MAY 2009, RELEASE ONE

GCP
THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

Hydrogen Peroxide: The Crest of the Wave

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I. INTRODUCTION

On January 16, 2009, the Court of Appeals for the Third Circuit issued an amended decision in *In re Hydrogen Peroxide Antitrust Litigation*,[2] resoundingly confirming that it requires rigorous assessment of whether a federal court claim qualifies for treatment as a class action under Rule 23 of the Federal Rules of Civil Procedure. The decision contributes significant heft to the wave of recent appellate court decisions on this case-defining question. It addresses all the issues considered by other appellate courts in recent years and leaves no doubt that in the Third Circuit, as in a majority of others,[3] district courts may not shy away from scrutinizing the plaintiffs' case to determine whether the requirements of Rule 23 are met. *Hydrogen Peroxide* also offers some guidance on handling the ubiquitous battle of class action experts in antitrust cases. After summarizing the majority rule as reflected in *Hydrogen Peroxide*, this article offers some practical observations, particularly in light of a very recent district court decision attempting to implement the majority rule in a case very similar to *Hydrogen Peroxide*.

II. BACKGROUND

Antitrust plaintiffs claiming class action status for damages claims generally seek to proceed under Rule 23(b)(3). That rule permits members of a class to sue (or be sued) as class representatives if, in addition to certain preconditions required for all class actions by Rule 23(a),[4]

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[2] In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir. 2008).

[3] Second: In re IPO Sec. Litig., 471 F.3d 24 (2d Cir. 2006); Fourth: Gariety v. Grant Thornton LLP, 368 F.3d 356 (4th Cir. 2004); Fifth: Regents of the Univ. of Cal. V. Credit Suisse First Boston, 482 F.3d 372 (5th Cir. 2007); Seventh: Szabo v. Bridgeport Machs., Inc., 249 F.3d 672 (7th Cir. 2001); Eleventh: Cooper v. S. Co., 390 F.3d 695 (11th Cir. 2004). Other Circuits have adopted formulations that are somewhat less clearly rigorous. First: In re New Motor Vehicle Canadian Export Antitrust Litig., 522 F.3d 6 (1st Cir. 2008); Eighth: Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005). The Ninth Circuit seems to continue to adhere to a less rigorous standard, see Dukes v. Wal-Mart, 509 F.3d 1168 (9th Cir. 2007), while the D.C., Sixth and Tenth Circuits have not specifically voiced their views on the recent wave of cases. Cf. Meijer, Inc. v. Warner Chilcott Holdings, Co., 246 F.R.D. 293, 299 n.4 (acknowledging recent decisions and rise of more rigorous analysis but noting that "the D.C. Circuit has not taken that step, and Eisen remains good law.").

[4] Rule 23(a) requires of all class actions that:

(1) the class be so numerous that joinder of all members is impractical,
(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).

> 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.[5]

The Supreme Court has given surprisingly limited guidance on how to apply these requirements. In its 1974 decision in *Eisen*, the Court noted, "We find nothing in either the language or history of Rule 23 that 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."[6] Some four years later, however, in *Livesay*, it noted in passing that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. . . . The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits.'"[7] Then in its 1982 decision in *Falcon* the Court stated that a "Title VII class action, like any other 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."[8]

Perhaps understandably, lower courts have struggled to glean a consistent standard from these brief and general phrases. They have particularly struggled to conduct *Falcon's* "rigorous analysis" of considerations that *Livesay* recognized generally are "enmeshed" or "entangled" with the merits, while also following the apparent admonition in *Eisen* not to conduct a "preliminary inquiry into the merits." Guidance from the courts of appeal was also somewhat limited, as a result of the abuse of discretion standard traditionally accorded to a trial court's case-management decisions combined with the difficulty of obtaining an immediate appeal of a class certification decision early in the case, at least until a 1998 rule change specifically enabled courts of appeal to accept class certification appeals immediately.[9] The result was a divergence of approaches among lower courts across the country.

The tide began to turn in 2001, when the Seventh Circuit decided an appeal under the new immediate appeal procedure. In *Szabo* it vacated and remanded a district court's certification of a nationwide Rule 23(b)(3) class action for damages allegedly caused by fraud and breaches of warranty under state laws.[10] Variations in state law had

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[5] Fed. R. Civ. P. 23(b)(3). The rule lists as four pertinent factors relating to class members' interests in individually controlling their actions, the nature and extent of litigation already begun, the desirability of concentrating litigation in a particular forum, and likely difficulties in managing the case as a class action. *Id.*

[6] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

[7] Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.12 (1978) (quoting 15 CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3911, at 485 n.45 (1976)).

[8] Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982).

[9] *See* Fed. R. Civ. P. 23(f) (allowing courts of appeal to accept appeals within 10 days after the grant or denial of class certification).

[10] Szabo, 249 F.3d at 678.

raised concerns about common legal questions, and the defendant had denied certain factual allegations in the complaint that were central to satisfying other requirements of Rule 23. The district court had rejected these arguments, believing that *Eisen* required it to accept the substantive allegations of a complaint when considering a class certification at the pleading stage of a case. The Seventh Circuit squarely rejected this rationale and held that judges should "make whatever factual and legal inquiries are necessary under Rule 23" and if they "overlap the merits . . . then the judge must make a preliminary inquiry into the merits."[11] The Supreme Court's concern in *Eisen*, the Seventh Circuit explained, had been to prevent judges from delaying or even denying class certification until or unless they believed plaintiffs likely would prevail, not to prevent them from looking beyond the surface of a complaint to ascertain whether Rule 23's requirements had been met.[12] More apt, in the Seventh Circuit's view, was *Falcon*'s observation that courts may need to "probe beyond the pleadings" and that "actual, not presumed, conformance with Rule 23(a) remains . . . indispensable."[13]

III. HYDROGEN PEROXIDE—THE MAJORITY RULE

The turning tide in 2001 has led to a rising wave of appellate decisions across the country, the latest high point of which is the Third Circuit's decision in *Hydrogen Peroxide*. The Third Circuit had already in 2001 echoed the Seventh's admonition to make whatever factual inquiries are necessary,[14] but in this January 2009 decision, the Third Circuit clarified what it means for trial judges to engage in a rigorous review. Citing all the major class certification decisions by other circuits in recent years, the decision collected the following guidance, which by now constitutes the majority rule regarding class certification:

- Although appellate review of the ultimate decision whether to grant class certification is for abuse of discretion,[15] a trial court's "broad discretion to control proceedings and frame issues for consideration under Rule 23 . . . does not soften the rule: a class may not be certified without a finding that each Rule 23 requirement is met."[16] Under this traditional standard of review, a decision relying upon a clearly erroneous factual finding or an erroneous legal conclusion is an abuse of discretion.[17]
- The trial court "must resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits."[18]

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[11] *Id.* at 676.
[12] *Id.* at 677.
[13] *Id.* (quoting Falcon, 457 U.S. at 160) (edits omitted).
[14] *See* Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166 (3d Cir. 2001) (citing Szabo, 249 F.2d at 676).
[15] Hydrogen Peroxide, 552 F.3d. at 312.
[16] *Id.* at 310.
[17] *Id.* at 320.
[18] *Id.* at 306.

- The trial court's standard for making required factual findings is preponderance of the evidence,[19] and the burden of proof rests on the party moving to certify the class.[20]
- The court specifically rejected a laundry list of formulations relied upon in the past to avoid the required rigor. Thus a movant cannot merely rely upon allegations in its complaint,[21] "demonstrate an intention,"[22] or give an "assurance . . . that it intends or plans to meet the requirement."[23] Nor may a court accept a "threshold showing" or a "prima facie showing," or rest after finding that the movant had met a "burden of production" or that the requirement is "'supported by some evidence.'"[24]
- The court rejected "err[ing] in favor of allowing the class" when in doubt or of "suppress[ing] 'doubt' as to whether a Rule 23 requirement is met," even in antitrust cases involving horizontal price-fixing claims.[25]
- The court must "consider all relevant evidence and arguments" proffered by both sides, including expert testimony.[26]
- Specifically regarding expert testimony, a court cannot credit testimony "merely because it should not be excluded, under *Daubert*[27] or for any other reason."[28] Nor may it decline to weigh conflicting expert testimony[29] or to consider the "credibility" of these experts.[30]

Beyond this general guidance, the Third Circuit's decision in *Hydrogen Peroxide* also provided some specific guidance about handling disputes among economic experts in antitrust cases. In the trial court below, the central issue—and the only issue pursued on appeal—was the requirement of Rule 23(b)(3) that "questions of law or fact common to class members predominate over any questions affecting only individual members."[31] This requirement, in turn, means that the trial court "must formulate some prediction as how specific issues will play out in order to determine whether common or individual

[19] *Id.* at 316, 320 ("to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23").

[20] *Id.* at 316 n.14 (citing Unger v. Amedisys Inc., 401 F.3d 316, 320 (5th Cir. 2005)).

[21] *Id.* at 316 & n.15 ("the requirements set out in Rule 23 are not mere pleading rules.").

[22] *Id.* at 321.

[23] *Id.* at 318.

[24] *Id.* at 306, 321 (quoting IPO, 471 F.3d at 33).

[25] *Id.* at 321 (abandoning language to this effect in prior Third Circuit cases as overtaken by contrary guidance in the advisory committee note to the 2003 amendments to Rule 23).

[26] *Id.* at 306, 320.

[27] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

[28] *Id.* at 323 (quoting IPO for rejecting the view that expert testimony may be relied upon "simply by being not fatally flawed").

[29] *Id.* ("Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.").

[30] *Id.* at 324.

[31] *Id.* at 310.

issues predominate in a given case."[32] In *Hydrogen Peroxide*, as in many antitrust class actions for damages, the parties disagreed about whether the plaintiffs would be able to show by common, rather than individualized, proof that every class member had suffered at least some antitrust impact from the alleged violation, a necessary element of every antitrust claim for damages.[33] Both sides offered expert economic testimony about whether such common proof was available, and the defendants sought to exclude plaintiffs' expert testimony as unreliable under *Daubert*.[34] Believing it improper to weigh the relative credibility of these experts, the trial court denied the *Daubert* motion and then accepted the plaintiffs' expert testimony without addressing the points made by the defendants' expert.

The Third Circuit held that failing to consider defendants' expert testimony was reversible error:[35] "Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court . . . ."[36] A trial court may find it unnecessary to consider expert opinion and may control the extent of discovery or hearings supporting opinion testimony, but if there is a genuine dispute, then the court must resolve it, even if that means weighing the credibility of the experts.[37]

The Third Circuit also demonstrated the kind of "rigorous analysis" that is required when considering expert opinion regarding class certification requirements.[38] Several points deserve mention. First, the court explained in significant detail the bases for the opinions of both parties' experts about whether common proof of impact was possible.[39] In doing so, it identified the specific factual and economic or statistical disputes that rendered the two experts' analyses "irreconcilable" and criticized the trial court for failing to "confront" the defense expert's analysis or substantive rebuttal of the plaintiffs' expert's arguments.[40] Particularly in light of the Third Circuit's repeated admonition to resolve factual and legal disputes, it seems clear that trial courts facing expert disputes must grapple with the substance of those disputes as part of their general weighing of conflicting opinions. Taking the Third Circuit's exegesis of the two experts' analyses as a guide, trial courts will need to lay out the critical analytical and factual bases of conflicting opinions to identify the specific points of disagreement,

[32] *Id.* (quoting Blades, 400 F.3d at 566, and New Motor Vehicles 522 F.3d at 20) (quotation marks omitted).
[33] *Id.* at 311.
[34] *Id.* at 312-13.
[35] *Id.* at 322.
[36] *Id.* at 324.
[37] *Id.*
[38] *See Id.* at 323 ("Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis."). Rigor was something of a refrain in Hydrogen Peroxide, being referred to more than 15 times in the opinion.
[39] *Id.* at 312-15.
[40] *Id.* at 322.

whether factual or theoretical, and will then need to determine who is correct, at least for purposes of class certification.

Second, the Third Circuit did not, itself, resolve the expert disputes, but left that to the trial court on remand. Although certainly reasonable given the abuse of discretion standard of review, this result leaves the trial court (and us) without the views of the Third Circuit on what seems to have been a standard analysis by a plaintiffs' economic expert frequently seen in antitrust cases.[41] As described by the Third Circuit, these were that (1) market conditions such as concentration, barriers to entry, and product fungibility favored a conspiracy that would have impacted all purchasers; (2) a "pricing structure" linked all product grades and tended to move similarly over time and that defendants' list prices had risen in coordinated fashion; and (3) either a benchmark analysis comparing actual prices with those before the alleged conspiracy or a regression analysis taking into account "various market forces that influence prices, including demand and supply variables" would be able to estimate damages and thereby also show impact on all class members.[42] Although the Third Circuit explained the specific points of disagreement by the defendant's expert,[43] with some sympathy, it did not resolve these disagreements itself. Nonetheless, the Third Circuit did respond to plaintiffs' argument that the circuit had accepted nearly the same economic analysis by the same expert in a different antitrust case.[44] As part of that response, the Third Circuit accepted the theoretical economic argument that price divergence and price decreases would not necessarily preclude class-wide impact from a conspiracy, but it required the trial court to look further to determine whether "if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class."[45]

Similarly, during its discussion of the defense expert's analysis, the Third Circuit highlighted as "[s]ignificant[]" that the expert had presented a statistical analysis of a sample of individual sales data, which showed that customers were as likely to see an increase as a decrease in price over a given sales year, but that plaintiffs' expert was unable to "explain . . . how or which common proof could be used to determine that the alleged conspiracy impacted customers whose prices declined, as well as customers whose prices increased or stayed the same, over the same time period."[46]

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[41] Indeed, defendants apparently characterized the plaintiff's market analysis as "generic" and equally applicable to a large number of industries. *Id.* at 314.

[42] *Id.* at 312-13.

[43] The defense expert challenged the fungibility of products, the existence of any "price structure" under which individual customers' prices tended to move together, the effectiveness of list price increase announcements in light of individual price negotiations, and the feasibility of the statistical analyses because any determination of prices but for the conspiracy "would have to incorporate a multitude of different 'variables,' defeating any reasonable notion of proof common to the class." *Id.* at 313-14.

[44] *Id.* at 324-25 (discussing In re Linerboard Antitrust Litigation, 305 F.3d 145 (3d Cir. 2002, which affirmed class certification supported by the same expert's opinion).

[45] *Id.* at 325.

[46] *Id.* (quoting defendants' brief) (quotation marks omitted).

Thus, although the Third Circuit did not tell us its views about this standard plaintiffs' economic analysis, it does seem open to arguments that a standard analysis is not sufficiently grounded or tested in a particular case with common proof for them to satisfy the requirements of Rule 23.

Third, the Third Circuit underscored the limitations and perhaps narrowed the applicability of the "*Bogosian* short-cut" to proving common impact. As the court explained, under this 1977 Third Circuit precedent, common impact can be inferred—rather than shown by common or individualized proof—if a conspiracy is proven and the industry's "price structure" was such that conspiratorially affected prices were higher than the entire range of prices that would have existed under competitive conditions.[47] In *Hydrogen Peroxide* the defendant complained about the district court's reliance upon such an inference, leading the appellate court to note facts, as presented by the defense expert, that were inconsistent with *Bogosian*. These included that prices had not risen uniformly and, in fact, were lower at the end of the class period than at the beginning, that production of the product had increased and not decreased during the period, and that there was a dispute about the existence of a "price structure" in the industry.[48] The Third Circuit stated that did not reject the *Bogosian* short-cut, either in principle or in the specific case under review, but it did reject the notion of any "presumption of impact" not based on "a careful, fact-based approach, informed, if necessary, by discovery"[49] and pointed the lower court on remand to "whether the reasoning in *Bogosian* is compatible with the record of the case."[50] This language suggests that the "*Bogosian* short-cut" may no longer be so short, even within its original circuit.

IV. CONCLUDING PRACTICAL OBSERVATIONS—*EPDM*

Hydrogen Peroxide and its predecessor decisions in other circuits, including the similarly exhaustive treatment by the Second Circuit in *IPO*,[51] leave no doubt that within the majority of judicial circuits, trial courts considering motions to certify a class must carefully scrutinize the legal and factual basis for satisfying all the requirements of Rule 23 and must resolve any disputes that bear on those requirements, including as between class certification experts.

The recent decision of the District Court of Connecticut in *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation*,[52] serves as a reminder, however, of the limitations of the majority approach toward class certification. In that case, the district

[47] *Id.* at 325-26 (discussing Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977)).

[48] *Id.* at 326.

[49] *Id.* ("We emphasize that '[a]ctual, not presumed, conformance' with Rule 23 requirements is essential.") (citing Newton, 259 F.3d at 167, itself quoting Falcon, 457 U.S. at 160).

[50] *Id.*

[51] In re IPO Sec. Litig., 471 F.3d 24 (2d Cir. 2006).

[52] 256 F.R.D. 82.

court purported to apply the more rigorous analysis mandated by the Second Circuit's decision in *IPO* to class action claims for damages due to alleged price fixing of certain synthetic rubber. As in *Hydrogen Peroxide*, the main issue was whether antitrust impact was an issue common to the class.[53] Also as in *Hydrogen Peroxide*, plaintiffs relied on evidence of parallel increases in nationwide list prices, as well as opinions by economic experts that the relevant market was susceptible to collusion that would have had class-wide impact, and a multiple regression analysis purporting to show the extent of (and therefore also the fact of) damages on a class-wide basis.[54] Defendants' experts challenged several aspects of these analyses, contesting the asserted link between list and actual prices, pointing out various disparities in pricing, and arguing that the regression analysis failed to take various relevant factors into account which, if taken into account, would show disparate impact on class members.

As instructed by *IPO*, the district court discussed the proffered arguments in depth, considering both sides and identifying specific points of agreement and disagreement among the experts. The court thus arguably did what *IPO*, *Hydrogen Peroxide*, and their predecessors require—grapple with the evidence presented by both sides on the critical Rule 23 questions. In the end, however, the court resolved nearly all disputes by concluding that the plaintiffs' showing was sufficient to demonstrate that common proof was possible and defendants' counterarguments were for trial on the merits. For instance, the court discounted defendants' evidence of individually negotiated discounts, rebates, and contract terms, instead finding that "national price list increases *could* have the effect of affecting the base price . . . from which all negotiations started, on a class-wide basis."[55] Similarly, the court considered the defendants' arguments that plaintiffs' regression model omitted key variables, such as a surge in capacity and a change in the structure of downstream demand,[56] to be a dispute about the merits.[57] Noting that defendants' experts had offered their own version of the plaintiffs' regression model altered to incorporate the missing factors in an effort to show that common impact could not be demonstrated, the court viewed the defendants as "asking this court to determine which multiple regression model is *most* accurate, which is ultimately a merits decision."[58]

The line that the *EPDM* court purported to draw is between asking, for preponderance under Rule 23(b)(3), whether antitrust injury "*can* be proven by evidence

[53] *Id.* at 86, 87. The court readily found that the existence of a price-fixing conspiracy was a common issue for the class. *Id.* at 87. The amount of damages, the third required element of an antitrust damages claim, the court proposed to handle by means other than a single class. *Id.* at 103-04.

[54] *Id.* at 92.

[55] *Id.* at 90 (emphasis in original).

[56] *Id.* at 98.

[57] *Id.* at 98-99, 100.

[58] *Id.* at 100 (emphasis in original).

common to the class" and asking whether it *has been* proven.[59] Resting decision on this distinction, however, risks falling into the trap that the majority rule of rigorous analysis seems intended to avoid. Asking whether offered evidence "can" prove impact quickly devolves to whether the evidence is probative of impact, which is nothing more than the traditional standard for admissibility. The *EPDM* court seems to have fallen into this trap. The error is most clearly visible in the court's reasons for rejecting defendants' complaints about the plaintiffs' regression model, where it explained that "failure to include certain variables in a multiple regression analysis 'will affect the analysis' probativeness, not its admissibility.'"[60]

And here lies one of the major limitations of *IPO*, *Hydrogen Peroxide*, and the other majority rule cases. Language in these decisions plainly rejects the view that "an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed"[61] or that it may be accepted "merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason."[62] Yet other language equally clearly states that "[p]laintiffs' burden at the class certification stage is not to prove the element of antitrust impact . . . . Instead the task . . . is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members."[63] Until the courts of appeal clarify what is meant by "capable of proof," lower courts will continue to struggle to find a standard different from bare admissibility.[64]

An appeal in *EPDM* may yield an opportunity for the Second Circuit to provide the required clarification. In meantime, however, a few practical observations may be gleaned from both *Hydrogen Peroxide* and *EPDM*.

- Being unable to "promise" an ability to prove impact and perhaps also the existence of a conspiracy and the extent of damages using common proof, plaintiffs will need to consider whether more discovery is needed before moving for class certification. The *EPDM* court had the benefit of full discovery, allowing the plaintiffs to offer concrete evidence in addition to econometric modeling.

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[59] *Id.* at 90 ("When assessing the predominance requirement of Rule 23(b)(3), . . . I need only determine whether the element of injury-in-fact can be proven by evidence common to the class."); see also *Id.* at 102 (stating that whether plaintiffs' regression model incorporated all necessary factors "has no bearing on whether the plaintiffs can meet the predominance prong o[f] Rule 23(b)(3) by establishing that common proof of impact is available in this case.") (emphasis added).

[60] *Id.* at 96 (quoting Bazemore v. Friday, 478 U.S. 385, 400 (1986) (per curiam)). Although the decision was per curiam, the quoted language is from a portion of the opinion by Justice Brennan in which all other members of the Court concurred.

[61] IPO, 471 F.3d at 42.

[62] Hydrogen Peroxide, 552 F.3d at 323.

[63] *Id.* at 311-12.

[64] The struggle is reflected in another of the EPDM court's strained formulations of the distinction: "whether the plaintiffs have established a workable multiple regression equation, not whether plaintiffs' model actual works." EPDM, 256 F.R.D. at 100 (emphasis in original).

- Experts on class certification issues offering statistical or econometric analyses may need to provide results using at least samples of data in order to satisfy a court that common proof can (or cannot) be used to satisfy the requirements of Rule 23. The plaintiffs' expert in *Hydrogen Peroxide* did not have results, while the *EPDM* experts did, giving the court comfort that the econometric model was sufficiently "workable." On the other hand, the defendants' experts in *EPDM* had apparently addressed both class certification and substantive issues, making it easier for the court to discount them as arguing primarily on the "merits."
- Because traditional arguments for common proof of these essential elements of an antitrust claim will be subject to stiffer, fact-based challenges, both plaintiffs and defendants will need to consider whether to bifurcate class and merits discovery.
- If merits and class discovery are not bifurcated, both plaintiffs and defendants will need to consider whether to combine merits and class certification expert testimony. The combination seems to have helped plaintiffs in *EPDM* but also hurt defendants, as the court found it easier to characterize arguments about class certification as really intended for the merits.

Like any surfer riding a challenging wave, parties riding the wave of "rigorous analysis" thus have to make some tough strategic choices about how to proceed in their particular cases. The recent decision in *EPDM* may suggest that this wave has reached its highest point in *Hydrogen Peroxide* and *IPO*. We shall have to see whether, if an appeal is taken, the Second Circuit is able to extend the wave to an even higher crest.