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The New Consensus on Class Certification: What it Means for the Use of Economic and Statistical Evidence in Meeting the Requirements of Rule 23

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David S. Evans *

I. INTRODUCTION

Offering expert testimony that is a hair's breadth away from nutty is no longer sufficient to secure class certification according to an emerging consensus across the circuit courts. The court must also get into any merits issues that are relevant to the class issues. As a practical matter credible expert testimony will prove more important going forward in all types of class certification for both plaintiffs and defendants. This note summarizes the consensus that is emerging and describes the sorts of analyses that will prove critical in seeking or opposing the certification of a particular class.

II. THE NEW CONSENSUS ON CLASS CERTIFICATION

Six Circuit Courts of Appeal—the Second, Third, Fourth, Fifth, Seventh, and Eleventh—now agree that class certification should be subjected to rigorous analysis by the lower court including the consideration of expert testimony from both sides and the examination of any merits issues that touch the class certification requirements under Rule 23. The First, Sixth, and Eighth Circuits do not go quite that far and comprise a middle camp. The Tenth and the D.C. Circuit have not weighed in. Only the Ninth Circuit currently excludes the consideration of the merit and the weighing of expert testimony.[1] Two years ago the Second Circuit was in the Ninth's Circuit's camp and the Third Circuit was in the middle camp. Table 1 summarizes where the Circuits are on class as of January 2009.

The breakthrough that helped forge the emerging consensus was the Second Circuit Court of Appeals decision regarding the *In re IPO Securities Litigation.* In reversing a lower court decision to certify six classes of investors the Second Circuit

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essentially repudiated its key holdings in its 8-year old *Caridad v. Metro North Commuter Rail System* and its 6-year old *In Re VisaCheck/MasterCard Money* decisions.[2] To see the import of the *IPO Securities* decision it is useful to go back to these earlier ones.

Caridad was an employment discrimination case. Much of the debate on class certification in the district court revolved around expert studies submitted by the plaintiff and defendant.[3] The plaintiffs' expert presented a study that showed, using multiple regression analysis, that African American employees of Metro North were less likely to receive promotions and more likely to receive disciplinary actions than were non-African American employees.[4] The defendant's expert argued that the regression analysis relied on by the plaintiffs' expert masked variations across the defendant company and that for many departments and positions there were no disparities in promotion and discipline for African Americans. There was thus no statistical evidence for concluding that the plaintiffs were representative of, and had interests common with, the preponderance of African American employees of Metro North. In effect, the plaintiffs' statistics were for an "average" across employees only some of whom appeared to have a common problem.

Table 1: Relative Degree of Rigor Demanded by Circuit Courts for Satisfying Rule 23 Requirements on Class Certification[5]

Circuit Court	Key Decision	Date	Status
First	In re New Motor Vehicle Canadian Export Antitrust Litig., 522 F.3d 6 (1st Cir. 2008)[6]	Mar 28, 2008	Moderate
Second	In re IPO Sec. Litig., 471 F.3d 24 (2d Cir. 2006) [7]	Dec 5, 2006	Rigorous
Third	In re Hydrogen Peroxide Antitrust Litig., No. 07-1689 (3rd Cir 2008)[8]	Dec 30, 2008	Rigorous
Fourth	Gariety v. Grant Thorton LLP, 368 F.3d 356 (4th Cir. 2004)[9]	May 12, 2004	Rigorous
Fifth	Regents of the Univ. of Cal. v. Credit Suisse First Boston, 482 F.3d 372 (5th Cir. 2007)[10]	Mar 19, 2007	Rigorous
Sixth	Rodney v. Northwest Airlines, Inc., 146 Fed. Appx. 783 (6th Cir. 2005)[11]	Aug 22, 2005	Moderate (?)

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Seventh	Szabo v. Bridgeport Machs., Inc., 249 F.3d 672 (7th Cir. 2001)[12]	May 4, 2001	Rigorous
Eighth	Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005)[13]	Mar 7, 2005	Moderate
Ninth	Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir 2007)[14]	Feb 6, 2007	Light
Tenth	No recent and definitive appeals court decisions[15]	N/A	TBD
Eleventh	Cooper v. Southern Co., 390 F.3d 695 (11th Cir. 2004)[16]	Nov 10, 2004	Rigorous
D.C.	No recent and definitive appeals court decisions [17]	N/A	TBD

*A "?" indicates that the assignment is debatable as discussed in the notes at the end of this article. "TBD" indicates that there is no recent and definitive decision on class although in both cases of TBDs the lower court decisions reflect a "light" degree of rigor.

The District Court agreed and refused to certify the proposed class. The Second Circuit Court of Appeals reversed on the grounds that the lower court had no business looking at anything that touched the merits of the case and that it should not consider dueling experts at the class stage. The Second Circuit put an exclamation mark on Carida*d* a few years later in the I*n* R*e* Vis*a* Check/MasterCar*d* Mone*y* litigation. [18] The retailer plaintiffs accused MasterCard and Visa of engaging in unlawful tying practices in violation of Section 1 of the Sherman Antitrust Act. Relying on Caridad, the district court accepted plaintiffs' analysis of commonality on the grounds under the standard that it "was not fatally flawed" and certified a class of millions of retailers. The Second Circuit upheld the decision. It said, in affirming the view that a significantly lower standard of proof applied to plaintiffs under Rule 23, that the lower court "must ensure that the basis of the expert opinion [regarding class certification issues] is not so flawed that it would inadmissible as a matter of law." As Professor Nagareda has observed, under these decisions "any expert submission that was not completely kooky would suffice."[19] The "not fatally flawed" expert rule was firmly established in the Second Circuit along with a warning to the lower court not touch anything that involved evidence on the merits.

The Second Circuit did an about-face when confronted with the prospect of certifying six classes of millions of investors. This reversal was all the more remarkable because the three-judge panel included the two judges who had authored the *Caridad* and *VisaCheck* and the decision was written by the author of the *Caridad* decision. The Second Circuit concluded that the lower court had to make a "definitive assessment" that the Rule 23 requirements for class certification were met and that should involve a resolution of any issue and expert disputes, including ones related to the merits, that

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bear on those requirements. The *IPO Securities* decision put the Second Circuit in line with the Fourth, Fifth, Seventh, and Eleventh Circuits at that time.

The Third Circuit was the most recent to insist on a rigorous approach to class certification. In its December 30, 2008 opinion regarding *In Re Hydrogen Peroxide Antitrust Litigation*, a price fixing conspiracy case, it reversed a lower-court ruling that had certified a class. The defendant's expert had presented a study that showed that some proposed class members had experienced decreases in prices and that there was great heterogeneity among the proposed class members in a variety of dimensions. The lower court largely ignored the evidence presented by the defendant's expert following the *Caridad* reasoning that it was inappropriate to consider dueling experts at the class certification state. The Third Circuit found that the district court had to resolve all factual and legal disputes, even those relevant to the merits, and the lower court was obligated to all evidence and arguments raised in expert testimony including that presented by the defendant. It concluded that the lower court had not done so and remanded the case for further review.

Only the Ninth Circuit has issued a recent opinion that forbids the lower court from examining merits-related evidence and from carefully weighing expert testimony by the defendant, and from otherwise conducting a rigorous examination of the Rule 23 requirements. In *Dukes et al. vs. Wal-Mart* which was written after the *IPO Securities* decision the Ninth Circuit continued to cite *Caridad* in support of a cursory examination of whether the plaintiffs' proposed class passed muster. It confirmed the certification of the 1.5 million past and present female employees of Wal-Mart, the largest employment class in history.[20]

III. THE USE ECONOMIC AND STATISTICAL EVIDENCE FOR RULE 23

The emerging consensus beckons the serious use of economic and statistical evidence at the class certification stage and the use of dueling experts to help the court assess competing views on class certification. In the Circuits with rigorous review plaintiffs cannot get by with superficial treatments of the Rule 23 requirements and defendants have greater latitude to dispute whether plaintiffs' have satisfied those requirements. As a practical matter class certification is where the action often is for litigation. If a sufficiently large class is certified the defendant may face so much risk that it has little choice but to settle while if no class is certified the plaintiffs' lawyers may find that there is little economic incentive for pursuing the cases. Class certification is a worthy battleground.

IV. RULE 23 AND THE PROPER SCOPE OF A CLASS

Class certification is governed by Rule 23 of the Federal Rules of Civil Procedure. Under Rule 23(a) plaintiffs have to show that for the proposed class there is a common

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issue that ties the class members together (commonality); that the plaintiffs' claims are typical of those of the class so that it makes sense for them to represent the class (typicality); that there are so many class members it doesn't make sense to handle the case individually (numerosity); and that the plaintiffs' lawyers are good enough to represent the class (adequacy of representation). In addition to meeting all four of the Rule 23(a) conditions the plaintiffs have to meet two other conditions under Rule 23(b): the issues of fact and law for the class predominate over the issues of fact and law for the individual class members (predominance); and a class action is better than alternative means of judicial treatment such as individual cases or test cases (superiority).

The controversies over the years have largely concerned how much of a burden plaintiffs should bear in establishing that they meet these requirements and how far the court should delve into factual issues that touch on the merits of the case. The emerging consensus is that plaintiffs bear the burden of establishing these requirements by the preponderance of the evidence, that the district court needs to undertake a rigorous examination of whether the plaintiffs meet these requirements, and that the lower court has an obligation to get into whatever is necessary, including looking at the merits and weighing compete expert testimony, in determining whether these requirements are met.

The fact that plaintiffs cannot meet these requirements for the class they have proposed does not mean that it is not possible to certify any class. The relevance of the emerging consensus for plaintiffs is that they need to fashion a class that can meet the new rigorous requirements. For example in the *Caridad* case the defendant's expert analysis did not purport to establish that it was not appropriate to certify ***any*** class—i.e. that all issues were necessarily individual. Rather he showed that the class proposed by the plaintiffs was too broad and that the plaintiffs had not proposed a class that could meet the Rule 23 requirements. Plaintiffs would therefore be well advised to construct their class by determining what group of individuals has common claims that match those of the named plaintiffs. The most likely outcome of the rigorous class certification requirements is that plaintiffs will be encouraged to propose more focused (and necessarily smaller) classes that can better meet the new standards.

Economic and statistical evidence is often used to address whether the class proposed by the plaintiffs meet the Rule 23 requirements particularly with regard to common methods of proof and the preponderance of class issues. The efficient markets theory developed by financial economists was central to the IPO Securities Litigation while the single-monopoly profit theory was an important issue in Visa Check.21 Statistical evidence often based on regression analysis was critical in the Wal-Mart employment discrimination case and the Hydrogen Peroxide matter. The importance of this evidence and the standards for assessing it will change under the emerging consensus

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for both plaintiffs and defendants.

V. AVERAGES, DIFFERENCES, AND STATISTICAL EVIDENCE

Statistics is a discipline that, like mathematics, provides tools for many other disciplines. Probability theory is its main building block. That field began in the mid 17th century with studies of games of chance. Over time it has focused on assessing the degree of beliefs one should hold based on certain evidence (is a coin fair?) and whether one can say something about the frequency of outcomes in the face of some randomness (what's the likelihood that a fair coin tossed twenty times will come out with 19 heads?). Statistics mainly focuses on techniques for using data to describe patterns in data (what does the average man weigh?) and testing hypotheses (does second-hand smoke increase the likelihood of lung cancer among non-smokers?). It is a natural fit for class certification because it can summarize patterns over a class and it can be used as a method of proof to establish claims over this class.

Statistics is also like mathematics in that anyone can use it regardless of their professional training. There are professional statisticians just like there are professional mathematicians. There are also people within particular disciplines that have specialized training in the use of statistics for that discipline—biostatistics is a major field on medical research and econometrics is an important part of economics for example. Then there are trained professional users—people who have taken advanced courses in statistics; most economists for example are required to undertake a substantial amount of training in econometrics to qualify for a Ph.D. And finally there are amateur users which would include everyone who has ever used an Excel spreadsheet to calculate an average or to do a simple regression to estimate a trend line.[22] Courts and lawyers should generally beware of statistical evidence that is sponsored by experts who lack training in this discipline. As Disraeli said, "There are lies, damned lies, and statistics."

There is a significant tension between the purpose of statistical methods and their use in litigation. Most scientific disciplines are interested in understanding general patterns and central tendencies. Statistics has been the handmaiden of science since at least the mid 18th century when it was used to estimate planetary movements. It has focused mainly on developing methods for taking data that exhibits wide variations and trying to discern patterns. Regression is a good example. Figure 1 shows some made-up data on the relationship between average personal income and years of education. Visually the data seem to suggest that income increases with education. Regression is a mathematical formula that shows the average relationship between two variables. In effect it draws a line through the points which fits the data as closely as possible by minimizing the differences between the line and the data. In the diagram the average relationship between income and education is $1000 per additional year of education. Of course there are many exceptions. Individual A for example has lower income than

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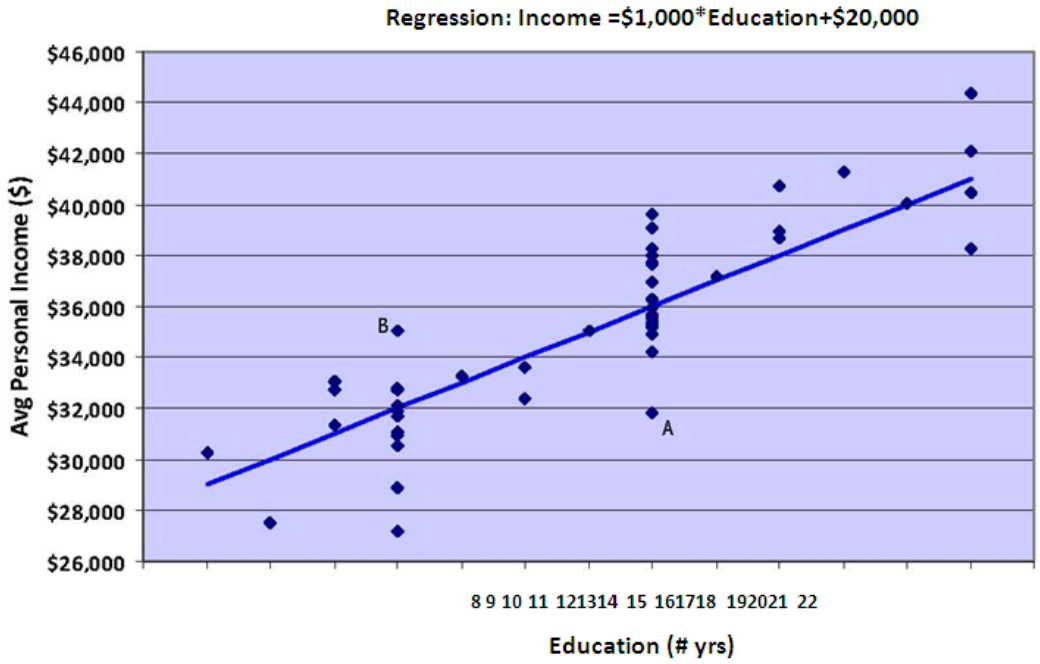
individual B despite having more education. Nevertheless, by focusing on the forest (the overall data) rather than the trees (points A and B), statistics has helped labor economists understand the relationship between income and education.

Figure 1.



The Rule 23 requirements, however, pose questions that are very different than the ones statistics is ordinarily used to answer.[23] The commonality requirement demands evidence that the proposed class members have a common cause of action that can be established with common evidence.[24] Consider an employment discrimination case in which the plaintiffs claim that women are paid less than men despite having the same qualifications. Figure 2 displays more made-up data taking education as the main qualification. It appears that there is a difference between men and women and regression methods might demonstrate that the average difference controlling for education is $1000. That is of little help in resolving the class issue because, in the example, many women earn as much or more than men with equal qualifications. They would not appear to have a common claim nor could this regression analysis provide common evidence on either liability or damages. The question in class is not about whose trees on average are affected with a disease; it is about indentifying the group of trees that are affected by the same disease.

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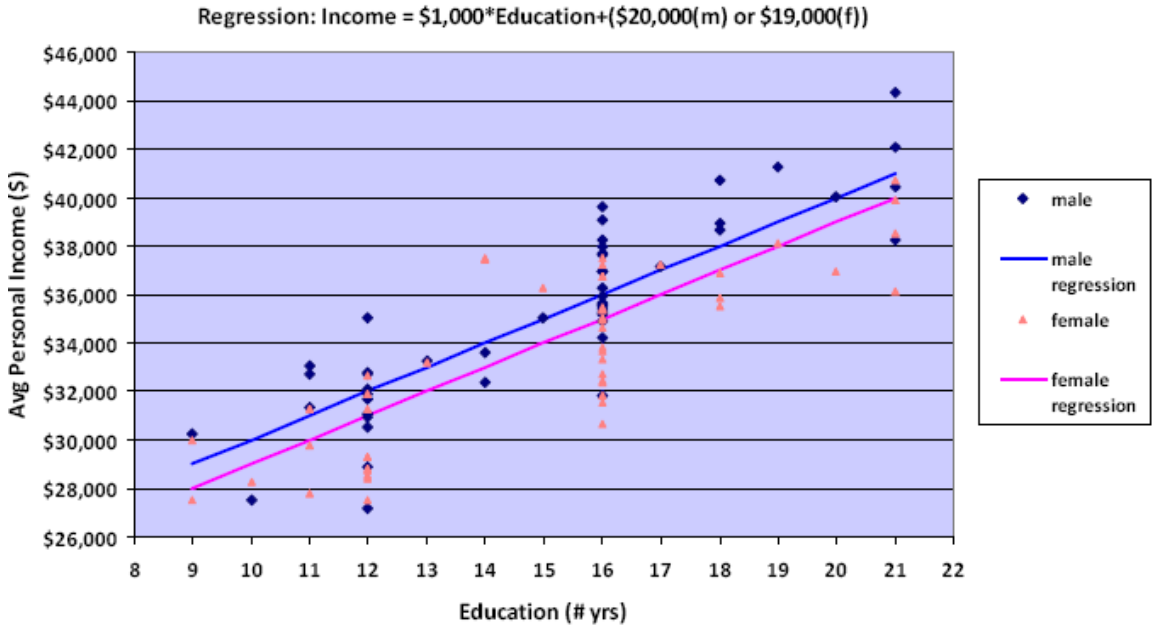
Figure 2.



This distinction was important in both *Caridad* and *Hydrogen Peroxide*. In *Caridad* the plaintiffs' expert relied heavily on regression analysis which identified "average" differences such as those describe above across large portions of the company. The statistical technique as applied was not capable of identifying a group of employees that were likely victims of a common practice. In *Hydrogen Peroxide* the plaintiffs' expert presented evidence that indicated that on average hydrogen peroxide prices were affected by the same demand and supply forces. That may well have been true. But the defendants' expert presented evidence that there was great heterogeneity when one looked at individual transactions. During the period of the conspiracy he found that some buyers were facing increasing prices while others were facing decreasing prices.

One should not take from this discussion that statistics are not a useful source of evidence in class certification, or that plaintiffs need to conduct exhaustive individual analyses to construct evidence of a commonality and preponderance. Statistics can help isolate whether the alleged cause of action had a common effect on plaintiffs. In the wage-education example above it may be that a number of other factors affect the relationship such as experience, the specific job, the individuals responsible for promotion decisions and so forth. After controlling for these factors the plaintiff may have statistical evidence that there is a class that has a common complaint and proof. For example, the statistical analysis in an employment discrimination case might

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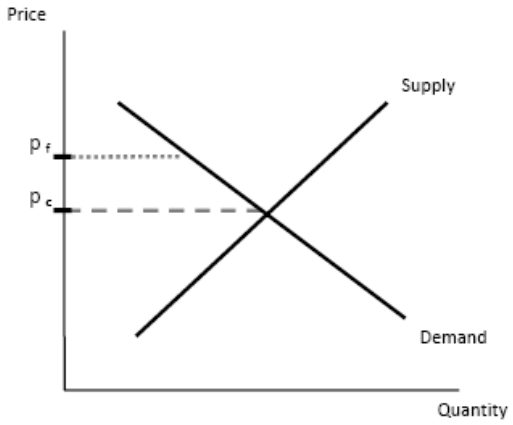
demonstrate that women who worked in a particular region or under a particular manager were generally paid less than similarly situated men. The statistical analysis an antitrust case might be able to demonstrate that, even though transactions are determined through bilateral negotiations, the prices were generally higher in most cases as a result of the conspiracy and that it is possible to calculate damages using common methods including those based on statistics.

VI. ECONOMIC THEORY AND EVIDENCE

Economic theory is widely used in class certification. The fraud-on-the market doctrine in securities class actions is based on efficient markets theory. The theory and empirical evidence in support of it says that the share price for a security reflects the consensus view on the value of the equity based on all available information.[25] When an issuer of securities fails to disclose material information all investors are harmed because the price they paid did not reflect all the relevant information. The *Bogosian* presumption in price fixing antitrust cases is based on the law of one price. Because of arbitrage possibilities buyers typically pay the same price. A conspiracy typically results in customers paying a price that is higher than the competitive one.[26] Figure 3 shows a simple textbook example of this. The competitive price is p_c and the conspiracy fixes the price at a higher level p_f. All buyers at the higher price have been injured by the conspiracy and incurred damages of $p_f - p_c$ for each unit they purchased.

Figure 3.



Economics faces the same issues as statistics for assessing whether a proposed class meets the Rule 23 requirements. Economic theory tries to identify general patterns in how markets work. As with most sciences theories are based on assumptions that in effect abstract away from many of the particulars of markets. Courts however are much more concerned than economists with the particulars when they deal with class

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certification. In the *IPO Securities* the Second Circuit denied class certification because the court did not believe that the prices of new securities issues were determined in an efficient market. In *Hydrogen Peroxide* the Third Circuit sent the case back to the lower court for reconsideration of evidence that prices were determined through individualized transactions.

The *Bogosian* presumption provides a useful example of the pitfalls in relying on economic theory in class certification. Economists have invested a great deal of effort over the last several hundred years in understanding how markets work. We have uncovered many important principles by stripping away the messy details of markets. The demand and supply framework displayed in Figure 3 provides a useful way for generally understanding how prices are determined and for assessing how prices will change if economic conditions change. Thus when the OPEC cartel restricts the aggregate supply of oil to the markets economists are confident in predicting that the overall price will increase. We're also confident in using this framework, together with knowledge that the short-run demand and supply for gas are both relatively inelastic, to conclude that reducing the tax on gasoline would probably not lower prices at the pump much.

The messy details that theory puts to one side matter a great deal for many other purposes including class certification. For most products prices vary across customers and time. That is especially true in business-to-business markets in which many prices are individually negotiated and volume discounts and bundled rebates are common. But it is also true in many consumer markets where discounts, coupons, and bundling lead to consumers paying effectively different prices. Those differences may be material for determining whether a class meets the commonality and preponderance tests. The heterogeneity may mean in the extreme case that it is not possible to calculate damages except on an individualized basis. It also may mean that it is not even possible to assess whether the practice had a common impact on all proposed class members. It is common for cartel members to cheat or for there to be differences across regions or customers in terms of the effectiveness of the cartel.

The lesson is that courts and lawyers need to exercise care in using economic theory and evidence. That usually means understanding the assumptions that the theory is based on. Some of these assumptions likely assume away heterogeneity among various economic actors. An important inquiry is whether those assumptions drive the conclusion that there is no difference among proposed class members. It also means understanding how the theory relates to the realities of the marketplace. After all many financial theorists thought the markets were evaluating the risks of sub-prime mortgages efficiently and that the prices of the securities that bundled these mortgages

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in whole or in part were fairly priced.

As with statistics the fact that the economic evidence may point to heterogeneity does not mean that it is not appropriate to certify any class. A careful evaluation of the market may result in the conclusion that there is a common effect of an unlawful practice on some group of individuals or businesses and that one can use common proof to establish this. In a cartel matter there may be evidence for example that a bid rigging agreement affected at some procurements and it may be possible to use statistical techniques such as regression to estimate the price increases after controlling for the many sources of heterogeneity that affected the bids.

VII. CONCLUSIONS

Economic and statistical evidence will play an increasing role in class certification as a result of the emerging consensus. Defendants have greater incentives to use economic and statistical evidence to rebut the plaintiffs' case of class certification now that the courts are obliged in many circuits to weigh this evidence carefully and to analyze the class requirements rigorously even if they touch on merits issues. Given the stakes in class certification defendants have incentives to use as much ammunition as possible at the class stage including bringing in any and all merits issues that are relevant to class. Plaintiffs have greater incentives—and indeed little choice—in presenting sophisticated analyses that can meet the rigorous requirements. Largely gone are the days when lawyers for the plaintiffs could just offer an expert analysis that "was not fatally flawed" and walk away with class certification. Plaintiff experts have to do more now than just show up. While it may take a while for plaintiffs to adjust to this new regime it is likely that key substantive battles will increasingly take place at the class certification stage and that economics and statistics will prove central to these.

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NOTES:

[1] For an excellent review of the case law as of a few months ago see Wendy Bloom, *Why Economics Now Matters for Antitrust Class Actions at the Class Certification Stage*, GCP MAGAZINE 2 (June 2008). In some cases, the degree of rigor required by a given Circuit may be somewhat debatable.

[2] David Evans, *Class Certification, the Merits, and Expert Evidence*, 11 GEO. MASON L. REV. 1 (2002).

[3] I was the expert labor economist and statistician for the defendant. For more details concerning this case see Robert Bone & David Evans, *Class Certification and the Substantive Merits*, 51(4) DUKE L.J. 1251 (2002).

[4] Multiple regression analysis is a statistical technique which estimates the relationship between a dependent variable, such as whether or not a person is promoted during the year, and various independent variables such as education, racial status, and performance rating. The section on Averages, Differences, and Statistical Evidences below describes this technique in more detail.

[5] In some cases, the degree of rigor required by a given Circuit may be at least somewhat debatable. One article stated that the "First, Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits have ruled clearly in favor of a more rigorous analysis of class certification, even if this analysis intersects with merits issues." That article, written prior to the Third Circuit's *Hydrogen Peroxide* ruling and the Ninth Circuit's *Wal-Mart* ruling, also noted that "Several important district court opinions in the Ninth and Tenth Circuits echo these sentiments in rulings where the courts denied class certification while still paying lip service to *Eisen*." Ian Simmons, Alexander P. Okuliar, & Nilam A. Sanghvi, *Without Presumptions: Rigorous Analysis in Class Certification Proceedings*, 21(3) ANTITRUST 61 (Summer 2007). Another survey article, written before *Hydrogen Peroxide*, stated that "Clustered at the rigorous end of the spectrum are the U.S. Courts of Appeals for the Second, Fourth, Fifth, and Seventh Circuits. Older news is that the Fourth, Fifth, and Seventh Circuits are at this end of the spectrum…. In the middle of this spectrum are the First, Third, and Eighth Circuits which find it 'sometimes' necessary to resolve factual disputes in deciding whether to certify a class. The Third and Eight Circuits have been in this camp for some time…. The First Circuit joined the middle ground in March 2008 in *In re New Motor Vehicle Canadian Antitrust Litig*." Bloom, *supra* note 1. Given the decisions in *Wal-Mart* and *Hydrogen Peroxide* the classifications below are consistent with those in Simmons et al. and Bloom. I have also indicated tentative classifications for the Sixth, Tenth and D.C. Circuits based on the decisions cited in the table.

[6] The First Circuit found that "when a Rule 23 requirement relies on a novel or complex theory as to injury, as the predominance inquiry does in this case, the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed." The court left open the extent to which this inquiry must be undertaken in other cases. *In re New Motor Vehicle Canadian Export Antitrust Litig.*, 522 F.3d 6, 56 (1st Cir. 2008).

[7] The Second Circuit stated that "We thus align ourselves with *Szabo*, *Gariety*, and all of the other decisions discussed above that have required definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues." *In re IPO Sec. Litig.*, 471 F.3d 24, 51 (2d Cir. 2006). The Second Circuit recently decided two cases applying the rigorous standard. See, *In re Salomon Analyst Metromedia Litigation*, No. 06-3225, 2008 WL 4426412 (2d Cir. Sept. 30, 2008); and *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, No. 063794, 2008 WL 4554156 (2d Cir. Oct. 14, 2008).

[8] The Third Circuit stated that "The evidence and arguments a district court considers in the class certification decision call for rigorous analysis. A party's assurance to the court that it intends or plans to meet the requirements is insufficient…. It is incorrect to state that a plaintiff need only demonstrate an

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'intention' to try the case in a manner that satisfies the predominance requirement. Similarly, invoking the phrase 'threshold showing' risks misapplying Rule 23. A 'threshold showing' could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification receives deference or a presumption in its favor. So defined, 'threshold showing' is an inadequate and improper standard." *In re Hydrogen Peroxide Antitrust Litig.*, No. 07-1689 (3rd Cir 2008) at 38, 47.

[9] The Fourth Circuit stated that "At bottom, we agree with the conclusion reached by the Seventh Circuit [in *Szabo*]," citing the language cited *infra* at fn. 12. *Gariety v. Grant Thorton LLP*, 368 F.3d 356, 366 (4th Cir. 2004).

[10] The Fifth Circuit stated, citing to *IPO, Gariety, Newton and Szabo*, that "Our circuit's conclusion that review of the factual and legal analysis supporting the district court's decision is appropriate on review of class certification enjoys widespread acceptance in the courts of appeals, and neither the Supreme Court authority nor the Fifth Circuit caselaw that plaintiffs cite for the proposition that no merits inquiry is permitted is to the contrary….In a rule 23(f) appeal, this court can, and in fact must, review the merits of the district court's theory of liability insofar as they also concern issues relevant to class certification. *Regents of the Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 381 (5th Cir. 2007) (internal citations omitted).

[11] The Sixth Circuit, in a case upholding denial of class certification in part because the rejected the evidence the plaintiffs had put forward on a proposed classwide market definition and theory of damages, stated that "a court is allowed to look beyond the pleadings on a class certification motion to determine what type of evidence will be presented by the parties." *Rodney v. Northwest Airlines, Inc.*, 146 Fed. Appx. 783, 785 (6th Cir. 2005). I have tentatively classified the Sixth Circuit as moderately rigorous because Rodney upheld the district court's decision looking beyond the pleadning, the Circuit has not clearly identified the extent to which the court is required to look beyond the pleadings and, for example, resolve conflicting expert testimony.

[12] The Seventh Circuit stated that "The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in *Rule 23* and has nothing to recommend it. . . .Before deciding whether to allow a case to proceed as a class action . . . a judge should make whatever factual and legal inquiries are necessary under *Rule 23* . . . . And if some of the considerations under *Rule 23(b)(3)* ... overlap the merits . . . then the judge must make a preliminary inquiry into the merits." *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675, 676 (7th Cir. 2001).

[13] The Eighth Circuit stated that "The preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case. Nonetheless, such disputes may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case for the class. The closer any dispute at the class certification stage comes to the heart of the claim, the more cautious the court should be in ensuring that it must be resolved in order to determine the nature of the evidence the plaintiff would require." *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005) (internal citations omitted).

[14] The Ninth Circuit stated that "The district court was on very solid ground here as it has long been recognized that arguments evaluating the weight of evidence or the merits of a case are improper at the class certification stage." *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1227 (9th Cir 2007).

[15] Although the Tenth Circuit has not yet weighed in, a recent district court decision engaged in some consideration of the competing positions of the parties' economic experts, although it stated, citing the Second Circuit's *VisaCheck* decision, that "it is not the court's task at this procedural juncture to resolve on the merits the issue of whether plaintiffs have in fact established that they suffered injury as a result of the

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alleged conspiracy by weighing the conflicting expert reports or engaging in statistical dueling of the experts." See *In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 451 (D. Kan. 2006).

[16] The Eleventh Circuit, upholding the district court's denial of class certification based on the district court's conclusion that the plaintiffs' statistical evidence of classwide injury was inadequate, stated that "we are satisfied that the district court did not improperly invade the jury's province when it conducted (as it was required to do in this case) a rigorous analysis of the evidence proffered by the parties at the class certification stage…. In this case, the district court was obliged to make some preliminary assessment of the plaintiffs' evidence to determine, at the very least, whether the named plaintiffs were claiming discrimination that was *common* to the members of the putative class. Indeed, the district court would have erred if it had certified a class without first determining that the named plaintiffs had claims common to those of the unnamed class members." *Cooper v. Southern Co.*, 390 F.3d 695, 712, 713 (11th Cir. 2004).

[17] Although the DC Circuit has not yet weighed in, two recent antitrust class action opinions in the district courts trended toward the lax end of the spectrum. In one decision, the court stated that "the Court, in reaching its decision, must refrain from either deciding the merits of the plaintiff's claims or indulging in a duel 'between opposing experts.'" See *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 369 (D.D.C. 2007). See also, *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293 (D.D.C. 2007).

[18] I was a consulting expert for Visa on this matter. For more details on the case see Evans *supra* note 2 and Richard Schmalensee, *Economic Analysis of Class Certification*, GCP MAGAZINE 2 (June 2008).

[19] Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, New York University Law Review, (*forthcoming*, 2009).

[20] Wal-Mart was, ironically, the lead plaintiff in *VisaCheck* which led to the largest antitrust settlement in history as of that time.

[21] See *In re IPO Sec. Litig.*, 471 F.3d 24, 42-43 (2d Cir. 2006); *In re Visa Check-Mastermoney Antitrust Litig. v. Visa*, 280 F.3d 124, 143-144 (2nd Cir. 2001).

[22] Advanced statistical tools are now available in many computer software packages such as Excel and Stata. This enables almost anyone to use advanced methods whether they understand them or not.

[23] See Schmalensee, *supra* note 188.

[24] Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure (FED. R. CIV. P. 23). Part (a) of Rule 23 requires that: (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. In addition, a class actions must satisfy one condition under part (b) of Rule 23. Employment discrimination class actions are often pursued under Rule 23(b)(2), where primary relief sought is injunctive (but which may also included monetary damage claims). Antitrust class actions are typically pursued under Rule 23(b)(3), which requires a finding that "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" in addition to the four conditions under Rule 23(a).

[25] Basic, Inc. v. Levinson, 485 U. S. 224 (1988).

[26] Economists do not have a monopoly on theory for class certifications. Sociologists often testify in employment discrimination cases. See *Dukes et al. v. Wal-Mart* for an example. The same sorts of issues discussed here apply to other disciplines.

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