for class counsel to consider the scope of claims that may be asserted by the class when negotiating the settlement, including whether some members of the class may be able to assert different or additional claims than other class members. And defendants seeking a broad release are well-advised to include a provision in the

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15 See Wal-Mart Stores, 396 F.3d at 106-07.
16 Id. at 109.
17 Id. at 113.
settlement agreement by which the class members expressly waive their rights under laws that prevent a general release from extending to unknown or unsuspected claims in favor of the releasor that, if known at the time of execution, would have materially affected the settlement.\textsuperscript{18} Adequacy of representation concerns therefore can arise in the course of determining the scope of the release or the fairness of the settlement as a whole, and not just in determining whether Rule 23(a)(4) is satisfied.\textsuperscript{19}

\textbf{12.05.1(b) Prospects of certifying a settlement class.} Even if the substantive law permits a broad release, the scope of the settlement class may pose procedural hurdles. In particular, the litigants must consider how the scope of the class and the claims settled will affect the prospects of certifying a settlement class under Federal Rule of Civil Procedure 23. Under \textit{Amchem}, a settlement class must meet all requirements of Rule 23, with the exception of manageability.\textsuperscript{20} Thus, when seeking certification of a settlement class under Rule 23(b)(3), for example, the class must meet the numerosity, commonality, typicality and adequacy of representation requirements of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b)(3). Indeed, as the \textit{Amchem} court noted, “other specifications of [Rule 23]—those designed to protect

\begin{footnotes}
\item[19] See, e.g., \textit{In re Cmty. Bank of N. Va. & Guaranty Nat’l Bank of Tallahassee Second Mortgage Loan Litig.}, 622 F.3d 275 (3d Cir. 2010) (questioning the adequacy of representation of the class when strong claims held by one-third of the class were not asserted or considered in negotiating the settlement).
\item[20] Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). For further discussion of the class certification requirements under Rule 23, see Chapter 5 of this \textit{Handbook}.
\end{footnotes}
absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context.”

On one hand, certification of settlement classes in antitrust cases would seem fairly straightforward compared to other substantive areas of law. As the U.S. Supreme Court has noted, antitrust cases generally are prime candidates for class treatment. This is because much of the focus in these cases is on the defendant’s monopolistic or conspiratorial conduct, which is often commonly felt by all members of the class. Even so, settlement classes comprised of members having diverse claims under more than one jurisdiction’s laws and varied rights to relief will pose greater challenges to settlement class certification.

12.05.1(b)(1) DIRECT PURCHASER VS. INDIRECT PURCHASER CLASSES. As a threshold matter, the prospect of meeting Rule 23’s requirements varies greatly by the type of antitrust case brought. In particular, a key factor is whether the class is comprised of direct purchasers, indirect purchasers, or both. A class comprised of only direct purchasers is the simplest case, because it does not pose the challenges concerning state law variations that may hinder certification of indirect purchaser classes. Each direct purchaser class member shares a single common claim that arises out of the same course of anticompetitive conduct undertaken by defendants. Thus, there are rarely problems associated with a

21 Amchem, 521 U.S. at 620.

22 See id. at 625 (“Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.”).
nationwide direct purchaser settlement class, unless the overcharge resulting from the alleged unlawful conduct affects one geographic region differently than another.

Settlement classes of indirect purchasers are a different story. Indirect purchasers are barred from recovering damages under federal antitrust law by reason of the Supreme Court’s Illinois Brick decision. They must instead bring claims under antitrust and consumer protection laws of various states. At the same time, defendants, seeking “global peace” will typically want the settlement class to be nationwide. Since not all states allow indirect purchasers to sue for damages, class members may be differently situated depending on the state in which they reside.

As we will see, this distinction between direct and indirect purchasers plays a role throughout the settlement class certification analysis.

12.05.1(b)(2) Rule 23(a): Numerosity, Commonality, Typicality and Adequacy. In most complex antitrust class actions, numerosity is not an issue. It is not uncommon to see settlement classes with millions or even tens of millions of class members.

Likewise, commonality is often satisfied in antitrust class settlements. Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” The


language of Rule 23(a)(2), as courts and commentators have noted, only requires the existence of a single question of law or fact common to the class. 25 Given the focus on the defendant’s conduct in antitrust cases—e.g., whether competitor defendants conspired to fix prices, or whether a defendant unlawfully monopolized a market—it is usually not difficult to find one common issue of fact or law common to the class. The more difficult issue is whether the common questions predominate over individual questions; this requirement of Rule 23(b)(3) is discussed below. 26

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25 See, e.g., In re Insurance Brokerage Antitrust Litig., 579 F.3d 241, 276 (3d Cir. 2009) (“[T]he commonality requirement is ‘satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class’ . . . .”) (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183 (3d Cir. 2001)); ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 3.12 at 314 (4th ed. 2002) [hereinafter NEWBERG] (“The Rule 23(a)(2) prerequisite requires only a single issue common to the class.”).

26 The Supreme Court’s recent opinion in Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ___ (2011), has the potential to make the commonality requirement a higher hurdle to certification, depending on how Dukes is applied in other contexts. In Dukes, the 5-4 majority Court considered dissimilarities among class members to determine whether commonality under Rule 23(a)(2) was satisfied. In responding to the dissent’s criticism that the majority had blended the 23(b)(3) predominance requirement with the commonality requirement, the Court stated: “We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions predominate, but in order to determine (as Rule 23(a)(2) requires) whether there is ‘[e]ven a single [common] question.’” Slip op. at 19 (emphasis and alteration in original). The Court made clear that not all common questions will do. Instead, class members’ claims must share a “common contention,” and that contention “must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” Id. at 9. For further discussion of the potential effects of Dukes on class certification analysis, see Chapter 5 of this Handbook.
Typicality is satisfied according to the language of Rule 23(a)(3) when “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” This can be a higher hurdle when the settlement class includes indirect purchasers in various states. But the typicality requirement overlaps with many of the other requirements of Rule 23, and courts often consider potential differences among class members as to indirect purchaser standing when considering predominance. The typicality inquiry, then, is focused on ensuring that the nature of the class representative’s claims is typical of the class’s claims. Irrespective of rights to relief, the class representative’s claims are typical of the class’s claim if both concern the same type of injury suffered, caused by the same conduct of defendants. Factual circumstances may vary to some degree between the named plaintiff and the class—e.g., the amount of product purchased or the prices paid—without destroying typicality. In the ordinary price-fixing case, for example, class members all claim to have paid a higher price due to an illegal agreement to fix prices among defendants. In this sense, courts often agree, the claims of the class representatives are typical of those of the class.

What remains to be seen is whether *Dukes* will be applied beyond its particular facts and disturb the abundant case law finding commonality easily satisfied in most antitrust cases.

27 See NEWBERG § 3.13 at 317-24.

28 NEWBERG § 18:9 at 30; *id.* § 18:8 at 26.

29 NEWBERG § 18:9 at 30-35.

30 See Newberg § 18:9 at 35 n.6 (listing cases).
12.05.1(b)(3) PREDOMINANCE. Rule 23(b)(3) requires that “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Predominance is a key battleground in the litigation context, and it can be an obstacle to certification of a settlement class, too. The standards for judging predominance in the settlement context are hotly debated, especially when plaintiffs seek certification of indirect purchaser settlement classes, and courts vary widely in their approaches.

For direct purchaser settlement classes, the question of predominance often hinges on whether the element of antitrust impact can be established with proof common to the class. Expert testimony is often necessary to opine on how the defendants’ conduct affected the price in the market. Although direct purchasers may have paid different prices in different regions, many courts have relied on the presumption of common impact set forth in Bogosian v. Gulf Oil Corp., which permits class certification regardless of whether conspiratorially affected prices were universally elevated to the same degree.31 But even if the Bogosian presumption applies, it may be advisable to

31 561 F.2d 434, 448 (3d Cir. 1977). In Bogosian, the Third Circuit stated:

If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage.
present economic analysis to buttress the presumption. Such a “belt and suspenders”
approach has been successful for plaintiffs, and with greater emphasis on merits inquiry
at class certification, the approach may become the norm.32

Establishing predominance when seeking certification of indirect purchaser
classes likewise requires presentation of common proof of impact. Further economic
analysis showing the pass-through of the illegal overcharge from direct purchasers to
indirect purchasers may also be necessary. Additionally, unlike direct purchaser classes,
indirect purchaser classes may find that varying rights to relief under different states’
laws pose challenges to establishing predominance. Settlement objectors will often argue
that predominance is destroyed by the lumping together of class members from Illinois
Brick-repealer states with those in states that do not permit indirect purchaser standing.
But several courts have certified nationwide settlement classes despite these state law
differences. In In re Warfarin Sodium Antitrust Litigation, for example, the Third Circuit
upheld the district court’s certification of a nationwide settlement class of indirect

32 See Linerboard, 305 F.3d at 153, 155 (applying “belt and suspenders” approach); In re Pressure Sensitive
Labelstock Antitrust Litig., MDL No. 1556, 2007 U.S. Dist. LEXIS 85466, at *49 n.8 (M.D. Pa. Nov. 19,
2007) (noting that courts and litigants often rely on Bogosian coupled with economic analysis); In re Bulk
economic experts in proving common impact, see Chapter 8 of this Handbook.
purchasers who had brought a variety of federal and state antitrust and consumer protection claims. Plaintiffs complained that the defendant, Dupont, had engaged in an anticompetitive and misleading campaign to lead consumers into believing Dupont’s product, Coumadin, was superior to the generic equivalent. In determining whether differences in state law defeated predominance, the Third Circuit found that settlement classes were different than litigation classes, and “[t]he difference is key.” In particular, the district court did not need to “determine whether variations in state laws present the types of insuperable obstacles which render class litigation unmanageable,” because such variations and manageability concerns “are irrelevant to certification of a settlement class.” Further, although variations among states’ laws may defeat predominance in some circumstances, the Third Circuit agreed that “the fact that there may be variations in the rights and remedies available to injured class members under the various laws of the fifty states in this matter does not defeat commonality and predominance.” Other courts have similarly certified nationwide indirect purchaser settlement classes, despite differences in state law.

33 In re Warfarin Sodium Antitrust Litig., 391 F.3d 516 (3d Cir. 2004).

34 Id. at 522-23.

35 Id. at 529.

36 Id. (citing Amchem, 521 U.S. at 620).

37 Id. at 530.

Although class members need not have identical claims in order to satisfy commonality or predominance,\(^\text{39}\) indirect purchaser plaintiffs still may find it advantageous to assert a common claim, such as a nationwide Sherman Act claim for damages or injunctive relief, even if the claim has been dismissed or is subject to dismissal on \textit{Illinois Brick} grounds. Plaintiffs should continue to assert the claim and maintain a right of appeal throughout the litigation. At least one district court has found the existence of a dismissed, but appealable, claim shared by all class members to be helpful in finding commonality and predominance in certifying a settlement class.\(^\text{40}\)

\textbf{12.05.2 Allocation among disparate groups and subclasses}

When some class members are situated differently than others, settling parties and courts must come up with creative ways to fairly allocate settlement proceeds to account for these differences. These differences often fall into two main categories: (1) the class includes members who have purchased at different levels of the distribution chain, which may affect the amount of damage suffered by each class member; and (2) the class

\begin{itemize}
\item \hspace{0.5cm} See \textit{Warfarin}, 391 F.3d at 530 (“In \textit{Prudential}, we noted that ‘a finding of commonality does not require all class members share identical claims,’ 148 F.3d at 310, and we rejected an objector’s contention that predominance was defeated because claims were subject to the laws of fifty states, \textit{id. at 315.”} (citing \textit{In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions}, 148 F.3d 283 (3d Cir. 1998)).
\item \hspace{0.5cm} See \textit{New Motor Vehicles}, 269 F.R.D. at 88 (noting the propriety of settling a nationwide Sherman Act claim subject to appeal); \textit{see also} Ramirez v. DeCoste, 142 F. Supp. 2d 104 (D. Me. 2001).
\end{itemize}
includes members who reside or purchased in different states, which may affect the right to relief available to class members.

12.05.2(a) Allocating among different levels of the distribution chain.

Cases are not often cleanly categorized as direct purchaser cases and indirect purchaser cases. Related direct and indirect purchaser cases are commonly consolidated into a single action, either through Rule 42(a) or via proceedings before the Judicial Panel on Multidistrict Litigation. In such cases, courts often define separate classes of direct purchasers and indirect purchasers, and assign separate counsel to each. Further, given the realities of the marketplace, where indirect purchasers—be they wholesalers, retailers or consumers—may buy at various levels in a distribution chain, courts may further divide an indirect purchaser class into subclasses to account for the different interests of each group.

The use of settlement subclasses in this context puts the issue of “pass on” before the court. In other words, parties will argue as to how and to what degree an overcharge resulting from defendants’ unlawful conduct is passed down the distribution chain from direct purchasers to the various levels of indirect purchasers. For example, purchasers higher up the chain at the wholesale level may absorb some of the overcharge, lessening the effect on those purchasing further down the chain, such as consumers. Counsel for each class or subclass will advocate for a fair allocation and ensure that all voices are heard.

Although subclasses may be necessary to avoid conflicts of interest, they also place considerable cost and timing demands on class counsel, who must devise an
allocation plan. Determining the proper allocation for each type of purchaser often involves complex economic analysis provided by expert witnesses, including competing expert witnesses who may submit reports on behalf of each class or subclass. In addition, if the settlement is reached prior to formal discovery, counsel for various classes or subclasses may require the defendant to agree to provide discovery in order to enable this expert analysis. Nonparty discovery may also be necessary.

The *Sullivan v. De Beers* case illustrates the use of subclasses in determining a fair allocation of settlement proceeds. There, the district court certified a direct purchaser class and an indirect purchaser class.\(^{41}\) The indirect purchaser class was further divided into a “consumer” subclass and a “reseller” subclass, with the latter consisting of diamond wholesalers and retailers that did not buy directly from De Beers. Each class and subclass was represented by separate counsel. The settlement called for $22.5 million to be allocated to the direct purchaser class, and $272.5 million to the indirect purchaser class. To determine the apportionment between the reseller and consumer subclasses, the district court appointed a special master to consider extensive briefing and expert reports concerning the diamond industry, diamond prices, and other issues relevant

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\(^{41}\) In *Sullivan*, the district court certified nationwide direct and indirect purchaser classes and granted final approval of the settlement. Sullivan v. DB Investments, Inc., 2008 U.S. Dist. LEXIS 81146 (D.N.J. May 22, 2008). Objectors appealed, and a three-judge panel of the Third Circuit, in a 2-1 decision, questioned whether the case could be certified for settlement purposes as drawn and remanded to the district court. Sullivan v. DB Investments, Inc., 613 F.3d 134 (3d Cir. 2010). On plaintiffs’ motion, shortly thereafter, the Third Circuit vacated the panel’s decision and granted rehearing en banc. Sullivan v. DB Investments, Inc., 619 F.3d 287 (3d Cir. 2010). The en banc rehearing occurred in early 2011, but as of this writing, the court has not filed its opinion.
to allocating settlement proceeds. The process involved enormous time and effort by class counsel and the special master, but such an effort may be necessary to ensure the adequate representation of differently situated class members.

12.05.2(b) Allocating Among Class Members in Different States. When the settlement class is comprised of indirect purchasers across the country asserting various state antitrust and consumer protection law claims, courts take a number of different approaches in determining how to fairly allocate settlement money across the class. First, some courts approve allocation plans that do not differentiate between class members of various states. This streamlines administration of claims, ensures that all those releasing claims are compensated, and assists class members in comprehending their rights by simplifying the settlement notice. But such plans are subject to objections from class members in Illinois Brick-repealer states who may argue that they deserve a greater share of the settlement money than those class members residing in states whose laws do not permit indirect purchasers to sue for damages.

Second, courts may require that class counsel weigh the various claims of class members and provide greater recovery to those with the strongest claims. In some instances, courts will employ subclasses to ensure that the various competing interests are adequately represented in this respect. But weighing what are oftentimes only hypothetical claims is inherently imprecise, and courts have not articulated the criteria that should be used to determine if, and by how much, the claims of a class member in one state are stronger than the claims of a class member in another state. For example,

state antitrust and consumer protection laws not only vary by whether indirect purchasers have standing to sue for damages, they may also vary as to (1) the remedy available (e.g., single versus treble damages); (2) whether the claim may be asserted on behalf of a class; (3) whether the claim is limited to intrastate commerce or conduct; and (4) whether there is a presumption of antitrust impact from a showing of unlawful conspiracy. Still other factors may also vary among states’ laws, and given this complexity, class members confronted with a settlement notice may have difficulty understanding why they will receive less money than others, which may inform their determination of whether to object or opt-out.

Unsurprisingly, the added complexity associated with subclasses also leads to added costs. In fact, subclasses can require significant extra attorney time, from a greater number of attorneys, who will ultimately seek and be entitled to recompense from the settlement proceeds, thereby diminishing the total amount of cash distributed to class members. Expert reports submitted on behalf of each subclass may further drive up expenses and diminish the amount of settlement proceeds distributed to class members. These costs should be carefully considered, especially when recovery is limited, and weighed against concerns about adequacy of representation.

Finally, it is important to note that perfection is not the standard when judging an allocation plan. “An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.”43 Significant differences among class members should be considered, but other considerations like fairness and efficiency need not yield entirely to a perfect, precise allocation plan.

§12.06 Approval of class settlements

In a matter as significant and public as settlement of an antitrust class action, failure is expensive, in terms of wasted resources, credibility with the court, and reputation of the counsel involved. Nonetheless, the same motivations that can bring the parties together - plaintiffs’ desire to create an opening in prosecuting or resolving the action, and defendants’ desire for an early and economical resolution -- create temptations that can doom antitrust class settlements.

When a settlement fails to win final approval in court (or in the “court of public opinion” among class members, i.e., a significant number of class members opt-out), the failure is often attributable to a shortfall in the information provided to justify the fairness and adequacy of the settlement. The preliminary approval stage, after all, represents merely a determination that the terms of the proposed settlement merit consideration by class members, the court having concluded that such terms are the product of arms’ length negotiations conducted by experienced counsel with sufficient discovery to act intelligently (and that they face few known objectors, or relatively few compared to the size of the class). At final approval, however, Rule 23(e) provides for approval only “after a hearing and on finding that [the settlement] is fair, reasonable, and adequate.” In addition to the negotiation history, the factors relevant to such a finding include the likelihood of success on the merits and the costs of continued litigation.44 Here, the

parties are well-served to include specifics concerning the issues raised in the litigation, particularly any unsettled ones, even though some plaintiffs may do so reluctantly.

In the final analysis, though, because the adequacy of a class settlement is partly determined by a somewhat amorphous criterion (i.e., the “uncertainty” of continued litigation), class members’ approval and acceptance of a settlement can depend more on “optics” than precise mathematics. The court likely will expect some estimation of damages attributable to the alleged conduct, of course, but plaintiffs may be wary of potentially tying themselves to a too-conservative damages theory if litigation against other defendants is continuing. The result may be a need to justify as adequate a number that represents a very small percentage of damages. To illustrate, a rule-of-thumb among many antitrust practitioners is that cartel conduct may result in overcharges on the order of 10 percent of the affected commerce (before trebling of damages). Yet, that being at best an order-of-magnitude estimation, class settlements have been approved that concededly provided cash compensation of less than two or three percent of the allegedly affected sales.45

When presenting such a settlement for approval, plaintiffs must be prepared to accept significant hurdles to the continued prosecution of the action, including, obviously, the lost prospect of recovery against the settling defendant, but also, more abstractly, the loss of a defendant with the ability to pay. At the same time, plaintiffs must make a convincing case for the substantial value of the settling defendant’s cooperation and any injunctive relief provided by the settlement. Even if a settlement is approved by the court, in the absence of such a well-documented analysis, it may be

45 In re GMC Pickup Truck Fuel Tank Prods. Liability Litig., 55 F.3d 768 (3d Cir. 1995)
subject to additional scrutiny by objectors\textsuperscript{46} and potential collateral attack or skepticism by class members, who then deign to opt out.

Finally, an antitrust class settlement is generally too important to risk dooming for a failure of administration, such as an inadequate notice plan. Experienced claims administration professionals should be utilized both to design an adequate notice plan and assist in preparation of an appropriate “plain English” notice. (In addition to processing claims, administrators are often well-versed in the mechanics and tax reporting associated with escrow accounts for settlement proceeds properly set up in a “Qualified Settlement Fund” pursuant to Treasury regulations.)\textsuperscript{47}

\textsuperscript{46} Whether objectors are drawn to a class settlement can be impacted by a number of factors addressed herein (e.g., avoiding any suggestion of collusion through appropriate confirmatory discovery and use of experts, employing third-party mediators if appropriate, and retaining a respected notice expert), as well as the prospect for attorneys fees for an objector’s counsel, which are allowable under Fed. R. Civ. P. 23, depending upon the ultimately viability of the objection.

\textsuperscript{47} For further discussion of the importance of employing notice and claims administration experts, see Chapter 13 of this \textit{Handbook}. 
I. **WHAT negotiations strategies work or don’t work?**

- What effect does working in teams have on negotiations?
- How does one express a willingness to settle without showing undue “weakness”?
- When does the “madman” approach work? When does it pay to be “reasonable” and “cut to the chase”? Do ultimatums or “lines in the sand” help or hurt the process?
- ETHICS QUESTION I: Is lying ethical in settlement discussions?
- ETHICS QUESTION II: When is it ethical to make threats in settlement negotiations?
- ETHICS QUESTION III: Is alcohol ever appropriate in settlement discussions? What affect does alcohol have on negotiations?

II. **HOW should the parties conduct class settlement negotiations?**

- Under what circumstances can mediation be effective (what format(s) can be employed; what is the interplay/social science involved in negotiating strategies and litigation posturing; should different mediators be used for different purposes, etc.)?
- Are presentations about the underlying factual or legal issues appropriate or helpful? Can mini-trials be useful?
- What are best practices for informal settlement discovery, sharing market data, etc. in support of mediation or settlement discussions?
- ETHICS QUESTION: What if there is an ongoing business relationship and the parties want to discuss the case apart from the lawyers?
- ETHICS QUESTION II: Can and should counsel reasonably be expected to sequester all knowledge from the mediation -- e.g., what if responses or objections in discovery appear unreasonable or untrue based on the mediation exchanges?
III. **WHEN should class settlement discussions occur?**

- Generally speaking, what are the best windows of opportunity?

- How have recent developments in class certification jurisprudence (which have tended to move the class certification decision much later in the process) affected, if at all, the timing or tenor of settlement discussions?

- What is the impact of having an amnesty applicant?

- ETHICS QUESTION: Can class settlement discussions be held prior to the filing of a complaint? If so, what are some of the pitfalls to be avoided in such circumstances? Is confirmatory discovery essential?

- ETHICS QUESTION II: Should class settlement discussions occur prior to the Court’s appointment of interim co-lead counsel? If so, what are the potential pitfalls to be avoided? How could a “race to the bottom” between competing co-lead counsel be avoided?

IV. **WHO should be involved in class settlement discussions?**

- In a multi-defendant case, which party(ies) should the plaintiffs approach first if they initiate?

- What role, if any, should class representatives play in settlement? What about particularly large or influential absent class members? Who should attend on behalf of a defendant client?

- In a case with multiple-opt out plaintiffs proceeding separately, should negotiations occur alongside or separate from the opt-outs? How does the presence of multiple co-plaintiffs effect the settlement process?

- What is the impact of joint defense and judgment sharing agreements?

- ETHICS QUESTION: What options are available to class counsel and defense counsel if it becomes apparent that class co-lead counsel have different perspectives/motivations?

V. **WHEN are partial settlements that do not resolve all claims or with respect to all parties appropriate?**

- What are the implications of defendants’ desire for “global peace” in a multi-plaintiff / multi-class (direct and indirect), and even multi-jurisdictional, case?

- What are the implications of moving forward with approval and class certification (in light of settlement) with some but not all defendants?
• ETHICS QUESTION: What if potential indirect claims lurk, but no action has yet been filed -- can the filing and settlement of an indirect suit be a precondition to settlement of the direct class case?

• ETHICS QUESTION II: What are the pitfalls, if any, of trading off prospective relief for money damages?

VI. WHAT should be done to ensure a successful approval process?

• How have Hydrogen Peroxide, DeBeers and other recent cases imposing stricter scrutiny of class certification decisions changed the settlement class certification landscape?

• How does one address complications presented in allocation plans, such as among different levels of purchasers (query whether direct and indirect purchasers should be in the same settlement class at all)?

• How does one properly value conduct relief? Cooperation?

• What is the current viability of coupon settlements? “Claims made” settlements?

• What potential future risks are posed by MFN provisions? Re-opener provisions?

• How do opt-outs, state AGs, and objectors impact the settlement structure and process?
  o Is it possible to structure a settlement so as not to attract objectors unduly?
  o Do “Professional Objectors” have any legitimate role to play or are they merely hold-up artists?
  o ETHICS QUESTION: If a potential objection is known and viewed as truly meritless by the parties, but it may imperil the settlement through delay or simply cause undue delay for no legitimate reason or purpose, what steps should be permissible to address it? Are there appropriate and inappropriate ways to “settle” with an objector and its counsel?

• ETHICS QUESTION: What discussions concerning attorneys’ fees expended and what understandings concerning fee requests, if any, can appropriately be had by the parties?

• ETHICS QUESTION II: Does a mediator have responsibility for ensuring a fair and adequate class settlement? Should the mediator be prepared to provide a declaration to that end?