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LITIGATION

Rigorous Analysis in Certification of Antitrust Class Actions: A Plaintiff's Perspective

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IN *GENERAL TELEPHONE CO. V. FALCON*,[1] the Supreme Court used the word "rigorous" to describe the analysis that the district court was required to conduct in determining whether a proposed class action meets the standards for class certification under Rule 23 of the Federal Rules of Civil Procedure. While the "rigorous analysis" rubric is now widely used in the class certification context, *Falcon* itself provides little guidance as to its meaning, and the depth and nature of an analysis that qualifies as "rigorous" for class certification purposes is much debated by advocates on both sides of the issue. Although courts regularly recognize an obligation to "delve beyond the pleadings"[2] in making the class action determination, the level of permissible fact-finding, and the issues for which that fact-finding is appropriate, remain unsettled questions.

"Rigorous," of course, is in the eye of the beholder. For a defendant opposing class certification, analysis of plaintiffs' approach can never be too rigorous. In fact, defendants in antitrust class actions often characterize a "rigorous analysis" as one requiring plaintiffs not only to prove the impossible,[3] but to do so at a preliminary stage of the litigation, i.e., before merits discovery has concluded, before transaction data has been produced, and before defendants' employees have been deposed.

This article explores the appropriate type and level of "rigor" to be applied in the class certification analysis. I start from the premise that cases should be resolved on their merits, not on a preliminary procedural ruling such as class certification. Thus, courts should not ratchet up the requirements to obtain class certification out of concern that certification may force defendants to settle weak cases, rather than "bet the company" on the whim of a jury. The countervailing concern, equally important, is that denial of class certification might effectively end even a strong case on the merits, leaving the victims without a practical remedy.[4] In short, in employing a rigorous analysis of the requirements of Rule 23, courts should be mindful that erroneous certification denials weigh at least as heavily—and arguably even more heavily against the public interest—than erroneous grants of class certification.[5]

Second, despite the view that a rigorous analysis requires some sort of "preliminary inquiry into the merits,"[6] the focus of the inquiry must remain on the requirements of Rule 23—not on the merits of the underlying claims. In a Section 1 case (15 U.S.C. § 1), this means that the inquiry must focus on how plaintiffs will seek to prove common impact, not whether they will succeed.[7] It follows from this fact that any consideration of the reliability of plaintiffs' experts' analysis must also focus on the question at issue—whether plaintiffs have demonstrated the existence of a methodology by which they may be able to prove the essential elements of their claims with evidence that is common to the class. In other words, while some fact-finding may be necessary to resolve issues about plaintiffs' proposed methodology, or the economic factors that would affect its application, plaintiffs' experts should not be required to prove the core merits issue of common impact at the class certification stage.

Adopting the alternative approach often urged by defendants—one that would, under the banner of a "rigorous analysis" require plaintiffs to demonstrate their likely success in proving common impact—would usurp the fact finder's function and run afoul of the Rules Enabling Act. As the Supreme Court stated in *Amchem*, no reading of Rule 23 can ignore the Rules Enabling Act's mandate that "rules of procedure 'shall not abridge, enlarge or modify any substantive right.'"[8] Therefore, if the question of the existence of antitrust impact would be one for the jury in a non-class context, that question should not be resolved by the court on a preliminary procedural motion.

This conclusion is especially apparent given the complexity of the common impact inquiry. Adopting an alternative approach that would require proof of common impact at the class certification stage would also require full-blown merits discovery to precede the determination. Even leaving aside Rule 23's directive that the class certification decision should be made at "an *early* practicable time,"[9] neither plaintiffs nor defendants would benefit from a system that would prevent the litigants from being able to assess the value of the case until discovery is virtually concluded.

The language of Rule 23, as the advisory committee notes emphasize, requires the courts to analyze "the nature of the issues that will actually be presented for trial."[10] It is to this

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inquiry that the court's "rigorous analysis" must be directed. As "an evaluation of the probable outcome on the merits is not properly part of the certification decision,"[11] a preliminary showing of plaintiffs' likely success in proving common impact is neither necessary nor permitted under Rule 23.

Erroneous Denials of Class Certification Undermine Private Enforcement of the Antitrust Laws. The Supreme Court has recognized that class actions "save the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23."[12] Their utility has been specifically acknowledged in suits alleging horizontal price fixing because litigation of these cases usually focuses on the "existence, scope and effects of the alleged conspiracy," facts that very often are amenable to class-wide proof.[13] Indeed, it is the very nature of a per se claim to have an effect or impact on a large group of people, e.g., purchasers of the product in a market where a normal competitive force has been restrained.[14] The fact that antitrust claims are particularly conducive to satisfying the requirements of Rule 23 was recognized by the Supreme Court, which commented when distinguishing a mass tort case, that "[p]redominance is a test readily met in cases alleging consumer or securities fraud or violation of the antitrust laws."[15] Thus, it is appropriate to approach the certification of antitrust class actions with this economic and legal reality in mind.[16]

In a similar vein, by establishing a private right of action under the antitrust laws, with the potential for recovery of treble damages and attorneys' fees, Congress has recognized the desirability of supplementing governmental enforcement with suits by "private attorneys general," who have the incentives to pursue litigation in the public interest.[17] The purpose of these laws is to benefit consumers, businesses, and the economy, not only through deterrence of anticompetitive behavior, but also by providing compensation to victims. Nevertheless, as Professors Robert Lande and Joshua Davis put it, "The distinctive system of private enforcement that we have in this country is substantially underappreciated."[18]

Often, without any empirical support, some advocates and commentators contend that private antitrust enforcement results in a windfall for private attorneys and little real benefit for consumers.[19] Justified by these unsupported assumptions, these advocates and commentators argue for an ever-increasing burden on plaintiffs to satisfy the requirements for class certification. Yet it is inconsistent with the policy behind private enforcement of the antitrust laws to erect artificial barriers to class certification that would eliminate the only practical remedy available to those harmed.

Commentators who speak about the evils of certifying classes in "questionable" cases appear to equate the certification of these cases with doubtful judgments on the merits. But class certification decisions have more to do with the nature of the product or markets at issue than with the ultimate culpability of defendants. A difficult case on certification does not necessarily imply a weak case on the merits. Nor is the converse true. Horizontal competitors can conspire in complicated markets as well as simple ones. As meritorious cases come in all sizes and shapes of "certifiability," ratcheting up the requirements for class certification to insulate defendants from liability in cases where proof of conspiratorial conduct is weak is misplaced—the procedural requirements for class certification provide an inadequate platform for distinguishing between cases where defendants have illegally conspired, and those where they have not.

The point here is that courts should endeavor to "get it right." Courts should neither certify cases without an appropriate analysis of whether proof of the representative's claim would establish the essential elements of the claims of the class nor erect insurmountable hurdles under the rubric of a "rigorous analysis" that effectively eliminate the private remedy afforded by Congress.

Falcon*'s Requirement of a "Rigorous Analysis" Does Not Permit the Court to Sit as Fact Finder on Merits Issues at a Preliminary Stage of the Litigation.* In *General Telephone v. Falcon*, the Supreme Court held that a class action "may only be certified if the trial court is satisfied after a rigorous analysis that the prerequisites of Rule 23(a) have been satisfied."[20] There, the class was certified by the district court based on nothing other than an allegation in the pleadings that the petitioner maintained a "policy, practice, custom and usage of discriminating against Mexican Americans because of national origin."[21] The court of appeals affirmed the certification order based upon the then-existing across-the-board rule in the Fifth Circuit that suits alleging racial or ethnic discrimination are often, by their very nature, class suits, involving class-wide wrongs.[22] The Supreme Court reversed the Fifth Circuit's determination because there had been no analysis whatsoever, not even a "presentation identifying the questions of law and fact that were common to the claims of the respondent and the members of the class he sought to represent."[23] Indeed, after trial, it was clear that the claim of the class representative was different than the claim pursued on behalf of the class.[24]

Falcon itself does not provide any guidelines as to what a "rigorous analysis" entails for, in that case, there was no analysis at all. Indeed, in *Falcon*, the Supreme Court suggested that in some instances, "the issues are plain enough from the pleadings to determine whether the interests of absent parties are fairly encompassed within the named plaintiffs' claims . . ."[25] Thus, the *Falcon* decision itself does not require a weighing of evidence on disputed issues to be part of a court's rigorous analysis.

Following *Falcon*, cases describing the nature of the Rule 23 inquiry have formulated a vague "rigorous analysis" requirement in a wide variety of ways. While courts regularly condone a peek at the merits, resolution of merits disputes has not generally been allowed. In *Amchem*, the Supreme Court stated that Rule 23 invites a "close look" at the predominance and superiority criteria.[26] In *Newton v. Merrill Lynch*, the Third Circuit stated that "class certification may

require courts to answer questions that are often enmeshed in the factual and legal issues comprising the plaintiffs' causes of action."[27] Thus, "a preliminary inquiry into the merits is sometimes necessary . . . ."[28] Other courts have used similar formulations.[29]

What does it mean to say that a "preliminary inquiry into merits is required?" Does this mean that the court may make findings of fact on ultimate merits issues—issues that in the non-class context would be decided by the jury? Moreover, could it possibly mean that the court is authorized to make this merits determination at a preliminary stage of the litigation on an incomplete record? The Second Circuit recently suggested that this was the case in *In re IPO Securities Litigation*,[30] a securities case in which the class certification issue turned on whether the securities market at issue functioned "efficiently" so as to obviate the need for proof of reliance on an individual basis. There, the Second Circuit held:

> (1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.[31]

Yet even in this apparently positive statement, there was some equivocation. The Second Circuit's opinion quotes the Advisory Committee notes to the Rule 23 amendments, that "an evaluation of the probable outcome on the merits is not properly part of the certification decision."[32] Moreover, it stresses that judicial fact-finding in the class certification context must be limited to "weigh[ing] conflicting evidence to determine the existence of a Rule 23 requirement."[33]

Reconciling these concepts—i.e., avoiding fact-finding that is within the province of the jury, while making the necessary determinations that the requirements of Rule 23 are met—can become muddy in the antitrust context.[34] In an antitrust case, the major contested issue under Rule 23 is almost always "predominance," and to put even a finer point on it, whether impact (or antitrust injury) can be proven with evidence common to the class. Obviously, one way of demonstrating that impact on members of the class can be proven with common evidence is to actually prove it with common evidence, that is, to run the data through the appropriate econometric models and to show an impact on price attributable to defendants' conduct. By the same token, one way to convince the court that impact on the class cannot be demonstrated with common evidence is to refute the existence of common impact. After all, if class-wide impact does not exist, then plaintiffs cannot prove it with common evidence. At the class certification stage, defendants often take this approach—refuting the existence of common impact and then arguing that plaintiffs have failed to carry their Rule 23 burden because their expert has not *proven* common impact by running the transaction data through the econometric models described in the report. In other words, defendants argue that plaintiffs cannot carry their burden under Rule 23 to demonstrate that impact is susceptible to common proof, unless they actually prove common impact as part of their class certification showing. The Second Circuit's *IPO* decision will likely be cited in support of this approach.

Many courts, however, even those that have long accepted the view that a preliminary inquiry into the merits may be required under Rule 23, reject the proposition that plaintiffs must prove the existence of common impact at the class certification stage. As the Third Circuit stated in *In re Linerboard Antitrust Litigation*, "at 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.'"[35] Indeed, any other approach would run afoul of the Rules Enabling Act, which is the authority for Rule 23 in the first place. Before a 1988 amendment, the Rules Enabling Act, 28 U.S.C. § 2072, provided that: "Such rules shall not abridge, enlarge or modify any substantive right *and shall preserve the right of trial by jury* . . . ."[36] It would be anomalous to permit judicial resolution of factual disputes in cases filed as class actions, where those same facts would be resolved by a jury in a non-class context. Indeed, given the complexity of the common impact inquiry, the preliminary stage of the litigation, and defendants' access to transaction data and other evidence that may be unavailable to plaintiffs, there can be no other result.[37] Rule 23 concerns *how* plaintiffs intend to try their case, not whether they will succeed in doing so. The question of whether the plaintiffs' proffered methods succeed or fail must be left to the fact finder. Resolution of a contested issue of fact by the trial court in the context of a Rule 23 analysis, before a complete evidentiary record has been created, and without the protections of Rule 56, would necessarily alter or abridge a substantive right. *Amchem* reminds us that procedural rules cannot be so utilized.[38]

An Analysis of the Sufficiency of Plaintiffs' Expert Reports at the Class Certification Stage Must Be Focused on the Issue at Hand—the Methodology Proposed for Proving Common Impact—Not Whether Common Impact Has Been Proven. In antitrust cases, plaintiffs invariably support their class certification motion with affidavits or reports by one or more experts in the field of antitrust economics. Among other things, these reports often describe in

economic terms, the nature of the claims alleged, the characteristics of the product and industry in question, and employ economic principles to explain why the conduct alleged, if proven, would tend to have class-wide effects. Plaintiffs' experts often opine as to the existence of data or other tools that could be utilized to estimate the extent of damage suffered by each member of the class.

Whether by way of a *Daubert* challenge[39] or otherwise, the court's evaluation of the plaintiffs' expert reports at the class certification stage should be limited by the scope of the question at hand—whether the requirements of Rule 23 are met. This analytical approach was illustrated in several recent court cases where direct purchaser price-fixing claims were asserted. In one such case, *In re Hydrogen Peroxide*, the court acknowledged that its "inquiry into the merits" should be limited "to the minimum necessary at this juncture" to ascertain whether the requirements of Rule 23 are met.[40] While the court applied the *Daubert* analysis, it held that the analysis is limited because "class certification is concerned primarily with the nature of the proof plaintiffs would offer, not with its quantity or sufficiency." Plaintiffs' expert report proffered two alternative analyses—a market analysis and a pricing structure analysis, either of which would support a conclusion that antitrust impact on each class member is susceptible to proof by predominantly common evidence.[41]

Despite disagreement between the experts on keys issues, such as whether an industry-wide pricing structure in fact existed, the court found that the requirements of Rule 23 had been met. All Rule 23 requires is that antitrust impact on each class member "is susceptible to proof by common evidence."[42] To resolve the dispute between the experts over the issue of whether a pricing structure in the industry actually existed, would, in the court's view, invade the province of the jury. It stated: "At this stage we are not concerned with whether we find plaintiffs' evidence convincing—that is a jury question—but whether it is predominantly common to all plaintiffs."[43] "Because the question of antitrust impact on all purchasers will be a question for the jury at trial, it is sufficient at this stage for us to find that it is amenable to class-wide proof. We need not find that such impact has already been shown or is more likely than not."[44]

A similar analysis was employed by the court in *In re Bulk [Extruded] Graphite Products Antitrust Litigation*.[45] There, both parties' experts disagreed over such issues as the nature and characteristics of the products and markets in question and the existence of pricing structures among various grades of bulk extruded graphite. These issues, however, "go to the merits of the case and are to be resolved by the finder of fact."[46] Similarly, in *In re Plastic Additives*, both experts submitted reports directed to the existence (or non-existence) of a pricing structure in the relevant industry. The court again refused to weigh the experts' testimony, characterizing the dispute as "a contestation that requires resolution by the finder of fact at trial rather than by this Court at the class certification stage."[47]

In each of these cases, the court also rejected defendant's arguments that plaintiffs' expert report was inadmissible under *Daubert* or that plaintiff otherwise failed to carry their Rule 23 burden because plaintiffs had failed to demonstrate that the proposed analyses would actually show common impact. In *In re Hydrogen Peroxide*, the court said: "A host of courts have determined that it is . . . improper to analyze the correctness or likely success of plaintiffs' proposed analytical model at the class certification stage."[48]

This approach to the analysis of the expert reports in the context of a Rule 23 motion has been labeled as the "a belts and suspenders rationale" by the Third Circuit in *Linerboard*.[49] The approach limits the inquiry and the scope of the court's "fact-finding" to the methodology proposed by the expert. Jury questions regarding the ultimate success of the methodology, remain with the jury.[50] This limitation is an appropriate one—as it is focused on determining, in the words of the Second Circuit in *In Re IPO*, "whether the Rule 23 requirements are met," not whether plaintiffs will prevail on their claims.

Using this approach, appropriate fact-finding in the class certification context might include fact-finding on such issues as the nature of the industry or the product in question, whether certain types of data are available, and whether plaintiffs' proposed methodology properly includes or excludes a particular factor. Assuming that plaintiffs' experts' evidence on these issues, considered in light of defendants' counter-evidence, is sufficient to pass muster under *Daubert* (and is therefore "admissible"), and is sufficiently probative to create a genuine issue of material fact (which would be resolved by the fact finder in a non-class context), the court should certify the class. If it turns out that plaintiffs cannot prove class-wide impact because, for example, transactional data does not in fact exist, then plaintiffs will lose. But to hold plaintiffs to a standard of proof on class certification that is even more stringent than that which would be required to get to the jury in the non-class context, would undermine plaintiffs' substantive rights and the private remedy afforded by Congress.

Adopting the alternative approach often urged by defendants—one that would define a "rigorous analysis" as requiring plaintiffs to demonstrate, by a preponderance of the evidence, the existence of common impact on members of the proposed class—would have ramifications in the discovery sphere as well. Demonstrating common impact is a complex undertaking, one that often requires extensive discovery of information within the exclusive control of defendants. Not only may individual transaction data be pertinent to proof of common impact, but so is testimony from defendants' employees, from its executives to its sales force. While discovery of methodology-based factual issues can be "managed" in a way to complete the class-certification record and present the class certification motion for decision at "an early practicable time,"[51] it is difficult to envision how discovery can be fairly limited where the class issues collapse into the complex inquiry regarding the existence of common impact.

As a final point, the "rigorous analysis" rubric should not be employed to justify raising plaintiffs' burden on the merits. Yet in arguing about the operation of the "but-for" world, antitrust defendants often urge the court to require a higher standard of proof for impact than that which would be applicable in an individual case. A colleague of mine calls this the "It's a Wonderful Life" of antitrust, referring to the beloved 1946 Frank Capra film starring James Stewart. *It's a Wonderful Life* is the story of the life of George Bailey as told to by his guardian angel, Clarence Oddbody, who has been recruited to save a suicidal George in his moment of need. To convince George that he's had a wonderful life, the angel grants his wish that he had never been born. The two then walk through the town and observe all the horrors that befell its good people simply because George had never been born.

Turning back to the earthly world of antitrust, a plaintiff who purchased a price-fixed widget has the burden of proving the overcharge he or she paid because of the antitrust violation, i.e., the difference between the actual price and the presumed competitive price multiplied by the quantity purchased.[52] But that's not good enough for proponents of the *It's a Wonderful Life* approach to class certification, who insist that class plaintiffs have the burden of proving what the entire world would have looked like for every class member in the absence of the antitrust violation. Surely some might have bought widgets at a lower prices, but some are "brand loyalists" who would have bought widgets at any price so they are not harmed; some would have bought something different that cost less or nothing at all, so they are not harmed; indeed, but for excessive profits garnered by the price fixers, the entire widget industry would have collapsed and nobody would have been able to buy any widgets, so no one is harmed. No matter what class plaintiff George Bailey did, he would not be typical of other class members. Anything short of presenting this alternative universe would not be rigorous enough and, since there are too many nuances, the class is not cohesive and cannot be certified.

If this truly were the burden on class plaintiffs, it is difficult to imagine how any antitrust class could be certified. Fortunately, it is not,[53] nor should it be.[54] Any attempt to make it so under the guise of "rigorous analysis" should be rejected.

In sum, antitrust class actions are an important component of enforcement that benefit consumers, businesses, and the economy. Courts cannot and should not impose artificial obstacles to class certification that are beyond the scope of Rule 23. A "rigorous analysis" in the class certification context must be limited to a consideration of the plaintiffs' ability to satisfy the requirements of Rule 23, and thus be focused on plaintiffs' proposed methodology. Further inquiry into the likely success of the methodology is not justified by the Supreme Court's *Falcon* decision and would abridge or modify substantive rights in contravention of the Rules Enabling Act.

If plaintiffs can demonstrate a potentially viable approach to proving antitrust impact on a class-wide basis, the court's analysis of that approach must stop short of pre-trial resolutions of ultimate issues of fact. This approach satisfies "rigorous analysis"—with "rigorous" meaning "logical" or "exact" (rather than illogical or inexact, as in *Falcon* itself). ■

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[1] 457 U.S. 147, 161 (1982). The Supreme Court stated that a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."

[2] 5 MOORE'S FEDERAL PRACTICE, § 23.61[5] ("Courts may delve beyond the pleadings to determine whether the requirements for class certification are satisfied.").

[3] For example, defendants often argue that in order to obtain class certification, plaintiffs must prove categorically what each class member would have done in the "but-for" world, and the precise amount of each class member's injury. *See infra* discussion accompanying note 52.

[4] *See, e.g.*, Newton v. Merrill Lynch, 259 F.3d 154, 167 (3d Cir. 2001). These competing concerns were addressed by the promulgation of Rule 23(f), which provides an avenue of immediate appellate review. *See* Fed. R. Civ. P. 23(f).

[5] Erroneous grants of class certification can be corrected through later decertification or reversal on appeal. *See, e.g.*, *In re* Methionine Antitrust Litig., No. 00-1311, 2003 WL 22048232, *5 (N.D. Cal. Aug. 23, 2003) (court decertified the class when plaintiff's expert relied upon a different methodology than had been proposed at the class certification stage). Weak cases can also be disposed of on the merits, through summary judgment or trial. By contrast, in most antitrust class actions, denial of class certification effectively ends the case. Although Rule 23(f) provides for permissive review of the class certification decision, a reversal of a class certification denial is extremely rare. *See* Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1381 (11th Cir. 1998). When a class is not certified, plaintiffs are left with few options beyond settling the named plaintiffs' claims. If the case is meritorious, the price fixers get off scot-free.

[6] *Newton*, 259 F.3d at 168.

[7] *See, e.g.*, *In re* New Motor Vehicles Canadian Export Antitrust Litig., 235 F.R.D. 127 (D. Me. 2006). ("The defendants may be able to show that the plaintiffs' proof is insufficient to establish antitrust or consumer protection impact under a particular state's law, but if so, they win. It is not enough to say that additional proof of impact would have to be individualized, because the plaintiffs do not choose to rely upon individualized proof of impact.") (footnote omitted)

[8] Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 613 (1997) (quoting 28 U.S.C. § 2072(b)).

[9] Fed. R. Civ. P. 23 (c)(1)(A) (emphasis added).

[10] Fed. R. Civ. P. 23 advisory committee notes, 2003 amendments.

[11] *Id.*

[12] Gen. Tel. Co. v. Falcon, 457 U.S. 147, 155 (1982) (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979)).

[13] *In re* Hydrogen Peroxide Antitrust Litig., 240 F.R.D. 163, 168 (E.D. Pa. 2007) (Rule 23(f) appeal pending).

[14] The judicial rationale holding that market allocation, price-fixing and certain other antitrust violations are *per se* illegal is best summarized by Justice Black in the landmark decision, *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958):

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also *avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries*, in an effort to deter-

> mine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

Id. at 5. (emphasis added). Nevertheless, in the context of class certification, many defendants advocate that "an incredibly complicated and prolonged economic investigation" is just what a "rigorous analysis" requires.

[15] Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 625 (1997).

[16] Some commentators have criticized certain courts as "soft" on the rigorous demands of a Rule 23 analysis in antitrust cases, *see, e.g.*, Robert H. Klonoff, *Antitrust Class Actions: Chaos in the Courts*, 11 STAN. J.L. BUS. & FIN. 1, 5 (2005) (citing cases recognizing a "presumption" in favor class certification). In *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir 1985), a securities case, the Third Circuit stated that "the interests of justice require that in a doubtful case . . . any error if there is to be one, should be committed in favor of allowing a class action." Later cases have recognized an extension of this principle into antitrust cases. *See, e.g.*, *In re* Bulk Extruded Graphite Products Litig., 2006 WL 891362 at *3–*4 (D.N.J. Apr. 4, 2006) (citing cases). The reason given for the presumption in favor of certification in antitrust cases is "the antitrust class action is an important component in the federal scheme for deterring anti-competitive behavior." *Id.*

[17] Hawaii v. Standard Oil, 405 U.S. 251, 262 (1972). *See also In re* Elec. Carbon Products Antitrust Litig., 447 F. Supp. 2d 389, 405 (D.N.J. 2006) ("In the antitrust context, the class counsel performs a private attorney general's function by seeking to enforce the antitrust laws by civil litigation.")

[18] Robert H. Lande & Joshua P. Davis, *An Evaluation of Private Antitrust Enforcement: 29 Case Studies*, Interim Report, Nov. 8, 2006, *available at* http://www.antitrustinstitute.org.

[19] *Id.* at 2–4 and nn.3–8.

[20] 457 U.S. at 161.

[21] *Id.* at 152.

[22] *Id.* at 153.

[23] *Id.* at 158.

[24] *Id.* at 152.

[25] *Id.* at 160.

[26] Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 615 (1997).

[27] Newton v. Merrill Lynch, 259 F.3d 154, 167 (3d Cir. 2001) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (3d Cir. 2001).

[28] *Id.*

[29] *See, e.g.*, 5 MOORE'S FEDERAL PRACTICE, § 23.61[5] ("Courts may delve beyond the pleadings to determine whether the requirements for class certification are satisfied.").

[30] 471 F.3d 24 (2d Cir. 2006) (*In re IPO*).

[31] *Id.* at 41.

[32] *Id.* at 39 n.10.

[33] *Id.* at 42 (emphasis added).

[34] Most of the cases discussed by the Second Circuit in *In re IPO* were securities cases where the issue, like that in *In re IPO*, was whether the securities market operated efficiently, permitting a "fraud on the market" theory of reliance to be used. The exception is *Monsanto v. Blades*, 400 F.3d 562 (8th Cir. 2005). There it appears that plaintiffs' expert failed to connect the scope of the alleged conspiracy with the scope of the market allegedly impacted. *Id.* at 573.

[35] 305 F.3d at 152 (quoting Lumco Indus. v. Jeld-Wen, 171 F.R.D. 168, 174 (E.D. Pa. 1997)).

[36] *Id.* (emphasis added). In a commentary on the 1988 amendments to 28 U.S.C. § 7072, David D. Siegel noted that "subdivision (b) [of the new 28 U.S.C. § 2072] continues the instruction that no rules adopted under (a) may alter any substantive right, an instruction previously contained in the second paragraph of the superseded § 2072. Also in that paragraph was the direction that the rules not impair the right to trial by jury guaranteed by the Seventh Amendment. That direction is omitted, but without moment: *no reminder is needed that neither a rule nor a statute can upset a constitutional requirement*." (emphasis added).

[37] *See In re* Methionine Antitrust Litig., No. 00-1311, 2003 WL 22048232, *3 (N.D. Cal. Aug. 23, 2003) ("Defendants also argued that the data necessary for performing [plaintiff's expert's] proposed multiple regression analysis was not available. This Court held it premature to deny [plaintiff's] motion [for class certification] on that ground. [Plaintiff's expert] had stated in his declaration that sufficient data could be collected and the Court could not find, on the record before it at the time, that it could not."). The court in *Methionine* ultimately decertified the class when plaintiff's expert relied upon a different methodology than had been proposed at the class certification stage. *See id.* at *5.

[38] Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997) (The text of a rule limits "judicial inventiveness" and "[c]ourts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.' § 2072(b)."

[39] More and more frequently, plaintiffs' expert opinions in support of class certification are being subject to *Daubert* challenges. These challenges are rarely successful at the class certification stage, Nichols v. SmithKline Beecham Corp., No. 00-6222, 2003 WL 302352 (E.D. Pa. Jan. 29, 2003), and seem to have little utility (except perhaps as a vehicle to provide the parties with some eighty additional pages of briefing to argue about the expert reports). Properly applied, however, a *Daubert* analysis is neither searching nor rigorous—it simply asks whether the expert report satisfies the minimum standards for admissibility. It certainly does not provide a framework for a "rigorous analysis" of the sufficiency of Plaintiffs' expert evidence or justification for the weighing of competing testimony.

[40] *In re* Hydrogen Peroxide Antitrust Litig., 240 F.R.D. 163, 170 (E.D. Pa. 2007).

[41] *Id.* at 173.

[42] *Id.* at 174 n.14.

[43] *Id.* at 174.

[44] *Id.* at 174 n.16.

[45] 2006 WL 891362 (D.N.J. Apr. 4, 2006).

[46] *Id.* at *14.

[47] 2006 U.S. Dist. LEXIS 69105, *40 (E.D. Pa. Aug. 30, 2006).

[48] *In re Hydrogen Peroxide*, 240 F.R.D. at 175.

[49] *Linerboard*, 305 F.3d 145, 153 (3d Cir. 2002).

[50] Appropriate fact-finding in the class certification context might include such issues as whether certain types of data are available and whether plaintiffs' proposed methodology properly includes or excludes a particular factor. These are methodology-based questions. It would be inappropriate, however to chose between competing methodologies or to reject a proposed methodology because it had yet to be tested with actual transaction data.

[51] FED. R. CIV. P. 23 (c)(1)(A).

[52] *See, e.g.*, *In re* Relafen Antitrust Litig., 218 F.R.D. 337, 344 (D. Mass. 2003).

[53] The law does not require *precise proof* of how each class member would have behaved in the "but-for" world, either for the purposes of establishing impact or damages. All that is required is that plaintiffs prove "with reasonable certainty" a causal relationship between "defendants conduct and plaintiffs harm." *See* Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1946) ("[I]n the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendencies to injure plaintiffs' businesses and from the evidence of the decline in prices, profits, and values not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.")

[54] *See, e.g.*, *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 134 (2d Cir. 2001) (rejecting as grounds to deny class certification defendants' "but-for" world contention that "there would be less usage of Visa Check and MasterMoney if their interchange fees decreased because banks would issue fewer cards and defendants would spend less money advertising the cards"); *In re* Northwest Airlines Corp. Antitrust Litig., 208 F.R.D. 174, 223 (E.D. Mich.) (refusing to consider "the near-endless parade of scenarios" potentially faced by consumers in "but-for" world as grounds to deny class certification), *review denied*, 310 F.3d 953 (6th Cir. 2002).