The Evolving Challenges of Class Certification

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I. Introduction

In recent years there arguably has been a sea change in how certain courts and practitioners view class certification.[3] While the purpose behind the Rule 23 class certification procedure arguably remains the same – "efficiency and economy of litigation," *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974) – given the plethora of litigation and changing standards, one could be forgiven for wondering whether this "principal purpose" is being subverted. Current jurisprudence, most recently in the form of the Third Circuit's decision in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008) ("*HP*"), is, on this reading, better seen as a revolution than an evolution of the class certification standards.

This Paper briefly discusses the reasons behind the aggregation method embodied in Rule 23, the traditional Rule 23 analysis, the impact on this analysis of recent circuit – but, importantly, not Supreme Court – case law, and the implication of these developing

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[3] We say "arguably" and otherwise qualify this statement because the recent case law is ambiguous on key issues. This is perhaps because of courts' reluctance to break from the traditional approach embodied in Rule 23 itself and in Supreme Court precedent and perhaps because of courts' ambivalence toward infecting the class certification procedure with unwieldy merits evidence. That is, most of the recent decisions fairly can be read as case-specific glosses on the traditional class certification approach. Many opponents of class certification, however, have instead heralded these recent decisions as nothing short of revolutionary. In an effort to provide the most conservative advice to practitioners seeking to certify proposed classes, this Paper assumes throughout the most defense-friendly interpretation of the recent decisions.

standards on antitrust practitioners. This analysis highlights several areas for concern, including the most prudent scheduling of class certification motions and the scope of expert reports.

II. Policies Supporting Class Certification

"Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits; and (2) to protect the rights of persons who might not be able to present claims on an individual basis." *Haley v. Medtronic, Inc*., 169 F.R.D. 643, 647 (C.D. Cal. 1996) (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)). The policies behind these purposes are self-evident. Absent the class mechanism, courts could be overrun adjudicating tens or hundreds of thousands of identical claims, and litigants could be subject to varying and inconsistent holdings. *Mungin v. Florida E. C. R. Co.*, 318 F. Supp. 720, 730 (M.D. Fla. 1970).

The class mechanism also allows claimants with small but valid claims that would be uneconomical absent class aggregation to pursue those claims. *See Cotchett v. Avis Rent A Car System, Inc*., 56 F.R.D. 549, 552 (S.D.N.Y. 1972) ("class actions may represent the only available means of redress for consumers whose claims are too small individually to render legal action economically feasible"); *see generally* Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 30 (2009) (discussing the policy behind class actions and the process by which aggregate litigation "dramatic[ally] enabl[es]" claims that are not marketable on an individual basis). Absent this mechanism, such claimants would be faced with the Hobson's choice of forgoing their claims or spending more to prosecute their claims than those claims are worth.

These policy goals are especially present in antitrust class actions in which diffuse sets of plaintiffs are harmed by defendants' uniform misconduct. *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 379 (S.D.N.Y. 1996). "'[A]ntitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy.'" *Id*. (quoting *In Re Sugar Indus. Antitrust Litigation*, 73 F.R.D. 322, 335 (E.D. Pa. 1976)). For these reasons, courts traditionally have been willing to resolve doubts in antitrust class certification motions in favor of class certification. *Diamonds*, 167 F.R.D. at 378 ("[B]ecause of the important role that class actions play in the private enforcement of the antitrust statutes, courts resolve doubts about whether a class should be created in favor of certification.") (collecting cases).

III. Traditional Rule 23 Standards in Antitrust Actions

Under the traditional class action framework courts take a "quick look" to ensure that plaintiffs' allegations provide a basis for class certification, but avoid a more searching inquiry into the facts supporting the allegations and do not engage in a weighing of the evidence for and against class certification. This paradigm encourages plaintiffs to seek class certification early in litigation, and many local rules are in accord and set early presumptive deadlines for filing class certification motions. As discussed below, the recent circuit court decisions have altered this framework and have substantially delayed class certification motions.

In antitrust class actions – as in all class actions – plaintiffs moving for class certification must satisfy all of the requirements of Rule 23(a) and one of the requirements of Rule 23(b). Rule 23(a) has four prerequisites: numerosity, commonality,

typicality, and adequacy of representation.[4] These prerequisites should be construed liberally, especially when class certification is assessed at an early stage of the litigation. *See Woe v. Cuomo*, 729 F.2d 96, 107 (2d Cir.) ("It is often proper . . . for a district court to view a class action liberally in the early stages of litigation, since the class can always be modified or subdivided as issues are refined for trial."), *cert. denied*, 469 U.S. 936 (1984). Plaintiffs carry the burden of demonstrating each of the Rule 23(a) prerequisites, but in most complex antitrust class actions these prerequisites are easily met and not hotly contested.

Rule 23(b) provides three different paths to class certification. Rule 23(b)(3)'s predominance and superiority path is the most common route to certification of actions seeking damages (as opposed to cases seeking injunctive relief), and the route on which most battles contesting class certification focus. "A class action may be maintained if Rule 23(a) is satisfied and if . . . the court finds 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." FED. R. CIV. P. 23(b).

Traditionally, courts have not performed a searching analysis of a case's merits at the class certification stage. This approach is grounded in both the text of Rule 23 and in evidenced in local rules requiring early filing of class certification motions. Rule 23(c) provides that courts "must" determine whether to certify proposed classes at "*an early practicable time* after a person sues or is sued as a class representative." FED. R. CIV. P.

[4] "One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a).

23(c) (emphasis added). Numerous jurisdictions set as a default deadline a short period – often just 90 days after filing a complaint – for filing class certification motions. *See, e.g.*, E.D. Pa. Local Rule 23.1(c) (setting a 90 day period); W.D. Pa. Local Rule 23.1 (same); N.D. Ga. Local Rule 23.1(b) (same). In the context of complex antitrust class actions, such rules only make sense if courts limit their analyses at the class certification stage and do not expect proponents of certification to rely upon a full factual record.

The Supreme Court in *Eisen v. Carlisle & Jacquelin* made clear that courts should not delve into the merits of a case when deciding a class certification motion. "[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).[5] And for years lower federal courts have followed these commands and been able to satisfy themselves that the requirements of Rule 23 are met without examining the merits of the underlying claim. "In determining whether to grant class certification, the Court's main concern is whether Rule 23's requirements are met and, particularly, whether the class action device is a fair and efficient method for litigating the particular controversy. In addition, it is clear that plaintiff is *not* required to prove the merits of the class claim on a motion for certification, or even to establish a probability that the action will be successful." *Haley*, 169 F.R.D. at 647 (emphasis added) (citing *Blackie v. Barrack*, 524

[5] Though *Eisen* is regarded as the seminal Supreme Court case concerning class certification, other Supreme Court decisions have added a gloss to its reasoning. *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982) ("Sometimes the issues [on a class certification motion] are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) ("'Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims. . . . The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits,'" (quoting 15 CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3911, at 485 n.45 (1976)).

F.2d 891, 901 (9th Cir. 1975)); *see also In re Linerboard Antitrust Litig.*, 305 F.3d 145, 152 (3d Cir. 2002) ("[A]t the class certification stage, 'the Court need not concern itself with whether Plaintiffs can prove their allegations regarding common impact; the Court need only assure itself that Plaintiffs' attempt to prove their allegations will predominantly involve common issues of fact and law.'" (quoting *Lumco Indus. v. Jeld-Wen, Inc.*, 171 F.R.D. 168, 174 (E.D. Pa. 1997)).

IV. The Evolving (or Devolving) Standard

Despite the policies behind class certification, the language in Rule 23 and in numerous courts' local rules favoring early adjudication of the class certification motion, and the Supreme Court's guidance in *Eisen*, defendants' aggressive challenges of class certification motions in antitrust and other areas have led recently to a string of potentially troubling appellate decisions concerning the proper standard for assessing class certification motions.[6] *See HP*, 552 F.3d at 307; *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) ("*IPO*"); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).[7]

In *Sazbo*, a fraudulent marketing and breach of warranty case, the Seventh Circuit started a trend that has required district courts to perform more detailed analyses at the class certification stage. Judge Easterbrook, writing for a panel that also included Judge

[6] This trend seems to be driven by an articulated – though unsubstantiated – fear of class actions leading to "blackmail" settlements. Though beyond the scope of this Paper, such fears are exaggerated and unfounded, though apparently no less powerful for being so. *See generally* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357 (2003) (discussing the history of the "blackmail" concerns and the lack of evidence supporting that concern).

[7] *See also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008) (indicating that the traditional class certification analysis applies but that "basic facts" may need to be resolved at the class certification stage); *Oscar Private Equity Inv. v. Allegiance Telecom., Inc.*, 487 F.3d 261, 267 (5th Cir. 2007); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356 (4th Cir. 2004) (following *Szabo*).

Posner, rejected "[t]he proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class" and instead held that when issues pertaining to class certification are contested, "the judge must make a preliminary inquiry into the merits." *Szabo*, 249 F.3d at 675-76. Though *Szabo* itself soon was effectively mooted by defendants' bankruptcy, the opinion has been uncritically adopted in part by other courts.

In *IPO*, the Second Circuit framed the issue as "whether a definitive ruling must be made that each Rule 23 requirement has been met or whether only some showing of a requirement suffices[,]" and held that the former was necessary when contested issues relevant to class certification are present. *IPO*, 471 F.3d at 39. Though IPO arguably did not go as far as *Szabo*, and much of *IPO* can be read as *dicta*, the case shows that *Szabo*'s impact would not be limited to the Seventh Circuit.

Most recently, the Third Circuit reversed a district court's grant of class certification in *HP* and remanded the case for further findings – not mere "showings" – on disputed issues, including disputed issues calling for expert analyses. Given that class certification in complex antitrust class actions generally requires expert testimony even under the traditional approach, the Third Circuit's apparent abandonment of its prior class certification standard[8] is perhaps the most troublingly development to date.[9] In *HP*, the Third Circuit held that:

[8] *Compare Linerboard*, 305 F.3d at 152, and *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *with HP*, 552 F.3d at 307. Of course, *HP* does not style itself as overruling *Linerboard* and, absent intervening Supreme Court authority, a three-judge panel of the Third Circuit lacks the power to overrule a prior panel of that court.

[9] The Third Circuit's opinion in *HP* is ambiguous or contradictory on key issues. For example, the court notes that "the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact *is capable of proof*" through common evidence. *HP*, 552 F.3d at 311-12 (emphasis added). This seems

> 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. 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. 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.

HP, 552 F.3d at 307. The court further noted that "[a]n overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met." *Id*. at 316-17 (explaining away *Eisen* as "preclud[ing] only a merits inquiry that is not necessary to determine a Rule 23 requirement").

HP is less than a year old and the extent to which district courts will employ its more draconian aspects is not clear. Recent cases, however, offer some caution for both plaintiffs and defendants. For example, in *McDonough v. Toys "R" Us, Inc.*, 638 F. Supp. 2d 461, 479 (E.D. Pa. 2009), an antitrust class certification decision following *HP*, the court explained (quoting *HP*) that "'the task for plaintiffs at class certification is to demonstrate that [each] element … is capable of proof at trial through evidence that is common to the class[.]' The relevant question is not whether each element can be proved but whether such proof will require evidence individual to class members." *Id. at* 479. The court then performed the extensive inquiry set forth in *HP* and certified the class, finding, among other things, that plaintiffs' expert's calculation of damages was "most persuasive . . . [and] will give a reasonable estimate of damages." *Id*. at 491 (quotation and citation omitted). In *McDonough*, then the district court did collapse certain merits

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very similar to the traditional approach. It remains to be seen how district courts will interpret and employ *HP* in standard antitrust class actions.

determinations – *e.g.*, the most reasonable estimate of damages – into the class certification analysis. But, the upshot was that plaintiffs now have a findings made by the court that may be helpful on certain issues to avoid defendants' motions for summary judgment and even to bring affirmative summary judgment motions on those issues. *HP*'s deputizing of the district court as a fact finder is not, then, the unalloyed benefit that many in the defense bar first imagined.

In *Jackson v. SEPTA*, another post-HP class certification decision, the court denied certification of the proposed class but clarified that defendants were overreaching with their argument that *HP* authorizes a "preliminary inquiry" into the facts supporting the merits of plaintiffs' case. *Jackson v. SEPTA*, No. 08-4572, 2009 U.S. Dist. LEXIS 78561, at *31-32 (E.D. Pa. Aug. 31, 2009). "[A] preliminary inquiry [] does not require the plaintiff to come forth with evidence – generally only obtained once merits discovery is completed – proving or establishing by a preponderance of the evidence the merits of his claims." *Id.* at *32. The only issue germane to the class certification analysis is "whether the relevant evidence is common to the class." *Id.* at *33.

V. Best Prospective Practices

Given the migration away from the traditional class certification analysis, prudent practitioners are revising litigation strategies so that they can meet potentially more onerous class certification requirements. The most obvious strategic shift involves the timing of the class certification motion. Whereas plaintiffs, consistent with the commands of Rule 23(c) and various local rules, often moved for class certification early in litigation, such an approach now has substantial pitfalls.

As a result of the recent appellate decisions, and especially *HP*, plaintiffs have in some situations withdrawn early-filed class certification motions and have begun to propose that class certification motions should not be due until at or near the end of fact discovery. For example, plaintiffs in *Flonase*, a direct purchaser antitrust class case alleging delayed entry of generic competitors to the prescription drug Flonase, withdrew their *pre*-HP class certification motion and expert report and rescheduled the filing of their new motion until near the end of fact discovery. *See In re Flonase Antitrust Litig*., No. 08-3149 (E.D. Pa.). This is all the more remarkable when one considers that plaintiffs in *Flonase* are seeking to certify a nearly identical class of direct purchasers that has been certified in nearly a dozen similar cases by various courts, including by multiple courts in the circuit and district where *Flonase* is pending.

Class certification was granted so regularly to this class – and never denied – that one defendant recently stipulated to the class instead of wasting resources on a futile opposition to class certification. *See Louisiana Wholesale Drug Co. v. Sanofi-Aventis*, No. 07-7343, 2008 U.S. Dist. LEXIS 81328, at *10 (S.D.N.Y. Oct. 14, 2008).[10] While the class has not changed and in plaintiffs' view the recent decisions do not impact the propriety of certifying the proposed class, prudence dictates that plaintiffs adjust their strategy so that they are prepared regardless of how *HP* is interpreted and applied. This is but one concrete example of how the recent circuit court decisions may increase litigation costs without impacting the ultimate outcome of class certification decisions.

[10] While defendants in other prior antitrust cases understood the efficiencies in stipulating to class certification, *see, e.g.*, *In re Automotive Refinishing Paint Antitrust Litig*., 515 F. Supp. 2d 544, 546 (E.D. Pa. 2007) (noting that the court had "certified a Class of direct purchasers by stipulation of the parties on October 9, 2002"), one expects that such agreements will become more rare if defendants view the recent appellate decisions as raising new barriers to class certification.

One of the primary reasons that plaintiffs are considering tying class certification to the end of merits discovery is so that plaintiffs' experts are able to provide more fulsome reports based on the actual evidence produced in the case. Greater factual grounding of expert reports will allow plaintiffs to avoid the critique that theoretical models are insufficient to demonstrate class-wide impact (and predominance under Rule 23). It remains an open question whether plaintiffs will be required to make some showing – perhaps even by a preponderance of the evidence – concerning, for example, the definition of the relevant market, defendants' market power, and the quantum of damages. But, prudent practitioners may include at least some evidence concerning these issues in class expert reports that previously would have remained silent on these issues. Because expert reports are so important in complex antitrust class actions, proponents of class certification are advised to develop and include in expert reports as many facts as possible concerning the most plausible "but for" world and common impact that plaintiffs suffered by virtue of defendants' alleged misconduct.

VI. Conclusion

The evolving standards for class certification ushered in by *Szabo*, *IPO*, and *HP* are still relatively new and lower courts have not yet elucidated the full contours of the applications of these cases. Nonetheless, prudent practitioners should assume that the most stringent standards will apply and should therefore plan their litigation strategies accordingly—including tying class certification to the end of discovery and preparing experts to submit comprehensive reports in support of class certification.