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The Recent Wave, or Ripple, of Antitrust Class Certification Denials

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For a long time, antitrust lawsuits and class certification (that is, grants of motions for class certification) went together like a Hollywood couple early in marriage, seemingly inseparable no matter how much you rooted against them. Indeed, in certain types of cases, such as those involving alleged horizontal price-fixing, some interested parties even perceived a “presumption” in the case law that class certification was appropriate. In the last few years, however, courts increasingly have been denying motions by plaintiffs to certify antitrust lawsuits as class actions. Plaintiffs in such cases thus have been required to proceed on behalf of only the named class representatives or not at all. In other words, the famous couple may be on the rocks.

What is behind this shift, if indeed there is one, away from the near automatic certification of antitrust cases as class actions? Is recent class certification doctrine, perhaps along with the Class Action Fairness Act of 2005 and its increased opportunities for defendants to remove cases to federal court, part of a greater pro-defendant movement in the federal courts?

With all due respect and sympathy for defendants seeking to ride a wave

of class certification skepticism, this article suggests that the recent denials do not represent any dramatic shift in antitrust class certification doctrine. While the number and frequency of class certification denials in antitrust cases undoubtedly have increased in the last few years, the courts issuing these denials have been applying principles of Rule 23 jurisprudence that are not new. And, as noted below, courts have not forgotten how to certify classes in antitrust cases. However, these recent denials do appear to delve into the facts, and test plaintiffs’ and their experts’

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contentions, to a greater degree than was typical before. As a result, while perhaps not representative of a doctrinal paradigm shift, these decisions appear to represent a more rigorous application of standard Rule 23 principles and offer new opportunities for future defendants opposing class certification.



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This article briefly summarizes several of the key recent denials of class certification in antitrust cases and attempts to shed some light on what these cases do and do not mean for parties litigating class certification motions.

Recent Class Certification Denials

1. *Blades v. Monsanto Co.*¹

Early on in the recent string of class certification denials, the *Blades* action involved allegations by purchasers of genetically-modified corn and soybean seeds that seed manufacturers illegally fixed prices. The seeds at issue in the litigation were more valuable than “conventional” (not genetically-modified) seeds—that is, the corn seed killed insects without pesticides, and the soybean seed was resistant to herbicides, allowing for more efficient use of chemicals—so the seed manufacturers charged more for them than for conventional seeds. Plaintiffs argued that defendants conspired to fix the premium charged for genetically-modified corn and soybean seeds in violation of Sherman Act Section 1 and sought to certify nationwide classes of corn and soybean seed purchasers under Federal Rule of Civil Procedure 23(b)(3).

In support of their certification motion, plaintiffs argued that, despite variations in prices paid across the country, the court should “presume” that all class members paid too much as a result of defendants’ alleged agreement (a rising tide floats all boats, after all) and that, therefore, classwide impact could be shown with common evidence.² Defendants responded that, among other things, variations in prices and local market conditions, along with discretionary discounting at the field level, meant that a non-trivial number of putative class members may not have been injured at all and that plaintiffs could not determine which purchasers were injured without evaluating individual purchases and determining non-conspiratorial, “but-for” prices in individual markets.³

The Eastern District of Missouri denied plaintiffs’ class certification motion, and the Eighth Circuit affirmed, holding that:

- (1) the market for seeds is highly individualized, requiring particularized evidence to determine the competitive price that would have prevailed in the locality of any individual farmer
- (2) prices for GM seeds varied widely, and some farmers paid negligible premiums or no premiums at all for GM seeds, as compared with corresponding non-GM seeds
- (3) plaintiffs’ expert did not show that the fact of injury could be proven for the class as a whole with common evidence.⁴

The court further held that, despite plaintiffs’ arguments to the contrary, it could not “presume” classwide impact. Relying on a recent class certification denial, outside the antitrust context, by the Seventh Circuit in *Szabo v. Bridgeport Machines, Inc.*,⁵ the court held that the Rule 23 inquiry may require a court to look beyond the pleadings or weigh expert testimony—two things the plaintiffs argued should never happen—when doing so was necessary to assess and “resolve disputes” concerning the elements of Rule 23.⁶

The lower court and court of appeals decisions in *Blades* have inspired a number of recent decisions in the antitrust class certification context, including one recent decision involving similar markets for the sale of genetically-modified seeds. In *American Seed Co. v. Monsanto Co.*, the federal district court in Delaware relied on several of the detailed factual findings made by the *Blades* lower court and rejected the presumption of injury being proposed by plaintiffs’ expert: “A legal presumption not grounded in fact. . . is not sufficient. The relevant market was thoroughly studied and previously deemed complex by the courts in *Sample* [the *Blades* lower court] and *Blades*. Plaintiffs’ lack of underlying factual support for Dr. Kamien’s proposed common damages formulas—even assuming they are indistinguishable from proof of common injury—is especially troublesome considering that precedent.”⁷

2. *Freeland v. AT&T Corp.*⁹

Recently, on August 17, 2006, the Southern District of New York denied plaintiffs' motion for class certification in this case involving allegations that various wireless telephone service providers illegally tied the sale of handsets to the sale of cellular services by "locking" handsets so they could not be used on another provider's network. Plaintiffs sought to certify a class consisting of "[a]ll persons who have purchased wireless telephone services on handsets in the United States from any defendant [after] January 1, 1999."⁹ The court, however, denied plaintiffs' motion, holding that plaintiffs failed to establish that two critical elements of their claims, antitrust injury and the showing of coercion necessary to a tying claim, could be proven with common evidence. In doing so, the court thoroughly tested the work of plaintiffs' expert and ultimately concluded that he failed to show that common issues predominated over individual issues in the analysis of whether plaintiffs were injured by the alleged conduct.

From the outset, the court made clear that its obligation to conduct a "rigorous analysis" under Rule 23 "applie[d] equally to the court's evaluation of expert evidence."¹⁰ The court fulfilled this obligation by, among other things, taking plaintiffs' expert to task over certain variables not included in his regression analysis (which purported to show that average prices of cellular handsets were inflated above competitive levels as a result of defendants' conduct). Like the court in *Blades*, the *Freeland* court did not accept the expert's conclusions at face value; nor did it simply take the plaintiffs' word for it that certain variables were excluded from the expert's regression model for good reasons. Instead, the court examined each of the reasons offered by plaintiffs and found all of them to be unpersuasive. As a result, the court held that plaintiffs failed to satisfy their Rule 23 burden and denied their motion for class certification.¹¹

Notably, in denying class certification, the *Freeland* court was called upon to address plaintiffs' argument that a "presumption of impact" relieved them of their obligation to explain how classwide inquiry could be proven with common evidence. Unlike

the courts in *Blades* and several other recent cases described in this article, the *Freeland* court did not reject such a presumption outright, but instead held that such a presumption operated only in limited circumstances, i.e., when plaintiffs could show that industry prices fluctuated within a range which, at any point on the scale, was higher than competitive levels. Plaintiffs failed to make such a showing, and the court refused to presume impact.¹²

3. *Valley Drug Co. v. Geneva Pharmaceuticals, Inc. (In re Terazosin Hydrochloride Antitrust Litigation)*¹³

Multiple plaintiffs brought federal and state antitrust claims against Abbott Laboratories and two generic manufacturers of Abbott's Hytrin[®] (terazosin hydrochloride), which is used in the treatment of hypertension and enlarged prostate. At issue were settlement agreements between Abbott and the two generic companies relating to patent litigation over generic versions of Hytrin. Plaintiffs claimed that the settlement agreements kept cheaper generic versions of terazosin off the market, prolonged Hytrin's exclusive position in the market, and resulted in higher prices to purchasers of terazosin.

Two regional pharmaceutical wholesalers (two out of a large group of plaintiffs whose cases were consolidated by the Multi-District Litigation Panel) sought to certify a class of direct purchasers. Defendants opposed, arguing that, among other things, the named class representatives did not adequately represent the proposed class because other class members, such as national wholesalers, did not experience economic injury (and in fact might have benefited) from the absence of generic competition. Such was the case because certain distributors, which were putative members of the class, received lower margins on the sale of generic products than on higher priced, brand-name pharmaceutical products.

The district court certified the direct purchaser class, but the Eleventh Circuit reversed and ordered "downstream discovery" to determine whether a "fundamental" conflict existed between the class representatives and class members who may have benefited from the absence of generic

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terazosin.¹⁴ Following post-remand discovery, the district court denied plaintiffs' renewed motion for class certification.¹⁵ The court held that plaintiffs failed to carry their burden to show that none of the representative sample of national wholesalers gained a net economic benefit from the absence of generic terazosin in the market.¹⁶ The district court found that (i) plaintiffs neither produced all the relevant data showing the extent to which class members actually benefited from generic competition nor proposed a cogent method or theory to analyze that data; (ii) plaintiffs' attempts to argue in general terms that wholesalers benefit from generic competition were legally insufficient and (iii) plaintiffs' attempts to introduce signed waivers of conflict by 23 class members were insufficient where the class consisted of approximately 1,947 members.¹⁷

4. *Heerwagen v. Clear Channel Communications*¹⁸

Plaintiffs, on behalf of purchasers of rock concert tickets from defendants, claimed that defendants unlawfully monopolized and attempted to monopolize in violation of Section 2 by using their radio industry dominance to pressure artists to use defendants' concert promotion services. According to plaintiffs, these actions reduced competition in the concert promotion market and artificially inflated concert ticket prices.

The Southern District of New York denied plaintiffs' motion for class certification, and the Second Circuit affirmed. The Court of Appeals required plaintiffs to prove their monopoly claims with reference to a specific market and held that the relevant market was local and not national. The court found that there was little cross-elasticity of demand for live rock concert tickets between geographic areas: concertgoers were unlikely to go outside of their local geographic areas to attend concerts promoted elsewhere. Thus, common proof regarding promotional activities across regions would not be capable of establishing impact on individual purchasers in local markets. The court also held that it was appropriate to look beyond the pleadings to evaluate whether Rule 23 was satisfied and acknowledged that, in doing so, there would be "overlap with the ultimate review on the merits." Similarly, the court held that it was not

error for the district court to weigh expert testimony and engage in what the plaintiffs called a "battle of the experts" to the extent "the district court was resolving the sufficiently independent question of whether plaintiff had made a proper showing of predominance pursuant to Rule 23(b)(3)."¹⁹

5. *In re Public Offering Fee Antitrust Litigation and In re Issuer Plaintiff Initial Public Offering Antitrust Litigation*²⁰

Plaintiffs brought this action on behalf of purchasers and issuers of securities offered in initial public offerings ("IPOs"). Plaintiffs alleged that defendants, underwriters of IPOs, violated Section 1 of the Sherman Act by colluding to fix the underwriting fees charged to issuers of IPOs. The court denied plaintiffs' motion for class certification on adequacy grounds with respect to the issuer class and predominance grounds with respect to the purchaser class.²¹ In doing so, the court rejected—or at least questioned seriously—plaintiffs' contention that courts should apply a presumption of classwide impact in horizontal price-fixing cases. The court held, "[i]f there is such a presumption as plaintiffs urge—and that is doubtful since injury or impact is a necessary element of a price fixing claim—then it does not apply here where an independent inquiry is required in the case of each member of the issuer class."²² The court further held that, while it "may not weigh conflicting expert evidence or engage in 'statistical dueling of experts,'" it was appropriate to accept defendants' expert over plaintiffs' "because [defendants' expert] addresses the question before the Court—which is whether antitrust injury or impact can be proved by evidence common to the class."²³

6. *In re NCAA I-A Walk-On Football Players Litigation*²⁴

Students listed on NCAA Division I-A football pre-season practice rosters who did not receive full institutional financial aid scholarships challenged the NCAA by-law that limited the number of scholarships at member schools. NCAA Bylaw 15.5.5 imposed a limit of eighty-five full institutional financial aid scholarships per institution and, plaintiffs argued, illegally restricted

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competition in violation of Sections 1 and 2 of the Sherman Act.

The Western District of Washington denied plaintiffs' motion for class certification on adequacy and pre-dominance grounds. As to the first basis, the court found that plaintiffs would need to "undercut" other class members' positions by arguing that they, and not the other class members, would have received a scholarship in the "but-for," competitive world. As a result, such class members had "inherently conflicting interests" that rendered them inadequate class representatives.²⁵ As to whether common issues predominated over individual issues, the court recognized that plaintiffs' argument relied on four key assumptions:

- (1) Bylaw 15.5.5 actually limited the number of scholarships at all 117 Division I-A schools during the class period because they all awarded 85 scholarships each year
- (2) all schools would add 20 scholarships if Bylaw 15.5.5 did not exist
- (3) each member of the class would have received one of those scholarships
- (4) each member would have attended the same school even without the Bylaw 15.5.5 restrictions.²⁶

With respect to assumptions (3) and (4), the court held that individual inquiries would be necessary to determine, in the absence of the alleged misconduct, whether each class member would have received a scholarship and which school he would have attended.²⁷ Assuming impact, in other words, was about as appropriate as assuming a touchdown. Certainly it was no basis on which to certify a class.

7. *Rodney v. Northwest Airlines, Inc.*²⁸

Plaintiffs moved to certify a class of Northwest Airlines ("Northwest") WorldPerks frequent flyer members who purchased and used fully refundable or unrestricted airline tickets from Northwest for nonstop travel on certain routes. Rodney alleged that Northwest's monopolistic control of

passenger air travel from its three hubs injured customers classwide.

In affirming the district court's denial of class certification, the Sixth Circuit held that individual inquiries would be necessary to determine issues such as market definition, monopoly power, and antitrust injury—no small matters in a Section 2 case. For example, cross-elasticity analyses would be unique to each of the 74 relevant routes, so market definition could not be shown classwide with common evidence. Nor could monopoly power or antitrust injury be proven with common evidence, as the "data screens" plaintiffs proposed to identify monopolized routes would need to contend with—unsuccessfully, the court held—"voluminous individualized information for each specific route." Moreover, such data screens would need to be applied on a route-by-route basis to filter out injuries not caused by the alleged anti-competitive conduct, which of course would have defeated the purpose of certifying a class.²⁹

Finally, the cases described above are not the only recent examples of denials of class certification in the antitrust context. For similar reasons as those relied upon by the above courts, the Fifth Circuit and the federal district court in Utah recently have rejected attempts at certifying classes in antitrust cases.³⁰

Recent Class Certification Denials in Context

To deny class certification, the courts described above often needed to reject a number of arguments that antitrust plaintiffs' counsel had grown accustomed to relying on for quite some time (and successfully). Those include the proposed presumption of impact, the prohibition on looking beyond the pleadings and into the merits of plaintiffs' claims, and forbidding a "battle of the experts." Rejecting these arguments also meant refusing to follow a large stack of cases, from courts around the country, accepting plaintiffs' arguments. And the stack indeed climbed high.³¹

But in refusing to follow this authority, these courts were not acting courageously, nor were the rationales for their decisions new. Rather, the

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bases for the holdings described above have been around for decades; these courts were applying principles established long ago. For example, nearly 25 years ago the United States Supreme Court declared in *General Telephone Co. of Southwest v. Falcon* that a class “may only be certified if the trial court is satisfied, after a **rigorous analysis**, that the prerequisites of Rule 23(a) have been satisfied.”³²

And even prior to the oft-cited *General Telephone* decision, courts of appeal were conducting “rigorous” analyses that would make the *Blades*, *Freeland*, and *Valley Drug* courts proud. In *Windham v. American Brands, Inc.*, for example, growers of flue-cured tobacco in South Carolina sought to certify a class in a case against tobacco companies and the Secretary of Agriculture involving allegations that defendants conspired to fix the price of flue-cured tobacco and monopolize the tobacco auction markets by means of percentage purchase agreements and collusive bidding.³³ In affirming the district court’s denial of class certification, the Fourth Circuit refused to assume away its responsibilities and held that “where the issue of damages and impact does not lend itself to . . . a mechanical calculation, but requires ‘separate “mini-trial(s)”’ of an overwhelming large number of individual claims, courts have found that the ‘staggering problems of logistics’ thus created ‘make the damage aspect of (the) case predominate,’ and render the case unmanageable as a class action.”³⁴

Similarly, in *Alabama v. Blue Bird Body Co.*, the Fifth Circuit explicitly rejected a presumption of impact

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in antitrust class actions.³⁵ The state of Alabama sued manufacturers of bus bodies and Alabama distributors who allegedly conspired to fix prices through a system of rotating bids and accommodation bidding that artificially raised prices. Alabama sought to certify

both state and national classes. In rejecting plaintiffs’ class certification motion as to the national class, the court held that “‘impact’ is a question unique to each particular plaintiff and one that must be proved with certainty. . . . [C]ases do exist wherein generalized proof of impact would be improper.”³⁶ Finding that buses are not homogenous products, but rather are designed to meet particularized specifications of purchasers, the court held that plaintiffs would be unable to show classwide impact with common proof.

Likewise, in *In re Agricultural Chemicals Antitrust Litigation*, plaintiffs alleged that defendant chemical manufacturers conspired to fix the price of pesticides.³⁷ The court denied plaintiffs’ class certification motion and criticized plaintiffs’ expert for “merely assum[ing]” that each class member suffered damage. The court held that the localized nature of the market for agricultural chemicals made it almost impossible to determine competitive prices absent the conspiracy. As such, plaintiffs could not establish injury with common evidence.³⁸ More recently, in a non-antitrust case that has been relied upon by a number of courts denying class certification in antitrust cases, the Seventh Circuit in *Szabo v. Bridgeport Machines, Inc.* vacated a grant of class certification and recognized that nothing in Rule 23 “prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that Rule and exercise the discretion it confers.”³⁹

Moreover, further reason to temper any enthusiasm for a new era of class certification hostility is the simple fact that class actions continue to be certified in antitrust cases around the country with some regularity. See *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 235 F.R.D. 127 (D. Me. 2006); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166 (N.D. Cal. June 5, 2006); *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346 (N.D. Cal. 2005); *In re Currency Conversion Fee Antitrust Litig.*, No. 04 Civ. 5723 WHP, 2005 WL 2364969 (S.D.N.Y. Sept. 27, 2005); *In re Carbon Black Antitrust Litig.*, No. Civ. A. 03-10191-DPW, MDL NO. 1543, 2005 WL

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102966 (D. Mass. Jan. 12, 2005); *Bradburn Parent/Teacher Stores, Inc. v. 3M*, No. Civ. A. 02-7676, 2004 WL 1842987 (E.D. Pa. Aug. 18, 2004); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260 (D. Mass. 2004); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661 (D. Kan. 2004).

However, this is not to say that nothing has changed in the business of antitrust class certification. To the contrary, while class certification doctrine may not have been upended, the depth of analysis may be evolving.⁴⁰ In the recent class certification denials discussed above, the courts appeared to be more willing than their predecessors were to delve into the facts and evaluate such things as price variations, local market conditions, and other factors relevant to Rule 23 standards. The district and appellate courts in *Blades*, for example, reviewed a substantial amount of evidence on regional pricing methods, possible no-impact purchasers, and local competitors to help determine whether plaintiffs adequately had shown that common evidence could be used to show impact in all regions around the country. Similarly, the court in *Valley Drug* ordered discovery on not only the prices paid by class members, but also the prices paid by purchasers throughout the distribution chain to determine whether certain plaintiffs actually benefited from the alleged conspiracy—and therefore could not have been injured. In both cases the courts did not accept plaintiffs' arguments at face value but instead tested those arguments against the evidence developed during class certification discovery.⁴¹ While neither court ruled on the underlying merits of plaintiffs' claims, the courts did look beyond the pleadings to the extent necessary to determine whether Rule 23 was satisfied.

Conclusion

A closer look at recent class certification decisions in antitrust cases reveals some not-so-good (or at least disappointing) news and some good news for defendants. For antitrust defendants waiting for the class certification tide to turn in their favor, the not-so-good news is that they will need to keep waiting. We have not witnessed a doctrinal paradigm shift. We have not, in other words, seen a new "conceptual framework" replace an old one.⁴²

The good news is that several courts have proven willing to listen to defendants challenging the prior conceptual framework, presumptions and all. These courts have shown an increasing interest in investigating the facts underlying class certification motions to determine whether common evidence really will answer all or substantially all questions of classwide injury vel non. Antitrust defendants *may* defeat class certification, and just seeing that in writing may be good news enough for defense counsel familiar with this fight.

To be sure, in the cases described above, the defendants took a significant amount of discovery on class issues and made substantial factual presentations—often in the context of evidentiary hearings devoted solely to class certification issues—attempting to show the predominance of individual issues. But if the cases described in this article stand for anything, they represent strong words of encouragement to future defendants willing to spend the time and energy to do the same.

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1 400 F.3d 562 (8th Cir. 2005).
2 *Id.* at 570.
3 *Id.* at 571.
4 *Id.* at 572.

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- 5 249 F.3d 672, 677 (7th Cir. 2001) (Easterbrook, J.).
- 6 400 F.3d at 567, 575.
- 7 No. Civ. 05-535-SLR, 2006 WL 3276831, at *6-7 (D. Del. Nov. 13, 2006).
- 8 No. 04 CIV. 8653 (DLC), 2006 WL 2380410 (S.D.N.Y. Aug. 17, 2006).
- 9 *Id.* at *5.
- 10 *Id.* at *6.
- 11 *Id.* at *12-16, 23.
- 12 *Id.* at *18.
- 13 MDL No. 1317 (S.D. Fla.); 350 F.3d 1181 (11th Cir. 2003).
- 14 *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1193-95 (11th Cir. 2003).
- 15 *In re Terazosin Hydrochloride Antitrust Litig.*, 223 F.R.D. 666, 675 (S.D. Fla. 2004).
- 16 *See id.* at 674-75.
- 17 *See id.* at 674-77. It is worth noting that despite the district court's refusal to certify a class of direct purchasers, the court did later certify a class of indirect purchasers consisting of consumers and third party payers. The Eleventh Circuit accepted Defendants' Rule 23(f) petition to appeal this class certification decision, but the litigation was settled prior to oral argument.
- 18 435 F.3d 219 (2d Cir. 2006).
- 19 *Id.* at 228-29, 232-33.
- 20 No. 98 Civ. 7890 (LMM), 00 Civ. 7804 (LMM), 2006 WL 1026653 (S.D.N.Y. Apr. 18, 2006).
- 21 The court did not decide the motion to certify a class of purchasers seeking injunctive relief pursuant to Rule 23(b)(2). In that regard, the court requested letters from the parties regarding whether the purchaser class would wish to proceed to obtain solely declaratory or injunctive relief without any prospect of recovering damages themselves and without the assistance of an issuer class seeking treble damages, and addressing the *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147, 164 (2d Cir. 2001), test for determining if the relief sought is exclusively or predominantly injunctive or declaratory in nature. *See* 2006 WL 1026653, at *9-10.
- 22 *Id.* at *7.
- 23 *Id.* at *8.
- 24 No. C04-1254C, 2006 WL 1207915 (W.D. Wash. May 3, 2006).
- 25 *Id.* at *9.
- 26 *Id.* at *11.
- 27 *Id.*
- 28 146 Fed. Appx. 783 (6th Cir. 2005).
- 29 *Id.* at 787-92.
- 30 *See In re Medical Waste Servs. Antitrust Litig.*, No. 98 Civ. 7890 (LMM), 2006 WL 538927 (D. Utah Mar. 3, 2006); *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 Fed. Appx. 296 (5th Cir. 2004); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003).
- 31 *See, e.g., In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002); *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566 (2d Cir. 1982); *Arden Architectural Specialties, Inc. v. Washington Mills Electro Minerals Corp.*, Nos. 95-CV-7574 CJS, 95-CV-7580 CJS, 2002 WL 31421915 (W.D.N.Y. Sept. 17, 2002); *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251 (D.D.C. 2002); *In re Northwest Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174 (E.D. Mich. 2002); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297 (E.D. Mich. 2001); *In re Plastic Cutlery Antitrust Litig.*, No. CIV. A. 96-CV-728, 1998 WL 135703 (E.D. Pa. Mar. 20, 1998); *In re Med. X-ray Film Antitrust Litig.*, No. CV-93-5904, 1997 WL 33320580 (E.D.N.Y. Dec. 26, 1997); *In re Polypropylene Carpet Antitrust Litig.*, 178 F.R.D. 603 (N.D. Ga. 1997); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493 (S.D.N.Y. 1996); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374 (S.D.N.Y. 1996); *In re Potash Antitrust Litig.*, 159 F.R.D. 682 (D. Minn. 1995); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019 (N.D. Miss. 1993); *In re Glassine and Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302 (E.D. Pa. 1980).
- 32 457 US 147, 161 (1982) (emphasis added).
- 33 565 F.2d 59 (4th Cir. 1977).
- 34 *Id.* at 68.
- 35 573 F.2d 309 (5th Cir. 1978).
- 36 *Id.* at 327.
- 37 No. 94-40216-MMP, 1995 WL 787538 (N.D. Fla. Oct. 23, 1995).
- 38 *See id.* at *5-8; *see also Kenett Corp. v. Mass. Furniture and Piano Movers Ass'n Inc.*, 101 F.R.D. 313, 316 (D. Mass. 1984); *In re Elec. Weld Steel Tubing Antitrust Litig.*, 1980-81 Trade Cases (CCH) ¶ 63, 783 (E.D. Pa. 1980).
- 39 249 F.3d at 677.
- 40 This trend also appears to have taken hold in the securities litigation context and potentially more broadly. In a recent decision by the Second Circuit Court of Appeals which broadly revisited that Circuit's standards for ruling on Rule 23 motions, the court set forth the following guidelines for class certification decisions: "(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 the 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." *In re Initial Public Offering Secs. Litig.*, No. 05-3349-cv, 2006 WL 3499937, at *15 (2d Cir. Dec. 5, 2006).
- 41 One wonders whether a case like *In re Vitamins Antitrust Litigation*, 209 F.2d 251 (D.D.C. 2002), would have turned out differently following a closer look at the underlying facts. There, the court held, among other things, that the plaintiffs' expert's conclusion that "[i]t is highly probable that all US purchasers of bulk vitamins (including premix) paid higher prices than they would have in the absence of the cartel" satisfied the plaintiffs' burden to show that common proof could establish impact on a classwide basis.
- 42 *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 92-94 (The University of Chicago Press 1970) (1962). By contrast, think of *Matsushita/Brooke Group* in the area of exclusionary practices.